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Abstract: Present in all independent nations, the phenomenon of codification in Latin America shares the same concept of ‘code’ with the European laws of the Continental tradition in the modern age: this work seeks to organize the legal materials within the historical context in which they have been produced, with the aim of achieving greater comprehension of the civil codification process in Latin America, highlighting the models and influences that were used, the intervention of jurists and the significance it took on for the different societies, the characteristics of the mentioned process and the causes for its early or tardy consolidation.

1. Preliminaries

The purpose of these pages is to introduce the reader, without pretensions of exhaustiveness, to the historic process of the formation of private law in Latin America, with special reference to the civil codification that acted as its main axis, and implemented after the triumph of the independence movements in the region. To this regard, it presupposes the existence of a family of laws which can be situated in the extensive system of codified laws based on the Roman tradition, and within it a Latin American group, more or less homogenous, as has already been pointed out by Castán Tobeñas and which still remembers the doctrine, with the consequence of excluding other experiences of codified law on the Continent from the study.

1 MOISSET DE ESPANÉS, L., Codificación civil y derecho comparado, Zavalia Editor, Buenos Aires, 1994, 297.
2 Specifically, the treatment of the codes of Quebec and Louisiana is excluded, whether because they do not fit in the same historical process, or because they are inserted in legal ordinances that are radically different to those of the rest of the (Latin American) countries of the Continent. An abundant bibliography exists on these codes, including HAMZA, G., Entstehung und Entwicklung der modernen Privatrechtsordungen und die römischerechtliche Tradition, Eötvös
In effect, in the same way as at the end of the 18th Century and dawn of the 19th Century, the central and western European states undertook the codification of their laws, in Latin America, the recently emancipated countries set themselves the task of reducing the current regulations from a certain branch of law into a single organic unit at a determined historical moment. The appearance of this new way of understanding law—so far away from the previous ‘written fixations of law’—can be explained, in the words of Wieacker, by the “alliance of natural law with the political planning of the Illustration”. In America, it was the triumph of liberalism, fruit of the Illustration, that provided the bases for the codification process, these being the sovereignty of the people, equality, the monopoly of power by the authority, the primacy of the law as the source of rights and constitutionalism.

These common bases justify the joint treatment of the codification process in the States covered by this work, but the differences that can be seen within the process should not be forgotten. Based on them, the exposition has been divided into two parts: the first, called according to doctrine the classical period of codification, initiated by Haiti and culminated by the 1916 Brazilian code, and the second part, which covers later developments up to the present day.

In the first stage, it is possible to establish a division closer to the reality of the process, taking the Napoleonic Code as the central element, either to follow it as an absolute model, or to reject it to a greater or lesser extent.

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5 VÁZQUEZ PANDO, Fernando, “Notas para el estudio de la historia de la codificación del derecho civil en México, de 1810 a 1834”, in Jurídica, 4, Mexico, July 1972, 383.
courses that may also represent the different degrees of maturity of Latin American codification.

In virtue of the foregoing, the first codifications studied in these pages are those that remain most faithful to the French model, gradually abandoned afterwards to give way to authentic endogenous codifications presented by such countries as a model for the rest of the codes in the region and even in Europe.

Following the study of the particularities observed in each nation, and their later updated, a section of trends and outlooks of private Latin American law is presented.

2. The Napoleonic Model

A) First codes

Haiti

The first civil code of what would come to be known as Latin America, was that of the Republic of Haiti, which until 1844 included the future Dominican Republic (although with continuity solutions); however, the island was divided into two governments —north and south— between 1807 and 1822. The Haitian Civil Code was promulgated on the 27th of March 1825 (Code civil de la République d’Haïti), and entered into effect on the 1st of May 1826, although a circular from 1816, issued by the president of the government of the south, and legally effective as of 1822, decreed the subsidiary application of the Napoleonic code “… in all doubtful cases of jurisprudence not provided by the laws in force in the Republic, and until a civil code has been specially written for the country…”

This depends directly on its source, except for a few simplifications: therefore, it follows the expository system of the French civil code in its divisions and parts; however, it consists of 2047 articles instead of 2281.

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6 MEJÍA RECART, G., Historia general del derecho e historia del derecho dominicano, Santiago de los Caballeros, El Diario, 1943, 150; quoted by GUZMÁN BRITO, A., La codificación civil en Iberoamérica siglos XIX y XX, Ed. Jurídica de Chile, Santiago, 2000, 291, who will be closely followed in this work.
Following this, the code of civil procedure (1825), commercial code (1826), code of criminal instruction (1826), and the criminal code (1826) were passed, completing the usual system of codes, which was extended with the rural code (1826), as a development of the decree dated the 2nd of January 1804, and the agrarian law of 1814. The abolition of slavery had been revolutionarily conquered after the Declaration of the 29th of August 1793; later confirmed in the Constitutions (1801, Art. 3; 1805, Art. 2, etc.); the civil code definitively establishes the liberty and equality of all Haitians\textsuperscript{7}. This legal text is still in force.

**Dominican Republic**

The Dominican Republic (eastern part of the island, under Spanish influence, differing from the French, western side), does not have a more lineal history than Haiti, and the vicissitudes of its independence (successively from France, Spain, Haiti and, once again Spain) should be added to those inherent to its legislation: the Haitian code governed the whole island as of its effective date and until 1844, year that marks the independence regarding the western end, and although the Constitution extended the validity of previous laws, i.e., the Haitian codes, in 1845 the decision was taken to eliminate them and replace them with their source, so that the Napoleonic codes were directly, and in their original language, given force, including, of course, the *Code civil* (Civil Code), although with the changes incorporated during the Restoration (specifically the abrogation of divorce), all of which makes this the purest case of the reception of the French codes on the American continent.

It was only during the period in which the newly-formed republic was incorporated to the Spanish Crown that a first civil code was published in Spanish (the *Código civil de la Provincia Española de Santo Domingo*, Civil Code of the Spanish Province of Santo Domingo, 1862), but after its declaration of independence in 1865, the validity of the previous laws was decreed, which included the Napoleonic codes in French, expressly in accordance with the text of the Restoration.

\textsuperscript{7} For the revolution of the so-called ‘black Jacobins’, SCHIPANI, S., “Il diritto romano nel Nuovo Mondo”, in *Il diritto dei nuovi mondi*, CEDAM, Padua, 1994, 75 ff. Schipani’s exposition titled “Codici civili nel sistema latinoamericano”, in *Digesto delle Discipline Privatistiche*, Civil Section, UTET, Turin, 2011, is also a constant reference for this text.
It wasn’t until 1874 that political events in the country allowed new official sanctioning and implementation of a civil code in Spanish. However, the Supreme Court of Justice found errors in translation and many difficulties in the changes made to the numbering of articles that hindered the utilization of previous doctrine and jurisprudence, so that, at its instance, in 1876 the Legislative House decreed the repeal of the 1874 text and the implementation of the French Civil Code, such provision being added to by other codes in 1878, except for the criminal code. Consequently, new translations and adaptations were commissioned, finally culminating in 1884 with the enactment of the *Código civil de la República Dominicana* (Civil Code of the Dominican Republic) the contents of which corresponds to the French code of the time. Since then, such code has remained in force.

**Oaxaca**

Another case of the early reception, almost word-for-word, of the *Code civil* in American territory occurred in Mexico, although it should not be forgotten that in this case, the triumph of federalism –added to the fruitless labor of the commissions responsible for preparing the drafts of the codes, at the dawn of its independent life, lead to that the states (i.e., the parties to the federal pact) were empowered to write their own codes. Among such states, special mention should be made of Oaxaca, as even though it was incomplete, its *Código civil* was promulgated in parts between 1827 and 1829, prolonging its validity until 1836, when the centralized regime was introduced in the country, although the re-establishment of the Federa-

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8 According to the text of the Restoration with the amendments of Louis-Philippe and Napoleon III.

9 The other codes were also promulgated in 1884.

10 Mexico (in reality, the viceroyalty of the New Spain), began its independence in 1810, which culminated in 1821.

11 As happens today, except for commercial matters which are of federal jurisdiction.

12 Around the same time, the codification movement also occurred, although without fruit, in Zacatecas, Jalisco and Guanajuato.

13 *Código civil para el Estado libre de Oaxaca*, reprint, with introductory study, by ORTIZ URQUIDI, R., *Oaxaca, cuna de la codificación iberoamericana*, Porrúa, Mexico, 1974.
tion in 1847 brought with it a new validity of this regulatory text. As has already been mentioned, the French model was present, almost absolutely, except for a few amendments, such as the unconditional protection in favor of the rights of aliens, or the adaptation of marriage to the canonic system.

**Bolivia**

Today’s Bolivia was constituted as an independent State in 1825, and from that same year it is possible to identify a line that will lead to legal codification, as can be read in a decree that instructs the tribunals to base their actions on the laws produced in 1812 by the Cadiz legislative assembly (*cortes generales*), whilst the nation was provided with its own criminal and civil codes. During the presidency of General Andrés de Santa Cruz, belonging to the Bolívar group and, therefore, inclined towards the French system, the review by the Supreme Court of a criminal text was ended, the favorable results of which were used to immediately promote the related reforms on civil matters.

With this aim, a commission was set up that worked on the preparation of a draft, submitted as the final version in December 1830, although the zeal of General Santa Cruz and perhaps his own vanity, provoked an anticipated enactment of the bill in October 1830, foreseeing its effective date as being the 1st of January the following year; but the *vacatio legis* (time between publication and the effective date) had to be extended, because it had not been possible to complete the publishing and circulation of the text, in such a way that a new decree postponed the effective date to the 2nd of April 1831.

This *Código Santa Cruz* (Santa Cruz Code) is differentiated from the American codes promulgated until then by not adopting, but rather adapting the Napoleonic Code although it is true that the original idea is far from the result, as the scopes of the directives given to the commission in order to proceed with the codification on the basis of pre-existing law – i.e., the current Spanish legislation– were suddenly reduced to focus the work on the French model. The original 1556 articles follow the Napoleonic expositive order, and two thirds of the contents coincide; the

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14 This is a decree by Marshal Sucre.

15 The nuance is from GUZMÁN BRITO, *La codificación civil*, quoted, 313 ff.
12 Carlos Soriano Cienfuegos, *Circulation of Models and Centrality of Civil Codes in Latin American Private Law*

differences were limited to specific subjects: marriage, provided in accordance with canonic law; privileged testaments for natives and soldiers; interpretation and integration, according to the Cadiz system.

The substantive text\(^{16}\) was followed by a commercial code in November 1834, based on the 1829 Spanish code, and was replaced by a new civil code\(^{17}\) in 1845 (much more faithful to the Napoleonic model), but its validity was reestablished in 1846, due to the rejection of the latter, and governed until 1976.

**Costa Rica**

For the history of codification in Latin America, the *Código Santa Cruz* also gains importance as the model used in Costa Rica, although in order to present the question it is necessary to remember some of the events on which it was based: in 1836, under the command of General Santa Cruz, a Peru-Bolivian Confederation was formed\(^{18}\), integrated by Bolivia and a Peru divided in two, corresponding to the North-Peruvian and South-Peruvian States, in the territory of which the validity, although ephemeral, of the 1830 Bolivian code was introduced with very few changes. The version that was used as the basis for the civil codification in Costa Rica was that promulgated in 1836 for the North-Peruvian State.

The independence of Costa Rica was declared in September 1821, together with that of Mexico, in virtue of the fact that the government of the general captainship of Guatemala, i.e. Central America (except for Panama, in the sphere of power of the New Granada) formally corresponded to the New Spain (Mexico). Later, these territories formed part of the Mexican Empire, under Agustín de Iturbide, to become once again independent in 1823. The following year they were constituted into the Federal Republic of Central America. Costa Rica became an independent State in 1848, although a *de facto* separation had already taken place in 1841.

After the fruitless attempts to carry out the reception of the civil code of Louisiana in Costa Rican territory, in July 1841, the dictator Braulio Car-

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\(^{16}\) A single procedural code covered both criminal and civil matters.


\(^{18}\) The Confederation was dissolved in January 1839.
rillo promulgated a Código General del Estado (General State Code), also called the Código General de la República de Costa Rica (General Code of the Republic of Costa Rica), divided into three parts: civil, criminal and judicial procedures, which in reality correspond to the codes of the respective matters.

With regards to civil matters, despite the many controversies related to the sources and influences derived from the text, it should be established that its contents coincides almost completely with the version promulgated for the North-Peruvian State of the Bolivian civil code. In 1853, regulations on commercial procedural matters were incorporated, and in 1858 a new edition was published, with the obvious amendments. The validity of this Código General ended in 1888.

B) Roman law foundations

All the cases considered up until now to a large extent depend on the model offered by the Napoleonic text, covering everything from the simple translation of the Code civil to the more or less significant adaptation work carried out on the American continent. These two ways of influence of the French code—adoption and adaptation—are added to by a third, in the form of a second generation reception, i.e., a process according to which the aforementioned model is present, but not directly, rather through an element that acts as an intermediary: concretely, it refers to Venezuela and its 1867 and 1873 codes. However, in virtue of the fact that its first code, dating back to 1862, is an adoption of the Chilean text of 1855, its exposition will be made within this context, which inaugurates a complete doctrinal analysis of Latin American codes.

Precisely due to its dependence on the Napoleonic text, ultimately the structure of these early codes is based on the Institutions of Justinian, in

19 SCHIPANI, Codici civili, quoted, 292 ff, indicates that it is a code such as that of the Kingdom of the two Sicilies, in which the parties placed one behind the other accentuate the internal unity of the text. In effect, this Costa Rican code should not be attached to the typology of the Allgemeines Landrecht für die Preussischen Staaten, or Prussian Code, although Carrillo very probably used it as a model.


21 Sic, indicated by GUZMÁN BRITO, La codificación civil, quoted, 328.
turn based on the expositive plan of Gaius\textsuperscript{22}, in virtue of which its expositive system and even the preferred technique for the writing of rules, does not coincide with the closest Spanish tradition; indeed, the scheme and form of the \textit{Siete Partidas} (Seven-Part Code) or any of the \textit{Recopilaciones} (Compilations) is replaced by those of the rationalist school of natural law or the Roman models validated (and not rejected) thereby.

These formal differences should be added to those that appear in terms of content, almost all of which are related to the liberal spirit and, therefore, reflected in matters of contracts, property, testaments, etc., in virtue of which it is necessary to bear in mind that although Roman law per se offered fertile ground for reorienting these institutions according to the liberal perspective, this was only in the way in which the classical jurisprudential data was presented in the work of the rationalist interpretation formulated to this regard\textsuperscript{23}.

The mention of Roman law is particularly important in order to comprehend the line followed by the formative process of the different national ordinances, as this first stage in which the \textit{Code civil} occupies a preeminent position, is followed by another in which –although thanks to its intermediation– there is concern about turning directly to the \textit{Institutions} of Justinian, consequently assumed as a model, and to respect the inherited tradition insofar as possible, now patrimony of independent and sovereign nations, giving rise to the first endogenous codifications in Latin America and allowing the development of their own system, shared from the legal culture of continental Europe.

\textsuperscript{22} In reality, Gaius’s work represents, for the history of law, a very important source as a structural model, GORIA, F., “Osservazioni sulle prospettive comparatistiche nelle Istituzioni di Gaio”, in \textit{Il modello di Gaio nella formazione del giurista, Atti del Convegno Torinese} (1978), Giuffrè, Milan, 1981, 211 ff.

\textsuperscript{23} I.e., that such civil codes contained the free \textit{testamentifactio} and primogeniture was suppressed, the concept of freedom in modern law not being shared with that of Roman law, despite the fact that no limitations imposed by primogeniture or sex existed in either case.
3. Endogenous codification

A) Transition towards domestic law

Peru – Guatemala

In Peru, the swearing in of the 1812 Cadiz Constitution also constituted the first precedent of codification, being succeeded by other constitutions promulgated during its independent life. However, these are mere programmatic declarations that did not bear fruit.

More effective was the interest that Bolívar himself dedicated to the task, as well as the work of a Peruvian character such as Manuel Lorenzo de Vidaurre, whose drafts of regulatory texts favored the reading of rationalist natural law works over the French model, and among which special mention should be made of the Proyecto de Código civil peruano (Draft of the Peruvian Civil Code), published between 1834 and 1836, which, however, did not become law.

Following the dissolution of the Peru-Bolivian Confederation, codification resumed its course in 1845, year in which a commission was ordered to be set up responsible for submitting several legislative bills. By the end of 1846, the text related to civil procedure was completed, and half way through the following year, the substantive code. This Proyecto de Código civil para la República del Perú (Draft of the Civil Code for the Republic of Peru) was given to the Congress, and notwithstanding the fact that it was not passed, the work of the commissions formed afterwards consisted basically of a review of its contents, especially dedicated to the institutions of marriage, filiation, inheritance, property and contracts. In December 1851, a law from the Congress addressed to the Executive contained the solemn enactment of the Código civil (Civil Code) and of the Código de enjuiciamiento civil (Code of Civil Procedure) for the 28th of July 1852, in order for both to enter into effect the next day. In addition to these, the Código de comercio (Commercial Code) entered into effect mid-1853. The

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24 In accordance with its Article 258, which foresaw the formation of codes.
25 1823, Article 106; 1826, called Vitalicia or Bolivariana, Article 46, № 1; 1828, Article 131; 1834, Article 11.
26 From 1811, dedicated to criminal matters.
substantive civil text governed until 1936, albeit with significant amendments.

The observations regarding the separation from the French model and the preference for the institutional structure present in Gaius and Justinian\textsuperscript{27}, could also be seen in the Peruvian code of 1852. It moves away from the French text in an aspect as important as the option to not give contracts real effects, and instead requires the delivery in accordance with the Roman-Spanish tradition, which naturally affects the division of the forms of acquisition of property, regarding obligations and contracts (matters brought together in the Napoleonic code), in such a way that its expository plan\textsuperscript{28} extensively coincides with that proposed by the \textit{Institutions}.

Furthermore, the examined code appears to adhere to the treatment of matters by the Spanish “practitioners”\textsuperscript{29}, and maintains greater correspondence to Peruvian society of such time, which was very conservative, as demonstrated by the fact that its original text contained rules regarding slavery\textsuperscript{30}, provisions aimed at the clergy; chaplaincies and patronages, etc. In contrast, it accommodates modern tendencies, such as the reference for the first time in Latin America to the ‘general principles of law’ as a method for covering legal loopholes, once again distancing itself from the French model and following, in this case, the Civil Code for the States of H. M. the King of Sardinia\textsuperscript{31}.

\textsuperscript{27} Persons and property, the latter subdivided into corporal and incorporeal (rights in rem, inheritance, obligations).
\textsuperscript{28} The Preliminary Title is followed by books I. Persons and their rights; II. Property, the way of acquiring it and the rights persons have over it; III. Obligations and contracts.
\textsuperscript{29} A comparison of the code with the \textit{Febrero novísimo} by Eugenio de Tapia (1828 edition), which highlights this aspect in GUZMÁN BRITO, \textit{La codificación civil}, quoted, 339 ff.
\textsuperscript{30} The distinctions between free-born, slaves and freedmen were repealed in 1855.
\textsuperscript{31} Of 1838, also called Albertine Civil Code; on this aspect, SCHIPANI, S., “Codici e rinvio ai ‘principi generali del diritto’. Il Código civil spagnolo come ponte fra sistema latinoamericano e codici europei”, in \textit{La codificazione del diritto romano comune}, Giappichelli, Turin, 1996, 83 ff.
From a historical viewpoint, the 1852 Peruvian codification is also relevant given that its *Proyecto de Código civil* (Civil Code Draft) of 1847 was used as a model in other parts of the continent, as was done by Justo Arosemena, who in 1853 submitted a preliminary draft of a code on the matter to the Congress of the Republic of New Granada (omitting the rules related to slavery and the clergy), which despite not being passed on this occasion, was later picked up by the State of Magdalena (belonging to the Republic), and promulgated in 1857, remaining valid until 1866.

On the other hand, the Peruvian *Código civil* (with the elimination of slavery, chaplaincies and patronages, and following the 1870 Mexican model in the precedence of creditors, among other things) was subject to reception in Guatemala in 1877, where it remained in force until 1933, culminating in a slow process of codification, in which it is necessary to mention the few fortunate experiences derived from the efforts to closely follow the model proposed by Livingston in Louisiana.

B) Chile and its influence

Considered as the first endogenous civil codification of the American continent, the Peruvian code is the beginning of an evolutionary process that culminated with the enactment of the *Código civil de la República de Chile* (Civil Code of the Republic of Chile) in 1855: belonging to the viceroyalty of Peru, the general captainship of Chile started its independent life in 1818, and despite the fact that Bernardo O’Higgins extolled the value of the French models, the contrary viewpoint was soon to be adopted, i.e., to proceed with the codification based on tradition.

In this first stage, which culminated in 1833, as the main task preparation was started on a diagnosis of the status of the legislation inherited from Spain, and the proposition of alternatives in order to replace it with national codes. It is possible to identify several drafts in this period, which provide different answers to the problem and which cover the proposals of leaving private law intact; its substitution by the French text (as in the rest of matters); to transform the text of the *Partidas* (Seven-Part Code) into a civil code; or the recourse into general principles…

32 I. e., primarily, Colombia, which included Panama.
Of these drafts, the one of greatest importance for the study of the Chilean case is that submitted by Manuel Vial in 1833, according to which it was necessary to compile the then current Castilian and country law, presenting the regulatory provisions in concise terms, and adding whatever can be extracted from interpreters and other distinguished jurists in case of gaps, with the respective quote of the source. Such work should have resulted in the preparation of a codified text that incorporated in-depth reforms, to the extent that they were necessary.

This draft was applauded by Andrés Bello, especially for the net separation it introduced between the work of ‘codification’ and ‘reform’ of law, giving such tasks the meanings of reduction of civil laws into an organized text, i.e., consolidation of the present materials, and the systematic layout and integration of the parts, respectively. Consequently, reform only comes after codification, which inherently assumes a critical re-reading of the sources, a kind of decantation made with the aim of eliminating any imperfection and redundancy, a fine-tuning of law.

Even though they are theoretically different, the tasks of consolidation and reform were not carried out by Bello separately, in order to produce two differentiated texts, but rather associated both from the very outset of work, by suggesting the convenience of proceeding to fix law without ignoring the experience of the European codes. This resulted in a new notion of codification, in which both consolidation and reform were encompassed in a single operation, such change being explained by the encounter of Bello with the concrete experience of preparing regulatory texts, i.e., the transition from theoretical to practical work, based on which the short-sightedness of conceiving codification as just a consolidation can be seen, and the consequent need to work simultaneously on reforms.

Regarding the relationship per se that should exist between both operations, Bello clearly explains his ideas, observing a preeminence of consolidation over the process of reform: “Assuming that the alterations should not be considerable; that the new code will be differentiated from the old more by what it excludes than what it introduces as new content; and that so many other patterns should subsist, all the fundamental and secondary rules that do not oppose the principles on which they are based… And why should we strive to make more extensive innovations? Our civil legislation, above all that of the Siete Partidas, encompasses the best of Roman
jurisprudence, the permanent rule of which over such an important part of Europe is testimony to its excellence... A reform reduced to the limits we have just covered, would not result in contradictions; would not clash with national habits, in which laws should not be seen to be antagonists but rather allies; and which could be gradually enforced taking first one part of legislation and then the other.\footnote{El Araucano, 6\textsuperscript{th} of December 1839; quoted by GUZMÁN BRITO, La codificación civil, quoted, 363.}

Keeping in mind these ideas, Andrés Bello continued to write and develop expositive schemes that he would use as the basis for submitting a bill in 1840 that marked out the directives of the process of civil codification. Derived from the approval of the bill, a commission was formed, the work of which revolved round an analysis of the proposals on which Bello himself had worked, and which lead to the formation of a preliminary draft, also examined as of 1841 by a review board, which was later merged with the commission, although from 1846 its work was interrupted, remaining exclusively in the hands of Bello, who concluded his work around 1852, publishing it between January and March 1853 in four volumes. This 1853 Draft was submitted for discussion to a review commission, and was also presented to the forum for observations, and consequently the amended text\footnote{The text of the code and of the different drafts, in BELLO, Obras completas, XII-XIII, Caracas, 1954.} was submitted to the National Congress in 1855, which, without further ado, sanctioned it as a Código civil in December the same year and established its effective date as the 1\textsuperscript{st} of January 1857.

Laws were promulgated prior to this legal text related to civil procedure in 1837 and 1851, although it wasn’t until 1902 that a code on this matter was published. On the other hand, in 1852 a law was enacted for commercial legislation implementing a process that culminated in 1865 with the enactment of the Código de comercio (Commercial Code).

The very abundant literature of drafts that preceded the publication of the final code were given to the printer in several cases, a very fortunate circumstance as it opens the possibility of identifying the sources and models that were used: as has been mentioned, in first place, the Siete Partidas, together with the notes of Gregorio López, but Roman sources were also consulted directly, i.e., the Corpus Iuris Civilis. In the same Castilian tradi-
20 Carlos Soriano Cienfuegos, *Circulation of Models and Centrality of Civil Codes in Latin American Private Law*

...tion, other minor sources should be mentioned, such as the *Fuero Real*, the *Novísima Recopilación de las Leyes de España*, etc., in addition to the doctrine of Acevedo, Hevia Bolaños, or Escriché, among many others. Regarding modern law, it is necessary to mention the *Concordance* of Saint-Joseph, and related authors, especially Pothier and other French authors\(^{35}\), although Vinnius and Heineccius are also present. In short, the Chilean civil text decidedly distances itself from the adoption of the Napoleonic model, and appears as a code with strong Castilian roots, and definitively Romanist\(^{36}\).

Its provisions are concise and are able to unite technicality with the elegance of the Spanish language, and constitutes the cornerstone of the system of codes, based on ‘natural equity’, transmitted by the Romanist tradition. Closely related to the order provided by the *Institutions* of Justinian, it is divided into a preliminary title, and the successive books of persons; goods, property, possession, use and enjoyment; successions due to death and donations among the living; obligations in general and contracts, as a consequence of postulating the requirement of a causal act for the constitution of rights in rem. It is also worth emphasizing the recognition it makes of civil rights without the requirement of reciprocity (such as, on the other hand, the French code), the limits imposed on the use and enjoyment of property, as well as the incorporation of popular actions. Connoisseur of the doctrine of Savigny\(^{37}\), Bello did not include his doctrine on legally-relevant acts, but he did include that related to the subject of law\(^{38}\).


\(^{38}\) Article 545 ff.
To the very many comments made by the doctrine, such as those of Chacón, *Exposición razonada y estudio comparativo del Código civil chileno* (Reasoned Explanation and Comparative Study of the Chilean Civil Code), Santiago, 1868; Alfonso, *Explicaciones del Código civil destinadas a los estudiantes del ramo en la Universidad de Chile* (Explanations of the Civil Code aimed at Law Students in the University of Chile), Santiago, 1882; Vera, *Código civil de la República de Chile comentado y explicado* (Civil Code of the Republic of Chile, Commented and Explained), Santiago, 1892-1897, it is necessary to add the fact that from the first moment it enjoyed deserved prestige, so much in fact that it was presented as a model of civil codification for several nations, and not just in Latin America\(^{39}\), as will be explained further on. The *Código civil de la República de Chile* is still valid today.

**Ecuador**

The Royal Audience of Quito formed part of the viceroyalty of the New Kingdom of Granada and achieved independence in 1822, and was later incorporated into the *Gran Colombia* (Great Colombia), which included the department of Venezuela and New Granada (integrated by the department of Quito and Cundinamarca\(^{40}\)); this data should not be lost of sight in order to understand the history of codification in such territories, as part of it is common to them: a decree in 1822, another being by Bolívar in 1825, as well as a commission formed at the request of the minister of the interior in 1829, are the antecedents for the case of Ecuador, which was constituted as an independent republic in 1830 and whose constitutional text, articles 26, N° 11, and 43, N° 14, reintroduced the subject of codification.

Then an editorial commission was set-up to prepare a draft of the civil code, presumably based on the Napoleonic model, which was not passed by Congress. In 1836, the need for codification was once again included in talks, and as a result José Fernández Salvador was given the task of analyzing the 1830 *Código Santa Cruz* –already examined above\(^{41}\)– in order

\(^{39}\) In effect, it was also considered during the Spanish codification process, PEÑA BERNALDO DE QUIRÓS, M., *El anteproyecto de Código civil español (1882-1888)*, Colegios Notariales de España, Madrid, 2006, 35.

\(^{40}\) Cundinamarca would later become New Granada, and then Colombia, including Panama.

\(^{41}\) *Supra*, Bolivia.
to submit a draft for the approval of the legislators, but this motion was soon interrupted without giving the expected fruit.

A Codifying Commission was created in 1852 responsible for providing the civil and military texts and reforming the criminal code, but no results were obtained here either, in virtue of which in 1855 the Supreme Court was commissioned to reintroduce the subject, without affecting its jurisdictional activity, starting its work without delay based principally on the Código Santa Cruz. The undertaking of the Court had already been crystallized into more than eight hundred articles when the Court itself decided to replace the basic text that it had been following until then with the Bello code, completing the review and remitting its draft in September 1857; even though it was passed by Congress in November that year, it wasn’t enacted as the Código civil de la República del Ecuador (Civil Code of the Republic of Ecuador) until 1860, and being the first case of reception of the Chilean model, is still in force today.

**Colombia – Panama**

Santa Fe de Bogotá, capital of New Granada, declared its independence in July 1810, which was recognized in August 1819, and then incorporated to Gran Colombia in 1821 under the denomination of the Department of Cundinamarca. Following its dissolution in 1830, the territory of the center of Colombia formed New Granada, and in 1843, the Republic of the same name. Ten years later, a constitution gave the provinces significant autonomy, and later they were transformed into federal states: Panama in 1855; Antioquia in 1856; Santander, Cauca, Cundinamarca, Boyaca, Bolivar and Magdalena, in 1857. The Granadine Confederation was created in 1858, which was succeeded in 1861 by the creation of the state of Tolima, and in 1863 with the formation of the United States of Colombia, also under the federal model, which was later abandoned in 1886 to give way to the Republic of Colombia.

We have already had the opportunity to point out the codification antecedents identifiable during the existence of Gran Colombia for the case of Ecuador, and now these extend to Colombia due to its participation in this history. Similarly, mention has been made of the draft presented by Justo Arosemena\(^42\) in 1853, based on the Peruvian code of 1847 and

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\(^{42\text{ Supra, Peru.}}\)
passed for the State of Magdalena in 1857 as a *Código civil*, and which constitutes the first regulatory text valid in a territory that would form part of Colombia.

Despite this adoption by Magdalena, the other confederate states did not go down the same route, instead preferring to use the Chilean model. The first step was taken by Santander, which in October 1858 adopted the aforementioned code, which definitively entered into force in July 1860 as its own substantive civil text. This was followed by the State of Cundinamarca, which passed Bello’s text as its civil code, with a few changes, in January 1859, with the same validity as that of Santander. Also in 1859, but in October, Cauca did the same and, in 1861, Tolima, although the latter state by sanctioning the code of Cundinamarca, and not directly that of Chile. The Federal District (Bogotá), also created in 1861, decided that the matter of intestate succession would be ruled by the code of Cundinamarca. In Bolivar, a first code was issued in 1862—not faithful to the Chilean text—, but in 1883 a new one was sanctioned that instead was adapted to the general model. The State of Panama also received the code of Cundinamarca, which entered into force in March 1862, as occurred in 1864 in Boyaca, and in Antioquia, from January 1865.

The reception process of the Bello model completed its cycle in the confederated states when Magdalena passed the adoption of the Cundinamarca code in 1866, and on a federal scale in 1873. The abandonment of the federal model in 1886 lead to the official sanctioning of a substantive civil code for the whole nation, based on that of Santander and, therefore, fundamentally on that of Chile\(^{43}\), in force from July 1887 to the present day.

Together with this regulatory text, in the same year (1887) the law related to overland trade entered into force—adopting that of the State of Panama enacted in 1869—, as well as the law on maritime trade, in addition to pro-

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\(^{43}\) One important modification was the reintroduction of the French principle of international reciprocity as a requisite of the enjoyment of the rights granted by the civil code, arguing “for example, the North Americans may not acquire land in Colombia, to the extent that Colombians are prohibited from doing so in the United States”. This measure is explained in the warning—more than an example—of the loss of a large part of Mexican territory in favor of its northern neighbors.
cedural and criminal codes. The outstanding doctrine of the Código civil constitutes the work of Vélez, Estudio sobre el derecho civil colombiano (Study of Colombian Civil law), published in 1898.

As corollary, it should be pointed out that when Panama became an independent nation in 1903, the adoption of Colombian laws and codes was carried out by law in May 1904, so that in the case of the civil code it is possible to see the continuity of the Chilean model (valid from 1860, in the form of the Cundinamarca text, as has been seen), and extended until the enactment of a new regulatory code in 1916, which despite not breaking with the existing scheme, introduced important changes based on the 1889 Spanish code.

**Venezuela**

The influence of the Bello model can also be seen in Venezuela, although in this case it is the issuance of a civil code with an ephemeral validity, as explained in continuation. In the name of brevity, and omitting any reference to the dawn of its independent life⁴⁴, it should be remembered that Venezuela formed part of Gran Colombia, created by the congress of Angostura in 1819, together with Cundinamarca and Quito, so that this part of the story should also be kept in mind for the case of codification in Venezuela, which in 1830, following the dissolution of its alliance, picked up the subject once again as its own, its Constitution from the same year containing a pragmatic rule that ordered the formation of national codes⁴⁵. At the start of 1832, an initiative was submitted that ordered the formation of an editorial commission for the preparation of the civil, commercial and criminal codes, but which when finally set-up in 1835 did not carry out its mission, such luck being shared by the attempts of 1839 and 1840, although in the latter case, the formed commission was able to prolong its activity until 1848, and submitted a draft of a commercial code. These efforts were repeated and continued to fail until 1853.

At this point, special mention should be made of a draft worked on and formed without official sanctioning, i.e., as the product of a private, citizen’s initiative of Doctor Julián Viso, who having requested a subsidy from Congress in order to complete his work, was favored by a 1853

⁴⁴ Its declaration of independence was in July 1811.
⁴⁵ Art. 87, N° 1.
decree, which allowed him to publish a draft of a civil code, which was built on the foundations of the 1838 Dutch text of Kemper and was submitted in January 1854 to the president of the Republic, who, in turn, presented it to Congress the following month, where, unfortunately, it was disregarded.

Later in 1855, at the request of the Senate, the creation of a permanent commission was proposed, which would assume the longed-for codification work, but this episode was as fruitless as other identical efforts that took place in 1860 and 1861. It was under the presidency of José Antonio Páez when Venezuela was given a commercial code at the beginning of 1862 and civil and criminal codes were promoted, so that its Código civil was enacted in 1862, based on the Chilean version, although its validity was very brief, as has already been mentioned: in effect, when Páez was overthrown, the laws passed during his dictatorship were repealed and the previous ones reestablished, except on commercial matters.

El Salvador – Nicaragua – Honduras

On two previous occasions the opportunity has already existed to remember the first events of the independent life of Central America: together with Mexico –more precisely the viceroyalty of the New Spain–, the region coinciding with the general captainship of Guatemala, achieved recognition of its independence from Spain in 1821, and joined the Mexican Empire in 1822, leaving it in 1823, to form the Federal Republic of Central America in 1824, without an underlying entity from 1835. For the three republics dealt with in continuation, El Salvador, Nicaragua and Honduras, it should be added that in 1842 a Central American Confederation was formed, which did not bear significant fruit, but which with the aim of achieving them, was retaken on two later occasions, in 1847 and 1852, which were equally discouraging.

El Salvador obtained the first tangible results of its codification process with the commercial code in 1855, followed by the procedural code in 1857. At the request of the president of the Republic, in 1858 Congress

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46 Most probably known by the author of the draft through the work of Saint-Joseph. Viso, however, did not openly confess to this filiation, and stated to follow the French model.

47 Supra, Costa Rica; Guatemala.
decreed the formation of two commissions responsible for preparing the respective drafts of the civil and criminal codes. For the first of them, the work concluded by the commission was subject to review by another formed to this effect, which completed its task in August 1859, in order to proceed a few days later and without any further formality with the enactment of the code, the validity of which –prolonged to date– entered into force in May 1860, and whose contents almost completely coincides with the model provided by the code of Andrés Bello.

Speaking of other countries belonging to the general captainship of Guatemala, it is now added that both Nicaragua and Honduras should be counted among those cases of reception of the Chilean civil model. The Código civil de la República de Nicaragua (Civil Code of the Republic of Nicaragua) was passed by both houses in March 1866, and enacted at the beginning of the next year, governing until 1904. Honduras also followed the structure and content of the Bello code in its first regulatory text promulgated in 1880, and which was in force until 1899, given that in 1898 another code had been enacted that strayed from the Andean model, rather preferring the 1889 Spanish model, which, in turn, was repealed and replaced by a third code, in virtue of a decree in February 1906, which opted to return to the original scheme, i.e. the Chilean model, although with more significant changes, and which is still in effect.

This process of formation of the Chilean code and its later reception by several Latin American countries, was extolled not only in the facts, but also in the speeches and programmatic declarations of different countries, among which the holding of the American Congress of Jurists today stands out, which took place in Lima between 1877 and 1879, according to the initiative of the Peruvian government presented to others in the region with the aim of proceeding with the unification of civil law and, failing this, the preparation of uniform rules of international private law, a drafty in which the model of Bello was the centerpiece for discussion.\footnote{SAMTLEBEN, J., Derecho internacional privado en América Latina, I, Buenos Aires, 1983, 10 ff, quoted by SCHIPANI, Codici civili, quoted, 297.}
4. Superposition of codification models

A) García Goyena and its influence

The ancient metropolis also set itself the task of writing its own codes, and these efforts did not always remain foreign to its old overseas territories. In 1843, Spain, due to the poor results achieved until then, created the General Codification Commission, the different sections of which would be responsible for providing the monarchy with the legal texts demanded by the times. Florencio García Goyena took charge of civil matters, and ultimately was the author of the draft submitted in 1851, based on the Napoleonic code. The following year, in addition to the draft, he published another work titled Concordancias, motivos y comentarios del Código civil español (Concordances, Motives and Comments of the Spanish Civil Code), the great success of which in Latin America may perhaps have compensated for the heartache caused by the rejection of his proposal – although in the end it was used as the basis for the preparation of the 1889 code. The part of the concordancias is especially significant, as although the draft was based on the French code, the comparison with the rest of the current ordinances (Bavarian, Prussian, Louisianan, Austrian, Neapolitan, of the Canton of Vaud, Sardinian and Dutch), and the confrontation with the Roman and Castilian tradition, resulted in an unquestionable piece of information, i.e., the very extensive common base of continental European law.

Venezuela

The influence of García Goyena can firstly be seen in Venezuela, whose first code of Chilean filiation was very short-lived, as has already been seen, and which set-up an editorial commission in the same year of 1863; however, it did not achieve the expected results and consequently another was established in 1867, which was granted an absurd peremptory period in which to complete the task. As a result the commissioners wrote “... almost completely the draft of the code presented to the Spanish Government by a commission named for its preparation...”, and which was approved by decree in May 1867, entering into force in October the same year.

49 Of forty days.
Later, other commissions were formed in 1868 and 1870, based on whose work a final draft was submitted and enacted in February 1873, entering into force a few months later, based principally on the 1865 *Codice civile del Regno d’Italia* (Civil Code of the Kingdom of Italy), which, in turn, also closely followed the French model.

The Venezuelan code has been formally replaced on several occasions between 1881 and 1982, but in reality these are reforms rather than the publication of authentically new codes, despite the relevance of certain amendments such as those regarding person and family, specifically natural children and divorce; those of 1942, which introduced aspects taken from the 1927 Italian-French draft of obligations. Under the form of its promulgation in 1982, it continues to be current law.

**Mexico**

When speaking of the case of the early reception of the *Code civil* in Oaxaca, the opportunity arose to indicate that Mexico commenced its independence in 1810, in order to obtain official recognition by the Spanish Crown in September 1821. Following a brief undefined period, the Mexican Empire was finally constituted under Agustín de Iturbide, which has also been mentioned, in virtue of its connection to the history of the aforementioned Central American countries. The organization under the imperial scheme did not last for long, and already in 1824 the federal regime was implemented, by means of the Political Constitution of the same year. However, the different political viewpoints were unable to reach an agreement: concretely, the debate between the formation of the Republic according to the centralized or federal scheme continued for a large part of the 19th Century. Many other events should be added to these fights between federalists and centralists, which had a widespread impact on the history of the country, and which unquestionably influenced the delay suffered by the Mexican codification movement.

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50 The fact that they are presented as new codes, even though they are only reforms, is explained by an old constitutional provision that is repeated later on: “Any law that reforms a previous one should be written out in full, including all those provisions that remain valid and declaring the repeal of the reformed law” (Article 99 of the 1830 Constitution).
Regarding the Código civil de Oaxaca, it should be remembered that in the federal scheme, the formation of these regulatory texts was under the jurisdiction of the states, and it was observed that except for this code, and even this one incomplete, no later progress was made. In 1836, when the country was formed according to the centralist scheme, codification underwent the coherent adaptation demanded by the new political regime, i.e., the unification of rules was ordered, eliminating the possibility of their multiplicity. Despite this, no tangible fruit was produced in this period, which extended for ten years more.

In 1847, with the re-establishment of the federation, civil codification once again returned to the hands of the states, but the efforts dedicated thereto did not lead to anything significant, also due to the many problems suffered by the nation, including the invasion of its territory by the United States of America, with the consequent loss of a huge part of the north.

On the contrary, commercial matters, under federal jurisdiction, were consolidated in a first regulatory text under the government of President Antonio López de Santa Anna, i.e., the first Código de comercio (Commercial Code), the preparation of which was the responsibility of the Minister Teodosio Lares, and which was officially sanctioned in May 1854.

The political events following the fall of Antonio López de Santa Anna finally lead to the enactment of a new Federal Constitution in 1857, in virtue of the fact that during the preceding years the regime was based on centralism. However, the 1857 Constitution not only represented the triumph of federalism, but also, and perhaps more importantly, of the liberals over the conservatives. As a result, social movements appeared that once again lead to the taking up of arms and even to the formation of two governments: one liberal, that of Benito Juárez, installed in Veracruz, and the other conservative, that of Zuloaga, in Mexico City, until 1861, when, after the toppling thereof, Juárez was able to return to the capital.

The declaration of bankruptcy protection issued by the Mexican Government provided the pretext for the arrival of the troops of Napoleon the Third on Mexican territory, who, as is well-known, were the instrument by means of which a Second Empire was established, this time offered by the Mexican conservatives themselves to the descendent of the House of Austria, Archduke Maximilian of Habsburg, who settled in Mexico City in 1864, and whose death by firing squad two hundred kilometers from the
capital, in Querétaro, occurred in 1867, date on which the government of Juárez once again returned to Mexico City, leading to the triumph of the Republican movement.

This brief outlook of the turbulent 19th Century in Mexico can be used to understand the very reasonable delay in its codification process: to what has already been said on the subject it should now be added that in 1839 the jurist Juan Nepomuceno Rodríguez de San Miguel published his *Pandectas Hispano-Mexicanas* (Hispano-Mexican Digest), with the aim of substituting the lack of codes, but also with a clear intention of postponing liberal codification as much as possible, which was finally resumed at the start of the second half of the 19th Century.

In effect, it was during the government of President Juárez that in 1858 Justo Sierra was commissioned to write a civil code, who, taking the work of García Goyena as his basic model, completed the regulatory text in a couple of years, which could only be subject to review after its publication in 1861 under the name of *Proyecto de un Código civil mexicano formado de orden del Supremo Gobierno* (Draft of a Mexican Civil Code Formed by Order of the Supreme Government), and which was adopted by the State of Veracruz as civil ordinance at the end of the same year.

At the beginning of 1862, a new commission was formed to review the Justo Sierra draft, which continued its work until May the following year, with the French army already at the doors of the capital, but in virtue of the fact that several of its members did not flee given this event, the commission continued its work, now under the government of Maximilian, who in 1866 published the preliminary title and the first two books of a *Código civil del Imperio Mejicano* (Civil Code of the Mexican Empire), which although incomplete due to the interruption of the foreign government, was the first to be implemented nationwide. It should be noted that the amendments that the Justo Sierra draft underwent in virtue of the work of the commissions responsible for the matter between 1862 and 1863, and between 1864 and 1866, were many, until the Imperial Code was completed.

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After the restoration of the Republic, it was inevitable that the efficacy of the regulatory text issued by the Emperor was interrupted, with the consequent renewal of the codification enterprise, although both the original draft by Sierra and the code of Maximilian were used as a basis for carrying out the task, without forgetting the documents produced by the review commissions themselves. In September 1867, a body was formed that concluded its work in January 1870. In December the same year, the Congress passed the draft submitted for its consideration and it was promulgated a few days later by President Juárez, entering into force in March 1871, as the Código civil del Distrito Federal y Territorio de la Baja California (Civil Code of the Federal District and Territory of Baja California), and although several states had gone ahead of the federation, it can be said that almost all of them adopted such text as their substantive civil code: to Veracruz and the State of Mexico were added those that received the federal code unaltered, i.e. Guanajuato, Puebla, San Luis Potosi, Zacatecas, Guerrero and Durango; those that made some changes, Hidalgo, Michoacan, Morelos, Tamaulipas, Sonora, Chiapas, Queretaro, Sinaloa; and finally, those that amended the model to a greater extent, such as Campeche and Tlaxcala.

The structure of the 1870 Mexican code is based on the imperial code, which implies that ultimately it is modeling on the draft by Florencio García Goyena, in turn based on the Napoleonic code, but introduces provisions taken directly from the Portuguese code of 1867 under the authorship of Seabra, which at the same time was the most modern, and according to the opinion of Batiza, the 1869 Spanish mortgage act should be added as a direct source, and other provisions from Roman Law, from the Austrian, Sardinian and Dutch regulatory codes, indirectly. As a peculiarity of its system, it can be seen that it moves matters of succession to the last book of the legal text.

When General Porfirio Díaz began to govern Mexico, the 1870 code was in force, but in the sole interval in his long mandate, by order of President Manuel González, in 1882 a review commission of such regulatory text

52 Los orígenes de la codificación civil y su influencia en el derecho mexicano, Porrúa, Mexico, 1982, 184 ff.

53 What also occurs in the Consolidação of Freitas and in the Argentine code of Vélez, although there is no sign of communication between the works; SCHIPANI, Codici civili, quoted, 301 ff.
was formed, which would fulfill the presidential commission of proposing a draft that would basically provide, for reasons known to all, the elimination of the *quota legitima* and introduction of the free *testamentifactio*: in December 1883, Congress authorized the President of the Republic to reform the 1870 text, and as a result he promulgated a new code in March 1884, although in reality it was only the aforementioned reform and others of less importance, the validity of which was extended until 1932, when the *vacatio legis* of the 1928 code ended, and which will be studied later on. Regarding the 1870 and 1884 codes, it is important to point out the exhaustive commentary published by Manuel Mateos Alarcón in Mexico, in parts from 1885, under the title of *Estudios sobre el Código civil del Distrito Federal* (Studies on the Civil Code of the Federal District)\(^{54}\).

On the other hand, federal commercial matters continued with the process of preparing codes, so that in 1884 a new commercial text was enacted, which in 1889 was replaced by another *Código de comercio*, still valid today, albeit with reforms, and more important still, experiencing the decodification of certain matters and the consequent rewriting of these contents in special laws (business corporations, shipping and maritime trade, negotiable instruments and credit transactions, insurance and bonds, etc.).

### B) Argentina and its influence

Whilst the civil codifications of the second half of the 19\(^{th}\) Century in Mexico did not adopt a preponderant model, but rather integrated different ordinances to configure their own text, in the same way Argentinean codification was able to amalgamate diverse influences to produce a regulatory civil text that is very representative and emblematic of the process examined in Latin America.

By May 1810, a Government had been elected by the Town Council of Buenos Aires, but it wasn’t until 1816 that the General Congress proclaimed the independence of the old viceroyalty of Rio de la Plata, and immediately focused on defining the form of organization that the nation would take, whether according to the federal or central scheme, the former being imposed in 1829, at least nominally, and formally became reality from 1853 in the Constitution, such regime being confirmed in the reform

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\(^{54}\) There is a facsimile edition with “Introductory study” by SORIANO CIENFUEGOS, C., 6 vols., Suprema Corte de Justicia de la Nación, Mexico, 2004.
that took place a few years later. Around the same time the effective history of codification began, although certainly as a discourse, it was present from the dawn of the independence movement.

When talking about the García Goyena draft, mention was made of a General Codification Commission, the civil section of which was chaired precisely by don Florencio: knowing this, Argentina formed its own in 1852, dividing the work into four sub-commissions, these being civil, criminal, commercial and procedural. In the first of them, a man appears as writer who is indissolubly linked to his code, such as Dalmacio Vélez Sarsfield, although this first organ did not give results, such luck being shared by another undertaking in the immediately following years, and also the collaboration offered by the provinces in order to successfully complete the national codification work. On the contrary, in commercial matters, Vélez Sarsfield worked together with the Uruguayan jurist Eduardo Acevedo on the preparation of a draft that was presented to the houses by the Executive, and which was sanctioned for the whole Argentine Republic in 1862.

In 1863, the Executive was authorized to form new commissions that would assume the task of writing the civil, criminal, military and mining codes, falling once again in the hands of Vélez Sarsfield the first of them in 1864, on which –following the indications of the decree regarding the inclusion of explicative Notas and of compared law for the provisions– he worked for five years: mid-1865 he finished the first book; the second between 1866 and 1867; the third, at the start of 1868; and, finally, the fourth in August 1869, reunited under the name of Proyecto de Código civil para la República Argentina (Draft of the Civil Code for the Argentine Republic). President Sarmiento submitted the bill to Congress in September 1869 in order for the draft to be passed, which it achieved without delay a few days later. The code entered into force on the 1st of January 1871.

The Argentine code includes more than four thousand articles, distributed in the four books that Vélez Sarsfield delivered step-by-step: persons, which includes the treatment of family law; personal rights of civil relationships, which covers obligations, legally-relevant acts, generalities about contracts and their types; rights in rem, encompassing property, possession and ownership; and, finally, common provisions on personal rights and rights in rem, including succession.
As can be seen, the distribution of the books, i.e., the expositive system, constitutes a characteristic feature of the code and, in effect, the ordering of matters seems to have been the aspect on which its author spent the most time, although as he himself states, it is not altogether original, but rather it is based on the works of Teixeira de Freitas in Brazil: “… I have followed the method so well-discussed by the wise Brazilian jurist in his extensive and learned introduction to the Compilation of the laws of Brazil, separating myself in some parts in order to make the connection between the different books and titles more perceptible, as the method of legislation, as Mr. Freitas himself says, may be slightly separated from the filiation of ideas”\textsuperscript{55}.

But the influence of the work of Teixeira de Freitas is appreciable in the Argentine code not only in its structure, but also in the contents of a large number of articles, although, as stated above, it does not predominantly follow any model: the \textit{Notas} that Vélez himself prepared concomitantly make it possible to see the richness of sources, models, doctrines and schemes that the codifier used\textsuperscript{56}. Among the literature related to the making of the codes, the Chilean text stands out, which is highly celebrated by don Dalmacio, and the work of García Goyena; in terms of doctrine, Savigny, Zachariae, Troplong, Demolombe, and many other French jurists; finally, special mention should be made of the direct use of Roman sources, i.e., from the \textit{Corpus Iuris Civilis}, for writing of around one fifth of the regulatory provisions.

The code of Vélez Sarsfield is presented, from the viewpoint of the history of codification in Latin America, as an eclectic work, but at the same time—and perhaps because of it—original, constituting one of the great regulatory monuments of the region, an authentic contribution to the general nature of the process, which is able to separate itself from its models, and which, therefore, justifies that they should be better classified as influences, which in the extensive culture of the Argentine jurist finds notable accommodation and coherence, unquestionably due to his vast historical knowledge not only of institutions, but also of the evolution of legal sys-

\textsuperscript{55} Words transcribed by GUZMÁN BRITO, \textit{La codificación civil}, quoted, 449.

tems. The work of Lisandro Segovia\textsuperscript{57}, *El Código civil de la República Argentina con su explicación y crítica bajo la forma de notas* (The Civil Code of the Argentine Republic with its explanation and criticism in the form of notes), is considered as the most complete of the exegetic genre regarding the Vélez code. The regulatory text continues in force today.

In Latin American culture, the Argentine code was able to summarize, to a greater extent than any other, the erudition of its author, favoring, by means of its articles and correlative notes, the cultivation of the science of law, although its detail, caused by a very marked trend towards casuistry and the incorporation of doctrine without a strictly regulatory function, added to the fact of its late writing, prevented it from having the repercussions and acceptance of the Chilean code, although it was certainly received, as will be seen below.

**Paraguay**

The Republic of Paraguay was born in September 1813, following the Roman scheme consisting of depositing the government in two consuls, as prior to this, the region belonged to the viceroyalty of Rio de la Plata, and when the aforementioned 1810 Government was established in Buenos Aires\textsuperscript{58}, Paraguay saw the chance to go its own way, although not without resistance by the people of Buenos Aires. Having just been formed, the nation chose a dictatorship, also inspired by the Roman lesson, although through the intermediation of the works of the Illustration: “Paraguay is a republic made on a mold that is more similar to that of the republics of old than that of the republics of the United States and Switzerland. It may not have the brilliant and obvious liberties of the republics of the day, but it has others, derived from a social order that is similar to that which formed the basis of ancient republics”\textsuperscript{59}.

Perhaps it was the dictatorial regime that decisively influenced the postponement of the process of codification in the country, but certainly it was only after the death of the dictator José Gaspar Francia (or rather, the death

\textsuperscript{57} In two volumes; Buenos Aires, 1881.

\textsuperscript{58} Supra, Argentina.

of the dictatorship, as it ended with him), when a first hint of interest in the matter appeared with the repeal in 1842 of the 1680 *Recopilación* and later laws, and mandatory force, although suppletory and provisional, was granted to the Castilian legislation.

In 1844, Paraguay abandoned the political schemes of classical times, and opted for modern presidential government, although not without difficulties, and in virtue of the military actions derived from the alliance of Argentina, Brazil and Uruguay, in 1870, Paraguay sanctioned a new constitution. In the same context, a bill was admitted to receive the Argentine codes, but it did not become law, due to the veto filed by the Executive, which was followed by a timid effort to set-up an editorial commission of the normative texts, which was ineffective. In this way, in August 1876 the validity of the civil Argentine text was formally implemented in Paraguay, which, with amendments\(^{60}\), was extended until 1985: the adoption of this code introduced important social changes in Paraguayan society, which most importantly include the privatization of real estate property, the explanation of which goes beyond this work\(^{61}\).

**C) Other models**

**Uruguay**

As with Paraguay, Uruguay formed part of the viceroyalty of Rio de la Plata, created in 1776, but unlike it, it adhered to the political program stated in virtue of the 1810 Buenos Aires Government. The expansionist goals of Brazil lead to intervention in Uruguayan territory, resulting, on the one hand, in the independence of Brazil from Portugal in 1825, and on the other and with regards to Uruguay, the signing of the Rio de Janeiro Treaty in 1827, by means of which Uruguay was emancipated from Argentina, at least formally, as *de facto* it supported another twenty-five years of its political intervention. Since the Constitution of 1830, the writing and enforcement of the usual codes had already been contemplated,

\(^{60}\) Not only its own, but also those recorded in Argentina: in effect, in 1889 a Paraguayan law incorporated the changes suffered by the Vélez text in Argentina.

but even when several years later the regulatory provision was to be turned into a reality, a civil war in 1838 inevitably hindered the task.

By the middle of the century, the Uruguayan jurist, Eduardo Acevedo, had completed a draft of the civil code, acting privately, i.e., not in compliance with an official commission, so that —accompanied by notes— it went to press in 1852 under the name of Proyecto de un Código civil para el Estado Oriental del Uruguay (Draft of a Civil Code for the Oriental State of Uruguay), which was submitted to congress the following year, but neither then nor on two later occasions did it become law. Distributed in a different way to the French model, and also different to it in terms of content, it seems to have used the 1847 Peruvian draft as its basis, although not to the extent of considering it a mere adaptation thereof, as several other sources can be clearly seen, especially Spanish literature, and the French doctrine, such as Acevedo himself notes in the presentation of his work.

It wasn’t until the following decade that the codification effort was once again undertaken, achieving in 1865 the promulgation of a commercial code, resulting from the work of a commission set up for the purpose of reviewing the draft prepared by Acevedo and Vélez Sarsfield for Argentina. On civil matters, the review commission was created in 1866, at the heart of which was the Argentine jurist Tristán Narvaja, and whose final report was submitted at the end of the following year, and consequently the Código civil de la República Oriental del Uruguay (Civil Code of the Oriental Republic of Uruguay) was enacted and entered into force in 1868. On the other hand, the civil procedural text became effective in 1878.

The commission’s own minutes stated that its work was based on numerous sources, which include the French and Chilean models, but worked into the scheme inherited from the Acevedo draft, to which it is faithful “… above all in the style of formulation of the articles… and in the separation of the treatment of property and rights over them (book II), of the forms of acquisition of property that are included in the next book III together with inheritance succession…”62. In addition, the influence of the works of Vélez Sarsfield and of Teixeira de Freitas can be clearly and manifestly seen, but especially that of García Goyena. With reforms, and apart from two successive enactments in 1883 and 1914 by means of

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62 SCHIPANI, Codici civili, quoted, 299 ff.
which its articles were renumbered, the Uruguayan code is still in force today.

Costa Rica – Nicaragua – Panama

It has been said that Costa Rica enacted a Código General in 1841, which covered civil, criminal and procedural matters. It was then mentioned that the validity of the civil part would be extended until 1888, and now is the moment to explain the reasons. In spite of the fact that the purpose of separating the matters into specialized regulatory texts was stated from the 1860’s, it wasn’t until 1880 that it was possible to actually promulgate a criminal code. Congruently, in 1882, an editorial commission was formed to prepare the civil and procedural parts.

The first of them was chaired by Antonio Cruz, Guatemalan by origin, and once he had completed his task, the Bar Association was consulted so that it could make its observations, which were very few. The Código civil de la República de Costa Rica (Civil Code of the Republic of Costa Rica) was enacted in 1886, establishing a long vacatio legis, so that the new code entered into force in January 1888. With later amendments and the de-codification of family matters to give way to special legislation, it is current law in Costa Rica today.

Its structure does not coincide with the previous one, which consequently results in a new sequence of its articles. Among the legislative options, the union of the treatment of goods, property and their amendments with succession should be highlighted, as well as the division of obligations including a general section. Its original version presents a significantly short text, of slightly more than one thousand four hundred articles, according to the aim of the legislator consisting of avoiding the doctrine on which it is supported. The provisions are inspired by several sources, including, firstly, the Napoleonic code, due in part to the identifiable substrate in the previous code, as well as French doctrine, especially that of Aubry and Rau.

In the explanation of the Bello code and its influence, it was pointed out that Nicaragua received such text almost completely intact, which governed from 1871 until 1904: in effect, in 1899 an editorial commission was formed to prepare a new regulatory code, which was promulgated in February 1904, entering into force three months later.
Its structure is similar to that of the Guatemalan code, which in turn is based on the Peruvian text, although the different models, doctrines and systems do not always happily converge. One peculiarity consists of the treatment of intellectual property in its articles. With the amendments recorded over the years, this text remains in force.

Due to well-known geopolitical reasons, Panama separated from Colombia in 1903, but even after the secession it continued to be governed by the Colombian code for several years. The codification process, however, appeared almost simultaneously: two commissions were created by decree in 1903, responsible for writing the drafts of the civil and judicial codes (one), as well as commercial, mining and criminal texts (the other). The following year, a law authorized the Executive to appoint the members of a permanent commission with the same purpose. The draft of the civil code was left in the hands of Facundo Mutis Durán, who, closely following the previous model, completed his work around 1906, without being able to go beyond the drafting phase.

In virtue of this, in 1913 the matter was taken up with the formation of a new commission, in which civil matters were commissioned to Carlos Mendoza, with the indication to use Durán’s work as a basis. In 1916, the complete draft was submitted for the approval of Congress, which it quickly obtained.

Although the expositive system maintains its Colombian and, therefore, Chilean antecedent, except for the inclusion of a fifth book, dedicated to notaries and the public registry, the contents of the provisions have several sources, including the 1889 Spanish code and, to a lesser extent, the Argentine code. The text, albeit amended, has been in force since 1917.

Cuba – Puerto Rico

As a result of the independence movement that characterized the Latin American 19th Century, Spain only conserved Cuba and Puerto Rico as overseas provinces on the continent. With regards to the validity of the legislation, it can be said that in both Spanish Law for the Indies and its own (derecho indiano, lato sensu) was applied, a situation that changed when the Código civil de España (Spanish Civil Code) was enacted in 1889, which, in effect, was introduced in Puerto Rico and Cuba (as well as in the Philippines) by royal decree in July 1889.
In the case of Puerto Rico, the code governed until December 1898, given that the Paris Treaty of the same year, resulting from the armed conflict between Spain and the United States of America, formally incorporated the island in the sphere of power of the latter, although it already exercised it de facto several months beforehand. In 1900, a rule issued by the North American government ordered the review of the current Puerto Rican laws, by means of the creation of a committee, which submitted its report to Washington the following year, but the matter had to be taken up again at a later date due to failing to reach an agreement. With regards to civil matters, the second commission completed its work, proposing the amendment of the first and second books, as well as of the preliminary title, of the Spanish code, and minor changes to the rest of the regulatory text.

As a result of this whole process, the Estatutos revisados y códigos de Puerto Rico (Reviewed Statutes and Codes of Puerto Rico) were published in 1902, following the Anglo-Saxon model of law compilation, and not the scheme of codified law. For the most part, the civil section of this regulatory text basically coincides with the contents of the Spanish code except for a few aspects taken from the code of Louisiana or introduced by the commissioners themselves or authorities involved in its preparation, principally regarding issues of persons and family.

Posteriorly, Puerto Rico experienced a new process of compilation of regulatory provisions, under the responsibility of the Insular Affairs Office of the War Department, which in 1912 published the document titled Compilation of the Revised Statutes and Codes of Porto Rico, the laws of which certainly included the civil code. In 1913, a new compilation in Spanish was ordered, published the following year, and the most recent, from 1930, which is still in force today63.

Cuba followed the example of Puerto Rico after the war between the United States of America and Spain, and the Spanish code remained in force despite the occupation by the North American army. In virtue of the Paris Treaty, which has already been mentioned above, the United States of America installed a military government that ended in 1902, but during this period, a transient article from a 1901 constitutional provision stated

63 On the inherent problems of bringing together two legal traditions, see DEL-GADO CINTRON, C., Derecho y colonialismo. La trayectoria histórica del derecho puertorriqueño, Rio Piedras, Edil, 1988.
that: “All laws, decrees, regulations, orders and other provisions in force at
the time of enactment of this Constitution, will continue to be obeyed insofar as they do not oppose it, and unless they are legally repealed or amended”\textsuperscript{64}. This provision provided the opportunity for the Spanish code to continue to govern in Cuba, which not feeling an urgent need to replace it not even in virtue of the changes derived from the revolutionary movement, kept it in force until 1987.

5. Brazil, last civil codification of the classical period

As a result of the Napoleonic invasion, the Portuguese King João VI took
the decision to abandon the peninsula and transfer his residence and court
to Brazil, but in 1821 he returned to his homeland, leaving his son in
America, who joining the independence movement, became emperor of
the old overseas province, under the name of Pedro I. The constitutional
text of 1824 already foresaw the promulgation of civil and criminal
codes\textsuperscript{65}. In a short time the substantive criminal code had been prepared
(1830), which was followed by the procedural code a couple of years later
and also containing provisions for civil cases; finally, commercial matters
were codified (1850).

On the other hand, the civil field underwent a much slower process: in the
middle of the 19\textsuperscript{th} Century, in 1855, Augusto Teixeira de Freitas assumed
responsibility for proceeding with the consolidation of the matter, such
work being succeeded four years later by the preparation of a code draft.
The distinction between both works is similar to that provided by the
activity of Andrés Bello for the case of Chile, as indicated above, and
assumes a classification phase, which basically consists of systematically
compiling the existing material, in this case, the legal texts present in the
tradition. This was followed by consolidation and codification, the first
resulting in the simplification of the regulatory statements, correcting
them, adapting them and filling their gaps, and the second, culminating in
the reforms required by the matter, i.e., to use tradition as much as possible
and to alter it only where absolutely necessary. However, after the comple-

\textsuperscript{64} LAZCANO, A., \textit{Las constituciones de Cuba}, Ediciones Cultura Hispánica,
Madrid, 1952, 583.

\textsuperscript{65} According to Article 179, n. 18.
tion of the Consolidação (Consolidation) in 1857, Teixeira de Freitas got round the distinction between the latter operations. The work, distributed in 1333 articles, was published in 1858 under the name of Consolidação das leis civis (Consolidation of Civil Laws), accompanied by a very rich and erudite Introdução (Introduction).

From this viewpoint, it can be seen that the work of the Brazilian jurist represented an important task for the identification of laws and regulations, as well as to delimit their correct interpretation, as the basis for the writing thereof in terms that achieve a greater precision of their scope and content, until transforming them into articles of legal texts in which their order and sequence were determined by the expository system of the regulatory code itself.

At this point, it is worth making an observation, given that the expository order designed by Teixeira de Freitas consists of a general part, with two titles, these being persons and property; and a special part, which contains a first book (personal rights), with two sections (personal rights in family relationships, and personal rights in civil relationships), and a second book, referring to rights in rem.

In addition to the aforementioned Introduction, each article of the more than one thousand three hundred have Notas, which contain the sources examined for their writing. The destiny of this doctrinal work, with various later editions and updates, made it take the place of civil regulatory text, until the first civil code entered into force in 1917.

Following the publication and favorable acceptance of this work, another commission was given to Teixeira de Freitas: in effect, in 1859, he was commissioned to write a draft of the civil code, so that as of 1860 the jurist began to deliver the progress made under the title of Código civil, Esboço (Civil Code, Draft) until 1867; at the same time, from 1863 a commission was set-up to review the works, which suspended its task in 1865. To the

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66 Regarding this expository system, the reader is referred to the work of RES-CIGNO, P., “La ’Parte generale’ del codice civile nell’Esboço di Teixeira de Freitas”, in Augusto Teixeira de Freitas e il diritto latinoamericano, Roma e America. Collana di Studi Giuridici Latinoamericani, 1, Padua, 1988, 341 ff, as well as that of BURDESE, A., “La distinzione fra diritti personali e reali nel pensiero di Teixeira de Freitas”, ibid, 303 ff.
criticism made of the draft, it is necessary to add the fact that the author himself proposed an important change of direction in the subject of codification in 1867, setting forth the need for a general code and a civil code that would cover all private law (civil and commercial), but this plan was not put into practice. In any case, the work was not accepted as legal text, but did influence the work of Narvaja for Uruguayan codification, as well as significantly influencing the thought of Vélez Sarsfield, and through him, Paraguay. Certainly, the preparation of the 1916 Brazilian code also knew how to exploit this valuable material in the writing of numerous articles.

The 4908 articles of the *Esboço* were distributed as follows: a preliminary title, and place and time; a general part, with the first book (elements of rights) distributed into three sections: persons, property, legally-relevant acts; a special part (rights), consisting of a second book (personal rights), with three sections, personal rights in general, personal rights in family relationships, personal rights in civil relationships; and a third book (rights in rem), with three sections, rights in rem in general, rights in rem over own property, and rights in rem over others’ property. In addition to the French doctrine, and the consulted European and American codes, the influence of the German pandectistic can be appreciated.

Other works were presented during the same period that allow us to see a very productive doctrinal activity in Brazil, such as the publication made by Cândido Mendes de Almeida of the *Código Philippino* (Philippine Code) (and its *Auxiliar jurídico*), a compilation of rules of law collected by Freitas, and the *Curso de direito civil brasileiro* (Course on Brazilian Civil Law) by Ribas, which are framed in the context of Romanism, by means of the Portuguese tradition.

The interest in writing a civil code continued with the promotion of several drafts. In virtue of the fact that the Brazilian Government terminated the contract made with Teixeira de Freitas for the preparation of the text, a new agreement was made with José Tomás Nábucu de Araújo in 1873 with the same purpose, but only partial results were obtained. This was followed by a draft submitted unofficially to the Government by Joaquim Felício dos Santos in 1881, whose content was accepted, but for which work started aimed at rethinking its system, and although significant progress was made, it was not possible to complete the task. In 1889, a
Commission was formed chaired by Cândido M. L. de Oliveira, still during the regime of Emperor Pedro II, whose work was interrupted by the establishment of the Republic in 1889, although the codification process continued, now in the hands of Antônio Coelho Rodrigues, whose draft presented in 1893 was rejected, and, after other efforts to obtain its approval, was finally abandoned.

Towards the end of the 19th Century, a law professor from Recife, Clóvis Beviláqua, published a work on the problems of civil codification, which earned him the interest of the minister of justice, who in 1899 commissioned the writing of the civil text from him. In October the same year, the jurist delivered his draft, distributed in 173 articles, accompanied by a Lei de Introdução (Introductory Law), with another 42. The work was published in 1900 in Rio de Janeiro as Projeto do Código civil brasileiro (Draft of the Brazilian Civil Code). Later, a review commission of the work was formed, which introduced numerous changes. Once the text had been submitted to the President of the Republic, it was given to Congress for discussion, where it was also extensively amended, sending it to the Senate in 1902, where it wasn’t discussed until 1912, incorporating many amendments. After being resent to Congress, it was passed, but it was discussed yet again by both houses in 1914 and 1915, and as a result the text was promulgated in January 1916, entering into force a year later.

The structure of the Brazilian code, heavily inspired by the German pandectistic, includes the aforementioned introductory law (related to the application of the regulatory text, and the contents of which also cover rules of international private and public law), and which is followed by a general part, divided into three books, persons, property, and legally-relevant acts; and a special part, with four sections, family law, property law, obligations law, and successions law.

This Brazilian code was commented on by its own author in an introduction and in the notes, similar to those of Vélez Sarsfield, and later by João

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67 COELHO RODRIGUES, Projeto do Código civil brasileiro (1894), Brasilia, 1980.

6. Later developments

Mexico – Guatemala

In 1910, the revolutionary movement began in Mexico that soon overthrew the regime of General Porfirio Díaz, but which took a lot longer due to becoming a program of social demands. In 1917, the Constitución política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States) was enacted, laying the foundations for a new social structure, for which the contents of the 1884 Código civil was behind the time (in reality, an amended version of the 1870 text), especially in aspects such as the concept of the family, which lead to the introduction of divorce in 1914, and a Ley de Relaciones Familiares (Law on Family Relationships) in 1917, instead of the respective book of the civil text.

In 1926, an editorial commission was set-up to prepare a new code for the Federal District (Mexico City), whose members notably included Ignacio García Téllez: in April 1928, the Exposición de motivos del Código civil (Preliminary Recitals of the Civil Code) was published (which attempted to put the “social” spirit of the new legislation into practice)\(^\text{70}\), posteriorly proceeding to publish the draft in the official gazette between the 26\(^{\text{th}}\) of May and 31\(^{\text{st}}\) of August the same year. Once enacted by the President of the Mexican Republic, it entered into full force and effect on the 1\(^{\text{st}}\) of October 1932.

With regards to its structure, a heading of preliminary provisions can be seen and four subsequent books: persons; property; successions; and obligations, divided into a first part (obligations in general), and a second (different kinds of contracts); to which an untitled third part is added dedicated to personal bankruptcy and public real estate registries. Regard-

\(^{69}\) REALE, M., 100 Anos de ciência do direito no Brasil, Saraiva, Sao Paulo, 1973.

\(^{70}\) Such as the legal equality between men and women, the incorporation of the abuse of law, strict liability, etc.
In the context of the contents of the articles, the opinion of Batiza springs to mind: “In its original form, the Civil Code literally or almost literally reproduced 2578 articles of the ’70 code in 2297 of its 3044 articles, through the ’84 code and the Law on Family Relationships…”71. For the rest of the articles, the Mexican constitution and also that of Weimar were examined, as well as diverse texts such as the Swiss, French, Spanish, German, Russian, Chilean, Argentine, Brazilian, Uruguayan and Guatemalan codes. In terms of doctrines, authors such as Duguit, Saleilles, and Valverde stand out.

In virtue of the constitutional reforms that granted the recently created legislative body of the Federal District the ability to pass its own laws, the full text of this Mexican code was enacted and promulgated in the year 2000 as the Código civil federal (Federal Civil Code). In turn, the Federal District published its code in the same year and the states on the dates indicated in continuation: Aguascalientes, 1948; Baja California, 1974; Baja California Sur, 1996; Campeche, 1942; Chiapas, 1938 (together with the Family and Vulnerable Groups Code, 2006); Chihuahua, 1974; Coahuila, 1999; Colima, 1974; Durango, 1948; Guanajuato, 1967; Guerrero, 1993; Hidalgo, 1940; Jalisco, 1995; Mexico (state of), 2002; Michoacan, 2008 (together with the Family Code, 2008); Morelos, 1994; Nayarit, 1981; Nuevo Leon, 1935; Oaxaca, 1944; Puebla, 1985; Queretaro, 2009; Quintana Roo, 1980; San Luis Potosi, 1946 (together with the Family Code, 2008); Sinaloa, 1940; Sonora, 1949; Tabasco, 1997; Tamaulipas, 1987; Tlaxcala, 1976; Veracruz, 1932; Yucatan, 1994; Zacatecas, 1986 (together with the Family Code, 1986).

Unlike this wide variety of civil texts, it should be remembered that commercial matters are federal, and therefore there is only one Código de comercio (Commercial Code), published in 1889, which has already been mentioned, the text of which has been heavily amended, giving rise to special laws.

The 1928 Mexican code was used as a model for the 1963 Guatemalan code (in force from the 1st of July 1964), as can be seen when examining its structure, which is practically identical, except for the exclusion of the preliminary provisions and a few changes in its expositive order. This Guatemalan text replaced a previous one, dating from 1933, the peculiarity

71 BATIZA, R., Los orígenes, quoted, 190, n. 85.
of which consisted of not governing the subject of obligations, for which the nineteenth century code remained in force.

Peru

The transformations suffered by Peruvian society during the 20th Century, such as the constitutional acknowledgement in 1920 of the indigenous communities and the imprescriptible nature of their land, lead to the need for a new civil code. In August 1922, the editorial commission was formed, which worked for fourteen years, although in a disjointed manner, so that it completed its work in 1935: a later review commission passed the draft shortly afterwards, so that it was published in August 1936, entering into force on the 14th of November.

Its structure, heavily inspired by the pandectistic doctrine through the 1907 Swiss Civil Code and the 1911 Federal Code of Obligations, consisted of one preliminary title and five subsequent books: personal law; family law; law of succession; rights in rem; and obligations law, all divided into sections, subdivided into titles.

Later, Peru set itself the task of starting work that would also lead to the repeal of the aforementioned code, from 1965, setting-up a commission to this effect; in 1982, the draft was sent for review to another collegiate body, as a result of which in July 1984 the President of the Republic published a Código civil del Perú (Peruvian Civil Code), which remains in force today. Although it basically follows the previous text and it is possible to identify the influence of the ’42 Italian Code in certain content, its structure adds a book related to legally-relevant acts, divides the treatment of obligations into two books, and uses special books for expiration, public registries and international private law.

Bolivia

Despite many attempts to prepare a new civil code (and an interruption in its validity), Bolivia continued to be governed by the 1830 text until 1975: in 1967, this South American country reformed its constitution, and in 1963 several commissions were set-up with the purpose of, among other things, separating family matters from the substantive regulatory text. The Código de la Familia (Family Code) was enacted in 1972, entering into
force the following year, together with the Commercial Code, although this was substituted in 1978.

In November 1972, a commission was created responsible for civil matters, which started work in January 1973, based on the minutes of another commission in 1962 and concluding its commission by the end of 1974, so that the text was promulgated in August the following year, entering into force in April 1976.

The current code is distributed –following the 1942 Italian structure, except for a few changes and exclusion of family matters– in five books plus four final provisions: persons; goods; property and rights in rem over others’ property; obligations, divided into two parts (obligations in general, and the source of obligations); successions due to death; and the exercise, protection and extinction of rights.

Paraguay

As with Bolivia, Paraguay records several attempts to change its civil code in its legislative history, although one that should not be ignored occurred in 1959, year in which a National Codification Commission was created: in terms of civil matters, the writing of the draft was put into the hands of Luis de Gasperi, who completed it in 1964, and which, when reviewed by the commission, most of it became part of the definitive text, with a few provisions transferred from the previous 1876 code (which followed the Argentine model), and the legislation of insurance, also from Argentina. It was enacted in 1985 and entered into force in 1987.

Its structure consists of a preliminary title and five subsequent books: persons and personal rights in family relationships; legally-relevant acts and obligations; contracts and other sources of obligations; rights in rem or property; succession due to death. The text is still valid today.

Cuba

In 1975 a Código de la Familia (Family Code) was enacted in Cuba, especially in virtue of the need to reform the matter due to the establishment of the new government regime in 1959. With regards to the rest of the civil code, the bill by the Ministry of Justice opened the way forwards, as a preliminary draft was published in 1979, which after undergoing a few alter-
ations, was published again the same year and then in 1981. It was then when a commission analyzed the text, consolidating it in successive versions that went to press in 1982, 1983 and 1985. In July 1987, the National Assembly passed the content based on the last publication.

Peculiarly, it has 547 articles, as well as thirteen final and transient provisions, distributed in preliminary provisions and four books: legal relations; real estate law and other rights over property; law on obligations and contracts; law on successions. Its structure is inspired by the system of the pandectistic doctrine, and the contents are based on the Spanish civil and commercial codes, those of the communist countries and others. The aim of brevity of the code has resulted in important loopholes in its regulations.

Brazil

In Brazil, the writing of a civil code draft was commissioned at the start of the sixties, although the design on the matter of obligations was prepared at the same time as other work; but these efforts were unable to become valid law, in virtue of which in 1969 a commission was formed for the same purpose, coordinated by Miguel Reale, which prepared a document containing one general part and five special parts: obligations; company law; property law; family law; and successions. The second part stands out, as it contains a partial merger of civil and commercial law, in virtue of the fact that valid parts of the commercial text are still maintained. The Congress passed the version submitted in 1975, but many different opinions and viewpoints were made on the reviewed text, published in 1978 and in 1981. By 1984, a version had been published that compiled the observations made, sending the document to the Senate, where the process was held up for almost a decade.

The changes made in Constitutional law, in the protection of indigenous communities and in labor-related matters, fundamentally, meant that the civil code was amended in order to make it compatible with these aspects, so that in 1995 it was reviewed and adapted to these new circumstances. The document was passed by the Senate in 1997 and by Congress in January 2002. It entered into force in January 2003 and, in addition to being current law, is the most recent Latin American civil code.

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7. Trends and outlooks

To use the words of a great Latin American codifier, “… completely and perfectly that supposes a body of legislation, the removal of customs, the very progress of civilization, political vicissitudes, the immigration of new ideas, precursors of new institutions, scientific discoveries and their applications to the arts and practical life, the abuses introduced by bad faith, fruit of discretion to evade legal precautions, unceasingly lead to rulings that are added to the previous ones, interpreting them, adding them, amending them, repealing them, until at last it becomes necessary to rewrite this confusing mass of different, incoherent and contradictory elements, giving them consistency and harmony and placing them in relation to the living forms of social order”\(^{73}\).

Consequently, although not all civil codes have been substituted by others after what is called the classical stage of Latin American codification, it is true that all of them, without exception, have undergone amendments to both their own text and by means of related or complementary laws, but it is not possible to cover them within the limits of this work.

In addition to the attempts of reform, especially that of the Argentine code, the most recent initiatives of which include one dating to 1986, according to which, and keeping in mind the Italian model, the unification of the civil code and the commercial code was proposed, stopped by the Government; and that of Colombian code, according to the Draft of the Civil Code by Valencia Zea in 1960, it is necessary to mention the numerous special legislations that in one way or another interfere with the system based on the civil code, such as the codes for minors or childhood, family codes, labor codes, and a regulatory abundance aimed at providing special protection for indigenous people or other groups considered to be vulnerable, such as women and the old aged, or holders of diffused or collective interests, such as consumers. Furthermore, in almost all countries, at least on a doctrinal level, there is a tendency to reduce the separation between

civil and commercial matters, specifically caused by the crisis of the notion of trade inherited from Napoleonic legislation. Nor should the commercial alliances and treaties between countries in the same region be ignored insofar as they impose rules and regulations that also modify general civil legislation.

In any case, it is possible to state that the preparation of codes, whatever their type, differs from ordinary legislation, and therefore it is considered as a task that should be placed in the hands of jurists, individually or formed into commissions, and does not correspond to the display of the regular political activity of the houses of representatives, based on which it is possible to see another aspect of the importance of the mission fulfilled by legal scientists in the development of their own discipline.

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**Considerations on New Prospects for Inclusion in Higher Education in Brazil through the Law 12,688 of 18th July 2012**

**Flavio Euphrásio Carvalho de Toledo, Eliana Franco Neme**

(1) Master's degree postgraduate program-Bauru-SP  
(2) Professor, Department of Public Law of the University of São Paulo.

**Abstract:** The purpose of this research is one of the most important issues of the current process of recognition in fundamental rights: education. The theme has a focus on newly published Law of July 18, 2012 12,688 Flores, a program of cooperation between the state and private entities in offering postsecondary education. The development of the paper passes through the examination of data on the topic and presents a positive prognostic effects of the norm in reality.

**Keywords:** education, inclusion, fundamental rights, higher education

**Introductory considerations**

Concerns about the effectiveness of the right to education in Brazil are constant since the Federal Constitution entered this value in the list of fundamental rights and made clear that there are no grounds of sovereignty, citizenship, dignity of the human person, social values of labor and free enterprise, and political pluralism without citizens having access to quality education. Similarly, the path to be travelled in searching and developing a just, free and solidarity society aiming at national development based on the eradication of poverty and marginalization, and reduction of social and regional inequalities promoting the common well being, without prejudices of origin, race, gender, color, age and any other forms of discrimination may only be pursued under the protection of this idea, i.e. that human identity is inexorably linked to education.

The human mind cannot be dissociated from the understanding of the values inherent to their condition, and indeed the understanding of the
human condition is inexorably linked to knowledge, at least knowledge one has of oneself. How may we think that without education?

We are unusual mammals and anthropology emphasizes the distinctions: "Man is the animal that produces tools, speech and symbols. Only reading, he laughs, he is the only one that knows he will die; only he denies the mating of the mother with his sister; only he invents visions of other worlds to live in what Santayana named religions or prepares mind modeling that Cyril Connolly called artwork. He not only is endowed with thought, but of consciousness; not only needs, but of values; not only of fear, but of scruples; not only a past, but of a story". This forces us to rethink our permanent problems. After all, in the words of Bauman "all identities – including the identities of ideas – are made of differences and continuities".

Yet it seems troubling that the discourse on the State obligation to provide education is at the end of riddled conformity related to public policies. In concern with perfect theories that eliminate problems and effect justice we remain at comfort assured by the theory of impossibility. In this role, the concern is not to provide a solution, but to present one of the real possibilities for inclusion in higher education.

Thus, on July 18, 2012, the Act 12,688 came into force dealing with a broad topic, but establishes and sets, from article 4, a Program of Incentives to the Restructuring and Strengthening of the Institutions of Higher Education – (PIRSIHE), that, despite involving directly tax recovery and granting of federal tax debt moratorium pursuant to arts. 152 to 155 of the Act 5,172, October 25, 1966, on behalf of the entities referred to in art. 3, and which are in serious economic and financial

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situation, also brought to low-income citizens, a widening of possibilities for starting higher education.

The above legislation is timely and deserves to be highlighted for its immediate cause, which is the recovery of higher education institutions and, especially, because of its mediate cause, which will be the transformation of the tax debts of these institutions on scholarships for low-income citizens, which were excluded from educational process plan for higher education.

It is important to mention that, by the official data of the national education, published in 2010, around 86.6% of adults in the University age group, namely, young people between 18 and 24 years of age are excluded from the educational process. These data revealed a significant contingent of citizens excluded from universities and allied to the national scenario of tax management difficulties of higher education institutions, the State became aware to the needs of not only including these young people, but also allowing private initiative with expertise in the educational area, i.e. a national recovery program.

It should be noted statistically, with respect to all students enrolled in universities, out of 100% of enrolled in higher education, 74.2% are inserted into private universities, alongside 25.8% enrolled in public establishment (Federal, State or Municipal) of higher education.

This reality reflects a significant portion of the population in University time absorbed by private initiative, a mission that the State would not support in case private businesses focused on higher education.

Thus, after revealing the statistical considerations of the Brazilian scenario on higher education, we go forward to the analysis of the legal provisions as inclusion mechanism, once it essentially allows private higher education institutions to target their tax liabilities and converts it into possibility of scholarships aimed at low-income population, whose

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3 The first paragraph of article 4 defines that serious economic and financial situation of the maintainer of IES is one that, in May 31, 2012, showed the amount of past-due federal tax debts which, divided by the number of total registrations, resulting in amounts greater than or equal to R$1,500,00 (one thousand five hundred reais).

4 Higher education Census 2010-MEC- www.mec.gob.br
economic power is not enough to allow them access to the private education systems, as a natural process.

Through this affirmative action the State distinguishes higher education institutions from others in the private sector, and gives them the mission of offering public education, fulfilling the constitutional provision that education is a right for all, but especially a duty of the State, in accordance with article 206 of the Citizen Constitution of 1988. Similarly, the effects of the legislation enable the provisions of item I of the same article 206, which stipulates equal conditions for access and permanence in school.

The need to bring to this study the discussion about the goals of the State regarding the inclusion by the implementation of education, facing the constitutional article 206 promises with regard to access to higher education and the real possibilities of these educational objectives directly by the State, is observed in the introductory considerations.

**The goals of the State and the need for inclusion in higher education**

Inequalities and social injustices that exist in Brazil put the State in a challenging position, demanding answers and solutions in order to create inclusion prospects in the various social dimensions. In particular, with regard to education, it is up to the State to promote the common welfare, offering citizens the desired human development. Fundamental rights are an ethical vision of humanity. Every man, by the mere fact of being, should make use of all of them, said Thomas Jefferson in the Declaration of independence of the United States of North America: "the right to life, liberty and happiness", repeated later by the Declaration of Rights of Man and of the Citizen.

Jorge Miranda\(^5\) teaches: "fundamental rights can be regarded prima facie as rights inherent to the very concept of being a person such as the person's basic rights, like the rights which constitute the legal basis of life at its present level of dignity, as the main basis of the legal situation of

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each person, they depend on the political, social and economic philosophies and circumstances of every time and place”.

The legal drafting of the list of fundamental rights changes because of political, social and economic times, once it has to protect what is inherent in the essence of the person. For example, limiting the State activity with regard to possible arbitrariness of the Government. Other person's protection arise in the legal scenario, adding to the already recognized fundamental rights, others of new generation, known as fraternity or solidarity rights.⁶

Fundamental rights, those with constitutional provisions assume powerful relationships. It is claimed that the list presented in the Federal Constitution of 1988 is not exhaustive, being open to others who may have the same status. So, all those that contain characteristics that identify as essential to the respect of the dignity of the human person shall be considered fundamental.

Facing inequalities and pursuing effectiveness of fundamental rights is uppermost thought in the Constitution of 1988 which when ranked education in the social rights attributed fundamental role in this matter.

In this way, it is evidenced that the University is a suitable place for this project of advances, in which culture and education are keeping up with their name, i.e. University deriving from the universe, from which a double meaning may be extracted: the coexistence of plurality of ideas and the open universe regarding the access of society components.

Thus, it is known that education is a duty which suits mainly the State and that its effectiveness addresses human development, according to Delors:

"...human development is a process that aims to expand the opportunities for people. At first, these possibilities can be endless and evolve over time. However, at any level of development, the three main points, from the point of view of people, are: having a long and healthy life, acquiring knowledge and gaining access to necessary resources for a decent life" ⁷

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This development process has the university as its birthplace, from which the growth flows not only individually, but as an achievement of the society itself, where the scientific and technological basis are generated, in response to the pressures of social evolution and the requirements of the labor market programs for formulating public policy, always with the ultimate goal of inclusion.

Paulo Bonavides\textsuperscript{8}, when dealing with the topic of democratization of access to University, so mentions:

"The University, in the contemporary world, must be a scientific propulsion factor, vehicle of advancement in each branch of knowledge, critical review of the principles values, cutting-edge work in all fields of intellectual production: but urge to be, above all, in the case of Brazil, the inspiring social liberation of the people, the imposition of combating inequalities that make and perpetuate the injustices, the battlefield where the science is put at the service of man to produce a technology of national liberation against those who stand to the status quo of privilege and delay, refractory to the action of the State..."

Thus, alongside the State's commitments to provide development to citizens, the constitutional commandment still lies in its article 208, that education is the duty of the State, which will be guaranteed as set out in item (V), with access to the highest levels of education, research and artistic creation, according to the capacity of each individual.

In this way, nevertheless the State is fit to correct the inequalities of various dimensions and especially regarding social rights, but for many times, the State faces its own limitations, since constitutional provisions are not enough to describe education as a duty of the State and rights for all; there is a need of materializing it.

As mentioned by Bercovici⁹, there is a difference between having the Constitution and being in the Constitution, when the author explains that constitutional provisions themselves do not solve social problems.

Given this, the State responds to the duty of becoming equitable the access to higher education, and the infinite structural, economic and social barriers to this aim boost the State to reinvent inclusion mechanisms, seeking the collaboration of the society in this process. This is, for example, the case of the law 12,688, July 18, 2012.

**The Brazilian deficit in higher education inclusion and the social function of education**

Brazil has many deficits, among others, the achievement in higher education as revealed by data from the Ministry of Education, through higher education census in 2010, which demonstrates the absence of rights concretion with regard to access to higher education.¹⁰ General education deficiencies are found in several points, as the index of illiteracy, low average years of schooling, but addressing the problem of access to higher education is one of the current problems with significant difficulty to be overcome.

In this sense, in order to illustrate the theme, the Brazilian National Education Plan¹¹ has the goal to become effective, by the year 2020, the university inclusion in percentile of 30 young people between 18 and 24 years, statistics that today is less than 15% of this quota. It is important to clarify that, in the National Education Plan of 2001 which should take place by the year 2010, the goal established but not achieved was of 30%.

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¹¹ The National Plan for education, which was established by the Federal Constitution of 1988, in particular article 214, "caput", was approved by the Chamber of deputies in June 25, 2012, with 20 goals to be achieved by the year 2020 and with investment forecast of 10% of GDP in education.
Note that it is through education that individual autonomy is promoted to citizens beyond their own mechanisms of development. Education is precisely the function of individual preparation for composing the collective without self-excluding them, preserving what was built for living in society.

According to Araújo, it is easy to see that we all have different characteristics and that "perhaps it is in this peculiarity, which resides all the beauty and intelligence of the human being". In attention to this peculiarity, which refers to considering the others, we should recognize the differences and get along with them. Such an attitude, to preserve the individual condition of every human being, is also provided by the level of education of the individual who are components of society.

In this sense, Sacristán lectures on the social function of education to individuals socially considered and the human need for access to higher levels of education and, on the inclusion in education at higher levels, he mentions: "...in globalized societies, inclusion means to get it to an ever-broader context, in which the workforce must be more cosmopolitan, leveled by a certain degree of education".

And, the author continues:

"...the inclusion has an intellectual dimension, as training for the understanding of the complex world and, this complexity requires an extension of compulsory education beyond the elementary school". Thus, "conscious, critical and active citizens, being participants in the current society require certain educational level to decode the world and adopt smart positions in each moment".

In this way, it is through the highest levels of education that social function of individual preparation regarding citizenship shall be reached to then provide to this single entity the preservation of their identity in the face of

the collectivity. The higher the level of schooling, the higher the possibility of being an equal member in the social sphere.

In this sense, of expanding legislative advances to the achievement of social function of inclusion through accessing higher levels of education, the law 12,668 will address the advances on inclusion matter as follows.

**The duty of the State and society on the inclusion in higher education and the law 12,688**

The world society highlights inequality rates, which in its most aggressive forms result in excluding practices. The inequality itself implies a distancing between individuals, while its progression to the exclusion takes the unrecoverable distance feature, in the words of Sacristan.\(^{14}\)

In this way, in the reasoning of the same author, education of society members is a condition for the progress as for the integration of those within the collective. Thus, the excluded, without access to education, "lack chances to come out of that estate; and can barely complain of the injustice of their condition ".

In this scenario, the Brazilian law 12,688 comes into effect, whose ruling extracted from interpretation of infra constitutional provisions in comment, is expressed in allowing federal debts compensation of higher education institutions, in an amount up to 90% as a whole, providing that the mentioned entities pay for only 10% of their debts to the Revenue, granting them the moratorium of 1 (one) year for starting payment of those debts.

To do this, higher education institutions must meet a series of requirements defined in the regulation of the law, and that also underpins the regulations of August 17, 2012, in a joint Decree No. 6 of the internal revenue service and the national public prosecutor's Office, such as the patrimony commitment of the partners and directors, presentation of receipts of the patrimony as item (VII) of article 7, all in order to guarantee that these resources are indeed applied, for effectiveness of fundamental rights to education, regarding the low-income population.

\(^{14}\) Idem, p. 154.
Alongside, the law also binds the need for proof of economic failure of the beneficiaries, herein the students, that will be included in higher education by means of scholarships through the PROUNI - University for all Program. With this legislative measure, from the edition of provisional measure 559, the State will promote the enlargement of the possibility of access to higher education for members of families with incomes less than three minimum wages, mainly coming from public schools or even private schools, once considering the precedent condition of full scholarship.

Yet, considering provisions of the first paragraph of article 4 of the law 12,688 of 2012, whereby the adhesion of educational institutions in serious economic and financial situation will be given, in case of falling in the rule that the amount of federal tax debts due, divided by the number of total registrations, resulting in amounts greater than or equal to R$1,500,000 (one thousand and five hundred), the amount of scholarships to be offered via the Federal Government (PROUNI) could reach the number up to 750,000 (seven hundred and fifty thousand) at the end of four years of PIRSIHE deployment.

By way of illustration, considering an educational institution that has a total debt of R$10,000,000 (ten million) with less than 6,000 enrolled students, it will be able to enroll in the national program, and pay off its debt at the Revenue by as much as 90% of this amount through the PROUNI scholarship offer. So, if we take as an example the average value of an undergraduate program of business administration in R$ 20,000 (twenty thousand), the educational institution must offer 450 (four hundred and fifty) scholarships through the PROUNI program for purposes of compensating up to 90% of the amount of its debt.

If we consider that the amount of the debts of several higher education institutions published by the Federal Government when discussing the issue of Provisional Measure 540, which gave rise to the law of 12,688 of 2012, amounted to R$ 15,000,000,000 (fifteen billion) and, if such institutions wish to pay up to 90% of their debts through the PROUNI

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15 Established in 2004, the PROUNI program aims to provide comprehensive and partial scholarships for graduate and undergraduate courses and specific training sequence, in private institutions of higher education.

16 The explanatory memorandum to the Provisional Measure no. 559 of 2012.
scholarship as authorizes the legislation in comment, the Federal Government may provide for these institutions up to 750,000 (seven hundred and fifty thousand) scholarships annually, which makes this inclusion plan as the largest in the history of higher education.

To compare with the amount of scholarships that were offered from 2005 to the first semester of 2011, which reached R$1,291,000 (one million two hundred and ninety one thousand), one can see the magnitude of this program.

This program - PIRSIHE - will significantly contribute to the promotion of inclusion with regard to access to higher education for low-income citizens and will reach the goals established by the National Education Plan until 2020, whose desired percentile is 33% of young people enrolled in higher education.

**Conclusions**

Higher education requires positive action through appropriate legislative production in order to encourage and strengthen the implementation of inclusion, which will be promoted by the State to low-income Brazilian families, allowing them the condition of citizens within society.

The article 205 of the Federal Constitution of 1988, conforms to the idea of the State duty regarding education as the responsible entity allied to the collaboration of the society that shall encourage and promote education as a right for all, which can be seen clearly in the law 12,688/2012, which has earmarked the funds arising from tax revenue from private higher education institutions to granting scholarships through the program PROUNI.

The consolidation of the legal provision establishing the recovery program of the private higher education institutions reveals itself as an affirmative action of the State, acting through a private initiative to expand vacancies to the university access across the country, specifically targeted to the population whose economic resources are insufficient to afford education in private educational institution.

When proposing the Provisional Measure, which now has turned into law, the Government allowed the conversion of the tax debts of higher
education institutions in scholarships to the inclusion of part of the low-income population and, assured not only the need to recognize the difficulties of this segment, but also involved society in this matter of inclusion.

According to constitutional provisions, the society intended to collaborate and encourage education in article 205 of the Federal Constitution by means of its legislative representatives, waives its financial resources that would be earned from tax revenues arising from higher education institutions to then practice a redistribution of income, geared to the implementation in the education of low-income individuals.

Plato in his Banquet stated: "what you do not have, what you are not, what you need, these are the objects of desire and love", those who desire, desire what is lacking and what is even missing is known to be important by its absence.

The inclusion by means of education and in education is a duty of the individual as part of this community called the human species. In our educational weaknesses and permeated by the relativism of our culture, it is essential to realize that this is the path and we must not allow the paralyzing effect of our limitations, drifting ourselves in a sea of possibilities.

Normative regulations herein commented, brings light to the confrontation in measures allowing the access and fosters new capacities for coping this key issue for all of us.

17 Plato. The Banquet.
Derivative works form an important part of copyright-related markets. At the same time, due to their specific legal nature and relationship with the pre-existing work their protection and exploitation pose complex legal issues on the copyright law. The article aims to analyse the solutions found in the relevant international, regional and national copyright law sources in Europe towards the main issues of the protection and exploitation of derivative works, i.e. the concept of a derivative work and the control the authors of pre-existing works can exercise in respect of the creation and exploitation of derivative works.

Keywords: derivative works, copyright law, originality, adaptation, pre-existing works.

Introduction

Derivative works form a separate and important category of the protected works in the modern copyright law. The most notable trend associated with the latter is expansion: the expansion of the scope of economic rights, the expansion of the term of protection and, what is relevant to this article, the expansion of the protected subject matter. The last form of the expansion is clearly presented in the case of derivative works, though not only in them (one can only remember the explicit inclusion of the computer software and databases in the list of protected works). From the economic point of view, derivative works comprise a huge part in copyright-related markets. From the legal point of view, they are subject to the peculiarities of their creation and relationship with pre-existing works which determine much more complicated questions that arise in respect of the protection.

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and commercial exploitation of such works, for example, the conditions for the protection, the scope of the rights, the relationship with the rights to pre-existing works, etc. In spite of the above-mentioned peculiarities, the statutory law normally does not provide special rules and general rules are not fit to answer all the arising questions. Besides, despite strong efforts to harmonise the national copyright law, the European jurisdictions still differ in their structural approaches and this inevitably impacts the national approach towards derivative works.

This article analyses several European jurisdictions that belong to different legal traditions and the relevant international and regional legal sources in order to elucidate the specific solutions given with regard to the protection and exploitation of derivative works. Particularly, France was chosen as the example of continental tradition, the United Kingdom represents a common law approach, Lithuania and Russia belong to the Eastern European transformation states. On the other hand, Lithuania, along with France and the United Kingdom, belongs to the European Union and is bound by the European Union copyright acquis while this is not the case with Russia.

The focus of the article is on the economic interests tied with derivative works, therefore the aspects of an author’s moral rights with regard to derivative works are dealt with only indirectly.

**Concept of a derivative work**

A derivative work cannot be easily described. The Berne Convention for the Protection of Literary and Artistic Works\(^2\), the influence of which on the national and regional copyright regimes is undisputable, uses the concept of alteration instead of a derivative work. As the genesis of the Berne Convention shows the original version of the Convention in 1887 required that the only kind of derivative works to be protected were translations (Article VI). In the course of revisions other kinds of derivative works found their way into the Convention, and the Paris Version of 1971

established that “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work” (Article 2.3). Also, Articles 14-14bis deal separately with one specific kind of adaptation - the cinematographic adaptation. Thus the Berne Convention imposes obligation on the member states to protect derivative works of various kinds but the list is not closed. Particular limits of this concept are to be established by the national courts.

Turning to the question of derivative works in the European Union copyright legislation the answer is that this concept is essentially not dealt with. The only minor exception is Article 4.1(b) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs which indirectly refers to the rights of the person who alters a computer program. Interestingly, derivative works are only sporadically mentioned in the recently published academic European Copyright Code of the Wittem group. This category can be found in the note 2 to the Code which states that the adaptation of a work may qualify as a work itself. Also, the content of this category can be further inferred from Article 4.6 (Right of Adaptation), where the right of adaptation is maintained as the right to adapt, translate, arrange or otherwise alter the work.

The concepts which can be found in the national statutes of chosen European countries follow the above mentioned pattern. Thus, Article L 112-3 of the French Intellectual Code stipulates that the authors of translations, adaptations, transformations or arrangements of the work of the

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5 Hugenholtz, Bernt et al, The Recasting of Copyright and Related Rights for the Knowledge Economy. Report to the European Commission, DG Internal Market. Institute for Information Law, University of Amsterdam, 2006. p. 34

mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. Similarly, under Article 1259(4) of the Russian Civil Code\(^8\) derivative works mean works being a remake of other works and in Article 1260 this concept is explicated as the one that covers translation, remake, screen version, arrangement, dramatisation or another similar work. The Lithuanian Copyright Law\(^9\) defines a derivative work as a work which is created on the basis of other literary, scientific or artistic works and provides a non-closed list of such works: translations, dramatisations, adaptations, annotations, reviews, essays, musical arrangements, static and interactive Internet homepages and other derivative works (Article 4.3(1)). Lastly, the United Kingdom lacks the statutory definition of derivative works and they are protected by means of applying general copyright rules. This inter alia means adherence to the closed list of works provided by the United Kingdom Copyright, Designs and Patents Act 1988\(^10\) (Article 1.1).

Summing up the above mentioned rules, generally no closed list of derivative works is provided\(^11\) and the typical kinds of derivative works (translations, adaptations, arrangements, etc.) are inserted for illustrative purposes only. Instead, derivative works are described through applying two conditions. First, the creation of a derivative work involves the use of a pre-existing work. Secondly, a derivative work should be an (original) work in itself. This means that the use of a pre-existing work is not enough

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\(^11\) As was mentioned above, in the United Kingdom the list of derivative works is restricted in a sense that they should fit one of the statutory descriptions of works.
but the intellectual creation of the author of a derivative work must also be shown. Now we turn to analyse these two conditions in more detail.

**The use of a pre-existing work**

The link with pre-existing works is the reason that determines the specific legal regime of derivative works. That is why the concept of derivative works should exclude autonomously created works in spite of the incidental similarity with pre-existing works. The attention should be paid to the position expressed in the literature that all the newly created works are derivative in the sense that all their creators rely on the works of the past.\(^\text{12}\) Despite this undoubtedly sound view, the modern copyright law universally distinguishes between the impacts of a pre-existing work, which does not affect the legal regime of a newly created work, and the cases where the impact of a pre-existing work is of such degree that the law recognizes it, and this is exactly the case of a derivative work.

The particular technique may differ from jurisdiction to jurisdiction, but the main doctrine that reflects the above mentioned distinction is the so-called idea-expression distinction. This fundamental rule postulates that ideas as well as facts are not protected and legal protection is confined to the original expression of the work. Though absent from the Berne Convention, this rule is reflected in the later international treaties\(^\text{13}\) and is found in the national statutes (Article 1259(5) of the Russian Civil Code, Article 5 of the Lithuanian Copyright Law) or at least is firmly established.

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\(^\text{12}\) See Goldstein, *supra*, p. 209.

\(^\text{13}\) Article 2 of WIPO Copyright Treaty (available at [http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html), last visited March 15, 2013); Article 9(2) of Agreement on Trade-Related Aspects of Intellectual Property Rights (available at [http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm), last visited March 15, 2013); see also in Art. 1.1 (1)(3) of European Copyright Code.
Ramūnas Birštonas, *Derivative Works: Some Comparative Remarks from the European Copyright Law*

in the legal doctrine\textsuperscript{14}. Therefore, the use of such unprotected elements does not qualify a work as derivative\textsuperscript{15}.

In the second case, the expression (i.e. the original elements of a pre-existing work) is used which enables visibly, audibly or in some other way to recognize the link between the two. But it is not necessary for the pre-existing work to be protected. Accordingly, even if the term of the protection of the pre-existing work has expired or this work belongs to the public domain because of other reasons, a newly created work can still be regarded as derivative\textsuperscript{16}. So, for example, a modern movie based on the Victor Hugo’s novel is a derivative work. On the other hand, if a pre-existing work is not protected, then the question about the derivative nature will lose almost all its practical importance\textsuperscript{17}.

**Originality of a derivative work**

The originality of a derivative work is the second necessary condition, which flows from the general requirement for all the works to be protected by copyright. This requirement in relation to derivative works is stated explicitly or implicitly in statutory law\textsuperscript{18} and clearly recognized in the legal theory\textsuperscript{19}. Without going into details of the concept of originality itself\textsuperscript{20}, the peculiarity of a derivative work’s originality requirement is that it is lim-


\textsuperscript{15} Gavrilov, E. *Komentarij k zakonu RF ob avtorskom prave i smeznich pravach*. Moskva : Ekzamen, 2003. p. 57


\textsuperscript{17} Issues of moral rights in the pre-existing work would be still relevant.

\textsuperscript{18} Art. 2(3) and 14bis (1) of the Berne Convention are the single articles where the requirement of originality is expressly mentioned and both articles deal with the situation of derivative works. Ricketson *supra* at & 8.75. Also see United Kingdom Copyright, Designs and Patents Act 1988 Article 1.1(a).
ited to the author’s own intellectual creation of the latter. That means that the originality of the pre-existing work is not to be taken into account. Therefore, it is possible that the pre-existing original work is used but a newly created object is not original enough to qualify as a derivative work\(^{21}\). In such a case there is a simple use of the pre-existing work which requires to get the permission from the holder of copyright or to rely on some other legal ground to use the work if it is still protected, but a newly created object is not a protected work and no new rights arise. The conclusion can be drawn that a derivative work should rely on the pre-existing work but at the same time this reliance should be of active and creative nature\(^{22}\) or, as it is expressed by other authors, a derivative work should exist in an independent form\(^{23}\). This conceptual separation from the pre-existing work gives way to the principle of the autonomy of rights: the existence of the rights in derivative works are independent of the rights in pre-existing works\(^{24}\) and, vice versa, the existence of the rights in pre-existing works are independent of the rights in derivative works. The prin-

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20 The originality requirement could be maintained the most nebulous concept of copyright law. The different level of originality is conceived as one of the main differences between continental law and common law and a noticeable part of the EU harmonization efforts were directed to remove these differences. Still it is doubtful is the situation at the present time is more clear. See, for example, Ginsburg, Jane, *European Copyright Code – Back to First Principles (with Some Additional Detail)*. Columbia Public Law Research Paper No. 11-261 (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747148](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747148), last visited March 30, 2013). p. 7.

21 The illustration could be a recent decision of Lithuanian Supreme Court where the court refused to recognize the status of protected work for a collage of excerpts from the newspaper articles.

22 Belov, V., Vitalev, G., Denisov, G., *supra*, p. 137; Bently, L., Sherman, B., *supra*, p. 94-95


24 *Id.*
ciple of autonomy means, among other things, that the term of the protec-
tion of pre-existing and derivative works is calculated separately.

Mostly the originality of a derivative work lies in the transformative,
altered use of a pre-existing work, for example translation of a novel,
dramatization of a poem, arrangement of music. These types of use are dir-
ectly linked with the author’s adaptation right. Here the question arises: is
the reliance on the pre-existing work always should manifest in the act of
transformation? The question is relevant to the cases where a pre-existing
work is not altered but, for example, simply reproduced, however, such
unaltered reproduction is incorporated into a bigger whole. This would be
a case of a musical work if music is attached to a work of poetry, collage,
photography of a work of art, etc.

An interesting solution is provided by the French Intellectual Property
Code which establishes a separate category of a composite work. This cat-
egory is described in L 113-2 as a new work in which a pre-existing work
is incorporated (incorporée) without the collaboration of the author of the
latter work. According to prof. Lucas, incorporation is to be understood as
the integration of a pre-existing work as such in another work (for
example, photography into the advertisement material, music into the
audiovisual work) and this is distinguished from the situations where only
certain elements of the pre-existing work are used. The latter case would
be an example of a derivative work. On the other hand, it is recognized
that the separation of composite and derivative works does not have prac-
tical importance. The other jurisdictions do not use such distinction and
the consequences of the incorporation of a pre-existing work should be
decided by applying general rules. It means that the main requirement for
the protection of a derivative work is not the use of a pre-existing work in
altered form, but the originality of a derivative work. Arguably, such
works could be treated as derivative according to Lithuanian26, Russian or
English law27.

26 See Mizaras, supra, p. 475.
27 See Copinger and Skone James on copyright, 16th ed. by Kevin Garnett QC,
Gillian Davies, Gwilym Harbottle. - London: Sweet and Maxwell, 2010. § 3-
134.
Author’s right to control the creation of derivative works

As the creation of a derivative work implies the use of protected elements of the pre-existing work, such creation conflicts with the author’s rights to control the uses of his work\(^\text{28}\). The author’s right to control the creation of derivative works based on their works is generally recognized but particular solutions can be different: either separate rights are not provided and control is enforced via the expansion of the reproduction right (France), or the special rights are designed to deal with derivative works (Lithuania, Russia, United Kingdom).

These differences can be explained historically. The reproduction right is the first right that has been recognized to authors and for a long time it has indicated the limits of copyright while the protection was limited to identical copies. In the time being copyright protection has expanded and such expansion took two above-mentioned forms. These tendencies are well reflected in the history of the Berne Convention. The original text of the Convention included Article X which regarded unauthorized adaptations, musical arrangements and other “indirect appropriations” as the particular cases of illicit reproductions, but such formula did not provide a possibility to forbid the use of a pre-existing work if a derivative work is original. This flaw was solved in 1948 when the Brussels revision introduced the present Article 12. The second “transformative” right established in the Berne Convention, i.e. the translation right (Art. 8), from the very beginning has gained its separate position. Though both the author’s right to alter and translate his work are established as a separate rights, independent from the reproduction right, their relationship remains an ambiguous one\(^\text{29}\).

In the European Union acquis the author’s rights to alteration and translation are not harmonized, save the cases of author’s rights in computer programs and databases\(^\text{30}\). But there are opinions that though the Information

\(^{28}\) As indicated before, the precondition of such control is the protection of a pre-existing work itself.

\(^{29}\) See Note 37.

Society Directive\(^{31}\) does not generally deal with the reproduction or other use of a work or other subject matter in an altered, modified, or adapted form, it appears to be the common ground that the reproduction right extends to such use\(^{32}\). This opinion can be strengthened by Article 5.3(k) which enables an exception to the rights of reproduction and communication to the public of a work for the purpose of caricature, parody or pastiche and these purposes obviously require works to be altered.

As was indicated, in the French Intellectual Property Code separate rights of adaptation or translation are not established and these are regarded as derivative from the reproduction right (Article L.122-4)\(^{33}\). On the opposite, Article 15.1 of the Lithuanian Law provides the translation right and the adaptation right as the separate author’s exclusive economic rights. The similar regulation is found in Article 1270.2(9) of Russian Civil Code, where the adaptation right is provided, but the right to translate a work is not an independent right and is encompassed by the adaptation right. Interestingly, some Russian legal theorists express their opinion that these rights are superfluous\(^{34}\) as they add nothing to the other author’s economic rights. Also in the United Kingdom, Copyright, Designs and Patents Act 1988 grants the owner of copyright the adaptation right (Article 16.1 (e)) which is defined in a more detailed way in Article 21 and which includes translation. But contrary to the Lithuanian or Russian position, the adaptation right in the United Kingdom is narrower because it is restricted to the copyright owners of literary, dramatic, or musical works, but not to the copyright owners of other works (Article 21.1)\(^{35}\).


\(^{33}\) Lebois, Audrey, Droits ses auteurs. - Droits patrimoniaux. - Droit de reproduc tion (CPI, art. L. 122-3), JurisClasseur, Fasc. 1246, para 157-159.

\(^{34}\) Gavrilov, supra, p. 131. Also see Sudarikov, supra, p. 90.

\(^{35}\) It is even doubtful if such a narrow perspective complies with Article 12 of the Berne Convention. See Bently, L., Sherman, B., supra, p. 146.
The difference between either of these solutions is relevant in two aspects. First, it can have an impact on the author’s control to use a derivative work. If the making of a derivative work is regarded as the reproduction of a pre-existing work then the copyright holder of the latter can certainly forbid further uses of the derivative work, because these are simply regarded as the use of the original work. Such is the case in France, where the alteration and translation rights are regarded as a part of the reproduction right and the author of a pre-existing work enforces his rights alongside with the author of a derivative work. If the creation of derivative works is controlled by separate rights, the conclusion, at least theoretically, can be different. Arguably, The Berne Convention does not provide a clear answer and is somewhat contradictory. But the survey of the national legal systems shows that this question is indeed a theoretical one because even the national systems which have a separate adaptation (and translation) right have additional rules clearly indicating that reproduction and other uses of alterations and translations are within the ambit of the author of the pre-existing work and this position is clearly recognized in Russian and Lithuanian legal theory. For this reason the narrower concept of the adaptation right in the United Kingdom does not seem to be of significant importance, because derivative works which avoid the adaptation right are controlled through the reproduction right.

Second, the above-mentioned difference is important when the exceptions and limitations of copyright are applied. Particularly, can the limitations to the reproduction right be applied to the translation and adaptation as well? Again, there is no straightforward answer to this question in the Berne Convention, though there is a strong ground to apply these exceptions and limitations at least to the translation right. In the opinion of the French legal doctrine the limitations to the reproduction right for personal purposes are also applied to the adaptation right. Therefore, the permission for adaptation or translation for personal purposes is not necessary. In the

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36 These different approaches are highlighted by Sam Ricketson, supra, § 11.35-37.
37 Ibid., § 11.36.
38 See Art. 21(2) of United Kingdom Copyright, Designs and Patents Act 1988.
39 Bliznec, I., Leontjev, K., supra, p. 69; Mizaras, supra, p. 237.
United Kingdom the fair dealing doctrine sets a different perspective because the permitted acts are not confined to particular rights. As a consequence, the relationship between the reproduction right and the adaptation right is not important. In Lithuania most of the limitations deal with the reproduction right only, for example, reproduction for personal use (Art. 20) or the use of a work for informational purposes (Art. 24). This wording contrasts with other limitations, i.e. limitation for educational purposes (Art. 22) and quotation (Art. 21) which expressly enables not only the reproduction but also the translation of a work. Does this mean that limitation for personal use is to be interpreted narrowly and translation or, say, abridgement for personal use is forbidden? Lithuanian legal doctrine takes more generous approach that the adaptation right is not opposable against such uses\textsuperscript{41} and, arguably, this is the correct view, because a narrow approach could lead to highly unreasonable consequences. Russian legal doctrine reaches the same outcome, because adaptation and translation without the intent of exploitation are generally regarded lacking any economic significance\textsuperscript{42}. These attitudes clearly show the relativity of demarcation between the reproduction right and the adaptation right.

**Relevance of the lawful use of the pre-existing work**

The next question is the relevance of the legality of the pre-existing work’s use for the protection of a derivative work, i.e. whether unauthorized derivative works are protected by copyright. The common sense of the justice gives the negative answer. However, this question should be discussed in more detail.

The question of the copyrightability of unauthorized derivative works is addressed indirectly by the European jurisdictions. Article 4(4) of the Lithuanian Copyright Law provides that copyright in derivative works shall apply without prejudice to the copyright in the work or works on the basis of which a derivative work has been created. In France the requirement not to infringe the copyright of the underlying work is postulated by


\textsuperscript{42} Gavrilov, *supra*, p. 130
law as well: Article L. 112-3 of the French Intellectual Property Code provides, that the authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. Under Article L. 113-4 a composite work shall be the property of the author who has produced it, subject to the rights of the author of the pre-existing work. Art. 1260(3) of Russian Civil Code provides that a translator, compiler, or other author of a derivative or compiled work shall exercise his copyright on the condition of observance of the rights of the authors of works used for the creation of the derivative or compiled work. These provisions are rather ambiguous; therefore, they are a subject to different interpretation.

A few comments should be made on the origin of these national provisions. The initial wording of the Berne Convention in Article IV provided that a lawful translation should be protected as an original work. This means that the lawful use of the pre-existing work has been provided as a condition for the copyrightability of the translation. The content of this provision has changed. During the Berlin revision of the Convention the list of the protected works was expanded and the actual Article 2(3) of the Berne Convention provides that translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work. Thus, the condition of the lawful use of the pre-existing work was abolished by using a vague and rather unclear wording in its place. As some scholars claim, the intent of these amendments was plainly to give the maker of an unauthorized derivative work recourse against copiers, while preserving the source work owner's power to stop both versions. The opinion that unauthorized derivative works are protected by copyright is shared by many authors.

The Lithuanian doctrine is rather incoherent. Prof. A.Vileita points, that a derivative work is protected under the condition that it does not infringe

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the copyright of the underlying work (the right of the authorship, the right to the author’s name, the integrity right)\textsuperscript{45}. He notes that the creation of a derivative work requires the permission of the pre-existing work’s author if copyright in that work has not expired\textsuperscript{46}. Herewith Prof. Vileita indicates that translation is copyrightable in spite of the consent of the pre-work’s author. It follows that the view of the above-mentioned professor is ambiguous. Prof. V. Mizaras states that a derivative work is separate and independent from a pre-existing work; the rights to a derivative work are granted since the creation of that work and are protected independently from the rights to a pre-existing work\textsuperscript{47}. In the French jurisprudence it is generally accepted that the abovementioned statutory provisions should not be interpreted as protecting exclusively authorized derivative works. The authorized use of the underlying work is the condition for the exploitation of a derivative work\textsuperscript{48}. Although English copyright law is silent on the discussed issue, it is generally accepted that copyright can, as a matter of principle, subsist in an infringing derivative work\textsuperscript{49}. Russia is a notable exception from the above-mentioned attitude, because the legal doctrine strictly sticks to the position that the lawful use of pre-existing works is the mandatory requirement for the copyright protection of derivative works, i.e. in the absence of an agreement with the copyright holder in the pre-existing work, there is no copyright in a derivative work\textsuperscript{50}. Such an exceptional position is, arguably, explained by the historical peculiarities of the Soviet copyright law, particularly by non-adherence to the Berne Convention.

\textsuperscript{45} Vileita, supra, p. 36.
\textsuperscript{46} Id.
\textsuperscript{47} Mizaras, supra, p. 237.
\textsuperscript{49} Copinger, supra, § 3-143.
\textsuperscript{50} Sudarikov, supra, p. 89, 152; Sergeev, supra, p. 160; Makagonova, N., \textit{Avtorsko pravo}. Moskva: Juridichiskaja literatura, 2000, p. 144. But against this view see Gavrilov, supra, p. 86.
Consequently, it could be said that it is more or less generally accepted that the copyright protection of a derivative work is not associated with the lawfulness of the use of a pre-existing work. This means that a derivative work is subject to copyright from the moment of its creation. The practical outcome of this conclusion is that in the case of unauthorized creation of a derivative work its author has the enforcement right against copying or other use of his creation. As pointed by D. Vaver, yet even a thief can stop everyone else, except the true owner or the police, from interfering with his possession of the stolen goods. The position of a derivative work’s creator is better because he has created something new and valuable. Leaving unauthorized derivative works without the protection would lead to the situations when not only the third persons but also the authors of underlying works would have a possibility to exploit derivative works freely, which is absolutely unacceptable. Nevertheless, since the law requires to not prejudice to the copyright in the original work, the relation between a pre-existing work and a derivative work cannot be unaffected by this requirement. The condition to not prejudice to the copyright in the original work is not associated with the phase of a work’s creation but with the phase of its exploitation, i.e. an unauthorized derivative work can be a subject to copyright, but its exploitation requires not to infringe the copyright in a pre-existing-work.

Conclusions

A comparative study of the chosen European jurisdictions has shown that the legal regime of derivative works in different countries of Europe is more or less the same, though particular legal rules in certain aspects differ. In general, a work must satisfy two criteria in order to qualify as a derivative work: first, the creation of a derivative work involves the use of the original elements of a pre-existing work; second, the use of these original elements should be of original nature in itself. The originality of a derivative work can manifest itself either in the creative transformation of a pre-existing work or in the use of the work in an unaltered form but in a

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51 Even though he does not have a right to exploit his work.


53 See id. Though D.Vaver analyses the situation of the authors of translations.
different context. The use of a pre-existing work in the creation of derivative works is universally controlled by the author’s economic rights in the former. However, the chosen European jurisdictions can still be grouped into two categories: first, where separate rights in this regard are not provided, and derivative works are controlled through the expansion of the reproduction right, like in France; second, where special rights are established to deal with derivative works, like in the United Kingdom, Lithuania and Russia. Practical outcome of these different regimes is not significant, as it is common for both categories that the use of a derivative work is subject to the author’s of the pre-existing work consent. On the other hand it should be pointed out that the copyright protection of a derivative work in European jurisdictions, except Russia, is not associated with the lawfulness of the use of the pre-existing work. This means that a derivative work is subject to copyright from the moment of its creation and only its exploitation phase presupposes an agreement with the author of a pre-existing work.
DEMOCRATIZATION OF JUSTICE — THE SELECTION OF JUDGES AS A PROBLEM OF LEGAL ETHICS AND THE SEPARATION OF POWERS

STEFAN KIRCHNER

Doctor in Social Sciences (Law), Vytautas-Magnus-University, Kaunas, Lithuania (2012); Magister Juris Internationalis Justus-Liebig-University, Giessen, Germany (2009); Rechtsanwalt – admitted to the bar in Germany (2008); Assessor jur. (2008); Referendar jur. (2005). Lawyer, Federal Maritime and Hydrographic Agency, Hamburg, Germany; Doctoral candidate in Law with a specialisation in Public International Law and Globalisation, Justus-Liebig-University, Giessen, Germany; Researcher (Legal Ethics), Lecturer (Law of the Sea) and Expert Lecturer (Human Rights), Faculty of Law, Vytautas-Magnus-University, Kaunas, Lithuania. The research for this article was funded by a grant (No. MIP-020/2012) from the Research Council of Lithuania in cooperation with Vytautas Magnus University, Kaunas, Faculty of Law. This article only reflects the author’s private opinion.

I. Introduction

In the first months of 2013, Argentina has been in the spotlight several times – most notably with the election of the first ever Pope from Latina America, Argentina’s Jorge Mario Bergoglio, now Pope Francis. Also the referendum on the Falkland / Malvinas-Islands and the dispute between Britain and Argentina on the islands in the South Atlantic has gained the attention of international media. One story that went widely unnoticed\(^1\) relates to the balance of powers and the checks and balances between the executive, legislative and judicative in Argentina where President Cristina Fernández de Kirchner has proposed that the body which chooses judges is

\(^1\) With the notable exception of THE ECONOMIST, which carried the story in its issue of 9 March 2013. (The version consulted by the author was the electronic issue in Kindle-format, which does not contain page numbers.)
The question to be discussed in this text is whether it is necessary in a democratic system to have a democratic element (i.e., go one step below the issue of direct elections of judges) in the selection of judges rather than a meritocratic procedure without any elements of political processes.

At the outset I want to make clear that the opinions expressed here are solely my own, they are not those of the German, let alone the Argentine, government, nor of my employer or any other institution. There are some issues on which I can agree with President Cristina Fernández de Kirchner while there are others on which I am in fundamental opposition to her views, for example with regard to the disregard for traditional family values exhibited by the current Argentinian government.

It is my hope that this article might become the starting point for a discussion about the separation of powers, in particular in Eastern Europe’s young democracies. By choosing a case from a faraway country which has emerged from a non-democratic regime just a few years before the nations of Eastern Europe it might be easier to transfer conclusions drawn in the context of this case to Eastern Europe.

**II. Democracy and the Courts**

When we ask the question whether it serves justice to have a democratic element in the way we choose judges many readers may wonder how such a question can be asked. And aren’t judges even elected in many jurisdictions? Then we could at least elect those who select the judges, right? And after all: isn’t democracy a good thing per se?

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2 THE ECONOMIST, 9 March 2013.
3 THE ECONOMIST, 9 March 2013.
But what is democracy? It is rule by the people – but does that have to mean taking the first step to court rulings by the people as well? As a German lawyer finding the words “court” and “people” in close proximity is a reminder of the bad old days of the Volksgerichtshof. Yet, at the same time Ovid’s “principiis obsta”\(^4\) had been turned into a popular Nazi slogan (“Wehret den Anfängen”) as well – hence a more balanced approach appears necessary.

There are two main arguments to be made: judges who are selected according to clear criteria based on merit and who do not have to worry about being re-elected can afford to make decisions which are based only on law and not on extra-legal considerations. By relying on their judicial independence they are able to issue unpopular rulings as well. Accordingly, these judges are in a good position to speak truth to power and to provide the checks and balances which are necessary in order to keep the executive and legislative branches at least somewhat honest. At the same time, this judicial independence and the selection based on merit and defined criteria such as exam grades can contribute to the emergence of an elite of judges who may be well qualified academically but who might lack the real world knowledge necessary to make the decisions they are asked to make – be it expert technical knowledge oder an understanding of everyday life of the average citizen. While some level of detachment can be helpful in order to maintain judicial impartiality, this detachment should not go so far as to completely render judges unable to make informed decisions. Yet, electing the body which chooses judges will not solve this particular issue. A legal system which wants to address this problem rather should allow for a fresh infusion of (non-legal) expertise but leave the judgments to the judges. In this manner, two key goals in the selection of judges – a quality legal education and the capability to make full use of judicial independence – can be achieved.

The prospect of re-election on the other hand does not necessarily increase quality and endangers judicial independence. To the contrary, judges should be well-trained to begin with and should be given as many opportunities as possible for continuing education as possible.

But if judges are not elected – should the members of the body which chooses the judges then be elected? Such a model exists for the judges of

Germany’s Federal Constitutional Court, although in practice the left and right political camps\(^5\) essentially share the seats on the Federal Constitutional Court.\(^6\) Depending on the way judges and the members of bodies which choose them are chosen a system like the one proposed by President Fernández can be doomed to stall or be abused by the dominant party of the day. Neither possibility is a prospect worthy of a functioning judicial system.

Is then making the selection of judges more democratic even possible when one moves from selection based only on merit to some sort of direct or indirect election? Or should an altogether different goal be pursued?

### III. Democracy, the separation of powers and participatory politics

The answer depends on our understanding of democracy. Democracy is the best known tool for electing the legislature, a parliament elected by majority vote which makes laws by majority vote. The judicial branch interprets and the executive branch applies the laws made by the legislature. In this conception of the separation powers the legislature is legitimized by the people. If we stay with this notion of input legitimization for a moment, it becomes easy to see why one might relate proximity to the people to the idea of legitimization. Being directly elected, the legislature might enjoy the highest level of input legitimization in this system of checks and balances between the three branches of government.

But is democracy also the best *modus operandi* for the executive? In ancient Greece, the voters (free, men who usually owned land and / or slaves) would come together in the town square to vote on many matters which is most countries today are dealt with by the executive. While the

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\(^5\) Consisting mainly of Christian Democratic Union and its Bavarian sister party, the Christian Social Union, as well as Liberal Democrats on one the “right” and Social Democrats and Greens on the “left”.

\(^6\) That is not to say that all judges at the Federal Constitutional Court are members of a political party but they are nominated by political forces.
temporary success of the so called Pirate parties (the name of which is an insult to victims of real piracy which remains a serious issue) in some European countries has raised the issue of direct democracy and a more direct participation of citizens in decision making processes, many issues are not conductive to being decided in this manner. Yet, there is a decision among many citizens for more inclusion in the decision making processes. In Germany there have been significant protests against the renovation of the Central Station in Stuttgart and the digging of the Elbe river between Hamburg and the North Sea in order to facilitate maritime traffic has met opposition as well. The same holds true for many infrastructure projects. In all of these cases, though, the law already allows for some input at early stages of the planning procedure. Yet, lawsuits are used in an almost harassing way in order to block important infrastructure projects. One explanation might be that the existing possibilities for citizen participation are deemed to be insufficient. But if more input from citizens is considered to be desirable, it also has to be noted that many decisions require expert knowledge or need to be made quickly. Both factors make an issue far less conductive to wider consultations – both factors can also be used as covers for avoiding more citizen input.

IV. Conclusions: Democracy, Good Governance and Accountability

If many democratic states do not democratize the executive further there might be more good reasons against too much public participation when it comes to the judicial branch. At the end of the day it comes down to a distinction which between democracy and good governance. Governance refers to more than the executive but to all branches of government and is not identical to democracy. Democracy is one element of good governance

7 This argument, though, should not be overextended. It has to be noted that German society is becoming older and that many of those who oppose major infrastructure projects have little or no stakes in future developments because they will make little to no use of the infrastructure in question and have no descendants who might do so. Hence many feel that they will only bear the burden without enjoying the benefits, such as speedier train connections or benefits for Germany’s export oriented economy which are gained from allowing larger ships to enter the port of Hamburg.
but democracy alone does not guarantee good governance. This distinction is often lost in today’s public debates. Not everything has to be decided by everyone all the time – but the decisions which are made have to benefit the common good. Those who make decisions and those who implement them have to be held accountable. This allows for delegation – with checks and balances. The common good is served by a judicial system which actually increases the chance of producing just decisions. This requires judges to be fair and impartial, qualified and accountable. A functioning system of checks and balances which can deter and correct excesses of any kind can serve justice more than populist measures which are disguised as democracy.

The issue which concerns this discussion, though, is simply a bad idea. President Fernández suggestion to democratize Argentina’s courts sounds like a populist measure – but it might not be a very effective one. Rather than upsetting the balance of powers the system of checks and balances should be strengthened and the government should focus on providing justice for all and on protecting those who are truly in need of legal protection. What is needed is accountability. The Argentine government would be well advised to consider this issue to be the starting point for a broader national debate about accountability. The former president, the late Nestor Kirchner, has opened the door to accountability for past crimes. The current president should take the next step and ensure that everybody, including the sitting government, can be held accountable and should make it clear that the government not only respects the legal process but also is committed to the rule of law. Before leaving the Casa Rosada at the end of her second term in 2015, President Fernández now has the opportunity to leave a lasting legacy to Argentina.

8 Like in Poland, the United States or Germany, Argentina’s presidents can only be re-elected once.
Abstract: Proper risk management is at the present time, the fundamental issue of the functioning of public administration. The risk management process is primarily the result of a discussion on organizational governance, which in recent times has a special role. Seriousness of this process also adds the possibilities of absorption of structural funds, which is especially sensed the public administration skillful risk management decision-making processes involving all the organizations. In addition, a wealth of experience of Western European countries show the urgent need for the acquisition by public sector entities skills involving the use of aspects of risk management in relation to the management of the entire organization. This is crucial, particularly during the spending of European Union funds.

Keywords: management, public management, local government, public administration, risk, risk management.

Introduction

The process of identifying risk areas and ways to manage important date is 27th August 2009, when the parliament passed a new law on public finance. The legislator has introduced a system of public finance management control. Act, but has been amended in that period, the control system introduced many interesting solutions for the public sector. One of these tools to support the essence of safety - it was mentioned above, management control. According to the reference to the public finance act, the legislature in formulating its content, do not forget about an important element of the process of managing every modern organization - what is the risk management process.

Proper implementation of risk management mechanisms in public sector units, however, requires a professional to prepare managers. It is up to them the skills required to identify risk factors in the organization, having been an effective analysis and to measure them. Under these conditions the

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1 Act of August 27th, 2009 on public finances (Journal of Laws No. 157, item 1240 as amended).
unit manager should refer the findings of the emerging risks to the respective owners of processes, in order to make changes to the existing management and control systems⁵.

A key role in this process is attributed to both the senior management of the organization as well as internal auditing. It should be noted that both these entities located within the organization, are very different from each mission and the role they have to play in the risk management process. What distinguishes the range identification and risk management, which has been assigned the leadership of the organization, the tasks assigned in the internal auditing field, is strongly regulated by law the responsibility of leadership of the organization as a reliable and correct identification of risk factors, as well as its evaluation and the effective management of risk identified. The purpose of this article is to show the importance of risk management in public institutions and the use of its results for the effective implementation of the tasks assigned to the organization.

The importance of risk in the public finance sector units

The possibility of the emergence of public sector entities of different types of risks makes it necessary actions are appropriate and the knowledge of how organizations should deal with such situations, which may include the opportunity to cover the cost to hedge against this risk. In the everyday functioning of public administration is essential to the correct identification of all events which may have an adverse effect on the character of the organization. Important measure is the precise planning of protective system, which aims to counter the negative effects of such events or the possible way to minimize the possibility of such damages. However, to continue to be the legal considerations and practical - it is worth considering the risk of being in the public sector.

Risk is an ambiguous term, multi-faceted and complex, making it difficult for its precise and unambiguous definition. There is no one in the literature, clear and comprehensive definition of risk and depending on your needs, discipline or industry - apply the relevant definitions.

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⁵ Compare T. Kaczmarek, Commercial risk management, financial and production for practitioners, Gdańsk 2002, p. 45-76.
Any discussions related to the essence of risk may relate to most causes and effects of risk. The first aspect is the most that the risk exists if it can be defined and evaluated by means of statistical probability, mathematical, or estimated. The second aspect of the most distinguished two ways to interpret the risk, i.e., the concept of negative and neutral concept. The concept of negative in its meaning includes the risk of a certain risk, which may result in failure to achieve the target. The concept of risk neutral treats mostly as a threat and an opportunity. In practice, the functioning of public administration constitutes a threat risk, where a public sector entity take certain actions that are designed to reduce this risk. On the other hand, organizations should be aware of the risk of a positive impact on the functioning of individuals, through greater involvement of employees, supported by well-developed risk management procedures. A large role in the responsibility for the proper functioning of the state, is attributed to the legislature that their decisions affect the lives of all residents. Not always, however, created regulations affect the behavior of both individuals and legal entities. The level of risk in this case is clearly high, but this knowledge is not always accompanied by people that have a real impact on legislation.

**Risk in the functioning of public administration**

Public sector entities must be aware that the regularity of its activities is the most important objective fixed by the management of the organization. However, emerging threats - they must be in the correct manner and by appropriate methods and tools for early reduced or minimized. Public bodies administering public funds, usually allocate them to carry out tasks that take the form of current jobs and investment. Always define risk as well as an estimate of its type - it depends on the reference point to analyze such risks. Dogmatics subject coverage includes aspects of public institutions, and takes into account the most important risk management objectives - isolated in his division, based on the criterion of the time horizon - the two fundamental types of risk: strategic and operational risks that arise in all public institutions.

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Strategic risk is the risk occurring in the public sector, whose occurrence is independent of the organization. Strategic risk is the risk of long-term, which is usually related to long-term decision. Examples of such risks are, for example, the adoption by the provincial government's development strategy, implemented in the next several years. Regional governments, defining their own development strategies - take into account the number of strategic goals. These are mainly polish culture and nurture the development and shaping of national consciousness, civic and cultural population, as well as nurture and develop local identity, stimulating economic activity and improving the competitiveness and innovativeness of the economy of the region⁴.

Strategic risk is the result of external actions, which could not have been foreseen and controlled. However, you can take certain steps that are already in the course of such risks - may reduce this risk, the degree of influence on the degree and manner of implementation of the tasks. Therefore, in the functioning of public institutions can be distinguished within a few risks of strategic risk:

- political risk - at the moment there is no or hindered the provision of services as required by government authorities or local government;
- social risk - the sign can be the results of demographic, socio-economic, or change of social conditions;
- investment risk - usually associated with erroneous financial decisions of public sector entities, lack of funding or even a nuisance occurring at the time of the delay of the investment;
- economic risk - often appearing in the situation the ability to settle its obligations, usually of a financial nature (for example economic risk may be a delay in the transfer of grants and subsidies to municipalities from the state budget, lack of financial resources to carry out the tasks assigned, or changes in the

economic situation in the country that have an impact on the financial condition of public institutions).

While the other quoted risk, operational risk - is the risk of short-term, usually associated with the current, daily activities of public authorities. At the level of operational risk include among others:

- financial risk - it is usually equated with the way the funding of statutory activities such as municipalities, where most part of this risk comes the danger of losing financial liquidity risk, the availability of recourse or non-repayable sources of financing, or the most dangerous risk of financial loss⁶;
- physical risk - the danger it involves appearing in unexpected situations (here include the fire, failure of access to resources, the safety of persons employed in the unit);
- legal risk - it focuses on possible violations of the law (principle of legality) and the possible violation of the right of public finances.

**Risk management - the nature and circumstances**

The process of risk management in the public sector units usually relates to the identification of risk with which an organization may encounter, as well as its measurement and control of activities. However, the risk management process can speak only when the risk can be quantified, that is, in a quantitative way to determine the value of such risks⁷. In the public sector entity responsible for the risk management process of the top management is responsible to make decisions - it has a real impact on the risk management process in the organization. Modern science dealing with the measurement of risk in the organization distinguishes 4 basic steps in the process of risk management is risk identification, risk measurement, risk control, and monitoring and control this risk and its monitoring.

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The first stage - risk identification - is focused on the identification of risks, which in many ways the organization is exposed. The point here, without a doubt, a precise indication of the causes of this risk, which is not a simple process, as potential sources should be established formation of such dangers in the core business of the organization. The public institutions are extremely useful well-developed procedures for the description of risks in the organization, management control procedures, reports, checks, or to measure the strengths, weaknesses, opportunities and threats based on analysis of all diagnosed events\textsuperscript{8}.

The second part of the risk management process called risk measurement is focused on determining the level of risk usually in numerical form. If such estimates is not possible - apply risk assessment based on certain categories (low, high, medium), using in this case a qualitative method\textsuperscript{9}. In the public sector units persons responsible for the measurement of the level of risk should indicate the likelihood of such risks and indicate the size, how big can be the risk.

The risk control is the ability to respond to the risk of any diagnosed. Those responsible for the organization of the risk control should take into account, inter alia, the degree of risk acceptable, feasible degree of control such risks, the area of risk transfer, and properly estimate the costs necessary to manage the process. Always, however, the management entity must accept a certain level of acceptable risk, which is often due to the adopted strategy\textsuperscript{10}.

For public sector entities, particularly during the current economic slowdown visible, skillful management of your public funds, should be a priority. Hence owned funds (domestic and foreign) must be subject to special control for economy, reliability, appropriateness and legitimacy of their spending. Poland in the last few years we have successfully used to participate in the structures of the European Union, give a great financial support for the implementation of structural policies. The proper use of


\textsuperscript{9} J. Sztumska, \textit{Methodological problems of social research}, [in:], \textit{Introduction to methods and techniques of social research}, Katowice, 2005, pp. 56-76.

public funds by the European Union - should also be supported by properly adopted risk management procedures in the correct absorption of European Union funds.

**Risk management - an attempt to assess**

According to the international organization of the Project Management Institute (PMI), an important role is attributed to the process of EU project management. Poland was the biggest beneficiary of European Union funds, also in the new programming period of the European Union for the period 2014-2020 - in its project management methodology makes use of such tools.

PMI developing risk management, has appointed the following 6 elements. After the patterns of these mechanisms are increasingly turning both central agencies and local government units:

1. risk management plan - the plan is to prepare a study on the risk of an individual project with the necessary tools that support the management unit to minimize or eliminate the risks of project risk\(^\text{11}\);

2. risk identification - is focused on the identification of the real risks associated with the project, which uses the test documentation including design, analysis, checklists, or use the Delphi method;

3. qualitative analysis of the project - the role of this element is to determine the key risks and threats that may or may not have to - occur during the project;

4. quantitative risk analysis - it includes estimation of the likelihood of the realization of the project of various risk factors, which may cause a temporary extension of the project and its impact on the increase in costs;

5. planning risk prevention measures - including the operation of the public must necessarily prepare internal safety procedures that

will be secured projects of dangers and hazards and minimize potential losses;

6. monitoring and control of risk - a process that is responsible for the implementation of project management and its full implementation\(^\text{12}\).

Skillful risk management in public institutions, the author confirms his observation of these entities, improves the level of quality of service. It is not only the management of public institutions, but also better prepared control procedures based on the principle of legality - set out the direction of development of public sector entities. In addition, thanks to the properly prepared risk management procedures, improve the level of implementation of the statutory duties, properly managed changes in the organization, and used knowledge of the use of new management procedures. In addition, this approach can eliminate signs of fraud, irregularity, or waste of public funds. One example of modern thinking, it is used in the public sector in the field of innovative services. A manifestation of these activities can be successfully implemented electronic petitioner contact with public institutions. The public sector, using the adopted risk management procedures may evaluate the probability of an event, the consequences of which could have a negative impact on the functioning of the entire organization\(^\text{13}\).

In modern public administration risk management means that the unit operates the evaluation process and counteract the effects of risk. What's more, risk management in the current work of public institutions, should include the risks that may occur at all levels of decision-making. Hence the need to have appropriate risk management procedures in organizations whose effectiveness may be an early warning of the management of possible problems.

Decisions taken in the unit, which often are covered by some level of risk must be subjected to proper evaluation. This assessment includes factors associated with making such a decision or, alternatively, may indicate the


consequences of that risky decision. Thus, in public institutions, especially at local government level, we can distinguish certain behaviors of the individual against the risk, that is:

1. acceptance of risk;
2. risk avoidance;
3. risk response;
4. acceptances;
5. risk transfer\(^{14}\).

**Risk management and other conditions**

The risk management process becomes a subject raised by a growing group of companies. Awareness of emerging threats, force entry ever tighter protection and control systems. For a more complete understanding of the risk management process, the legislature also introduced a management control standards that expand the four most important legal and practical situations that relate to the need of the individual response to the identified risk, i.e. risk identification, risk analysis, to identify an acceptable level of risk and appropriate response to risk. These legal situations occur with varying frequency in the public sector. Identify the risks in the process unit is undoubtedly very important, but also very responsible, as appropriate understanding of and response to risk can help to reduce the risk, and in some cases even eliminate it. Quite often, top management individuals aware of the need to respond to the risks already revealed - formulate plans that seeks to respond to the risk. Responsible managers can engage in this process all employees whose knowledge and experience will help in the effective management of risk.\(^{15}\)

The very definition of the statutory management control contained in article 68 of the public finance act \(^{16}\) indicates that the control of management in the public sector units is generally taken action to ensure that the goals


and objectives in a manner consistent with the law, efficient, cost-effective and timely manner. Here we have a multitude of tasks that should force the management of the proper management of the organization, especially in terms of public spending. In addition, the legislature has identified seven objectives of management control:

- business compliance with the law and procedures;
- efficiency and effectiveness;
- the credibility of the reports;
- conservation of resources;
- upholding and promoting the principles of ethical conduct;
- effectiveness and efficiency of the flow of information;
- risk management.

The last of these objectives - risk management - prepared in the form of appropriate risk management procedures, provides the top management of the organization of information so that management can take place in a unit in a competent, efficient and free from risky activities. The experience of the author, who is also the internal auditor of the local government, provides confirmation that a well-developed risk management procedures, can effectively protect the body against the dangers (especially in the area of public spending). Also, remember it is not always possible to completely eliminate the risk during the tasks. However, every year comes with knowledge of the risk management process, the exchange of experience between public institutions and properly prepared and developed protective mechanisms mean that modern public administration authorities are better prepared for the risks that may adversely affect the achievement of the tasks and missions.

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Conclusion

Public institutions are increasingly aware that they need to look ahead to the future, to be dynamic, and fast enough to respond to changes along with the maximum use of available resources. Accordingly clever, designed and implemented a risk management system in the body is the foundation of the correctness of the implemented measures. The risk management process, which was developed in the form of internal procedures should be continuously improved and adapted to changes in the organizational environment in which a huge part in the development of the unit has both management and all employees.

Public institutions are often at risk of internal and external risks. There is also the risk of the organization as well as the risk level tasks. The observed behavior of public authorities towards risk are not neutral, but turns out to be an important full awareness of the dangers of this title arising from the principles of rational action. Are constantly emerging new threats and dangers, forcing search for new solutions. Risk management in the units is a dynamic process, where necessary seem to periodically review all identified risks.

Developed by local risk management procedures do not provide never one hundred percent protection against unintended actions. However, the possibility of developing hierarchical provide areas of risk in a particular area of the organization. Managed risk in the public sector covers all areas of the unit, where no doubt the key to success in the realization of the tasks is the appropriate involvement of all employees with the possibility of their impact on the risk assessment of the organization.

Drawing on the experience of private companies in the risk management process in order to develop a culture of risk management - in public institutions must also involve the authorities of the unit, determine development policies and risk management procedures, and then indicate the operational (staff roles and responsibilities, the method of conduct, structure activity), conduct regular training and monitoring, as well as periodically review the policy and emerging risks.
LEGAL CRITERIA FOR DETERMINING THE AMOUNT OF NON-PECUNIARY DAMAGE

EGLĖ ŠIMKEVIČIENĖ

Northern Lithuania College (Lithuania)
Turiba University (Latvia)

Abstract: Respect for human rights and dignity as well as principles of liberty, democracy, equality and the rule of law are common to all the European Union (EU) Member States. Constitution guarantees the right to appeal to court for the violation of constitutional rights and freedoms. Therefore, if a person believes that there is a violation of their rights, they may seek pecuniary and non-pecuniary damage compensation following the civil procedure. This right is defined in the Civil Code. However, the existing laws do not provide non-pecuniary damage thresholds. Therefore, the court follows the criteria of non-pecuniary damage compensation according to the law (taking into account the effects of damage, financial status of the perpetrator and other relevant factors as well as criteria of fairness, justice and reasonableness). Consequently, the establishment of the amount of non-pecuniary damage is under discussion. It is difficult and sometimes impossible to measure non-pecuniary damage in monetary terms, since it is difficult to assess pain and suffering, emotional stress and spiritual experiences. The concept, purpose and principle of non-pecuniary damage are presented in the paper. Legal criteria for determining the award for non-pecuniary damage are analyzed. The methods of document analysis, comparative analysis, systematic analysis and the method of aggregation have been used in the paper.

Keywords: non-pecuniary damage, criteria, award (compensation).
Introduction

Intense development of social life and constantly increasing pace of human life lead to unavoidable experiences. The majority of people undergo negative emotions such as frustration, pain, emotional stress, spiritual experience or even depression every day. Many scientists (Volodko, 2010; Cirtautienė, 2005; Rudžinskas 2002, etc.) note that the most effective instrument is non-pecuniary damage by which the compensation for experienced non-material damage and positive emotions are given.

According to the Article 30 of Constitution of the Republic of Lithuania (Valstybės žinios, 1992, No. 33-1014), “the law shall establish the procedure for compensating material and moral damage inflicted on a person”. However, Constitution does not establish the subjective right to claim damage compensation; it obliges the legislator to pass laws on the award for pecuniary and non-pecuniary damage and emphasizes that “the law must ensure human rights and freedoms and should be in compliance with other protected values of the Constitution” (The Ruling given by the Constitutional Court of the Republic of Lithuania on the 30th of June in 2000).

According to the Article 1.138 of the Civil Code of the Republic of Lithuania (hereinafter referred to as the Civil Code) one of the ways to protect civil rights is an award for non-pecuniary damage. Moreover, Part 2 of the Article 6.250 of the Civil Code provides that non-pecuniary damage shall be compensated only in cases provided for by laws.

The establishment of the amount for non-pecuniary damage is under discussion both in practice and legal doctrine. Since it is difficult to define and sometimes even to evaluate the non-pecuniary damage because it occurs as non-material loss a fair compensation problem arises – how to choose the fair compensation for the experienced sufferings. For it is only fair and adequate compensation can ensure that rights to award for non-pecuniary will reach the goals. Lithuanian judicial practice still lacks a systematic approach to the award for non-pecuniary damage. Besides, the practice determining the amount of compensation is still inconsistent.

The subject of the paper – the assessment of the criteria for determining the award for non-pecuniary damage according to the practice of Lithuanian courts.
Eglė Šimkevičiūtė, *Legal Criteria for Determining the Amount of Non-Pecuniary Damage*

The aim of the paper – to analyze the legal regulation and practical experience on the determining an award for non-pecuniary damage in Lithuania.

To achieve the aim the following objectives have been raised:

1. To analyze and present the concept, purpose and principles of non-pecuniary damage.
2. To assess the practical significance of the criteria for the award for non-pecuniary damage.

The following methods have been used: comparative, document analysis, systematic analysis and the method of aggregation.

**Concept, purpose and principle of non-pecuniary damage**

The concept of non-pecuniary damage is defined in the Article 6.250 of the Civil Code (*Valstybės žinios*, 2000, No. 74-2262). It notes that: “Non-pecuniary damage shall be deemed to be a person’s suffering, emotional experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, etc., evaluated by a court in terms of money”. However, it is not an exhausted list. The legislature has given the right to consider the particular circumstances to the court (in equivalent terms).

Moreover, various Lithuanian authors provide specific features for non-pecuniary damage as well as the definitions for the concept. But their approach to the concept is rather different. For instance, Mikelėnienė and Mikelėnas (1998, p. 24) emphasize that non-pecuniary damage occurs by aggrieved person’s sufferings and inner experiences that are not always revealed externally. However, Rudžinskas (2002, p.73) argues that non-pecuniary damage is some certain negative mental changes which occur in the mind after the violation of personal material and non-material values.

There are three basic purposes of non-pecuniary damage distinguished in legal theory and practice, i.e. compensation, punishment and prevention.

It is assumed that for a long time both in the judicial doctrine and court practice there has not been common opinion of what purposes and functions should have been sought because of the specifics of non-pecuniary damage. Nowadays, it is discussed whether the functions of the relations
of non-pecuniary damage should be compensatory or punitive. As a result, this issue remains essential at the present time. Mikelėnas and Mikelėnienė (1998, p. 23) emphasize, that the function of civil liability is compensatory, thus giving priority to punish the offender but not to compensate for aggrieved person’s physical and emotional experience would be violation of the essence and nature of the civil liability. Mizaras (2003, p.128) takes the position that two purposes are sought by the award for non-pecuniary damage, i.e. to compensate for non-material damage and the injustice. Meškauskaitė (2004) argues that the amount of the award for non-pecuniary damage should be higher in the cases of honour and dignity because it does not hold financially strong media of sensitive information dissemination.

Systematic interpretation of the provisions of the Civil Code (Articles 6.245, 6.249, 6.250, 6.251, etc.) shows that the award for non-pecuniary damage has a compensatory function. Lithuanian court experience emphasizes that: “judicial function is to compensate for the aggrieved person’s mental pain, other negative feelings as fair as possible on the basis of the statutory criteria” (Civil Case No. 3K-3-91/2004), “the law provides financial satisfaction which aims to compensate for aggrieved person’s experienced emotional and physical sufferings, etc. as fair as possible. Court’s function is to determine fair monetary compensation for the injustice (emotional, physical experiences, losses)” (Civil Case No. 3K-3-371/2003). Although these orders refer to the Court’s function, the author considers that, the award for non-pecuniary damage has the same purpose, i.e. to compensate for damage.

Furthermore, the opinion of scientists differs in the aims sought by the compensation for non-pecuniary damage. According to Cirtautienė (2005), the legal doctrine recognizes that compensating for non-material damage and the injustice should be sought by the award for non-pecuniary damage. The courts have also observed this approach with a focus on the core purposes, i.e. compensation and award.

A full compensation principle is consolidated in the Civil Law, and the Court deciding the amount of compensation for non-pecuniary damage has to follow the rules of law as well as take into account the specific criteria typical of the cases of the category (Part 2 of Article 6.250 of the Civil Code).
Constitutional Court of the Republic of Lithuania has laid down the general rule that material (monetary) compensation for non-pecuniary damage as an equivalent of material non-pecuniary damage has to be awarded in accordance with the principle of full compensation for damage. The court has distinguished the peculiarities of application of full damage compensation which should be taken into account by the courts determining the award for non-pecuniary damage, i.e.:

1. material compensation for non-pecuniary damage is fundamentally different from the content of non-pecuniary damage that has been done and for which it has been compensated, and by its very nature cannot or not always can replace suffered spiritual harm;

2. the purpose of the compensation for non-pecuniary damage is to recreate material assumptions, to develop something that cannot be returned, to compensate for the things which cannot be replaced by money or any material assets.

It follows that the approach of the Constitutional Court to the award for non-pecuniary damage comes to the implementation of the principle *restitutio in integrum*, i.e. creating such material assumptions by which it would be possible to recreate something that cannot be returned or restored. This interpretation of the Constitutional Court of the Republic of Lithuania is clearly legally justified. If guided by the opposite assumption that the principle *restitutio in integrum* cannot be objectively applied to the award for non-pecuniary damage, it would result in legal uncertainty, disregard for the principles of the rule of law. Then the person experienced non-pecuniary damage could not legitimately expect full compensation and non-pecuniary damage institute would loose one of the basic functions, i.e. the compensatory function. The above mentioned interpretation of the Constitutional Court of the Republic of Lithuania is based on the fact that an aggrieved person who experienced non-pecuniary damage should receive a fair compensation even in cases when no money or material wealth could replace the experienced suffering.

Lithuanian judicial practice until the ruling given by the Constitutional Court of the Republic of Lithuania has had slightly different approach to the principle of full compensation for non-pecuniary damage and has stated that full compensation principle cannot be applied objectively. The
Supreme Court of Lithuania speaking on the law regulating the award for non-pecuniary damage has noted that the principle of full compensation for non-pecuniary damage (restitutio in integrum) cannot be applied objectively in the case of compensating for non-pecuniary damage because it is impossible to estimate non-pecuniary damage. At the same time the Supreme Court of Lithuania has emphasized that the court has a duty to provide with fair compensation for non-pecuniary damage and adjust monetary satisfaction which would compensate for experienced anguish, physical pain and other violations of non-material values as fair as possible.

In conclusion, non-pecuniary damage is a personal damage as it is directly linked to the person and is an integral part of their personality as well as it depends on their own experienced emotions.

In legal doctrine there are many opinions about the application of the principle of full compensation for non-pecuniary damages. The aim of the determining the amount of damage – to compensate the aggrieved person for the actual damage done due to the offender’s illegal actions (inactions). The purpose of the compensation for non-pecuniary damage – to create material assumptions for redeveloping the things which cannot be returned, i.e. to ensure the principle restitutio in integrum during every case.

## Criteria of award for non-pecuniary damage

The legislature by fitting the criteria which can help to identify (evaluate) the amount of damage has to follow the principles of reasonableness and rationality. However, the variety of criteria depends on the discretion of the legislature. The regulation of criteria for determining non-pecuniary damage award should create all legal assumptions for fair compensation for non-pecuniary damage.

As it is emphasized by the Constitutional Court: “<…> in no law the indicated criteria expressis verbis by which the amount of damages should be determined (estimated) should not interfere with the course of justice observing reasonableness, imperatives of proportionality while awarding for material and (or) moral damage”.
Although the amount of damage is determined by the court there are particular criteria of award for non-pecuniary damage determined by the legislature. According to Part 2, Article 6.250 of the Civil Code, “The court in assessing the amount of non-pecuniary damage shall take into consideration the consequences of such damage sustained, the gravity of the fault of the person by whom the damage is caused, his financial status, the amount of pecuniary damage sustained by the aggrieved person, also any other circumstances of importance for the case, likewise to the criteria of good faith, justice and reasonableness”. The statutory list of the criteria for non-pecuniary damage is not exhausted. The legislature has given the court the right to determine the criteria for the amount of non-pecuniary damage assessing the circumstances relevant to the case according to the criteria of justice, fairness and reasonableness. Expansive establishing of the legal criteria for determining the amount for non-pecuniary damage is left to the competence of the court adjusting the case.

In order to facilitate a compensatory mechanism, Volodko (2010) identifies general and specific criteria for determining the amount for non-pecuniary damage (refer to Table 1).

Table 1. Criteria for determining the amount of non-pecuniary damage

<table>
<thead>
<tr>
<th>General criteria</th>
<th>Individual (specific) criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of damaged property</td>
<td>In the case of assassination</td>
</tr>
<tr>
<td></td>
<td>Degree of kinship of the claimant to the decedent, emotional, spiritual, physical, economic nature of the connection, duration of the cohesion, fact of the material maintenance, etc.</td>
</tr>
<tr>
<td>Degree of emotional and physical suffering</td>
<td>In the case of personal injury</td>
</tr>
<tr>
<td></td>
<td>The degree and nature of damage to health, duration of health impairment, percentage of disablement, risk of disease progression, prognosis</td>
</tr>
<tr>
<td>Degree of emotional and physical suffering</td>
<td>In the case of imprisonment</td>
</tr>
<tr>
<td></td>
<td>The duration and nature of false imprisonment, detention, arrest and other coercive measure, gravity of illegal charge, conditions of detention, previous custodial fact, etc.</td>
</tr>
<tr>
<td>Fault</td>
<td>In the family proceedings</td>
</tr>
<tr>
<td></td>
<td>Nature of spouse’s fault; duration of marriage; children’s presence, number, age; perspectives to start a family – in family proceedings</td>
</tr>
<tr>
<td>Consequences of non-pecuniary damage</td>
<td>Cases of honour, dignity and privacy infringement</td>
</tr>
<tr>
<td></td>
<td>Nature of unrealistic, humiliating or privacy</td>
</tr>
</tbody>
</table>
As it can be seen from Table 1, general criteria are applicable to all contractual situations and to all categories of the cases on the award for non-pecuniary damage while individual criteria are specific to some certain categories of cases since this informs about emotional stress suffered, the nature of inconvenience, level of physical pain in a particular situation and in most cases simply formed by case law.

In order to facilitate a compensatory process, Volodko (2010) presents factors reducing and increasing the amount for non-pecuniary damage (refer to Table 2).

<table>
<thead>
<tr>
<th>Feature</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>The amount of pecuniary damage</td>
<td>In the case of copyright infringementSpread of copyright misuse and related rights number of copies, viewers, listeners; edition, audience; popularity of the work and its author, the artistic level of the work; nature and extent of work distortion; option of violated right’s recovery</td>
</tr>
<tr>
<td>Features of personality</td>
<td>In labour proceedings Duration of labour relations, nature and specifics of employee’s functions, employee’s behaviour at work, penalties, incentives, nature of employer’s violation and consequences.</td>
</tr>
<tr>
<td>Financial status</td>
<td></td>
</tr>
<tr>
<td>Motivation and goals of behaviour</td>
<td></td>
</tr>
<tr>
<td>Principles of fairness, reasonableness and good faith</td>
<td></td>
</tr>
</tbody>
</table>

Table 2. Factors reducing and increasing the amount for non-pecuniary damage

<table>
<thead>
<tr>
<th>Factors increasing compensation</th>
<th>Factors reducing compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experience of emotional and physical suffering at the same time</td>
<td>Long time from the offence</td>
</tr>
<tr>
<td>Violation of several moral values</td>
<td>Severe financial status of the offender</td>
</tr>
<tr>
<td>Intentional very cruel action of an offender</td>
<td>Careless action of the offender</td>
</tr>
<tr>
<td>Negative offender’s behaviour after damage</td>
<td>Positive offender’s behaviour after damage: repentance, apology, sincere seeking to mitigate the effects or to alleviate the suffering of the aggrieved person</td>
</tr>
<tr>
<td>Particularly painful damage effects which last for a long time or are impossible to remove</td>
<td>Total or partial compensation for pecuniary or non-pecuniary damage</td>
</tr>
<tr>
<td>The pursuit of material gain by making illegal actions</td>
<td>The aggrieved person’s fault or inappropriate, provocative behaviour</td>
</tr>
<tr>
<td>Recrudescence</td>
<td>First offence</td>
</tr>
</tbody>
</table>


Although factors reducing and increasing the amount of non-pecuniary damage are presented, the author thinks, these factors cannot be interpreted in the same way for all cases they can unroll mainly in the individual situation. Therefore, there is a lack of clarification.

According to Part 2 of the Article 6.251 of the Civil Code, the court having regard to the nature of liability, the financial status of the parties and their relationship can reduce the amount of damage, if the total compensation leads to unacceptable and serious consequences.

As already mentioned, the criteria of award for non-pecuniary damage are applied and the amount for damage is determined by the court. Moreover,
it should be noted that the court following the law laid down in criteria of non-pecuniary damage assessment and taking into account the circumstances relevant to the case as well as principles of good faith, justice and reasonableness determines individual amount for non-pecuniary damage.

According to the court practice developed by the Supreme Court of Lithuania, the purpose of non-pecuniary damage institute is to compensate fairly for emotional suffering, negative feelings, inconvenience, etc. Therefore, the court in order to determine the fairer amount for particular damage must apply as many criteria of monetary evaluation of the damage as possible. Not only identified criteria by which the court determines the amount for non-pecuniary damage should be named in the judgment. Also, the argued determining of each indicated criteria to the facts of the case, the revealed significance and influence of the criteria deciding the amount of compensation for non-material damage in the definite situation. Moreover, deciding on the amount for non-pecuniary damage all criteria should be assessed in each case, i.e. circumstances which could increase the amount for non-pecuniary damage and circumstances which could lower the amount for non-pecuniary damage. In each case the judgment must be based on motivated arguments on what criteria the court determines the concrete sum of money (Rulings of the cases No. 3K-3-386/2008, No. 3K-3-96/2010, 3K-3-117/2010, 3K-3-201/2010, of the Trial Chamber of the Supreme Court of Lithuania).

Guilt criterion is usually considered to be one of the main criteria for determining the amount of non-pecuniary damage. The courts in determining the amount of non-pecuniary damage, should take into account the offender's culpability. Moreover, while detailing the size of harm the attention to the nature of the fault should be paid (Part 2 of the Article 6.250 of the Civil Code.). According to the Lithuanian court practice, if the fault occurs during a premeditated violent crime against a person when injuring them or forcing them to undergo severe physical and emotional suffering at the time of injuring – such offender’s guilt creates preconditions for higher amount of non-pecuniary damage. However, if an aggrieved person’s carelessness makes an influence on damage and the court in accordance with the principles of good faith, justice and reasonableness can lower the amount of non-pecuniary damage. The offender’s guilt depends on the violated value and the nature of the violation.
Furthermore, there is an attitude of the court practice that the fact of infringement of fundamental values and natural rights such as health and life is a significant criterion for the determining the amount of non-pecuniary damage. The analysis of Lithuanian court practice in copyright protection cases confirms that the amount for non-pecuniary damage is influenced by the nature of copyright infringement, while in the labour proceedings a decisive influence is played by employee’s as the weaker party’s nature of the offence. Although the court assesses the criteria for non-pecuniary damage as a whole, however, the consequences of non-pecuniary damage for non-pecuniary damage are essential criteria justifying the amount for non-pecuniary damage.

The examined cases of the Supreme Court of Lithuania result that the courts take into account the offender’s financial status, permanent income, age, possibility to earn or get higher income. However, the Supreme Court states that the offender’s financial status cannot be a decisive criterion for determining the amount of non-pecuniary damage in cases of personal injury or assassination (Ruling in a Civil Case No. 3K-3-87/2007, 3K-7-70/2011 of the Trial Chamber of the Supreme Court of Lithuania).

According to Volodko (2010), the courts are widely guided by the defendant's financial status as an argument to reduce or increase the award for non-pecuniary damage and sometimes ignoring requirements of reasonableness and fairness even forget to take into account other circumstances of the case. However, these circumstances are crucial in determining the amount for non-pecuniary damage.

According to Part 3 of the Article 6.282 of the Civil Code, the court may reduce the amount of damage taking into account the difficult financial status of the offender except the damage was caused intentionally. The author thinks that the previously-mentioned factors influencing the amount of damage cannot be attributed to the criteria of the award for non-pecuniary damage influencing the reduction of already determined amount of damage and may be determined only after the non-pecuniary damage is identified.

In summary, it can be concluded that the court determining the amount for non-pecuniary damage must assess the circumstances significant to a particular case. Moreover, the award for non-pecuniary damage should be
determined on the grounds of the circumstances relevant to the case as a whole. Lithuanian Supreme Court is of the common practice that in order to determine the fairer award for non-pecuniary damage in a particular case has to apply as many criteria of the monetary award of damage as possible.

Conclusions

Non-pecuniary damage is a person’s suffering, emotional experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, etc., evaluated by a court in terms of money (Part 1 of the Article 6.250 of the Civil Code). The Supreme Court of Lithuania states that non-pecuniary damage causes physical and emotional impairment which influences sufferings for a natural person. This is a useless effect on a person. It is unfavourable and unacceptable for a person and cannot be done by any reasonable person’s point of view. This can be physical pain, physical harm, bodily integrity breach, as well as the accompanying emotional experiences as a person ponders the effects occurred. In the case of physical cause, the person assesses physical consequences not only because of the past fact but inevitably assesses in terms of the future – how the pain or injury caused to the body will affect their health in the future. The natural person is constantly concerned about their future and the survival, i.e. the emotional and physical safety.

In Part 2 of the Article 6.250 of the Civil Case of the Republic of Lithuania the criteria of the amount of non-pecuniary damage are listed. The courts should take them into consideration while examining the case. One of the main criteria in determining the amount for non-pecuniary damage is the offender’s guilt which influences the reduction or increase of the award for damage.

Besides, the offender’s property criterion could be applied only in exceptional cases after the evaluation of the circumstances of a particular case also bearing in mind compensation goals.

Moreover, as the list of the criteria justifying the amount for non-pecuniary damage is not exhaustive and non-pecuniary damage can be individual
in each case, the courts should assess circumstances essential to the case transforming and assessing them as the criteria supporting the amount for non-pecuniary damage.

Furthermore, the courts are not willing to restore personal losses basically, compensate damage fully, often are guided by self-set precedents not seeking to assess the criteria justifying the amount for non-pecuniary damage but seeking to award with not bigger amount for damage than other court has awarded.

It is proposed to assess and define individual criteria of non-pecuniary damage for a particular case taking into account the loss, survival, personal internal damage of a person and other individual criteria.

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**LEGAL, MEDICAL AND ETHICAL ASPECTS OF EUTHANASIA**

**MONIKA KOTOWSKA, TOMASZ KARDACZ**

(1) Assistant Professor at the University of Warmia and Mazury in Olsztyn (2) Ph.D candidate at the University of Warmia and Mazury in Olsztyn.

**Abstract:** This article is an attempt of analysis of one of the most important subjects of current public debate - euthanasia and withdrawing persistent treatment. It aims to demonstrate briefly the differences between them and medical, ethical and legal consequences of both of them. It consist also a short comparision between polish and foreign law regulations of this subject, presenting different approaches on solving of that problem. Law regulations always depend on commonly accepted ethical rules. In modern world, however, this rules are changing and it is sometimes impossible to find one proper solution.

**Keywords:** euthanasia, discontinuing persistent treatment, vegetative state

**Introductory comments**

The beginning of the 20th century saw the commencement of medicine’s real race with death. As late as 100 years ago the concept of vegetative state did not even exist, as patients in such a state did not have any chances of survival. Nowadays only 10% of people die in an abrupt and sudden manner, and over 80% of deaths are hospital deaths preceded by a long hospitalization with no chances of recovery.

Medicalization of death has become the hallmark of our time, bringing about a number of ethical, medical and legal dilemmas. Rapid development of medical sciences, as well as modern technologies, has given us increasing opportunities of supporting and prolonging life of terminally ill and dying patients, sometimes to the extremes of their physical and mental abilities, far beyond the limits set by nature.¹

¹ An example of prolonging life far beyond the limits set by nature can be a history of 41-year-old Krzysztof Jackiewicz, comatose for 26 years. In May 2011 his mother, wanting to lessen her son’s enormous suffering and being at the limits of her physical and mental strength, filed a petition with the court to allow her to give Krzysztof an injection that would quietly make him fall asleep and pass away. More on the subject: V. Ozimkowski, *Blaganie o śmierć* (Beg-
Recently not only the perception of life has changed, life that according to the so called Western philosophy should have good quality from beginning to end, but also the perception of death. By numerous accounts of calamities, executions and wars the media have somewhat accustomed the public to sudden, premature death. Slow and prolonged passing away in pain and the helplessness of doctors and families accompanying the dying are still considered tabu subjects, and even to some extent a failure of modern medicine. Euthanatic movements, nowadays more and more popular, as well as organizations opposing them, are a clear indication that the society considers this a serious issue and is searching for solutions before having to actually face the problem.

Poland’s membership in the European Union structures, closer political and cultural ties between European countries, as well as aforementioned development of medicine and modern technologies contribute to the fact that issues of the broadly understood “right to die” 2 are becoming valid in our country.

When tackling the issue of euthanasia, one might be tempted to refer first and foremost to Christian tradition, deeply rooted in Polish mentality, and specifically the belief in sanctity of human life. On the other hand, though, in light of progressing secularization, one needs to search for axiological ideas and ethical criteria that would be understood in the ongoing social debate and that could become a reference for all the participants, and not just Christians.

The so called right to die can be currently understood in many different ways, starting with withdrawing persistent treatment saving or supporting life, through “passive euthanasia”, to the most controversial “active euthanasia.” At the stage the medicine is right now, a person’s death is not an obvious moment, although a definition of death is referenced in transplantation law, and especially the Act on collecting, storing and trans-

2 According to M. Blocher, The Right to Die? Caring Alternatives to Euthanasia, p. 92 (1999), the concept of the „right to die” was born in the USA, and the originator was an organization founded in 1938 called Euthanasia Society of America. The author points to the fact that the so called “right to die” derives from values embedded in the American laws, such as the right to control one’s own body, right to privacy and right to act towards freedom.
planting cells, tissues and organs. According to the provisions of the act, the definition of death assumes permanent termination of all vital functions of the central nervous system with artificially supported or spontaneous cardiac and respiratory activity. Polish law, thus, defines death as irreversible arrest of circulation.

A situation different from the death understood in the above described manner is so called vegetative state. It is assumed that a vegetative state is diagnosed in “a patient who is conscious, but lacks awareness. The patient has retained reflex reactions, which constitute a part of a properly functioning medulla oblongata, including defense mechanisms, body posture, temperature regulation, circulation, respiration, digesting force-fed foods. However, the patient is devoid of sensory contact with the world, as a result of damage to hemispheres which normally are responsible for making a person aware of themselves, the surroundings and condition the purposefulness of their actions. A patient in a vegetative state requires constant specialist medical care – nursing, passive rehabilitation, proper nutrition. The care is a necessary condition to keep the patient alive. Vegetative state at times can be reversible.” In other cases we may deal with persistent vegetative state, which often requires force-feeding and constant nursing.

Legal reflection on the issue is impeded by confusion regarding the terminology. From the point of view of people not versed in the legal-medical jargon, concepts connected to the broadly understood “right to die” may be understood as equivalent or at least causing serious doubts of the lin-

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3 The July 17, 2009 act amending the Act on collecting, storing and transplanting cells, tissues and organs and amending the – Provisions introducing the Penal Code (Dz.U., nr 141, poz. 1149).


guistic nature. It is thus essential to focus on explaining the doubtful concepts.

The first term that requires an explanation in the context of the discussed issue is euthanasia. The first documented mention of euthanasia dates back to the 5th century BC. The term was used by a Greek poet Kratinos. In one of his comedies he used an adjective „euthanatos” to describe a person who died quickly and without suffering any pain. The noun “euthanasia”, in turn, was first used around 300 years BC in a comedy entitled “Myrmex” by a Greek author Poseidippos. He wrote the following: “Out of everything that a man tries to ask from gods, he does not wish for anything better than a good death (euthanasia).”

In modern times the term “euthanasia” was adopted by F. Bacon in 1605. In his work *De dignitate et augmentis scientiarum* (Of dignity and development of science) he introduced a term „eutanasia exteriore – exterior euthanasia”, which he defined as medically assisted, gentle and pleasant parting with life in cases of a disease not giving fair promise of recovery. This type of euthanasia, according to the author, goes beyond simply accompanying a dying person, and becomes a task for the doctors, one that possesses obligatory powers. A notion opposite to “external euthanasia” is, according to Bacon, a different type of euthanasia, one that entails a spiritual preparation for death.

Nowadays the term ”euthanasia” also carries different meanings. For example, a passive (negative) euthanasia consists in “the doctor discontinuing to treat a curable illness in a patient who also suffers from a terminal illness, the doctor refusing to employ extraordinary measures aimed at saving life and employing only ordinary measures, when the patient requests so, stopping the treatment without the patient’s consent when the doctor deems that further treatment only prolongs the suffering, complete

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8 *Id*, p. 66.
9 *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem W. Kopalińskiego* (W.Kopaliński Dictionary of Foreign Words and Phrases with an Almanac), p. 159(1994)., defines euthanasia as „a doctor ending a hospitalized patient’s suffering in prolonged agony by administering a lethal dose of an analgesic.”
refusal to employ any type of treatment or procedure at the time of dying.”

Active voluntary euthanasia consists in the doctor, upon an explicit demand on the part of a terminal and suffering patient, intentionally causing or precipitating the patient’s death by administering a lethal dose of medicine or terminating the patient’s life in another manner. Thus it constitutes conscious and deliberate actions of the doctor aimed at precipitating death, which occurs earlier than it would if the patient died a natural death. Both types studied together are collectively called euthanasia _largo sensu_, while the passive euthanasia alone is referred to as euthanasia _stricto sensu_.

In medical jargon one may also encounter terms such as dysthanasia and orthotanasia. Dysthanasia means implementing any medical treatments to support a life of person in a state of brain death, where the brain is irreversibly biologically dead. Thus it consists in artificially supporting cardiac and pulmonary activity in a patient with irreversible or grave brain damage (death with artificial survival). Orthotanasia, in turn, means discontinuing treatments supporting the above described state. According to M. Tarnawski orthotanasia should be considered a type of passive euthanasia, which seems to be correct in essence, but disrupts the dichotomic division of the concept.

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Other significant terms that shall be explained while discussing the issue of euthanasia include the following procedures of terminal and palliative medicine: refraining from employing or discontinuing a futile treatment in a situation where it would only prolong the patient’s suffering without any hope of recovery, terminal sedation (putting a terminally ill patient in a state of pharmacological coma in which he or she remains until natural death occurs), or analgesia of terminal states (administering increasing doses of strong analgesics to a terminally ill patient, which may result in his/her death occurring sooner.)

Euthanasia pursuant to the Polish doctor's code of ethics

The basic act regulating doctors’ ethical activity is the Doctor’s Code of Ethics. Its authors made distinctions between prohibited euthanasia and assisted suicide, and persistent treatment. Pursuant to article 31, “a doctor shall not perform euthanasia or assist a patient in a suicide”, because it infringes upon the basic right, which is the right to live. However, when treating terminal patients, doctors are not obliged to undertake and perform CPR or persistent treatment, as well as employ extraordinary measures. The decision to discontinue CPR shall be made by a doctor based on an assessment of the patient’s chances of survival (art. 32). The article 32 provision, thus, constitutes a basis for the doctor’s moral and ethical right to withdraw persistent treatment and extraordinary measures. It does not, of course, relieve the doctors from the obligation to make every effort to ensure humanitarian terminal care and dignified conditions of death. A doctor shall, until the very end, relieve the suffering of terminal patients and sustain, to whatever degree possible, the quality of the life that is ending (art. 30).

The doctor, thus, shall not only save human life and health, but also relieve patients’ suffering and, to a degree it is possible, try to sustain the quality of a life that is ending. However, whether the assessment of the quality of life shall be made by a doctor still remains a debatable issue, even if the doctor’s motives are noble.16

Euthanasia pursuant to the Polish penal code

Pursuant to the Polish penal legislation euthanasia is illegal and constitutes one of voluntary manslaughters. Voluntary manslaughters carry certain privileges, which are manifested in reduced penalties for such acts as opposed to a penalty for a second degree murder. Euthanatic manslaughter has been regulated in article 150 of the June 6, 1997 Penal Code, pursuant to which whoever kills a human being on his demand and under the influence of compassion for him, shall be subject to penalty of the deprivation of liberty for a term of between 3 months and 5 years.

Article 150 § 2 provides for an extraordinary mitigation of penalty or even the court’s renouncement to impose the penalty onto a person who has committed voluntary manslaughter because of compassion, although only in extraordinary circumstances.

The definition of a prohibited act included in the 1997 Penal Code (article 150 § 1 of the Penal Code) is a repetition of article 150 of the April 19, 1969 Penal Code, as well as article 227 of the July 11, 1932 Penal Code. The difference lies in the reduction of a minimal penalty from 6 months to 3 months, which is a manifestation of rationalization of penalties of deprivation of liberty provided for by the law in the new Penal Code.

The protected object here is human life – basic, birth and unalienable right of every human being. By legally prohibiting euthanasia, the legislation executes the guarantee function of the criminal law, protecting the value that is human life and indicates in article 150 § 1 of the Penal Code boundaries that shall not be crossed.

The crime of euthanasia has a common nature, although in reality the person committing it is a doctor, a member of the medical personnel or the

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17 Dz. U. from 1997 r., Nr 88, poz. 523 as amended.
18 Dz. U. from 1969 r., Nr 13, poz. 94 as amended.
19 Dz. U. from 1932 r., Nr 60, poz. 571 as amended.
In the doctrine of law there is an established view that euthanasia applies only to perpetration. Acts consisting in refraining from assisting in a suicide shall not be classified pursuant to article 150 of the Penal Code. It does not mean, of course, that a doctor can assist a patient in a suicide, as article 151 of the Penal Code states that “whoever by persuasion or by rendering assistance induces a human being to make an attempt on his own life shall be subject to the penalty of the deprivation of liberty for a term of between 3 months to 5 years.”

The crime of euthanasia can be committed both by acting (eg. administering poison, purposeful overdose of a life-supporting medication) and by omitting to act (eg. failure to administer a life-supporting medication). However, the crime of omission may only be committed by a person under specific obligation to protect the victim’s life (eg. a doctor, a nurse).

The provision of article 150 of the Penal Code requires the occurrence of two prerequisites: the victim’s demand and specific motivation of the perpetrator in the form of compassion. The demand shall be explicit, free of any form of duress, unambiguous, convincing and firm. It cannot be simply a request, permission or a suggestion, as those do not, pursuant to the article, constitute a demand. It shall be the victim’s final and actual decision. It shall also be directed at a person capable of recognizing such demand, and thus it shall not be directed at a legally insane person nor at a minor – i.e. at a person whose level of mental development prevents them from correctly assessing the essence of such demand.

There are no provisions made as to the motive for compassion towards the euthanized patient. In recent years, it has been a popular opinion that compassion as a motivation to act occurs mainly in relation to deep physical suffering of a terminally ill person, although as late in the 1930s both in

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the judicial decisions of the Supreme Court and in the doctrine, one could encounter a stance that a demand for euthanasia can be justified by disappointment in love, causing spiritual suffering\(^26\) or a threat of shame\(^27\).

The crime of euthanasia is an intentional crime, consisting in terminating the life of another human being, however there is no consensus on whether it can be committed only with direct intent or also with possible intent. Those in favor of the view that intent under article 150 § 1 of the Penal Code includes only direct intent claim that limiting the perpetrator to direct intent is supported by a specific motive for the crime,\(^28\) which is compassion for the victim, when the perpetrator’s actions aim at shortening the victim’s suffering. Others do not rule out the commission of the crime of euthanasia with only possible intent, eg. in the case of administering a dangerous increased dose of analgesics, when the perpetrator concedes to the person’s possible death.\(^29\)

Pursuant to article 150 § 2 of the 1997 Penal Code, in special cases the court may rule extraordinary mitigation of a penalty or even renounce the imposition of a penalty. It should be pointed out that the judge’s right of extraordinary mitigation of a penalty or renouncement of the imposition of a penalty, did not exist in previous penal codes. There are many in favor of and opposed to the solution. The former claim that the provision is merely a manifestation of tendencies intensifying nowadays in Europe, aiming at lightening regulations regarding euthanatic practices and thus bringing the Polish legislation closer to European norms and liberalization of law.\(^30\) The opponents of the regulation consider the introduction thereof a highly inopportune move and propose that the provision be stricken off.\(^31\)

\(^{26}\) Ruling of the Supreme Court from February 24, 1936, 2K. 2240/35, poz. 336.
\(^{27}\) L. Peiper, *Commentary to the Penal Code*, p. 461 (1936).
Euthanasia and withdrawing persistent treatment

Persistent treatment is most often defined as “excessive, unnecessary, artificial support of vital organs of a patient with fatal illness or injury related lesions using extraordinary measures, which contribute only to the prolongation of the patient’s suffering, and by no means do not heighten the quality of that patient’s life.” 32

When making a distinction between euthanasia and withdrawing persistent treatment, it shall be noted that the purpose of euthanasia is different than that of the withdrawal of persistent treatment. It is pointed out that in the case of euthanasia the purpose of the actions (or refraining therefrom) is to cause the death of a patient at the patient’s demand. The choice of measures also unequivocally indicates such direction. In the case of withdrawing persistent treatment the purpose is not to shorten or prolong the patient’s life, but to protect the patient from additional suffering, when nothing more can be done for the patient in terms of medical treatments. 33

The obligation to withdraw persistent treatment is stipulated in many norms of international law. For example recommendation no. 779 of the Council of Europe Parliamentary Assembly on the rights of the sick and dying (1976) emphasizes that the development of modern diagnostic and curative methods may lead to impersonal treatment of patients, who face a bigger and bigger challenge when protecting their rights. Authors of the recommendation emphasize that prolonging human life is equally important as minimalizing the pain of a dying person. A doctor, when making every possible effort to relieve the patient’s suffering, cannot, however, intentionally precipitate the natural process of dying. In another legal act, the Declaration of Venice on Terminal Illness, article 3 points to the fact that: “The physician must refrain from employing any means that would provide no benefit for the dying patient.” 34

Pursuant to Polish law it is not a crime to refrain from employing the so called persistent treatment, i.e. employing extraordinary medical measures, which may expose the patient to unnecessary pain and suffering. 35

33 M. Gałęska – Śliwicka, M. Śliwicka, Id, p. 22.
34 Id, p. 22-23.
35 Id, p. 69.
although it shall be pointed out that sometimes the distinction between passive euthanasia and refraining from employing persistent treatment poses problems. The opinions are divided.

Sometimes both situations are interpreted integrally, indicating that withdrawing persistent treatment is equivalent to passive euthanasia. It stems from the assumption that euthanatic manslaughter, by definition, may be committed both by acting and refraining from acting, which includes discontinuing to support the patient’s vital functions. Such perception of the issue seems too narrow, which means that a clear distinction needs to be made between cases of withdrawing persistent treatment and euthanasia, subject to penalty (art. 150 of Penal Code). Active euthanasia, as has been previously emphasized, is prohibited, however, pursuant to the provisions of law, it is allowed to discontinue medical treatments that only prolong the dying process, i.e. when despite employing medical measures, it is impossible to stop the patient’s impending death.

Another significant issue in the context of the discussion of euthanasia is the question of withdrawing further treatments as a consequence of an objection expressed by the patient – an objection that is clearly stated, made pro futuro or reproduced using available evidence.

The literature points to the fact that in the case of withdrawing persistent treatment, the decision made is related to a negative assessment of the patient’s chances of recovery, while the case of the patient’s objection is related more to respecting autonomy and the right to private life that every person shall possess.

M. Gałęska – Śliwka and M. Śliwka propose that the legislators shall regulate each case separately, introducing separate motives for withdrawing persistent treatment and the patient’s objection. The authors emphasize that the first case requires that the following in particular be precisely regulated: the definition of persistent treatment, the scope of the rights of the doctors and third parties (e.g. members of the patient’s family or the patient’s loved ones). If an institution were to be introduced that would allow for the patient’s objection to be taken into account, it would require clear guidelines as to how the patient’s objection may be expressed, since the patients are often unconscious.  

36 M. Gałęska – Śliwka, M. Śliwka, Id, s. 26.
Rules of law protecting human rights award each person with a right to private life. The right shall be broadly interpreted as the right to live according to one’s choices and to choose one’s own fate. Ignoring a patient’s objection, and consequently obligating them to undergo a medical intervention, may lead to infringement of for example article 8 of the European Convention on Human Rights. Also article 9 of the European Convention on Bioethics orders that doctors take into consideration previously expressed wishes of the patient regarding medical intervention if the patient is not capable of expressing their will while the intervention is underway.

The notion that an individual’s will is considered an important factor in a patient-doctor relationship is manifested by the fact that the former is entitled to express consent or objection regarding a proposed medical treatment. As rightfully pointed out by L. Kubicki, “consent shall be an act executing the protection of autonomy of a person in relation to basic human rights.” Pursuant to article 32 of the Act on Medical Profession, a doctor may conduct examinations or provide other medical treatments, subject to exceptions specified by the law, after receiving consent from the patient. Pursuant to the law, each patient is granted a right to consent to or refuse to undergo certain medical treatments, having been properly informed regarding those treatments. M. Nesterowicz rightfully points out that one shall discard the „general, unrestricted right to treat against the patient’s will and the patient’s obligation to undergo treatment stemming from it.” Thus, an objection expressed by a patient of age, with full capacity for legal actions, shall be binding for the doctor.

Patient’s right to express consent or objection does not expire when the patient becomes gravely or terminally ill. What is more, rational legisla-

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37 See ECtHR’s rulings: from March 26, 1985 in the case X and Y v. The Netherlands, complaint no. 8978/80; from December 10, 1984 in the case Acmanne v. Belgium, complaint no. 10435/83
38 L. Kubicki: New kind of doctor’s criminal liability (crime under art. 192 of Penal Code, vol. 8 Prawo i Medycyna, p. 36. (2000), as cited in M. Gałęska – Śliwka, M. Śliwka, Id, , p. 27
40 A. Zoll, Lack of patient’s consent regarding treatment (Comments regarding Supreme Court ruling from October 27, 2005. III CK, vol. 4 „Prawo i Medycyna” p. 7. (2006); as cited in M. Gałęska – Śliwka, M. Śliwka, Id, p. 27.
ture shall be required to introduce such legal norms that would enable an individual to exercise their autonomy and freedom even in the case of loss of consciousness. A patient in a vegetative state shall have the same scope of rights as a patient who has not lost consciousness. It is so stipulated in numerous international legal norms, which when granting rights to an individual at the same time prohibit any form of discrimination.\textsuperscript{41}

It is beyond doubt that it is problematic to assess the will of a person who is unconscious or otherwise incapable of making a decision. It seems that one shall look for such legal instruments that protect the autonomy and freedom of an individual, but at the same time prevent possible abuse. Applicable procedure shall, to the greatest extent possible, enable the assessment of the individual’s actual will. In the case of patients who are not capable of making a conscious decision, the first step shall be to investigate whether the patient made a \textit{pro futuro} declaration expressing their will regarding the employment of any life-supporting procedures (including the so called living will). If there is no evidence that would enable for the patient’s actual will to be reproduced, the party responsible for making the decision on the patient’s behalf shall independently assess what lies in the best interest of a typical patient (the so called objective test). If the patient’s condition is not sudden, the decision regarding life support measures for a patient with full capacity for legal actions shall be made by the court of protection. We believe that, at the stage of making a ruling, the court shall take into account the patient’s will expressed in case the patient loses consciousness.\textsuperscript{42}

Withdrawing further treatment based on the so called reproduced objection – when the patient has not executed a living will – causes some doubts. Jurisdiction of foreign countries, however, deals with cases where decisions to withdraw further treatment are made. It means that a party entitled to make a decision to withdraw further treatment (usually a doctor or a court) tries to investigate what would the decision of the patient be if he or she was able to make such decision. Some systems employ subjective models here, meaning that the entitled party tries to establish what would be the decision of a particular patient. Others make use of the objective model, within which it is established what would be the decision of an

\textsuperscript{41} M. Gałeśka – Śliwka, M. Śliwka, \textit{Id}, p. 28.

\textsuperscript{42} Same, p. 29
average person in a situation like this. In the subjective model, when the patient has not expressed his or her will in writing, the accounts of witnesses are the decisive factor, as they allow to establish the patient’s preferences, previously expressed opinions, religious beliefs etc. However, such procedure has certain flaws. The greatest of them are the danger that a patient might be killed because of erroneous interpretation of his/her wishes, as well as a huge area for abuse. Which is why the subjective model is more and more often being replaced by the objective model. In those instances, the person making the decision on behalf of the patient shall assess what lies in the patient’s best interest. To do that, one shall take into consideration purely objective factors: chances of recovery, alternative treatments, risks and side effects, ailments that the patient will suffer, the quality of the supported life, the degree of humiliation and dependency, the loss of dignity, etc. 43

Summarizing, apart from the crime of euthanasia and withdrawal of persistent treatment one shall distinguish a situation in which the withdrawal of further treatment is dictated by an objection expressed by the patient. In such case, the basis for withdrawal of further treatment is respecting the autonomy of a patient in a vegetative state. Thus we postulate that the legislation separately regulate the issue of withdrawing persistent treatment and pro futuro declarations.

**Regulations in international law and selected countries**

In international and comparative law generally a doctor is prohibited from performing active euthanasia or assist in a suicide. 44 The International Covenant on Civil and Political Rights as well as the European Convention on Human Rights, wanting to protect a birth right to live, prohibit euthanasia in the sense of intentional actions of a doctor aimed at shortening the patient’s life.

In most countries – including Poland – active euthanasia and medically assisted suicide are considered crimes, because to all legal intents and pur-

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43 Same, p. 29-30.
poses they constitute an attempt on human life, committed by a third party (a doctor).

However, in the Anglo-Saxon common law system, despite the active euthanasia being formally strictly criminalized, judicial practices show a clear tendency to decriminalize it, as provisions regarding manslaughter turn out to be an inapplicable instrument when confronted with humanitarian motivation of the perpetrator and the victim’s demands. From a formal standpoint, common law does not view those factors as mitigating circumstances in manslaughter cases, however due to the lack of applicable legal provisions, the courts tend to be more lenient towards accused doctors – they are usually found not guilty or given very light sentences.

In many legislatures, mitigating circumstances – the victim’s demand and the perpetrator’s motivation – are incorporated directly to the provisions of law, thus establishing, just like in Poland, a voluntary manslaughter. There are four possibilities: when only the demand is taken into consideration, when only the compassion is taken into consideration, when both factors are considered alternatively (demand or compassion) and finally when both factors are taken into consideration simultaneously. One may differentiate four types of voluntary manslaughters: (1) killing on demand (Germany, Italy, Austria, Denmark, Island), (2) mercy killing (Portugal), (3) killing on demand or mercy killing (Norway), (4) killing on demand and mercy killing (Switzerland, Greece and Poland). There are also legal systems where euthanasia is legal, for example in Belgium, Luxemburg and the state of Oregon in the USA. 45

A country considered a pioneer regarding euthanasia is The Netherlands, where it was first noted that euthanasia had been practiced illegally for many years. 46 The Dutchmen have not set forth criteria for permissibility of active euthanasia and assisted suicide through one legislative decision, but have developed them gradually, through court’s decisions with significant participation of medical community. Initially, the Dutch Supreme Court adopted the idea of the state of higher necessity as the basis for permitting active euthanasia or assisted suicide. Euthanatic practices were

legalized in 2002. In 2006 there were 1923 cases of euthanasia and in 2007, 2120.\textsuperscript{47}

Euthanasia itself is defined in the Dutch penal code as intentional action consisting in terminating the life of a person at their explicit and serious demand (euthanasia \textit{stricto sensu}). Euthanasia \textit{largo sensu} is a „passive euthanasia”, i.e. shortening the life of a person by discontinuing treatment at the patient’s explicit demand, or without such demand in cases where further treatment is futile from medical standpoint and “indirect euthanasia”: employing medical measures to reduce the patient’s suffering, where the precipitated death of a patient is in a way a side effect.

Euthanasia \textit{largo sensu} is viewed as doctor’s regular actions, and infringement of rules in such cases is punishable only disciplinarily. Assisting in a suicide is subject to criminal penalty. Assisted suicide means acting with intent to lend assistance in a person’s attempt on their life, at that person’s request. The penal code provides for sanctions for assisting in a suicide or providing means for it, when the suicide has been committed.

The Dutch judicial decisions provide the following criteria for overruling the illegality of euthanasia:

1. serious, explicit demand for euthanasia to be performed from the patient capable of making such decision,

2. the demand shall be expressed explicitly, in writing or orally; the demand in writing is not valid as long as the patient is capable of still expressing his/her will,

3. the demand shall not be binding for the doctor, it is merely an authorization,

- the demand shall be permanent, the doctor shall investigate whether the demand is not a consequence of a temporary depression or impulse,

- mere incurability of the disease shall not be sufficient, it must be accompanied by “unbearable suffering” – which is assessed by the doctor,

- the patient does not have to be in a preagonal state,

Legal, Medical and Ethical Aspects Of Euthanasia

- the patient shall possess precise and undoubtful knowledge with regards to his condition and prognosis,

- the patient’s health condition does not indicate any chances of recovery,

- the procedure shall be performed by the attending physician or a specialist, but the decision shall be made after consulting with another doctor, who has not treated the patient.48

The Dutch model for justifying euthanasia and medically assisted suicide, as well as the entirety of legal practices adopted there, have become a model for other countries deciding to legalize both practices.

Another country where a similar legislative model was introduced was Belgium, where the year 2002 saw the introduction of the “Act on euthanasia.” Pursuant to the legal definition, euthanasia means “actions of a third party that intentionally takes the life of a person if the person shall so demand.” A doctor does not commit a crime when performing euthanasia when:

- the patient is of age and has capacity for legal actions, as well as is fully conscious and aware when making such demand,
- the demand is voluntary, expressed with prudence, repeated, in writing,
- the patient’s medical condition indicates no chances of recovery and entails constant physical or psychological suffering that cannot be relieved, resulting from an accident or an organic disease,
- the patients acts pursuant to the provisions of the law.

The doctor, then, shall:

- inform the patient about their health condition and the hopes of keeping the patient alive, agree on a common stance and consider treatment possibilities, come to a conclusion (with the patient) that there are no other solutions,
- ensure that the physical or psychological suffering is permanent, as shall be the will of a person to end their life,

48 Id.
• consult with another independent doctor,
• discuss the matter with the patient’s loved ones, if the patient so requests.

Japan is another example of a country where euthanasia is permissible, though very rarely practiced. In the state of Oregon in the USA, doctor assisted suicide has been legal since 1997. In 2001 there were 17 such suicides and in 2002, 30.

In Switzerland, administering medications precipitating death has been permitted by the law since 1942. It is illegal when the doctor’s motives are selfish. Research conducted by the University of Zurich in 2001 suggests that Switzerland is the country where euthanasia is most common in the world. It is the only country where euthanasia tourism is practiced. Death on request is offered by an organization called Dignitas, which during 8 years of its activity helped end the life of over 800 people. Half of them were Germans. 49

It shall be emphasized that any laws and acts legalizing euthanasia make provisions for the patient to be able to change their mind regarding their demand to be euthanized. The majority of acts and laws also require that a patient express their demand not only orally, but also in the form of a personally signed document (the Dutch law is the only one that does not make such provisions). The Oregon law additionally requires that the document be signed in the presence of two witnesses, out of which at least one shall not be related to the patient, the patient’s heir or an employee of the medical institution or the nursing home where the patient is being treated. The witnesses are supposed to be a guarantee that the patient is fully capable of making decisions, is acting on his/her own will and does not sign the document under duress. 50

Dutch, Belgian and Luxemburg laws also make provisions allowing the patient to execute a document called “living will”, in which the patient

may express his/her wishes regarding the performance of euthanasia when he or she is no longer able to express such wish.

To provide additional security against possible abuse it is a common practice to summon deciding committees, composed of doctors, lawyers and ethicists and examine the patients wishing to undergo euthanasia (when possible) by expert psychiatrists.

**Ethical aspects of euthanasia and discontinuing persistent treatment**

In modern times death is a subject we try to avoid. In the era of youth, apotheosis of life, the beauty of human body, rapid development of medicine, and especially plastic surgery, agony seems to be pathetic and often put on the backburner. Death is no longer related to certain mythical cult, when people ended their lives surrounded by their loved ones and having made peace with God. Nowadays our loved ones leave this Earth between white hospital walls separated from their surroundings by a screen as a defect of programmed cure.

In this particular exchange, every opinion counts, however, undoubtedly, those who should especially be heard are the doctors. After all, representatives of that particular profession are the ones held professionally, legally and morally liable. It is the medical community that actually executes the legal norms regarding euthanasia, doctors are the ones making decisions regarding continuing persistent treatment or discontinuing it, when the patient has no chances of recovery. At the same time, very often doctors and medical organizations are trying to distance themselves from the discussion, so that they will not be accused of favoring behavior not compliant with the Doctor’s Code of Ethics.

A question also arises of whether while making a fully conscious decision regarding our life we have a right to do so? And whether we should not limit our doubts when making such a decision for someone else?
On the other hand, though, is a next of kin, making a decision regarding euthanasia, always motivated by compassion and love? There are, after all, known cases where even when the patient is alive, the patient’s loved ones are guided by their own interests, very often of a financial nature. Obligated to take care of a living person in exchange for receiving a house as a gift from grandmother or mother, they physically or psychologically abuse the donating person, preventing that person from accessing sanitary appliances, or even throw the person out of the house. How would a family behave knowing that in such situation they may “get rid of” the older, often terminally ill person quickly and legally, with only some paperwork to fill out?

Many doubts arise as to why a greater part of society when asked about their own life, answers without even thinking, as if they had a ready and well-thought answer in their mind, and at the same time are not able to make the same decision regarding their loved one? Is it because it is so easy to immensely criticize such decision? Or because we can afford long-term treatment and supporting life functions in terminal cases? Or maybe because the influence of the public’s opinion or the danger of presenting a clear pro or con stance is too great?

If we make an assumption that an individual human being, even a doctor, shall not make decisions regarding a death of a patient, who by assumption shall be treated to the very end, then a question arises as to who should be the one to make such decision? A sovereign court (criminal court or civil court?) or an ethics committee composed of lawyers, doctors, ethicists?

Summarizing, we believe that a discussion on whether euthanasia is always wrong or if possibly in some cases it is morally justified, has no chances of being resolved in a straightforward and decisive manner. It seems that it will always keep referring to the axioms of Christian faith, as well as to the axioms of secularization of law, often in opposition to those of faith. It will always remain a highly abstract discussion, an issue for philosophers, lawyers, doctors. A concrete, individual human case, in need of assistance “here and now”, will always remain outside of such discussions, destined for loneliness, and in the case when radical decisions have to be made, even for moral condemnation. Life experience shows that when judging other people’s behavior in extreme situations (and not only then), one shall remain as restrained as possible.
To sum up, if there was a way to guarantee that introducing legal solutions that would, for the price of refraining from prosecuting some cases of euthanasia, allow for euthanasia and euthanatic abuse to be controlled at least to some extent, we would be inclined to say that such solutions would be needed.
**Loan Agreement in Financing Households**

**Bogdan Włodarczyk**

University of Warmia and Mazury in Olsztyn

**Abstract:** The credit process of households is a complex flow of the activities on the side of a bank and its customers. It is beginning with defining the borrower’s needs through analysis of credit rating for the payment and repayment of credit. The most important document in the entire process is a loan agreement reflecting its course and binding the parties for the entire period of credit provision. The author is discussing a loan agreement and its legal aspects resulting from regulations of acts having influence on its shape. A loan agreement as a classified subjective agreement by law must contain determined elements in order to constitute the appropriate document. Moreover, in the article the author made analysis of financing households in Poland in the period of two last years pointing at dynamics of the rise in credit volumes, relationship of credit to the GDP and to the net profit of households.

**Introduction**

Outside sources of financing have essential meaning in developing economies, to which the Polish economy belongs. All institutions of the economy i.e. the treasury, units of the local government, enterprises, households or financial institutions need financial means for the service of current activities in progress and protection of investments. The basic outside source of financing of above mentioned subjects is a bank sector for which the section of households constitutes an important source of the bank activity. The credit process is a complex flow of activities on the side of a bank and customers. It begins with defining the needs of the borrower through analysis of the credit rating for payment and repayment of credit. A loan agreement is the most essential document in the entire process, which is reflecting its course and is binding the sides for the entire period of credit providence. In the article a risk of financing the households in Poland relating to the UE has been assessed.
Loan agreement in the bank law

A loan agreement was not defined by a legal document till 1989. Regulations of the bank law being in effect until then treated a loan agreement like a nameless agreement, or like a subtype of the loan agreement. Distinguishing a loan agreement as the separate type of the agreement was called a work of doctrine\(^1\). Loan agreement got the statutory regulation in the act on 31.1.1989 on the bank law. The definition of loan agreement included in the bank law in 1989 was taken over with minor changes into the bank law in 1997\(^2\). Due to the Art. 69 sec. 1 of Bank Law through the agreement of credit the bank is committing itself to hand over to the borrower’s disposal for the time fixed in the agreement the amount of financial means intended for the established purpose, and the borrower is committing themselves to using it on conditions stipulated by contract, returning the amount of used credit together with the interest rate in indicated dates of re-payment and paying the commission on given credit.

The settlement of the bank Law is defining a credit agreement as the separate contract from the loan agreement. Accepted names in the act: “agreement of credit”, “agreement for credit” and “loan agreement”. Different expressions are also still being used in literature, in particular “agreement for bank credit”\(^3\). One should notice that the legislator is also using a different term in different legal documents for determining the agreement of credit i.e.”loan”. While the phrases “giving credit” or “taking credit” are used in order to determine legal proceedings consisting in concluding the credit agreement in regulations.

Definition of credit agreement is met in other legal documents i.e. Act from 2011 on consumer credit\(^4\), where an agreement for consumer credit is defined and in the articles of the Act on the National Bank of Poland\(^5\),

\(^1\) CIEPIELA I., Bank activities as a subject of activities of banks, Warsaw 2010.
\(^2\) Bills from 29th August 1997, Bank Law, Dz. U. Nr. 140 from 1997 pos.939 with later amendments.
\(^3\) BABIARZ P., Resignation from the bank loan, Biuletyn Bankowy 1999, Nr. 8.
\(^4\) Act from 12 May 2011 about the consumer credit, Dz. U. Nr. 126, pos. 715, from 2011.
where loans between the National Bank of Poland and banks are defined. In the first case regulations of consumer credit, are appealing for economical notion of credit. A credit agreement has been ranked, besides other agreements (including agreements of the loan), to agreements which after fulfilling premises determined in these regulations are regarded as agreements for consumer credit. In the second case the contract of credit regulates giving to banks so-called refinance credit by the National Bank of Poland.

A lot of different acts are in power apart from mentioned legal documents which influence loan agreements and very act of credit giving. It concerns regulations which regulate credit for determined purposes e.g. student credit, housing credit with extra supplement, aid credit. Part of these acts regulates concluding agreements of credit only indirectly because they determine conditions which need to be fulfilled in order to get the state aid in the form of extra supplements for credit allocated for purpose determined in the act or takeover the repayment of the part interest by the state or even obligation by writing off the debt.

Regulations of the Bank Law are above all the source of legal regulations of loan agreement. The agreement of credit has a relation under civil law and so general regulations of law of fulfilling the obligations and non-performance are being applied to agreements of credit as well as regulations of general part of the civil code about signing a contract, while part of the Bank Law regulations being in Chapter V of the act has a public and legal character. Suggestions and recommendations of the Committee of the Financial supervision are other regulations influencing the shape of loan agreement. It results from Art. 138 of the Bank Law, it is determined that as a part of the supervision of bank activity KNF can give recommendations which are directed to banks and in accordance with Art. 138 sec. 7 they cannot violate credit agreements already concluded by the bank. Article 137 sec. 5 of the Bank Law will give KNF authorizations to give recommendations to banks in the scope of good practice of careful and stable bank management. KNF is using busily this statutory legal instrument (16 recommendations given), particularly in the period of the financial crisis because giving the recommendation it influences the politics of the bank sector in the scope of financing the national economy. Recommendations named by letters refer to many spheres of credit activity of the bank e.g. Recommendation T - refers to good practice in the scope of man-
aging the risk of retail credit exhibitions; Recommendation S - refers to credit financing estate properties and protected by mortgages; Recommendation T - is ordering to examine ”all elements which can have essential influence on the ability of persons obliged to the repayment” while assessing the credit rating of bank customers, and to establish parameters of the credit rating assessment of bank contractors in a solid and objective way. According to the recommendation one should also separate functions connected with offering “products” and with analysis of credit applications, as well as the risk assessment and taking the credit decision.

Doubts are being expressed in literature as for legal character of the recommendations. Certainly they cannot be recognized as the law acts commonly being in effect (in understanding of the Art. of 87 Constitution of Republic of Poland). In contrast with KNF resolutions it is also possible to claim that they do not have a standard character but they constitute only a demand at the address of banks concerning the correct bank organization bank and safe management. They can influence the shape of relations of the bank with its clients only indirectly if the bank accommodates itself to the recommendation. They are not a base of duties of the bank towards its clients, hence no authorisations against the bank result from them. However, not complying with the recommendation influences the negative assessment of the bank what in consequence can contribute to punishments put by KNF on banks.

Next elements of the agreement of credit are decisions resulting from rules and bank instructions. Due to Art. 109 sec. 1 of Bank Law the bank can give out general conditions of agreements and rules determining among others kinds of given credit and conditions of agreements of credit in the scope of its activity. Decisions included in them are binding for sides provided the sides will not decide in the agreement about their rights and duties differently resulting from the individual transaction e.g. the condition of the credit payment, protection or extension and timetables of repayments. Banks are applying standards of loan agreements, it is customarily accepted, Art. 384 § 2 sentence 1 of Civil Code determines conditions of their incorporation. The agreement of credit cannot be ranked among agreements universally signed in trivial current matters of everyday life, therefore when a consumer is a bank contractor in the understanding of Art. 221 of Civil Code, the model will be binding it if it is delivered before signing a contract.
Instructions, worked out by the bank for their workers, are being applied in the bank practice, apart from general conditions of agreements, rules and specimens of contracts having character of models. Instructions determine the way of the conduct of bank workers while doing particular bank activities in order to provide the uniformity of the bank action. Instructions are not directed at clients of the bank, they are not a subject to a publication. Therefore the instructions not only are not binding the client of the bank, but they cannot even constitute bases of interpretations put forward by parties of declarations.

Criteria and kinds of agreements

The rich economic life is extorting circumstances, for which bank customers need financial means. There are numerous loan agreements in the bank turnover, depending on individual needs of borrowers and the internal division applied by banks. The literature on the subject proposes tidying up the credit agreements in relation to determined criteria. Eleven criteria of credit agreements were distinguished in the Pisulski’s work:

- criterion of the purpose or allocating credit - rotational, investment, export, housing loans, for removing effects of the flood etc.;
- criterion of the way of making means available to the borrower - credit in the current or economical-credit account and credit in the credit account, acceptance credit, cash credit etc.;
- criterion of providing credit for the period - short-, average- and long-term credit;
- criterion of currency of credit - in zlotys and foreign exchange currency credit;
- criterion of the person of the borrower - credit for the business activity and consumer credits;
- criterion of applied interest rate- credit of permanent or changeable rate of interest;
- criterion of the way of credit payment - credit paid in tranches, credit paid on a one-off basis;
- criterion of securing the repayment of credit - secured and unsecured credit;
- criterion of the possibility of repeated using of credit - on a one-off basis used credit and renewable credits;
- criterion of the way of the repayment of credit - credit returned in installments and on a one-off basis;
- criterion of the person of lender - syndicated credit, the refinance credit.

In the majority, distinguishing individual kinds of credit carried out according to the presented criteria above has only organising meaning. As a rule no legal effects are involving the determined classification of the agreement of credit.
However, one should pay attention to Art. 482 § 2 of Civil Code which is excluding an application of anatocism to “agreements for long-term loans given by credit institutions”. It is proposed in literature to apply this regulation also to long-term contracts of credit. Division of agreements of credit for long-term and remaining (short- and medium-term) would gain significance at adopting this view. However, the problem relies in the fact that the act shows no criterion, according to which it is possible to include the credit agreements to the category of the agreement of long-term credit. It is proposed in literature so that on the basis of Art. 482 § 2 KC only agreements signed for the period over 5 years to regard as long-term agreements of the loan (and in consequence - also long-term contracts of credit).

Taking the regulations of Civil Code into consideration it seems that the practical significance has above all standard distinguishing of determined agreements of credit. So it concerns such agreements of credit, for which statutory regulations provide the special legal regime (like e.g. agreement of student credit) or which are combining other legal consequences (e.g. supplement funding, supplement interest, “family on their own” agreement of credit).

**Conditions of credit agreement signing**

So that the agreement of credit would be signed a numerous conditions must occur on the side of a bank and its customers. A bank, called the lender, in accordance with Art. 2 of Bank Law is the only authorised subject for signing agreements of credit. Together with the development of the bank sector in Poland the law allows domestic, foreign, cooperative banks, credit institutions or departments of credit institutions in Poland to be a party of the contract. In the case of mentioned refinance credit according to the Act on the National Bank of Poland the party of agreement giving the credit is the NBP. Giving credits is an activity reserved exclusively for banks (Art. 5 sec. of the Bank Law). Loan agreements concluded with other subjects than mentioned above are not being concluded, the only exception are Economical-Credit Cooperatives which can conclude the agreement for credit only with their members on the basis of Art. 21 Acts
An allowed form of entering into a contract is also an agreement for credit given in the consortium. Then a party of the contract is not one bank but two and more. Consortium contracts are applied in case of the big value credits so that the risk of giving credit would be dispersed or in order to avoid exceeding a limit of the concentration in the business or the customer’s.

Every physical, legal person or organizational individual not-owning the legal entity which the act is granting the legal capacity, called the borrower, can be the other side of the agreement of credit. The bank law is not forbidding taking a loan by a few persons. In such a situation these persons will be responsible for a repayment of credit jointly unless the agreement is determining differently. Obligation ensuing as a result of entering into a credit contract by a few borrowers will undergo a division in the lack of appropriate reservation in the agreement of credit.

Regulations are curbing the possibility of taking credit by some persons in some cases. The limitations result from regulations of the bank Law as well as from other acts. The forms of limitations are: a ban of taking credit or narrowing the circle of persons who can take a particular credit; necessity to obtain the assent (permission) to take a credit of the other organ of the same legal person, of the third party or of a state organ.

The act on functioning of cooperative banks and their cooperation from 7.12.2000 contains essential limitations in signing agreements of credit. According to the Art. 6 sec. 2 of the issued act the cooperative bank can conclude among others agreements of credit only with physical persons or owning a company on the area of action of the bank and with legal persons and so-called imperfect legal persons having the seat or organizational units on the area of action of the bank.

Other regulations imposing limitations in signing loan agreements are regulations of the Code of Trade Companies, referring to companies of the commercial law. These limitations concern among others: taking out a

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8 Act on 1 April 2011 on the amendment of act – the Code of trade companies and some other bills. Dz.U. 2009 nr. 104 pos. 860.
loan of amount exceeding the double of the seed capital, for concluding the agreement of credit a resolution of partners is required unless the company’s agreement constitutes differently as well as a consent of a general meeting of shareholders or a major general meeting of shareholders is required for entering into a contract by the capital company among others of credit with the member of the board of directors, a supervisory board, a review board, the proxy or the liquidator. Similar agreement but a general meeting of shareholders or a major general meeting of shareholders of the dominating company, needs entering into a contract among others of credit with a member of the board, the proxy or the liquidator of the dominating company by the dependent company. According to the Art. 17 par. 2 of KSH the lack of the resolution of the general meeting of partners results in invalidity of the concluded contract.

Not without meaning are also regulations of the Family and Carers’ Code in a loan agreement. The article 41 par. 1 of KRO predicts that the bank should get the assent of the borrower’s spouse for concluding the agreement of credit if they want to ensure possibility of fulfilling from the entire shared wealth; it results from limit responsibility from common wealth of spouses for obligations made by one of spouses. The agreement of the borrower’s spouse requires no form in principle however the bank should demand a consent in writing because otherwise it will not be able to get the clause of feasibility against the borrower’s spouse.

Before entering into a contract for credit the Bank should asses the credit rating of the future borrower. Article 70 of the Bank Law is saying that a bank can only give the credit for a person who has the credit rating. With the person which does not have the legal capacity the bank can conclude the agreement of credit in three situations:

- if they set special protection for repayment of credit;
- if they introduced - apart from securing the repayment of credit - a repair program whose realization will allow to get credit rating;
- for a new entrepreneur, the legal person or the so-called imperfect legal person.

The credit rating is being defined as ability for the repayment of credit together with interest rate in time stipulated by contract. It is a forecast of determined state of affairs which will exist in the moment of the claim for

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the return of credit, made on the basis of the information delivered by the future borrower, own data of the bank, information obtained from institutions authorised by law to collect and process the data in the case of physical persons of the Credit Information Office. In accordance with the Bank Law Act the borrower should cooperate with the bank in order to enable verification of their financial and economic situation and to present documents and the information essential to make the appraisal of credit rating when a bank requests for that. Infringing this order can result in the refusal of concluding the agreement of credit by the bank. In the agreement of credit the bank as a rule sets the security for the case of non-repayment of credit on time which is most often a result of loss of the credit rating. Making an appraisal of the credit rating banks have freedom in determining methods and methodologies of examining the credit ability as well as the scope of information on the basis of which they are making an appraisal of financial possibilities of borrowers. Mentioned already recommendations and KNF advice can be guidelines in this scope.

The process of entering into a contract for initiated credit is to be by putting forward the application to the bank by a future lender. As a rule a bank determines a template for the conclusion. Enclosing determined documents to the application is often necessary (e.g. employment statement and earnings), which are used by the bank to make credit rating of the future borrower as well as for an appraisal of the value of proposed protection. In practice only putting forward the application by the future borrower most often begins a process of negotiations between sides of the future agreement (e.g. the value and currency of credit, dates and ways of the credit repayment, kind of protection). The agreement of credit then would be concluded with the moment of agreeing on all grasped decisions covered by negotiations. It is paid attention in literature that there is a strengthened custom that it is not a moment of finishing the negotiation but the moment of signing the agreement of credit which shows the behaviour displaying the sufficient willpower to conclude the agreement10. Till the moment of signing the agreement by both sides the agreement would not be concluded in spite of agreeing on its all decisions. Detailed activities of the bank before entering into a contract are determined by internal procedure

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of the bank concerning conclusion the credit agreement. Signing the agreement can be preceded with giving the promise credit. The promise of credit as a rule is expressing the promise to conclude the agreement of credit in the future. Promises can be unconditional - obliging the bank to sign a loan agreement on parameters determined in it or conditional - then signing the agreement of credit takes place after determined conditions are met e.g. delivering appropriate documents, occurrence of facts described in the promise and the like. Agreement of credit can also be preceded by entering into a contract frame. Such character general loan agreements have which are familiar to the bank practice or also agreement for the credit line. In these agreements an upper limit of bank’s credit involvement for its contractor in determined as well as kinds of credit agreements or other agreements of the credit function (e.g. given by the bank on the order of the contractor) which will be concluded in making the general agreement as well as the procedure of concluding them and used protections.

In the Art. 69 paragraphs 2 and 3 Bank Law determines what an agreement of credit must contain. According to this regulation the agreement of credit should determine:

- amount and currency of credit;
- purpose for which credit has been given;
- rules and date of credit repayment;
- amount of credit interest charge and conditions of its change;
- way of securing the repayment of credit;
- scope of bank’s entitlements connected with the control of spending and repayment of credit;
- date and way of giving out the financial means for the borrowers;
- amount of commission if the contract involves it;
- conditions of making changes and terminating the contract.

In the case of the agreement of denominate credit or indexed to currency different than Polish currency one should point in the agreement of credit:
principles of determining the ways and dates of establishing the currency rates, on basis of which the amount of credit is being calculated, its tranches and capital-interest instalments and principles of converting the payment or repayments of credit into currency, principles of opening and running an account serving for amassing funds allocated for the credit repayment and principles of making the repayment via this account\textsuperscript{11}. A purpose for which a credit is given is an essential part of the credit agreement. Means from credit must be spent according to the purpose they had been given. However in many contemporary studies there is a doubt expressed about a need to give the purpose for which credit is being given. It is also claimed that establishing the rate of interest in a loan agreement is not necessary if the contract foresees the commission payment or the bank is obtaining the compensation from public means on account of interest, from which payment the borrower is relieved (in a case of some so-called preferential credits)\textsuperscript{12}.

For making the financial means available to the borrower the bank is taking percentages which make reward for using by a borrower the capital allocated to them. Articles 69 sec. 2 pt 5, Art. 76, 79 sec. 1, art. 111 pt 1 and 3 are regulating that in the Bank Law. Interest rate of credit is a reward for using by the borrower financial means allocated to them by a lender. The amount of interest charge can in principle be determined freely by the parties in the agreement of credit however it cannot exceed the rate of maximum interest determined in Art. 359 § 21 of KC amounting to the quadruple of charge interest foot of the NBP pawn loan. The way of determining the amount of charging interest can also be different. Bank rate of the interest can be given in figures or possible to determining in the agreement the way of its calculating it. In loan agreements a method of determining the amount of interest rate by referring it to the amount of basis rate is often used (e.g. the WIBOR or LIBOR rate) enlarged by so-called profit margin of the bank. The rate of the interest can be permanent or changeable. In the second case the change of interest rate can be a result of changing of the base rate or result from a decision of the bank, if the

\textsuperscript{11} ROGOŃ D., Legal situation of bank and borrower at the concluding the agreement for consumer credit bound with the agreement for purchase of a thing or a service, PB 2006, Nr. 6.

\textsuperscript{12} RZETELSKA A., Remarks on the notion of agreement for a bank credit, Acta Universitatis Lodzienensis Folia Iuridica 1888, Nr. 34.
bank has been authorised in the agreement of credit to change the interest rate.

The other form of rewarding the bank at loan agreement is payments and commissions. Payments and commissions which banks apply in agreements of credit are being taken for particular activities, they are put into agreement or the agreement is appealing to a list of fees and commissions applied by the bank. Payment for issuing certificates and information connected with credit are being ranked among most often taken payments (e.g. credit rating certificate, history of repayment). Charged commissions are: commission for giving credit, for processing the application, for currency change of the credit and early repayment. The law does not determine the structure of commission. Practice is showing that the amount of commission can be determined by a sum or in percentage terms, can be taken in advance or afterwards, on a one-off basis or in instalments. The agreement of credit requires a written form. Art 69 sec. of 1 of Bank Law is deciding about that. It is the reserved form for evidential purposes; the change of agreement of credit and giving notice also requires the written form and is putting rights and duties on both the lender and the borrower. The lender is obligated to pay out the amount of credit according to decisions of the agreement on a one-off basis or in tranches. Tranches e.g. can be conditioned by fulfilling determined conditions by the borrower. Giving the financial means to the borrower can be in the cash or cashless form, directly for the bank account of the borrower or to the third party. An agreement determines the detailed form of the payment. Using these financial means by the borrower always requires cooperating of the bank. Hence, together with the duty of giving the financial means to the borrower there is lender’s duty coupled with making financial calculations out on borrower’s request. Refusal of the realisation of financial orders of payment of the borrower, not-paying the credit amount in cash or not-transferring it to the determined bank account shown in the agreement make non-performance of obligation by the bank. The other duty imposed on the lender by Art. 76 of Bank Law there is a duty of informing the borrower of the change of charging interest rate if the agreement of credit

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13 WŁODARCZYK B., PUCZKOWSKI B. Klient instytucji finansowych wg regulacji MiFID, 2010, s. 270.
decides about the changeable rate of interest. The lender is also under an obligation to immediate notifying persons who appointed securing the repayment of credit about delay in the repayment of this credit. Such a notice lets the person being a debtor on account of legislated protecting credit pay the lender off and to prevent further growing of interest for the delay. In case of not notifying the persons shown in the agreement of credit about delaying the repayment of credit the lender can be responsible for a loss incurred by these persons, if after debts repayment debts they could not get the repayment of the put in amount from a debtor. The bank law demands using the credit by a borrower according to the purpose for which it has been given. If the credit is used through realization of payment instructions lodged by the borrower, the bank can control systematically the way of using credit. In other cases the bank can demand the information and documents from the borrower which will let it assess whether the credit is being used according to the purpose stipulated by contract. Art.74 of Bank Law is allowing for that. Using credit for the other purpose than determined in the agreement of credit does mean that the borrower has not fulfilled “the conditions” of the agreement and can justify termination of the credit agreement by the bank. The other duty of the borrower is a payment of the interest and commission. The borrower is obliged to pay off a loan in the way and within date determined in the agreement of credit. Depending on the content of agreement the repayment of credit can follow in instalments or on a one-off basis. The amount of instalments can be stable or decreasing. In this second case the amount of interest will be tailing off together with the repayment of next instalments. In the agreement of credit parties can assume so-called grace period in the repayment of credit. In this period the borrower isn't paying capital off but they are only paying interest rate to the lender. The lender cannot demand an earlier repayment of credit but also the borrower does not have a right for early repayment of credit, in such a case the lender can demand the commission for the early repayment. Non-payment of credit on time or in the amount stipulated by contract makes non-performance of the obligation by the borrower. The borrower is obliged for the payment of the penalty interest rate for the period of delaying in the repayment, their size is determined in the agreement or the agreement refers to announcements of the bank on the percentage rate of penalties. Each agreement of credit is concluded for the determined time. After the repayment of the debt the agreement is expiring. Expiring of the credit agreement can also be a result
of the same events as in the case of remaining agreements. It can be e.g. renewal, deduction, fulfilment of condition terminating the agreement, dissolving a contract by parties or confusion. The agreement of credit is expiring also in case of announcing the bankruptcy of the bank if till the day of declaring bankruptcy the amount of credit was not paid for the borrower. Expiring of the credit obligation follows also in case of death of the borrower. Then the duty to return of credit is accessing to the inheritance from the borrower on general principles. Heirs are responsible for a repayment of credit in the limited or unrestricted way depending on whether taking the inheritance took place with stock-account or directly. The agreement for credit can also be terminated by sides. The bank law is granting the lender authority to terminate the agreement of credit in the Art. 75, while for borrower- in the Art. 75 a sec. 2. The bank can terminate the agreement or to reduce the amount of credit in case of failing the conditions of giving a credit by the borrower or in case of the credit rating loss by the borrower. Notice, provided the parties did not determine the longer date in the agreement, amounts to 30 days and in case of threat with the borrower’s bankruptcy - 7 days. The bank law is not granting the borrower authority to terminate the agreement in case of non-performance obligation by the lender (particularly in case, when bank did not give financial means for the borrower under the terms of agreement). A borrower can terminate the agreement of credit - on general principles - in case of occurrence of the important cause. Certainly a non-performance obligation by the lender is such a cause. And if the parties set the time of credit repayment longer than a year termination of the contract by the borrower can take place with keeping the three-month period of time.

Risk of providing credit for households in Poland relating to the EU

The bank system is giving credits to the financial sector to which among others the following belong: Leasing societies, banks (interbank market), brokerage offices and to the non-financial sector which consists of households, enterprises and non-commercial institutions. Commercial and cooperative banks as well as departments of institutions providing credit are acting for the non-financial sector on the market of credit. 47 commer-
cial banks, 573 cooperative and 19 credit institutions worked at the end of 2011 in the Polish bank sector. The bank sector led its activities in 7077 bank units and 6569 branches, branch offices, registered representations employing 176665 persons at the end of 2011. A non-financial sector is a basic credit activity of the bank system and households in it. In December of 2011 this market was worth 532 021 998 474 PLN which constituted 66.5% of the non-financial sector.

Through entire 2010 credits for the non-financial sector grew at the pace of 5-6% r/r, in order to hasten in 2011 up to about 7-8%. Stabilized pace of the growth of the entire credit aggregate in recent months was accompanied by distinct differences between the rate of changes of individual categories of credits making its composition. Total transactions of households carried out as part of financial obligations at the 3rd quarter of 2011 achieved the amount of 14.6 milliard zlotys what meant the growth of 7.4% in the annual frame. Balance value of the households’ debt at the end of 3rd quarter of 2011 increased additionally by 15.2 milliard zlotys (that is of 2.7% of the state of obligations from the end of 3rd quarter of 2011) because of financial effects or re-calculations, caused by currency rate differences (at the essential PLN depreciation with account of currencies, in which the part of credit is being priced) and of different changes of the volume (fig. 1).
At the end of 3rd quarter of 2011 the total state of financial obligations of the households’ section grew by the 5.7% (29.8 milliard zlotys) in comparison with the 2nd quarter of 2011. In the annual presentation the debt grew by 14.3%, i.e. by 69.1 milliard zlotys. The state of financial obligations of households at the end of 3rd quarter of 2011 reached 554.3 milliard zlotys. Growth on the market of credits for households, visible on the basis of above financial data, found its confirmation in results of the study of the situation on the market of credits. They show an increase in demand for credits, both housing and consumer ones, noted by banks. Results of the poll show that banks conducted the policy of not-aggravating (in the net meaning) of credit criteria for consumer credits and extending the period of providing credit for households. At the same time a policy of slight aggravating of conditions and criteria was being applied, at the reduction...
in non-interest borrowing costs and taken commissions in order to support the reviving demand for house loans\textsuperscript{15}.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{Quarterly changes of financial obligations of households according to their kinds (in milliard zlotys) Source: Quarterly financial bills, the National Bank of Poland in G. Mierzejewska, A. Urbaniec, the financial Situation of the section of households at the 3rd quarter of 2011, the National Bank of Poland, Warsaw 2012.}
\end{figure}

Financial transactions on account of credit and long-term loans, achieved value of 12.7 milliard zlotys in 3rd quarter of 2011, the same like before the quarter. However an average quarterly increase in long-term credit in 2011 (10.2 milliard zlotys) suggests the curbed demand for credits in comparison with their average quarterly values appearing in the period of 2007-2010 (c 15.1 milliard zlotys).

Slowing down the demand on long-term credits given for the housing industry watched in the last years had its source both in gradual weakening

\textsuperscript{15} MIERZEJEWSKA G., URBANIEC A., Financial situation of the households’ sector in the 3rd quarter of 2011, NBP, Warsaw 2012.
the dynamics of households’ incomes as well as also in aggravating the conditions of giving long-term credit by banks, among others in the result of a numerous supervisory recommendations. Transactions on short-term credits were still under the influence of changeable tendencies, initiated at the turn of 2008/2009. After the drop by 0.7 milliard zlotys in the 2nd quarter of 2011 the credits and loans taken out by households for short periods of time (till 1 year) grew again in 3rd quarter of 2011 by the amount of 0.4 milliard zlotys. An average quarterly increase in 2011 of short-term credits took 0.3 milliard zlotys, i.e. minimally more than the year earlier and was on average over three times smaller than their medium values from 2007-2010 in the amount of 1.0 milliard zlotys\textsuperscript{16}.

Until the end of 2011 banks were supposed to implement all recommendations of amended in January of this year the Recommendation S concerning good practices in the scope of managing with credit expositions financing estates and protected by a mortgage. New regulations are providing that burdening net profits of the retail borrower with repayments of a foreign currency home loan should not exceed 42%. The banks polled by the National Bank of Poland about the influence of introducing the regulations of amended Recommendation S on the credit action predict relatively big scale of reduction in the pace of increase in home loans. Yet, the change of the KNF resolution implementing the amendment of the CRD directive into the Polish law becoming in force in June 2012 is assuming raising the scale of risk to 100% with reference to retail foreign currency exhibitions\textsuperscript{17}.

In the period preceding the collapse of the Lehman Brothers bank the pace of the rise in debt of households in Poland and other new EU membership countries was higher than on average in countries of the euro zone (fig. 3). It resulted among others from the expansion of international bank groups on markets of hosting countries and from the great demand for credit, backed up with expectations to continue the high pace of the growth in economy. In consequence the relation of credit for households to the GDP increased in 2004-2010 from about 7% up to 31% in Poland whereas in

\textsuperscript{16} There, p. 14

\textsuperscript{17} Resolution of the Committee of Financial Supervision from 7 June 2011 amending the bill nr. 76/2010 of the Committee of Financial Supervision on the scope and detailed regulations of determining the capital requirements because of particular types of risk.
the group of states of the euro zone – from about 39% up to 48%. The rise in debt of households in Poland resulted above all from the development of the home loans market. The average value relation of given home loans to the GDP increased from about 4% in 2004 to about 21% at the end of 2010\textsuperscript{18}.

![Graph showing the relation of value of households' credits to the GDP in Poland and countries of the euro zone in 2002-2011. Source: EBC in the Report on the Stability of the Financial System December 2011, the National Bank of Poland, Warsaw 2012.](image)

The similar rate for the wallet of consumer credits grew in this period to a lesser degree and it reached the level about 10%, i.e. above the average for the states of euro zone which took about 7%. From 2006 home loans are a main form of debt of households. Their share in the wallet of credits for households amounted to about 67% at the end of 2010 and compared with 2004 it approached the level of countries of the euro zone where an average value of this indicator in 2004-2010 was about 85%. The debt of Polish households is still on average much lower than in EU countries. In the group of states of the euro zone the relation of value of credits to net financial assets of households is about 23% (fig. 4). This rate for Poland grew significantly over last years however its value still was almost three times

\textsuperscript{18} Raport on stability of the financial system, December 2011., NBP, Warsaw 2012, p.41.
lower than the average for the euro zone. A relation of credit value to the income for the gross predisposition of households is also lower than in the case of states of the euro zone. At the end of 2010 this rate was about 32% in Poland in comparison with 55% in states of the euro zone\textsuperscript{19}.

The quality of the wallet of credits is not without meaning at the considerable pace of the rise in volumes of credit for households and lack of distinct increase in the net profit of this professional group in the last years. Percentage of credits with identified loss of value (NPL) for the nonfinancial sector formed on the level 8.30% at the end 2011, while for households it was 7.24% (in it: 2.34% for home loans and the 17.95% for consumer credits), and for enterprises - 10.53%. It influenced banks considerably which are concentrating mainly on giving credits to households. Their situation takes attention because of relatively high sensitivity to worsening the quality of assets and at the same time quickly deteriorating quality of the credit range in 2010-2011. At present these banks are fulfilling the capital norms with respect to commitment and qualities of the wallet, however they should raise capital in order to increase resistance to potential worsening of the quality of assets.

The other aspect of comparing credits for the section of households is relating them to the same credits given in countries of our geographical area (drawing 5). Relations of the debt of households to the GDP in Poland and in other new EU membership countries are on the similar level. It results from the similar model of the development of domestic bank sectors and occurring economic transformations. Negative effects of the financial crisis, in it slowing down the growth in the economy and limiting the flows of interbank markets as well as aggravating the credit politics of banks resulting from new domestic supervisory regulations and materialization of the credit risk caused slowing down the growth of credits\textsuperscript{20}.

\textsuperscript{19} There, p. 42.
\textsuperscript{20} Raport on stability of the financial system, December 2011, NBP, Warsaw 2012, p. 43.
Resume

Lower than in the EU debt level of Polish households and described fundamental factors can prove the potential for the further growth of the market of credits for households in Poland in the future - above all in the section of home loans. For keeping the stability of the financial system it is desired so that this growth would take place at keeping high standards of the credit politics by banks. Risk of appearing excessively fast rise in credits for households in Poland is at present low. In a long term however this risk can materialize and it requires permanent monitoring - similar to the UE.
DIPLOMATIC ASYLUM ON HUMANITARIAN GROUNDS

SAULIUS KATUOKA, SIMONA LEONAVIČIŪTĖ

Mykolas Romeris University, Faculty of Law (Lithuania)

Abstract: This article attempts to analyse an issue of diplomatic asylum granted on humanitarian grounds. Diplomatic asylum is analysed in the context of international law instruments, including universal and regional human rights documents, and relevant case law. Opinions of different authors writing on the topic are also taken into account. The notion, historical development and practical examples of diplomatic asylum are presented in order to reveal the issue and understand different attitudes towards it. The article focuses on the understanding of humanitarian grounds and the relation between diplomatic asylum and human rights. In this article, diplomatic asylum is considered to be an extraordinary means to protect human rights.

Keywords: Diplomatic asylum, humanitarian grounds, human rights, sending State, receiving State.

Introduction

Diplomatic asylum is a controversial issue: on the one hand, it is a common regional practice and a legal institution in Latin American States, but on the other, the majority of the States do not recognize it as a part of public international law. However, many examples of diplomatic asylum could be found not only in Latin American region. An incompatibility between attitudes expressed by States and their practice makes the issue of diplomatic asylum a vague one. In 2012, several embassies of different States received a bid for asylum and had to take a decision with regard to sheltered persons.

In February 2012, Carlos Perez, director of the newspaper “El Universo” convicted of libel against Ecuadorian President Rafael Correa asked for asylum in the embassy of Panama in Ecuador. The director as well as another three journalists were sentenced by the national courts of Ecuador to three years in prison and ordered a total of 40 million US$, for publishing an article in which they accused the President of crimes against humanity. Human Rights Watch evaluated this situation and concluded
that: *the criminal conviction of the President's critics is a major setback for free speech in Ecuador.*\(^1\) Mr. Carlos Perez was granted diplomatic asylum as a political offender.\(^2\) In May 2012, a blind dissident, Chen Guangcheng, campaigning against forced abortions under China's one-child policy received protection in the US embassy in China and was later allowed to leave for New York.\(^3\) At the moment of writing the article, the world’s attention is focused on the asylum of “WikiLeaks” founder Julian Assange. “WikiLeaks” is online organisation publishing secret information from anonymous sources; it leaked sensitive diplomatic cables involving various countries.\(^4\) Mr. Assange, an Australian editor, activist, publisher and journalist became internationally known for his work with “WikiLeaks”, which published a number of American secret documents. In 2011, Julian Assange was detained in the UK after Sweden issued an international arrest warrant over allegations of sexual assault.\(^5\) Mr. Assange sought asylum in the Ecuadorean Embassy in London trying to avoid extradition to Sweden. Ecuador granted diplomatic asylum to Julian Assange, and the decision was based on the probability that Mr. Assange could face “political persecution” or be sent to the United States to face the death penalty.\(^6\)

Three cases occurred in the States which maintain different attitudes towards diplomatic asylum. It shows that no single State is prevented from

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persons seeking asylum in embassies or consulates. In all of these cases fugitives saw diplomatic asylum as a way to be protected. Diplomats and International law specialist renewed discussion whether diplomatic asylum is a historic relic or is it still a potential to protect individuals who find themselves in circumstances dangerous to their lives or safety.

An issue of diplomatic asylum is not a newly raised phenomenon. The majority of authors writing on the topic are scholars from the United States and from Latin America. They represent different attitudes dominating in the doctrine regarding diplomatic asylum in public international law and in Latin America. The article refers to the works of Alona E. Evans, S. Prakash Sinha, Anthea J. Jeffery, Sussane Riveles, Anthony Aust, Juergen Kleiner, Manuel R. García-Mora, Peter Porcino, F. Galindo Vélez and others. However, a few is written regarding diplomatic asylum on humanitarian grounds even if it could be a basis to grant diplomatic asylum in countries which do not recognize it. In this article, diplomatic asylum is analysed from the perspective of human rights. Theoretically, it is considered to be an extraordinary means to protect essential rights of a person who finds himself/herself in a desperate situation and where a bid for asylum in an embassy is a way to be protected.

Thus, in order to analyse diplomatic asylum on humanitarian grounds, the authors distinguish the following objectives: 1) to determine the issue of diplomatic asylum in the context of public international law; 2) to find out the grounds granting diplomatic asylum; and 3) to discuss the theoretical possibility of diplomatic asylum as an alternative to protect essential rights of a person. The methods used by the authors are the linguistic, the comparative, the analysis and the method of generalization.

Notion and historical development of diplomatic asylum

In legal literature the category of asylum is sometimes divided into two types: a) territorial and b) non-territorial asylum.7 F. Galindo Vélez, as

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well as Maria Jose y Tella, stress that in a Latin American system, asylum has two types: a) territorial asylum; and b) diplomatic or political asylum as it is defined in certain legal instruments.\(^8\) The UN General Assembly report, Question of Diplomatic Asylum: Report of the Secretary of 1975, explained what the differences between the two types of asylum are: a) “diplomatic asylum”, in the broad sense, is used to denote asylum granted by a State outside its territory and b) “territorial asylum”, is asylum granted to individuals by the State within its borders.\(^9\)

Territorial asylum is generally recognized in public international law. It is regulated by the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and by regional treaties. Diplomatic asylum is covered only by conventions concluded in Latin America. The Convention on Diplomatic Asylum concluded at Caracas on 28 March 1954, Art. I states that \textit{asylum can be granted in legations, war vessels, and military camps or aircrafts, to persons being sought for political reasons or for political offences}.\(^10\) According to the Havana Convention on Asylum concluded on 20 February 1928, \textit{diplomatic asylum is a provisional measure for the temporary protection of political offenders}.\(^11\) Thus, one may review the term “political asylum” as a synonym for “diplomatic asylum”.

There is no uniform understanding of the issue of diplomatic asylum. Different authors propose different notions,\(^12\) however one could distinguish


\(^{10}\) \textit{Convention on Diplomatic Asylum}, OAS Treaty Series No. 18, Art. 1.

\(^{11}\) Convención sobre el Derecho de Asilo (La Habana, 1928), No. 40.

similar elements and define diplomatic asylum as: a) an internal asylum; b) granted in diplomatic missions or consulates; c) in the territory of the Receiving State; d) by the head of mission of the Sending State; e) for fugitives from the Receiving State; f) being sought mainly for political reasons. In this article, the term “diplomatic asylum”, shall be used in the narrow sense. Thus, analyzing issues of asylum granted in premises of a Sending State.

For a long time diplomatic asylum was religious rather than legal. A fugitive could seek refuge in sacred places: the residences of such envoys had the same right to grant asylum which was traditionally enjoyed, in Antiquity, in temples of pagan deities, in the Middle Ages, in Christian churches and monasteries. An asylum provided a resort for persons accused, justly or unjustly, of common crimes.

Development of diplomatic asylum is related with the beginning of permanent diplomacy and the opening of the first permanent diplomatic missions. The first permanent ambassadors were sent by the Republic of Venice in XV century. Later, in 1648, the Peace treaty of Westphalia established permanent institution of embassies. It was felt necessary to add inviolability of the ambassador's dwelling to the personal inviolability that

30 (1985): diplomatic asylum is asylum given within the territory of the State from which refuge is sought and may be given in embassies and consulates, or on warships and merchant vessels in the ports of the State from which the fugitive seeks his escape. Liza Schuster, Why do States Grant Asylum? Vol. 18, No. 1 Politics 11-16 (February 1998): diplomatic asylum is the protection granted by the representatives of one power to a fugitive, using the immunity granted to them while in the territory of a foreign power. Aust, A. Handbook of International Law, 2nd ed., Cambridge University Press, New York, 2010, p. 170: diplomatic asylum is the giving of protection by diplomatic mission to a person fleeing from the authorities of the host State (not just from a person or a crowd). Kleiner, J. Diplomatic Practice: Between Tradition and Innovation, 1st ed., World Scientific Publishing Co., 2009, p. 167: diplomatic asylum denotes a refuge granted to a political offender or a person qualifying as a political persecutee in a diplomatic or consular mission.


had been traditionally enjoyed in order to remove him from the influence of the receiving State. The inviolability of an ambassador dwelling guaranteed protection from entrance of officials of receiving States. At the time, diplomatic asylum was granted to common criminals, not to political offenders. Political offenders were seen as the highest risk for a State. The exclusion of political offenders from diplomatic asylum prevailed until the XIX century.

From the XIX century onwards, diplomatic asylum almost ceased to be granted in Europe except during political disturbances. In these cases, which were found in Europe since the first quarter of the XIX century, the claim to grant asylum assumed a new aspect: asylum for common offenders was no longer heard of; it was for political refugees that it was claimed and tolerated. This approach towards diplomatic asylum remains until today and may be seen in Latin American Conventions.

The authors believe that the codification of diplomatic asylum (in States where diplomatic asylum is considered a legal institution) and the grant of diplomatic asylum on humanitarian grounds (in States where diplomatic asylum is not recognized as a legal institution) could be features attributable to diplomatic asylum as an issue of today. In Europe, asylum evolved to territorial asylum, however, in Latin America, territorial asylum as well as diplomatic asylum evolved in parallel. In Latin America, the two kinds of asylum are two aspects of one common institution of asylum. During the XIX century, the institution of diplomatic asylum gradually reappeared in Latin America and so became a characteristic feature of Latin American

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15 Question of Diplomatic Asylum: Report of the Secretary-General, (Part II), supra note 9, par. 2.
16 Ibid., par. 10.
Latin American States often defended diplomatic asylum as a principle of law peculiar to their countries. In Latin America diplomatic asylum is a common regional practice.

**Different attitudes towards diplomatic asylum**

Diplomatic asylum is a controversial issue in public international law because two different positions exist: a) majority of States do not consider it as a part of public international law but in rare cases grant it on humanitarian grounds, b) in Latin American region it is codified and it is considered a part of regional international law. This law derives from conventions concluded among the Latin American States. The authors are going to look through different legal sources, mostly related with diplomatic asylum, in order to reveal these two different approaches.

Due to the fact that diplomatic asylum is coherent with immunities of diplomatic or consular missions, especially with inviolability of the premises, one must mention the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations. These two documents maintain the position that diplomatic asylum is not a part of public international law.

Art. 22 (1) of Vienna Convention on Diplomatic Relations and Art. 31 of Vienna Convention on Consular Relations provide inviolability of premises. Inviolability of the premises is crucial in the de facto exercise of diplomatic asylum. Even though consular and diplomatic inviolabilities of premises are not of the same extent, they mean that the receiving State’s officers cannot enter the premises. Thus, they cannot enter and arrest or

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19 Stanislaw Nahlik, E., _supra_ note 13, p. 280.
24 Anthea J. Jeferry, _supra_ note 12.
detain a fugitive who is under protection of the sending State. The preambles of both Conventions provide that the purpose of immunities and privileges is to ensure the functions of missions. Even though the lists of functions are not terminative (Art. 3 (1) of Diplomatic Convention and Art. 5 of Consular Convention), granting diplomatic asylum is not provided as a function.

Moreover, Art. 41 (1) of Vienna Convention on Diplomatic Relations and Art. 55 of Vienna Convention on Consular Relations establish the principle of non-interference into internal affairs of the State. The action of granting asylum in the premises of sending State could be considered as interference into internal affairs of the receiving State. Thus, when diplomatic asylum is sought, there is a need to consider both: the inviolability of premises on the one hand, and non-interference into internal affairs of the receiving State on the other.

The similar dilemma was faced in 1950. The dispute arose between Colombia and Peru regarding diplomatic asylum granted in the Colombian embassy to the Peruvian Victor Raúl Haya de la Torre, head of a political party, who was accused for the instigation and direction of the rebellion. Peruvian Government considered Haya de la Torre as a common criminal, while the Colombian Government qualified him as a political offender. The dispute was brought to the International Court of Justice. The Asylum case is the only one case regarding diplomatic asylum analyzed by the International Court of Justice.

The International Court of Justice analysed certain aspects of diplomatic asylum in the Asylum case. Perhaps, the most important conclusion was that a decision to grant diplomatic asylum involves derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.\(^\text{25}\) Despite the ICJ ruling, Haya de la Torre remained in the embassy of Colombia for five years. During that time,

authorities of Peru did not enter the embassy respecting the inviolability of the diplomatic premises.

The position expressed by the Court is the dominant position in public international law and it is maintained by many States. The decision in the Asylum case was widely criticized especially by Latin American lawyers and legal writers. The decision was felt to be a denial of the essential character of diplomatic asylum, a customary right in these countries, and a subordination of Latin-American international law and practice to the European concepts of international law on this matter.\(^{26}\)

As previously mentioned, most of the Latin American countries recognize diplomatic asylum as a legal institution. The practice of allowing asylum in embassies in this region is one of the foremost examples of regional international law. In Latin American region diplomatic asylum is regulated by the following treaties: 1) Treaty on International Penal Law signed in Montevideo 1889;\(^{27}\) 2) Convention on Asylum signed in Havana 1928;\(^{28}\) 3) Convention on Political Asylum signed in Montevideo 1933;\(^{29}\) 4) Treaty on Political Asylum and Refuge signed in Montevideo 1939;\(^{30}\) and 5) Convention on Diplomatic Asylum signed in Caracas in 1954.\(^{31}\) The last Convention was concluded after the Asylum case in the ICJ. This Convention is a leading document on the issue of diplomatic asylum nowadays. The Caracas Convention can be considered the most authoritative of the above mentioned instruments.\(^{32}\) Thus, the most precise regulation on diplomatic asylum could be found in Latin American Conventions, especially the

\(^{26}\) J. L. F. Van Essen, *Some Reflections on the Judgments of the International Court of Justice in the Asylum and Haya de la Torre Cases*, Vol. 1 No. 4 The International and Comparative Law Quarterly 533-539 (October 1952).


\(^{28}\) *Convención sobre el Derecho de Asilo*, (La Habana, 1928).

\(^{29}\) *Convención sobre Asilo Político*, (Montevideo 1933), OEA, No. 34.

\(^{30}\) Americas - Miscellaneous, *Treaty on Asylum and Political Refuge*, 4 August 1939.

\(^{31}\) *Convention on Diplomatic Asylum*, supra note 10.

\(^{32}\) Stanislaw Nahlik, E., *supra* note 13, p. 284
Caracas Convention, which lists rights and obligations of the sending and receiving States.

**Humanitarian grounds to grant diplomatic asylum**

In 1974 the United Nations General Assembly received a question related to a need to codify the issue of diplomatic asylum. The General Assembly adopted resolution 3321 (XXIX) and invited Member States to express their views. Due to various approaches and opinions expressed by countries, the question of codification was not tackled. However, a number of States expressed their position on diplomatic asylum and stated that it could be granted on humanitarian grounds. Thus, what are humanitarian grounds?

Generally, humanitarian reasons could refer to events or situations that cause or involve widespread human suffering, especially one that requires the large-scale provision of aid.

Humanitarian considerations were named as principle by International Court of Justice in Corfu Channel case: (...) certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war. The elementary consideration of humanity mentioned in the Corfu Channel Case does not differ from the principle of humanity. The ICJ named a source of public international

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Saulius Katuoka, Simona Leonavičiūtė, *Diplomatic Asylum on Humanitarian Grounds*

law, with respect to the *Corfu Channel case*. The ICJ in the *Asylum case* considered that *in principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a Government might take or attempt to take against its political opponents.*

The UN General Assembly Report on the Question of Diplomatic Asylum includes positions of various States regarding diplomatic asylum. Certain States named special circumstances in which diplomatic asylum could be granted on humanitarian grounds: 1) immediate, serious danger, 2) State persecution incompatible with minimum standards of human rights (position of Austria), 3) when a person is exposed to an imminent physical threat (position of Denmark), 4) inhuman treatment or punishment (positions of Sweden, Norway), 5) where the life, liberty or physical integrity are threatened by violence against which local authorities are unable or unwilling to offer protection (position of Canada), 6) urgent cases (position of Jamaica), 7) imminent personal danger of persecution (position of Liberia), 8) an imminent danger to life (position of Pakistan).*

Beside the positions addressed by States, many authors consider that diplomatic asylum finds its justification on humanitarian grounds. In Oppenheim's International Law it is written: *It is sometimes suggested that there is, an exception, a right to grant asylum on grounds of urgent and compelling reasons of humanity, usually involving the refugee's life being in imminent jeopardy from arbitrary action.* Myint Zan asks: *are the*
premises of an embassy a “suitable” or “proper” place for asylum or refugee seekers to seek protection? A pragmatic or functional answer would be only if the asylum-seekers are very desperate and have really genuine fears of persecution.\(^{40}\) Anthea J. Jeferry is of the opinion that asylum for purely humanitarian reasons could be granted to any person whose life, liberty or person is threatened by violence emanating from the local authorities or against which they are obviously powerless to protect him, or even which they tolerate or provoke’ or ‘when such threat is the result of civil strife.\(^{41}\) Alona E. Evans thinks that motives of humanitarianism may well inspire the grant of diplomatic asylum where violence marks changes in Government and no quarter is allowed to dissenters. In the face of these conditions, even countries such as the United States, which refuse to condone diplomatic asylum as a legal principle, will permit the use of an embassy as a temporary refuge for political offenders.\(^{42}\)

**Examples of diplomatic asylum granted on humanitarian grounds**

The authors shall present an overview of certain diplomatic asylum examples where the asylum was based on humanitarian grounds. All examples mentioned occurred, in States that do not recognize diplomatic asylum as a part of international law.

It could be said that the United States represents all the States that do not recognize diplomatic asylum. However, the United States have faced a bid for asylum in their embassies on several occasions. One of the most known examples is the one of Cardinal Mindszenty, who was given diplomatic asylum in the embassy of United States, in Hungary in 1956. After the collapse of the Hungarian people's revolution against the Soviet-backed Government, the outspoken anti-communist Mindszenty, who had been freed after eight years of incarceration, was threatened with arrest


\(^{41}\) Anthea J. Jeferry, *supra* note 12.

\(^{42}\) Alona E. Evans, *supra* note 14, p. 157
and detention when the Soviet Union gained military control over the Hungarian situation. The Cardinal Mindszenty, Primate of Hungary, found refuge in the American legation in Budapest where he stayed for about 15 years. This is not the sole case were the USA was involved. The newest bid for asylum in a US embassy was by a blind Chinese dissident, Chen Guangcheng, as aforementioned in this article.

There are a number of examples when diplomatic asylum was granted in Canadian embassies on humanitarian grounds: granting of asylum to the Belgian Embassy staff members in Cairo in 1961, when the embassy building was set on fire; in 1968 individuals of various nationalities, but mostly Czechoslovak, were given temporary asylum at the Canadian Embassy in Prague due to genuine fears of the concentration of foreign armed forces in the city; in 1973, temporary refuge was given to a number of individuals in Santiago, in Chile; during the 1979 occupation of the U.S. Embassy in Tehran by student militants, Canadian diplomats sheltered six members of the U.S. Embassy. In 2004, 44 persons from North Korea climbed over a wall into the Canadian Embassy in Beijing. It is believed to be one of the largest defection attempts by North Koreans hiding in China.

Diplomatic asylum helped to safe thousands of lives during the Spanish Civil War in 1936-1939. Around 10,000 to 15,000 persons were sheltered by States, inciting humanitarian reasons. The Latin American States were leaders in granting asylum. However, other States, such as Belgium, Norway, the Netherlands, Poland, Rumania and Turkey, were also included.

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47 Sinha Prakash, S., supra note 7, p. 33
In 1990, around 6000 Albanians stormed Western embassies seeking for asylum. The embassies of Greece, Turkey, Poland and others were involved.

Beside the recent cases, there were a number of attempts to seek protection in the missions of Sending states during the last decade. Diplomatic asylum was sought by Northern Koreans in various embassies and consulates: in 2009, nine North Koreans entered Denmark's embassy in Vietnam; in 2002, two North Koreans sought asylum at the U.S. Embassy in Beijing, in China; in 2002, fifteen North Koreans sought asylum in the German embassy, in China; twenty-five Northern Koreans sought asylum in the embassy of Spain, in China as well.

**Diplomatic asylum in the context of human rights**

The examples mentioned above show that the grant of this kind of protection saved thousands of lives. A person faced with immediate danger is unable to take advantage of the protection afforded by territorial asylum because he has no access to the territory of a foreign State. García-Mora Manuel R. thinks that when a diplomatic representative grants asylum to a

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political offender, the diplomatic representative is not obstructing the application of the laws of the country to which he is accredited, but he is merely offering the political offender the protection of International Law. This idea could be applied not only for political offenders, but for persons facing risk of being deprived of lives or safety too. Diplomatic asylum on humanitarian grounds could be an extraordinary means to protect persons in situations where no other alternative is possible. Diplomatic asylum could save important values such as human life or safety protected by international law.

The arguments for this kind of asylum could be based on the principle of humanity acknowledged by the International Court of Justice in Corfu Channel case and a concern for human rights.

The UN Charter, Art. 3 (3) provides promotion and encourages respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Art. 3 Universal Declaration of Human Rights provides: everyone has the right to life, liberty and security of person. The right of life is of paramount importance in human rights law. A person who finds himself/herself in a situation dangerous to his/her life, for example, in riots and mobs, and have no other way to avoid danger, could be granted protection in embassies or consulates. Diplomatic asylum is a valuable means of preventing useless death.

The UN Declaration, Art. 14 (1) provides that everyone has the right to seek and to enjoy in other countries asylum from persecution. Manuel R.

56 Corfu Channel Case (United Kingdom v. Albania), supra note 35.
García Mora writes: it can be rightly presumed that if a person is to seek and to enjoy in other countries asylum from persecution, it must be under the protection of the foreign State to which such person resorts. Under this logical assumption, it would not make any difference whether reference is made to territorial or diplomatic asylum. Moreover, diplomatic asylum could be a pre-phase before territorial asylum is possible: diplomatic asylum may be a means to enjoy territorial asylum provided the right to qualify the offence and the right to demand a safe-conduct for the departure of the refugee are recognized as appertaining to the State that grants asylum. In such a case, it would be extremely difficult to establish a practical difference between the two. Practical examples show that protection granted in embassies can later become a territorial asylum.

In 2009, Indigenous leader and former president of Peru’s Interethnic Association for the Development of Peru’s Jungle Alberto Pizango sought refuge in the Nicaraguan Embassy in Lima. Pizango was charged with sedition, conspiracy and rebellion for leading protests over plans to open large swathes of the Amazon jungle to oil drilling and other large development projects. After the safe-conduct from Peru, Pizango was subsequently granted asylum in Nicaragua. In 2006, three North Korean defectors who had entered the U.S. consulate in Shenyang, China were allowed to proceed to the United States. The State granting asylum in embassy or consulate is not obliged to assure the person territorial asylum. However, in cases when the State grants diplomatic asylum, it has a right to grant the territorial one. In certain cases, if diplomatic asylum is the initial step for the territorial asylum, Art. 14 (1) could be applied.

Three principle regional human rights instruments such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights provide

60 Manuel R. García-Mora, supra note 55, p. 956.
61 Ibid, p. 950.
and protect a right to life, liberty security. With respect to provisions on asylum, the African Charter on Human and Peoples' Rights provides in Art. 12 (3), that every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. 64 The American Declaration of the Rights and Duties of Man says in Art. 27, that every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.65 The ECHR does not contain any provision on asylum. However, Art. 1 which provides obligation to respect human rights says: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. In Section I, the European Convention on Human Rights provides right to life, prohibition of torture, right to liberty and security and other rights.66

In “B” & Others v. Secretary of State for the Foreign & Commonwealth Office English Court of Appeal gave ruling on diplomatic asylum: where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. (...) The receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending State to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the European Convention on Human Rights may well impose a duty on a Contracting State to afford diplomatic asylum.67


65 American Declaration of the Rights and Duties of Man (adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948).

Another aspect that we would like to mention is diplomatic asylum in the context of the principle of *non-refoulement* which is a customary international law according to the United Nations High Commissioner for Refugees. The iteration of the principle in a human rights context makes it applicable to all persons and not only to refugees or asylum seekers. The principle of *non-refoulement* is defined in Art.33 (1) of Refugee Convention: no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Legal writers are discussing the scope of this principle. Two different understandings, the strict and the broad, could be distinguished. The strict sense of the principle of *non-refoulement* is the dominant one: the *non-refoulement* can be applied only to refugees outside their country of origin. According to the broad sense, States are responsible for conduct in relation to any refugee subject to or within their jurisdiction. An embassy would be a place where a jurisdiction of sending State exists. According to the broad understanding, the principle of *non-refoulement* could be applied for persons being in the jurisdiction of a State. A person could not be returned outside the jurisdiction (the embassy) if his/her life or freedom is threatened. Lauterpacht and Bethlehem notes: (...) the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum

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Diplomatic Asylum on Humanitarian Grounds

seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State...(...), in such circumstances, the protecting State will be subject to the prohibition of refoulement to territory where the person concerned would be at risk.71 Susanne Riveles writes: Inherent in non refoulement is the idea of a temporary stay until safe conduct to a third country can be worked out. This idea is crucial to diplomatic asylum.72

After all these considerations, we conclude that diplomatic asylum granted on humanitarian grounds is not contrary to human rights instruments. It could be a due means to protect individual from the danger life or freedom, because the aim of diplomatic asylum (to protect lives or safety of persons) is in accordance with universal and regional international law instruments. All the examples mentioned in the article show that people being in desperate situations considered diplomatic asylum as a way to be saved. Diplomatic asylum having a long history and deep traditions in Latin American region should not be forgotten by the rest of the countries. It still has a potential to protect human rights, especially in situations when no other alternative is possible.

Conclusions

Diplomatic asylum could be defined as an internal asylum granted in diplomatic missions or consulates in the territory of the Receiving State by the head of the mission of the Sending State for fugitives being sought mainly for political reasons.

Evolution of this kind of asylum could be divided into four stages with specific features: 1) diplomatic asylum as a religious asylum, when criminal offenders sought asylum in sacred places; 2) diplomatic asylum after


72 Sussane Riveles, supra note 43.
establishment of first permanent missions, when common offender sought asylum in places of diplomatic envoys; 3) diplomatic asylum as protection in diplomatic premises only for political offenders; 4) diplomatic asylum as codified legal institution or extraordinary means of protection on humanitarian grounds.

Two different attitudes toward diplomatic asylum exist. Majority of States do not recognize it as a part of public international law basing on Vienna Conventions on Diplomatic Relation or Vienna Convention on Consular Relations as well as on the case law (the ICJ: Asylum case). According to understanding dominant in Latin American States, diplomatic asylum is a legal institution codified by the treaties, thus, acknowledged in regional international law.

Practical examples of diplomatic asylum can be found not only in Latin American region, but even in States that do not recognise it as a part of international law. A number of examples show that, in general, States tolerate granting diplomatic asylum on humanitarian grounds. In every case when diplomatic asylum is granted to a person in danger to be deprived of life or safety, the principle of humanity, acknowledged by the ICJ, is applied in practice.

Diplomatic asylum could be granted on humanitarian grounds on a case – by – basis where the life, liberty or physical integrity are threatened by violence and a person is in urgent need of protection. Practical examples show that these situations might arise during wars, political instability and changes of Governments or in situation when local authorities are not able to maintain an order (for ex., during mobs and riots). Diplomatic asylum could be an extraordinary means to protect human rights when no other alternative is possible.

Diplomatic asylum is in accordance with universal and regional human rights instruments, because it has an aim to safe persons’ life or liberty protected by international law. Diplomatic asylum granted on humanitarian reasons would prevent people from useless deaths and loss of freedom.
Abstract: Contemporary mainstream legal doctrine seems to widely agree that the origin of copyright and author's rights is closely connected to Johannes Gutenberg's invention of mechanical printing in the first half of the 15th century. The Statute of Anne, enacted in 1710, is usually cited as the first "Copyright Act" in a modern sense. However, there is also a school of thought suggesting that the roots of legal protection of authorship could be traced as far back as ancient Rome. This argument is based, most importantly, on an analysis of historical sources dealing with text written on paper belonging to somebody else and the question discussed by roman lawyers of who should be regarded as the owner of the resulting manuscript.

This paper takes a critical look at both of these approaches - asserting the roots of copyright with the printing press and in particular, its first manifestation in the Statute of Anne as well as attempting to identify at least some embryonic form thereof in Roman antiquity.

It is argued that the core question of copyright and author's rights was never mainly to whom such a right is supposed to be assigned, but much more and in the first place in what such a right actually should consist. It is, in other words, not about a property right in the classical, let alone material sense, but about where exactly the lines are to be drawn that define said right. We conclude that this problem was not solved before Immanuel Kant and Johann Gottlieb Fichte, when mechanical printing already had become a widespread technology and bookselling a viable industry across Europe and that the philosophical and political thought of the Age of Enlightenment was essential in the creation of copyright and author's rights.
Geschichte der Autorenrechte: Unterschiedliche Ansätze


Andererseits wollen einige Autoren die Wurzeln des Urheberrechts noch viel früher, und zwar bereits in der römischen Antike, sehen. Zum Teil werden hier schon die Anfänge eines Urheberpersönlichkeitsrechts bejaht

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4 Andererseits widmete in jüngerer Zeit E. Höffner mit dem zweibändigen Opus Geschichte und Wesen des Urheberrechts, Band I und II, München, 2010/11, diesem Zeitraum eine detailreiche und über weite Strecken bahnbrechende Untersuchung, auf die im folgenden noch mehrfach zu verweisen sein wird.

5 Für eine Darstellung der dazu geäußerten Hypothesen vgl. U. Bartocci, Aspetti giuridici dell’attività letteraria in Roma Antica. Il complesso percorso verso il riconoscimento dei diritti degli autori, Torino 2009, 93 ff. m.w.N.

 andere Autoren postulieren einen Rechtsschutz ökonomischer Interessen der Urheber\textsuperscript{7}. Relativierend hat in jüngerer Zeit Ugo Bartocci versucht, „un primo embrionale orientamento nella direzione che porterà, attraverso una secolare elaborazione dottrinaria e passando per la concettualizzazione, elaborata nell’età moderna, della proprietà letteraria, alla definizione di quello che verrà poi comunemente indicato in forma sintetica come diritto di autore“\textsuperscript{8} zu identifizieren.

Wenn wir davon ausgehen, dass mindestens zwei Elemente nötig sind, um von einem Urheberrecht im heutigen Sinne sprechen zu können\textsuperscript{9}, nämlich erstens die grundlegende Abstraktion des unkörperlichen Werks, der geistigen Schöpfung (z.B. ein Gedicht oder Roman) von seinem materiellem Träger (das Papier, auf dem es gedruckt wird) sowie zweitens, die rechtliche Anerkennung einer Verbindung dieses Werkes mit seinem Schöpfer, dem Urheber, dann verdienen diese Überlegungen eine durchaus kritische Betrachtung.

**Litterae chartis cedunt**

Die Theorie von Bartocci\textsuperscript{10} basiert auf einer neuen Lesart eines der wichtigsten juristischen Zeugnisse zum Thema *scriptura*, und zwar Gai. 2.77:

\[
\text{Gai 2.77: Eadem ratione probatum est, quod in chartulis sive membranis meis aliquid scripserit, licet aureis litteris, meum esse, quia litterae chartulis sive membranis cedunt.}
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\textsuperscript{7} Dazu nochmals U. Bartocci, *Aspetti giuridici dell’attività letteraria* cit., S. 110 ff.

\textsuperscript{8} U. Bartocci, *Aspetti giuridici dell’attività letteraria* cit., S. 233.

\textsuperscript{9} Ausführlich M. Rehbinder, *Urheberrecht* cit., S. 23 ff.

Bartocci vertritt die Auffassung, Gaius würde im vorliegenden Text den Fall untersuchen, dass jemand, der Eigentümer der zu beschreibenden Unterlage und gleichzeitig Autor des darauf zu schreibenden Werkes sei, letzteres einem scriba diktieren würde. Aufgrund dieses Textverständnisses meint Bartocci nun, der Grundsatz, die Buchstaben würden dem Papier folgen, sei die Antwort „ad un’esigenza concreta: la necessità cioè di poter attribuire la proprietà di un testo a persona diversa dallo scrivente qualora questi non ne fosse l’autore“\textsuperscript{11}. Da der Schutz eines Verfassers von einem Schriftwerk als res incorporalis\textsuperscript{12} in Rom undenkbar gewesen sei, schließt er, „il rimedio che il sistema giuridico romano trovò per proteggere l’autore, non poté che essere inquadrato in uno dei mezzi di acquisto della proprietà già previsti per le res corporales\textsuperscript{13}. Weil beim Verfassen von Literaturwerken so häufig auf scribae zurückgegriffen worden sei, wäre dieser Schutz über die Regeln zur accessio verwirklicht worden.

Um seine These zu stützen, untersucht Bartocci in der Folge die zum gaianischen Text korrespondierende Stelle aus den Res cottidianae:

\begin{quote}
Gai 2 Rer. cott. D. 41.1.9.1: Litterae quoque licet aureae sint perinde chartis membranique cedunt, ac solo cedere solent ea quae aedificantur aut seruntur. Ideoque si in chartis membranisve tuis carmen vel historiam vel orationem scripsero, huius corporis non ego, sed tu dominus esse intelleges.
\end{quote}

\textsuperscript{11} U. Bartocci, Aspetti giuridici dell’attività letteraria cit., S. 20.
\textsuperscript{13} U. Bartocci, Aspetti giuridici dell’attività letteraria cit., S. 129 Fn. 129.


Obgleich diese These zugegebenemaßen verlockend ist, erscheinen die zu ihrer Untermauerung vorgebrachten Elemente, wie zum Teil auch schon in der Literatur dargelegt wurde, doch zu schwach um sie als gesichert anzunehmen\(^\text{14}\). Abgesehen davon, dass keineswegs klar ist, in welchem Ausmaß die Arbeit nicht versklavter *scribae* zur Niederschrift von Texten in Anspruch genommen wurde\(^\text{15}\), und dass darüber hinaus auch der von

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\(^\text{15}\) Dieser Einwand wurde bereits vertieft von G. Santucci, *Diritto romano e diritti europei* cit., S. 35 Fn. 79; Id., *Diritti dell’autore* cit., 145 f.

Weniger entscheidend dagegen die auf Paul. 21 *ad ed.* D. 6.1.23.3 (*Sed et id, quod in charta mea scribitur aut in tabula pingitur; statim meum fit: licet de pictura quidam contra sensorint propter pretium picturae: sed necesse est ei rei cedi, quod sine illa esse non potest*) gestützte Anmerkung von Santucci. Er meint nämlich (*Diritto romano e diritti europei* cit., S. 36 und Fn. 82; Id., *Diritti d’autore* cit., S. 144 und Fn. 4) bezüglich dieser Stelle „si giustifica l’acquisto della *scriptura* al proprietario della *charta* per il semplice ed incontestabile principio logico che la scrittura presupponne necessariamente il supporto materiale e, non potendo venire ad esistenza senza di esso, ad esso deve essere subordinato“. Dem ist allerdings entgegenzuhalten, dass die Erklärung von Paulus, obwohl explizit nur von Malerei die Rede ist, auch auf

\(^\text{16}\) Auch diese Kritik wurde bereits von G. Santucci, *Diritto romano e diritti europei* cit., S. 35 Fn. 79; Isp., *Diritti dell’autore* cit., S. 144, entwickelt, der betont wie „dalla maggior parte delle testimonianze letterarie prodotte a sostegno di questa interpretazione, si può argomentare e contrariis, in quanto in non pochi casi si tratta di situazioni in cui gli autori ricorrono alla dettatura in ragione di un impedimento fisico o materiale“. Zurückkommend auf die auch von Bartocci ausführlich untersuchte Ulp. 24 *ad. ed.* D. 10.4.3.14 (vgl. *infra* Fn. 26) legt er dann dar, dass es um eine „vicenda affatto peculiare che certamente non può essere assunta come modello di una prassi“ gehe (145).


\(^\text{18}\) Gai. 2.73: *Præterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit. 74. Mulitoque magis id accidit et in planta, quam quis in solo nostro*
Fallen stellt Gaius nun den des Schreibens zur Seite, wobei er das Papier dem Boden gleichstellt und auf diese Weise schlüssig zum Obsiegen des Eigentümers über den Schreibenden kommt.

Andererseits ist der gesamte Abschnitt über die *accessio* so abgefasst, dass der Eigentümer derjenigen Sache, welcher die jeweils andere zufällt, in der ersten Person Singular bezeichnet ist, der jeweils andere dagegen in der dritten Person Singular. In Gai 2.73 ist „ich“ also der Grundeigentümer auf dessen Grundstück gebaut wird, in 2.74 der, auf dessen Grund gepflanzt wird und in 2.75 der *dominus* auf dessen Grund gesät wird. Auf diese Beispiele folgt direkt jenes des Schreibens, es scheint mithin also völlig selbstverständlich, dass hier im Einklang mit den zuvor erwähnten Beispielen Gaius, der ja die Unterlage, Papyrus oder Pergament, hier analog zum Grundstück behandelt, den Eigentümer ersterer wiederum in der ersten Person und denjenigen, der die Schrift darauf aufbringt, in der dritten Person bezeichnet. Im darauf folgendem Beispiel der *pictura* finden wir wiederum den Maler in der dritten und den Eigentümer der *tabula* in der ersten Person Singular:

Gai. 2.78: *sed si in tabula mea aliquis pinixerit veluti imaginem, contra probatur; magis enim dicitur tabulam picturae cedere.*

Die Bezeichnung des *dominus tabulae* in der ersten Person Singular und die Formulierung *is qui pinixerit* in der dritten Person führt also die

Vgl. auch G. Santucci, *Diritto romano e diritti europei* cit., S. 35 f.


Während im folgenden Teil das „ich“ unverändert auf den Eigentümer des beschriebenen Untergrunds bezogen bleibt, wird der Schreibende nun in der zweiten Person bezeichnet (*…certe secundum hanc regulam si me possidente*)
anfangs eingeschlagene Aufteilung einmal mehr konsequent weiter. Dass aber der Maler auch der Schöpfer des Gemäldes ist, steht zweifelsfrei fest und obwohl hier, im Gegensatz zu dem beim Beispiel des Schreibens festgestelltem, der Eigentümer des Untergrundes unterliegt, denkt Gaius offenbar nicht daran, den bisher durchgehaltenen grammatikalischen Aufbau abzuändern.22


Obzwar es zutrifft, dass in den Res cottidianae für bestimmte Probleme Lösungen zu finden sind, die sich von jenen der institutiones

petas imaginem tuam esse, nec solvas pretium tabulae, poteris per exceptionem doli mali summoveri; at si tu possideas, consequens est, ut utilis mihi actio adversum te dari debeat: quo casu nisi solvam impensam picturae, poteris me per exceptionem doli mali repellere, utique si bonae fidei possessor fueris. illud palam est, quod sive tu subripueris tabulam sive alius, competit mihi furti actio), was für unsere Überlegungen jedoch unbeachtlich bleibt.

unterscheiden\textsuperscript{23}, so scheinen für den hier in Frage stehenden Fall keine ausreichenden Indizien vorzuliegen, die eine Hypothese wie die von Bartocci vorgeschlagene nahelegen würden. Was die Unterscheidung der literarischen Genres \textit{carmen}, \textit{historia} und \textit{oratio} betrifft, auf die Bartocci wie oben schon angedeutet abstellt, lässt sich unter Bezugnahme auf die bisherigen Analysen argumentieren, es ginge hier um den Umfang des Geschriebenen und damit um die Menge an verwendeter und daher mit dem Papyrus oder Pergament verbundener Tinte. Hinsichtlich des Subjektwechsels, der nach Bartocci ein weiteres Element wäre, der die Aufmerksamkeit des Juristen auf den Autor des Schriftwerks unterstreichen soll, bietet sich ein Vergleich des Textes der \textit{Rescottidianae} mit jenem der Institutionen des Justinian\textsuperscript{24} sowie mit der Paraphrase des Theophilus\textsuperscript{25} an. In den Institutionen Justinians wird die \textit{accessio} des Geschriebenen an die Unterlage mit einem den Eigentümer bezeichnenden „Du“ in der zweiten und der schreibende \textit{Titius} in der dritten Person beschrieben. Wie in den \textit{Rescottidianae} ist also der schreibende auch Autor des Werks, nur dass hier von ihm in der dritten und nicht in der ersten Person die Rede ist. Bei Theophilus wird der Fall nun in folgender Weise geschildert: der Eigentümer der Unterlage wird mit „Ego“ bezeichnet, der schreibende wiederum in der dritten Person Singular. Es wird näher ausgeführt, dass „\textit{indifferens autem est, sive metricum carmen, sive historicum aut rhetorificum sermonem inscripserit}“. Wenn es nun tatsächlich darum gegangen wäre, die Autorenschaft am Werk zu betonen, so sollte derselbe Aufbau von Subjekt und Objekt, respektive Eigentümer der Unterlage und der auf dieser Schreibende auch in den Institutionen des Justinian und der Paraphrase des Theophilus zu finden sein.


\textsuperscript{24} I. 2.1.33: \textit{litterae quoque, licet aureae sint, perinde chartis membranisque cedunt, acsi solo cedere solent ea, quae inaedificantur aut inseruntur: ideoque si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripsersit, huius corporis non Titius, sed tu dominus esse iudiceris.}

\textsuperscript{25} Theoph. Inst. 2.1.22.
Will man also nicht ein ganz spezielles Augenmerk des Gaius auf die Schöpfer literarischer Werke\textsuperscript{26} annehmen, eine Sensibilität die dann in der folgenden Epoche vergessen worden sein müsste, ergibt sich ein weiteres Argument dafür, dass den hier besprochenen Stellen der Gedanke an eine rechtliche Beachtlichkeit der Autorenschaft von Schriftwerken schlicht und einfach fremd ist. Abgesehen von der Unwahrscheinlichkeit eines Perspektivenwechsels wie er hier besprochen wurde, gibt es einen weiteren Einwand, der die Hypothese einer besonderen Beachtung von Autoren durch Gaius\textsuperscript{27} auf noch schwächeren Füßen stehen lässt. Will man dieser nämlich folgen, so verbliebe derjenige Autor, der sein Werk eigenhändig auf dem Papier eines anderen niederschreibt, gänzlich ohne Schutz. Keinesfalls lässt sich nun aber annehmen, dass dieser Fall anders als nach der in Paragraph 77 aufgestellten Regel behandelt werden soll; dazu fehlt schlicht und einfach jedweder Hinweis in den Quellen. Sollte es aber andererseits tatsächlich zutreffen, dass das eigenhändige Niederschreiben von Werken gegenüber dem Diktat nur selten vorgekommen wäre, so bleibt dennoch die Tatsache, dass in den erwähnten Texten der Res cotti\textit{diana}e, der Institutionen des Julian sowie in der Paraphrase des Theophilus ganz ohne Zweifel genau davon die Rede ist. Insgesamt erscheint es daher nur schwerlich vertretbar, in den Institutionen des Gaius eine andere Fallkonstellation annehmen zu wollen, als in allen anderen hier besprochenen Texten, die sich mit dem Verhältnis chartae/litterae befassen.

\textsuperscript{26} Es soll nicht unerwähnt bleiben, dass auch Julian, Ulpian und Paulus ohne jeden Zweifel das Prinzip vertreten, dass die Schrift dem Schicksal der beschriebenen Unterlage folgt, vgl. Ulp. 24 ad ed. D. 10.4.3.14: … Ait Iulianus, si quidem mea charta scriptae sint, locum esse huic actioni, quia et vindicare eas possum: nam cum charta mea sit, et quod scriptum est meum est: sed si charta mea non fuit, quia vindicare non possum, nec ad exhibendum experiri: in factum igitur mihi actionem competere; Paul. 21 ad ed. D. 6.1.23.3 (Dazu oben Fn. 15).

\textsuperscript{27} Dies deutet auch A. Plisecka, \textit{Tabula picta} cit., S. 91 Fn. 106, an.
Vom Buchdruck bis zum Statute of Anne


28 Vgl. dazu nochmals die oben in Fn. 1 zitierten Nachweise.
32 Ihre Mitglieder erwarben Manuskripte, gaben deren Druck in Auftrag, und verkaufen en gros an die eigentlichen Buchhandlungen, wären also aus heutiger Sicht eher als Verleger bzw. publisher zu bezeichnen, E. Hößner, Geschichte und Wesen des Urheberrechts, Band I cit., S. 60.
33 E. Hößner, Geschichte und Wesen des Urheberrechts, Band I cit., S. 58.

34 E. Hößner, Geschichte und Wesen des Urheberrechts, Band I cit., S. 95.
wurden die Rechte an den Werken Shakespeares, die nach dem Gesetzestext bereits seit 1731 ausgelaufen waren, noch 1768 an den Meistbietenden versteigert.


36 Vgl. dazu E. Höffner, Geschichte und Wesen des Urheberrechts, Band I cit., S. 82 m.w.N. U. Izzo weist in Alle origini del copyright cit., S. 103 f. Fn. 26 zurecht darauf hin, dass die hinter dieser Publikation stehenden, persönlichen Interessen Lockes als erfolgreicher Investor viel zu selten Beachtung finden.
37 Dies arbeitet E. Höffner, Geschichte und Wesen des Urheberrechts, Band I cit., S. 79 ff. recht treffend heraus.
entwickelten Ideen umfasst, behindert die Gesellschaft insgesamt. Dafür, wo diese Trennlinie zu ziehen ist, gibt die Arbeitstheorie allerdings wenig her und das Statute of Anne, wodurch eine Lösung dieses Problems ebenfalls aus, wohl auch weil kaum nachhaltiges Interesse daran bestand, das bisherige System der Inhaltskontrolle veröffentlichter Werke tatsächlich abzuschaffen.

Kant und Fichte

Die entscheidende Wende hin zu einem Urheberpersönlichkeitsrecht kam erst mit Immanuel Kant. Er wandte sich explizit gegen den Nachdruck von Büchern ohne Zustimmung des jeweiligen Autors und kritisierte dabei vorrangig die Ansicht, das Eigentum an einem körperlichen Werkstück würde die Berechtigung zu dessen Vervielfältigung und Verbreitung einschließen, doch wandte er sich auch prinzipiell gegen die Auffassung, die Verlegertätigkeit sei mit dem Gebrauch eines Eigentumsrechts als solchem vergleichbar. Er unterschied dann zwischen einem persönlichem Recht (also einer schuldhrechtlichen Befugnis), die der Autor einem Verleger auf Vertragsbasis überlassen könne und welches dann diesem zustehe und einem unveräußerlichen ius privatissimum, das in der Berechtigung des Autors bestehe, über sein Werk mit dem Publikum, der Öffentlichkeit zu kommunizieren und das ausschließliche Entscheidungsrecht über Art, Umfang und etwaige Änderungen der Verbreitung begründete.

Kant kommt zu dieser Differenzierung über einen interessanten Ansatz, denn er geht zunächst nicht von einem Schriftstück, Manuskript oder Buch, also einem körperlichem Gegenstand aus, sondern von der Rede, die der Autor an seine Leser halte. Die gesprochene Rede als Handlung eines Individuums könne unabhängig von diesem nicht existieren, sie sei ihm und nur ihm für immer zugeordnet und in diesem Sinne unveräußerlich. Die Schriftform und damit auch das gedruckte Buch ist also sozusagen „nur“ eine Verkörperung dieser Rede und bleibt dieser in ihrem Schicksal rechtlich untergeordnet. Kant vertrat damit also eine recht extreme Position zugunsten des Autors – und gegen den Verleger.

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Johann Gottlieb von Fichte\(^{40}\) entwickelte diese Argumentation einerseits weiter, andererseits relativierte er sie auch und machte sie so konsensfähig\(^{41}\). Er unterschied am Beispiel des Buches drei Komponenten: einerseits die Verkörperung eines Werkes, also das bedruckte Papier, andererseits dessen Inhalt, die Gedanken und Ideen, die ein Buch vorträgt sowie zuletzt deren konkrete Form, die Art und Weise in der sie der Autor vorträgt, also die Worte, Wendungen und Formulierungen die er konkret benutzt. Die Verkörperung, das Buch als greifbarer Gegenstand sei durch den Verkauf in das Eigentum eines anderen übertragbar. Der gedankliche Inhalt dagegen ginge mit der Veröffentlichung in eine Art Gemeingut über, da jeder Leser ihn in seine eigene Ideenwelt integrieren könne\(^{42}\). Die Form jedoch, die Abfolge von Zeichen, mittels welcher ein Gedanke vorgetragen werde sei etwas, das niemand sich ohne Veränderung zueignen könne, sie bleibe auf immer ausschließliches Eigentum des Verfassers. Daraus folgerte und forderte Fichte erstens, in persönlickehrechtslicher Hinsicht, dass dem Autor niemand dieses (geistige) Eigentum\(^{43}\) absprechen dürfe, und zweitens, ebenfalls in persönlickehrechtslicher Hinsicht, allerdings mit direkter vermögensrechtlicher Wirkung, das Recht zu verhindern, dass irgendjemand Eingriffe in dieses Eigentumsrecht tate. Demzufolge könne der Verleger auch durch Vertrag nicht mehr als ein Nutzungsrecht erwerben, welches ihm, im Namen und Auftrag des Verfassers und zu


\(^{42}\) Die dualistische Auffassung der zeitgenössischen Urheberrechtslehre unterschlägt die Bedeutung dieser Komponente: aufbaudend auf Fichtes Analyse könnte man nämlich tatsächlich von einer Tripartition aus Persönlichkeits- und Vermögensrechten sowie aus Rechten der Allgemeinheit sprechen.

\(^{43}\) Terminologisch ist die Anlehnung ans Eigentum körperlicher Sachen hier also eher eine geistige Brücke, die eine Analogie zum sachenrechtlichen Eigentum gerade nicht sucht.
dessen Bedingungen zur beschränkten Vervielfältigung und Verbreitung berechtige.

Damit bereitet Fichte den Boden für jenen dualistischen Ansatz, der die persönlichkeits- und vermögensrechtliche Seite als Einheit sieht und das Urheberrecht bis heute prägt. Erst auf der Grundlage einer umfassendem Verbreitung des mechanischen Buchdrucks und des völlig neuen Marktes, der dadurch entstand, hat die aufklärerische Vorstellung vom Menschen, der im Zentrum der Schöpfung selbst schöpferisch tätig ist, die Grundlage für die herrschende Urheberrechtsordnung geschaffen⁴⁴.

BOOK REVIEW
Professor Jan Sobczak is a Polish historian who conducts research on the latest general history, especially being interested in the history of the Russian Empire from the turn of the 19th and 20th centuries, but also taking into account the history of Poland. Up to 2002 (the year of his retirement) he had worked at the University of Warmia and Mazury in Olsztyn as the director of the Institute of History and International Relations. He has strong connections with Law and Administration Faculty because up to 1996 he had worked at the Institute of Law and Administration. He was also a member of the Senate, the head of the Department of History of the Eastern Europe and the chief editor of the early Echoes of the Past. At present he is holding the position of a full professor at the Aleksander Gieysztor Academy of the Humanities in Pułtusk.

The great amount of his works and studies can be impressive for anyone who is fond of history. There are nineteen books of the own authorship and over five hundred shorter academic publications. Professor Jan Sobczak was also the editor of several joint publications and four great volumes of memoirs of Polish political activists. Among the wide range of his books it could be mentioned, for example: The First Days of Revolution, The Chronicle, November 6th – December 3rd 1917- Warsaw 1967, 1977, The Encyclopedia of the October Revolution (together with prof. Ludwik Bazylow)- Warsaw 1977, 1987, The Cooperation of the Social-Democratic party of the Kingdom of Poland and Lithuania with the Social-Democratic Workers’ Party of Russia 1893-1907- Warsaw 1980, The Emperor Nicholas II. Youth and the first years of reign 1868-1900, part I-II, Olsztyn 1998, The Emperor Nicholas II. Liberal by Disposition, Autocrat on the Throne, Toruń 2003, The Russian Paths of Clio, Warsaw-Puł-
tusk 2007, Nicholas II- the Last Tsar of Russia, Warsaw 2009 (“Bellona”). It should be taken into account that Nicholas II- the Last Emperor of All the Russias. The Study of Personage and the Evolution of Power written in English is unfortunately only a shorter version of the most extensive Polish book from 2009, which was the first comprehensive biography of this monarch prepared and written by the Polish author. The book was translated by Iwona Hetman – Pawlaczyk.

It is significant that Nicholas II, the last tsar of Russia governing 1984–1918, was in some respects a tragic person. During many years the last monarch of the one of the most influential and immense countries in Europe was the subject of the intense manipulations aimed at discredit the tsar in the eyes of his contemporaries. Even today there are many lies and half-truths connected with the portraying of Nicholas II. There is a real battle in the Russian historiography over the true picture of the tsar even these days.

The book of professor Jan Sobczak touches the delicate field of the changes in the Russian history and as he says that Poles do not have special reasons to admire or idealize any of the Russian tsars. Poles rather aren’t in favor of any Russian monarchs. Nicholas II is not also a special exception. Unfortunately, unfair opinions concerning that person are not unique in the Polish historiography. Myths and lies are very difficult to be removed. Professor Sobczak is a historian who is conscious of the fact that perceiving of Russian by Poles (or even by Europe!) is quite ambiguous. In his book he writes ”Today Russian journalism and not only discussions are held concerning the perception of relations between Russia and Europe or, in general, the rest of the world on the part of Russian ruling circles as well as the country’s elites of power. How to perceive Russia and its politics, what place occupies the so called homo russicus in it, the notion of the separate identity of the Russian system, the apotheosis of the Russian idea, not only in the political sense but wider, that is to say the one of civilization, the right to its Sonderweg- a separate and unique developmental path. Voices can be heard advocating, apparently, democracy, but perceived in the Russian manner, again a tsar at the head, not necessarily crowned”¹.

¹ J. Sobczak, Nicholas II- the Last Emperor of All the Russias. The Study of Personage..., op.cit., p.9.
The reviewing book consists of the author’s introduction, fifteen chapters, afterword and bibliography of the most important publications used. The construction is based on the chronological system. The bibliography is very impressive and it is divided into documents, journals and memoirs (cohesive printed matter and the most important in academic and socio-political periodical press) and literature of the subject. It is worth to add that in a longer polish version of the book there are further more works of different sorts mentioned. The author had studied and examined critically not only precious official and private correspondence and toms of the tsar’s memoirs that turned out to be extremely useful taking into account the author’s knowledge of the emperor’s psychology, but also he had searched diaries, memoirs and letters of people who were close to the monarch.

It is worth mentioning that the book is expressing the constructive image of the Russian monarch. The author presents Nicholas II’s childhood, youth and adolescence, a spartanian style of his upbringing, love affairs, travels, enthronement, relations with Pyotr Stolypin and the influence of Grigori Rasputin on his life. As professor Sobczak says, even during the monarch’s life there existed two opposing legends- “a white one, constructed not always skillfully by the official circles and later sustained by the monarchist Russian emigration, and a black one, advocated by not at all heterogeneous organizations and wings of liberal-revolutionary opposition as far as their image is concerned”\(^2\).

An important aspect of the book is the fact that professor Jan Sobczak pays his great attention to some aspects of carrying out a range of activities by Nicholas II in the field of improving and changing Russian legal system and legislative and political sphere of the country. The last emperor was the man during whose reign the political system of Russia changed from the despotic monarchy to the constitutional society and Russians citizens received civic freedoms. To reduce bribery and corruption among state officials, Nicholas II took efforts to change the Russian legal system by introducing a new penal code accepted in 1903. It replaced the old *The Code of the main and reformatory penalties* from 1845. The new penal code was prepared by a special editorial committee consisting of the most outstanding Russian lawyers leading by prof. Nikolai Tagantsev. Undeni-
ably, the reorganization of the local administration and governmental structures, the changes in the administrative system, decentralization of the state administration as well as transformation of State Duma and reorganization of the State Council took place during the reign the last emperor of Russia.

Professor Jan Sobczak tries not to idealize Nicholas II by covering the weaknesses of his reign in order to give him a higher mark than he deserves. He has also no reason to mercilessly condemn him. Undeniably, the fact of idealizing is quite common among biographers. The last Russian monarch reigned and lived in a difficult epoch and conditions of the epoch should also be taken into account to understand tsar’s moves and decisions. Nicholas II was a real human being with his pluses and minuses, with his good sides and worse sides. The portrait of the last Russian monarch painted by professor Sobczak undeniably enriches the knowledge of historiographers of the life, actions and reforms of Nicholas II.

It is interesting to consider that up to present time there was a great number of favorable reviews penned by such outstanding specialists in Russian studies as prof. Bazyli Białokozewicz, Andrzej Andrusiewicz, Antoni Czubiński, Leszek Jaskiewicz, Sławomir Kalembka, Piotr Łossowski, Walenty Piłat or Paweł P. Wieczorkiewicz concerning the books and publications of professor Sobczak on the subject of Nicholas II. One should hope the selected English version of the precious biography will appear in a longer version in the future to give the opportunity for a foreign reader to come face to face with Nicholas II- the last emperor of all the Russias.