General Editors

JAKUB J. SZCZERBOWSKI, Ph.D – Chief editor
BENEDYKT PUCZKOWSKI, Ph.D. - Statistical editor
KRZYSZTOF KRASSOWSKI, Ph.D. - Statistical editor

Editorial Board

CARMEN ESTEVAN, Professor – University of Valencia, Spain – Commercial Law

ANTONIO FERNÁNDEZ DE BUJÁN, Professor – Universidad Autónoma de Madrid, Spain – Roman Law

EWA GRUZA, Professor – University of Warsaw, Poland – Forensic Science

ALESSANDRO HIRATA, Professor – University of São Paulo, Brasil – Roman Law

GABRIELE JUODKAITE-GRANSKIENE – Associated Professor, Vilnius University, Lithuania – Forensic Science

EVA KLONOWSKI, Ph.D. – Iceland/Bosnia and Herzegovina – Forensic Anthropology

LUZ MARTINEZ VELENCOSE, Professor – University of Valencia, Spain – Civil Law

WITOLD PEPIŃSKI, Professor – Medical University of Bialystok, Poland – Forensic Genetics

ALDO PETRUCHI, Professor – University of Pisa, Italy – Roman Law, Comparative Law

BRONISLAW SITAK, Professor – University of Warmia and Mazury in Olsztyn, Poland – Roman Law, Comparative Law

JUAN ANTONIO TAMAYO, Professor – University of Valencia, Spain – Civil Law

ARIANNA VEDASCHI, Professor – Bocconi University, Italy – Constitutional Law, Human Rights
# TABLE OF CONTENTS

Articles.................................................................................................................................7

*Game Theoretical Perspective in the Unfairness of Contracts in a Common European Sales Law*
(Mariusz J. Golecki)........................................................................................................8

*Conditions of Fairness of Judgment under Civil Procedure*
(Edyta Gapska)..............................................................................................................44

*Preliminary Studies for Identifying Graves From ca 1800 BC in South-Eastern Poland*
(Monica Abreu-Głowacka, Dorota Lorkiewicz-Muszyńska, Czesław Žaba, Anna Hyrchała, Bartłomiej Barteccki, Eliza Michalak, Witold Pepiński, Agnieszka Przystańska, Tomasz Kulczyk, Wojciech Kociemb, Michał Rychlik, Tomasz Danyluk)..............................................................63

*Professional Ethics of an Expert Witness*
(Beata Kosiba).................................................................................................................78

*A Correlation Model For Bloodstains Ageing Based On The Qualitative And Quantitative Analysis Of Genomic DNA Via rtqPCR.*
(Małgorzata Lenart, Jarosław Piątek, Krzysztof Safranow, Andrzej Ossowski, Grażyna Zielińska, Katarzyna Jałowińska, Marta Kuś, Karol Tejchman, Ewa Jasionowicz-Piątek, Katarzyna Kotowska, Miroslaw Parafiniuk, Krzysztof Borowiak)..................................................92

*The concept of management of European Union projects in the public sector*
(Paweł Romaniuk)...........................................................................................................111

4th International Conference on Comparative Law, Olsztyn 2014........123

*The Historical Background of the United States Patent Law*
(Edyta Sokalska)............................................................................................................124

*Measures for Saving Companies Intrinsic Value. The Spanish and Italian Experience*
(Luigi Lai).......................................................................................................................140
Informed consent in the context of over-the-counter Access to an Multi-Effect Pharmaceutical and the International Covenant on Civil and Political Rights  
(Stefan Kirchner) ........................................................................................................ 156

Regulatory models of insider trading and the concept of “use of inside information”  
(Carmen Estevan de Quesada) ...................................................................................... 169

Ownership of the State and Preservation of Environmental Values: The Case of Fenced Fishing Areas in the Venice Lagoon  
(Alessandro Palmieri) .................................................................................................. 192

Acquisitive Prescription of Real Estate Owned by the State Treasury in Poland.  
(Beata Kowalczyk) ..................................................................................................... 202

The role of local government in the period of transformational change  
(Paweł Romaniuk) ...................................................................................................... 212
GAME THEORETICAL PERSPECTIVE TN THE UNFAIRNESS OF CONTRACTS IN A COMMON EUROPEAN SALES LAW

MARIUSZ J. GOLECKI

University of Łódź and University of Debrecen

Abstract: The recent propositions of the EU Commission on Common European Sales Law attempts at reconciliation of two allegedly contradictory principles, namely freedom of contract (art. 1 CESL) and the substantial protection of weaker party (art. 51 CESL), referred to such concepts as excessive benefit or unfair advantage. The paper attempts at application of two competitive models of contract offered by game theory. The first is based on D. Gauthier’s concept of the so called restrained maximization. The alternative refers to the solution to bargaining problem offered by J. Nash. The question remains whether game theory could support one of two competing approaches, reconciling apparently incoherent regimes of art 1 and art 51 of CESL. This problem has recently gained additional importance due to the legislative intervention of the EU Parliament from 26 February 2014, due to the enactment of the art 51a of CESL.

Keywords: Common European Sales Law, game theory, reciprocity, economic theory of contracts, Nash bargaining solution.

Reciprocity, fairness and the limits of contract as exchange

The problem of reciprocity and equivalence in contracts is often discussed as one of the most important issues of analytical contract theory. Additionally I will refer to the Anglo-American general theory of contract due to its’ impact on economic analysis of law and the contemporary game theory, where the ongoing discussion on reciprocity of contracts seems to be still inspiring. It seems to

Acknowledgment: „This research was supported in the framework of TÁMOP 4.2.4. A/2-11-1-2012-0001 National Excellence Program – Elaborating and operating an inland student and researcher personal support system key project. The project was subsidized by the European Union and co-financed by the European Social Fund.”


be obvious that the analysis of this topic is strongly linked with the discussion of particular legal institutions from a dogmatic and purely doctrinal perspective. However it seems that the problem could also by fruitfully analysed from the broader philosophical and economic perspective as it is clearly discernible in general theory of contract. Looking at the problem of fairness in contracts, one may distinguish two types of theories of contract. According to the subjective theory, parties enter into contractual relations because it seems to be subjectively profitable. The terms of contract are negotiated and the contract is binding because of the fact that both parties voluntarily agreed. Therefore, consent seems to be the source of a binding force of contract. This and similar theories assume that freedom of contract stems from the principle of individual autonomy. Contract may be validated only if the consent was vitiating, but there was a typical procedural problem with the process of formation of contract. Subjective theory is partly based on the economic reasoning: from the economic perspective, if one of parties voluntarily enters into contract, it seems that she acts accordingly with her preferences.

On the other hand the neo-classical theory as opposed to the liberal, the so called “will” theory of contract equalizes contract with an economic exchange of commodities or obligations rather than with a sheer exchange of promises. Contract as economic institution

---
seems to be perceived and understood as an objective bargain rather than a subjective agreement. This approach to the nature of contractual obligations seems to be based on the assumption that contract which maximises utility of at least one party, other being constant, is Pareto efficient. In fact, the main purpose of exchange (and the contract) is to achieve Pareto improvement so that the result of the contract was Pareto-superior as compared to the situation in which the contract would not have been concluded.

Thus the concept of freedom of contract may be analysed from the perspective of interaction between the legal system and the economic environment in order that legal norms would enhance efficiency rather than waste of resources. In this place we intend to present two possible approaches to such an analysis.

The first approach is a characteristic feature for the economic analysis of law. According to this view the legal system should promote efficiency, understood as an allocative and static factor. The criteria to measure it are based on the notion of utility and individual preferences. Thus, the analytical tool to measure efficiency is associated with Pareto-efficiency (the increase of utility of two parties or at least one part to a contract) or Kaldor-Hicks criteria (cost-benefit analysis). Taking into account incomparability of individual utilities such an analysis seems to be inconclusive from the perspective of allocative efficiency or wealth-maximising demand, i.e. it does not give any recommendations regarding the regulation of bargaining process and especially the enforcement of efficient contracts.

---

In this context, efficient contract is characterised by the mainstream of law and economics as a Pareto-optimal. Since the concept of Pareto optimality refers either to individual utilities or to individual preferences or to free consent, and all of these bases are either subjective or purely procedural (free consent), one may state that these factors give a very week support for any solution to the problem of contractual equivalence. The concept of Pareto efficiency and utility maximisation does in fact support both the principle of freedom of contract and the principle of formal (procedural) reciprocity. In this context the equivalence of obligations seems to require only the subjective reciprocity, i.e. the situation in which the party finds the counter-performance as equivalent to the offered benefit to the other party or detriment to the offered benefit. This might be found as an economic justification for the legal rule in common law that the doctrine of consideration does not require a substantial adequacy of consideration (i.e. obligation).

However, the legal order does not seem as a whole to include this rule. There are many situations in which the court denies the enforcement of contract even if ex ante reciprocal. This is the situation of ex ante and ex post contract. If the enforcement of contract was based on the assumption that the subjectively reciprocal contract is in itself, ex definition, profitable for both parties, because the party would not consented to it if it had not maximised its util-

---

10 A contract is Pareto efficient if it is impossible to raise the expected utility of both parties to it – it is the first best contract within the class of complete contracts. Cf. S. Shavell [in:] New Pelgrave Dictionary of Law and Economics, vol. 1, p. 436.


12 Cf. R. Posner, who he acknowledges that: “Economic analysis, at least, reveals no grounds other than fraud, incapacity and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract.”, Economic Analysis of Law, 2-nd Ed. Boston (1977), p. 87.
ity, there would be no need for the enforcement of contract at all\(^\text{13}\). In fact the only problem would arise concerning the possibility of non-compliance. This problem is solved by certain rules such as *exceptio non adimpleti contractus* or by exchanging hostages in economic terms, i.e. by securitization. Therefore the only problem would be the enforceability of half-performed contracts, and in such a system the enforceability would deal exclusively with unilateral contracts (when one party would perform its obligation whereas the other would take the benefit of not performing its obligation).

However, in real life this is not the case. The most serious problems concerning enforceability of contracts stem from the fact that one party has changed her mind or has found another better opportunity. In those situations, common law accepts the so-called “doctrine of efficient breach” and it allows damages instead of specific performance.

The doctrine of efficient breach may work smoothly only in such circumstances, that: firstly, there is a full access to market and the substitution of commodities is available (there are general, not specific goods) and secondly, the non-performance (breach) of contract has been declared before the performance of obligation (the executory contract).

However, in many situations the above-mentioned conditions are not fulfilled. Then, if the party claims that the substantial inequity in terms of the value of obligations takes place there are two possible solutions. Firstly, there is a substantial solution, requiring the comparison of the value of obligations (goods, commodities). Such was the *leasio enormis* or just price theory. The court used to compare the price paid to the market price. The typical situation is, however, that there is no market price available both to the parties and to the court.

\(^{13}\) This was a position of Roman law regarding informal conventions – *nuda pacta*, which had been generally unenforceable.
Secondly, there are other cases such as *imprevision*, fundamental breach or *Wegfall der Geschäftsgrundlage*, which may be implemented only in case of a drastic change of circumstances. As the scope of randomness is not being measured, it is very difficult to determine to what extent the change of circumstances should have been taken into account. The procedural solution is based on the assumption that the self-interested individual does not make detrimental contracts freely. If the contract is in fact detrimental to him, there is a high probability that the consent was illusory and there was no agreement at all. This solution is deployed in cases of duress or the abuse of bargaining power.

As a response to the defects of liberal (classical and neo-classical) theory of contracts the other theories referring to the objective equivalence between performance and counter-performance have been proposed. According to some objective theories, a contract is regarded as an exchange\(^{14}\) and the exchange should by fair not solely from a procedural point of view. Those theories require a minimal equivalence between the obligations of two parties.

One of the most famous authors supporting such a proposition is James Gordley\(^{15}\). In a series of articles he insists on the importance of equality in exchange. According to Gordley, contract law is not based on the concept of freedom of contract but rather on the principle of equality in exchange. He points out that the notion of commutative justice as formulated by Aristotle has been abolished within the contemporary legal systems. On the other hand Gordley stresses the need of reinterpretation of the notion of commutative justice. Therefore, contract should be enforced in such a degree as it refers to the just price. Gordley understands just price as a market price on a perfect, competitive market. He also identifies the price with the marginal cost of supplier.

---


Summarizing, he points out that such doctrines as unconscionability within the Angloamerican law, _lesion_ in France and _Wucher_ in Germany reflect in fact the principle of equality in exchange. The basic foundation for this theory may be found, according to Gordley, in Aristotelian concept of commutative justice, which means, that no one should gain by other’s loss, and in Roman law. According to the passage D.50,17,206 of _Digest_: “By nature it is equitable that no one should be made richer by another’s loss or injury”. The crucial argument for equality in exchange identified with the market price is the following: “The market price depends on the judgement of many buyers and sellers as to what future prices will be. In contrast, a contract price was determined by only two parties, one of whom was acting under circumstances of ignorance or necessity that prevented him/her from taking advantage of the market.”

On the other hand Prof. J. Gordley requires another condition to be satisfied, namely that the market price should be equal to the average cost of production of a given commodity. The equality and fairness in contract should be measured according to the purchasing power of the assets of parties. Those assets should remain unchanged after performance of the contract, although the “wealth” of the parties measured in terms of utilities increases.

Another theory which emphasizes the need of the objective equivalence in contract is the concept of substantial unconscionability presented by Melvin A. Eisenberg. The principle of unconscionability means that in some cases the contract can be invalidated by a judge if there is a gross disproportion between the obligations of the

---

14 Mariusz J. Golecki, _Game Theoretical Perspective in the Unfairness of Contracts in a Common European Sales Law_.

15 This text does not refer, however, to contract and is traditionally referred to unjust enrichment and tort. In classical Roman law another principle was applied, namely: “it is permitted by nature for one party to buy for less and the other to sell for more, and thus each is allowed to outwit the other. Cf. Digest D.19,2,22,3 and D.4,4,16,4.

16 J. Gordley, _op. cit._, p. 1612.

parties resulting from procedural or substantial unfairness\textsuperscript{19}. In fact the “unconscionability” seems to become an instrument of terms of contract. Despite this criticism, the judge may assess not only the fairness of the bargaining process, but also of the results of bargaining process\textsuperscript{20}. M. A. Eisenberg proves, that the control over the terms of contract is thoroughly justified. The principle of freedom of contract should be limited in many cases if it results with harsh bargains.

The main line of this argument is also based on some reference to the economic theory. Eisenberg states that substantial unconscionability results from a market failure. The bargain principle and the freedom of contracts concern the situation in which the parties agree over the terms of contract on a perfect market. Any distortion of the perfect market in form of a monopoly power, asymmetry in information, price ignorance, exploitation of distress, may be regarded as a potentially inferring unconscionability. In his defence of substantial unconscionability, prof. Eisenberg formulated the principle, according to which the strongest case for legal enforcement may be identified with the situation in which parties made a contract in a perfectly competitive market and the plaintiff in fact performed his obligation (half-completed bargain).

Those circumstances may well be described as a Prisoner’s Dilemma game. The party which has not performed an obligation has no incentive to perform it unless there is a real threat of punishment. Eisenberg distinguishes this situation from an executory contract containing two promises creating legal obligations, but not performed. In such a situation and in case of breach of contract, the party that want to sell the goods, may still do it on the market. The paid price, i.e. the market price should equal or almost equal the

\textsuperscript{19} Cf. § 2-302 Uniform Commercial Code and § 208 of Restatement of Contracts (Second) (1981).

opportunity cost of the seller. The principle of freedom of contract should be limited to these contracts that are made in a perfect market.

There is a hidden assumption in this reasoning that the objective equivalence of contractual obligation is either equal to the market price in a perfectly competitive market or it is measured by the court. This view is generally shared by P. S. Atiyah who proves that in fact common law requires an adequacy of consideration in some cases, where it is efficient to control the terms of contract, because of the gross inadequacy or unfairness 21.

Apart from those theories, there is another source of criticism about the principle of the freedom of contract. Eric A. Posner implements economic analysis to defend some substantial limits of the freedom of contract 22. In his model he criticizes the view that legal system should enforce voluntary contracts and at the same time it should not be engaged in distribution of wealth. According to E. A. Posner, such assumption is both unrealistic and does not lead to efficiency maximization in the long run. He stresses the need to include the welfare system which must operate in case of poverty. However, the system which supports the poorest is costly. Contract law may prevent such a situation by virtue of limitation of the scope of the freedom of contract in the situations that cause at least potential impoverishment of one party. Therefore, taking into account the doctrine of welfare state, the limit of freedom of contract may enhance efficiency deterring risky, socially costly transactions. E. A. Posner’s model is based on the assumption that the minimum welfare state and welfare opportunism creates in fact a moral haz-

21 P.S. Atiyah admits that: „(...) courts will not interfere to iron out every trivial imbalance in an exchange; but (...) when there is some gross imbalance, something serious enough to offend our sense of justice, it will usually be found that some remedy is available”, op. cit. pp. 338.

ard effect. In this respect restrictive contract doctrines may be regarded as a more efficient instrument. Such doctrines as usury laws prevent the development of excessively risky transactions.

Summarizing, restrictive contract doctrines state that limitations of the freedom of contract are or should be intended to minimize excessive risk in the transactions that involve potentially poor party. In case of a breakdown such as a loss of income or other assets the poor party would be entitled to payment from the state. Restrictive contract doctrines in fact limit the freedom of contract of poor parties to prevent the cost of welfare benefits. At the same time poverty is a standard of living, measured by minimum level of goods and services and the utility level. In this respect E. A. Posner bases his assumptions on a kind of objective criteria, namely on the standard of living. This certainly leads to the paternalistic theory of restrictive contract doctrine, blurring the traditional distinction between private and public law, distributive and commutative justice. An example of such a hybrid weakly paternalistic framework may be found in one of the most recent regulations on contract law drafted in the EU, namely the “Proposal for a Regulation on a Common European Sales Law”.

**Unfairness of contracts in Common European Sales Law**

An interest in the idea of harmonization of the European contract law within the European law has recently led to the preparation of the “Proposal for a Regulation on a Common European Sales Law” (CESL) of 11.10.2011 by the EU Commission. This conception is vivid in many resolutions adopted by the European Parliament who urges the governments of the EU members states as well as the organs of the European Union to launch a


strict cooperation in order to elaborate a uniform code of contract law. A legal base for starting the above-mentioned project may be found within the content of the art. 3 of the Treaty of Rome that obliged the member states to undertake the necessary actions aimed at the creation of a uniform common market. It is stressed that the contemporary level of the European integration requires the unification of the regulations concerning the contract law and a system of the transfer of ownership.

As far as the issue of harmonization is concerned it may be stated that the unification resulted in the elaboration of a few projects of the European contract law. So far, these projects remained however doctrinal proposals rather than sources of the EU law. In 1999 stemming from the initiative of the Committee on the Harmonization of European Contract Law a first version of such code, named Lando’s Principles or Principles of European Contract Law (PECL), has been elaborated. The project is intended to become a part of a uniform European Civil Code that has been in preparation by the Working Group on European Civil Code. This group is headed by Prof. Christian von Bahr and in its work it concentrates on the regulation of particular types of contracts, such as sale, contracts on rendering services, insurance contracts and financial actions.

26 See also art. 23 and 44 Treaty on the European Union within the text adopted by the Amsterdam Treaty.
It is however the “Proposal for a Regulation on a Common European Sales Law” (CESL) of 11.10.2011 which may in fact become a normative ground for further development of the common European Contract law probably due to less ambitious scope of application and more functional approach to the harmonization process. In fact CESL is not primarily aimed any kind of direct harmonization. Actually the opposite is true, since the Commission plainly endorses harsh critique on differences between regulation of contracts in different Member States. The Commission observed that those differences result with complexities leading to the growth of transaction costs and diminishing the volume of trade in common market\textsuperscript{30}. Thus unlike the previous academic attempts to regulate contracts due to gradual process of harmonization the Commission holds a view according to which the situation requires much faster actions and less ambitious aims. It is partly due to the strong resistance against harmonization of contract law en block on the EU level. On the other hand, the Commission urges the EU Parliament and the EU Council to adopt a set of specific rules on the law of sale rather than general contract law. Meanwhile the major objective of the application of CESL is to:

“improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State”\textsuperscript{31}.

Thus the Commission acknowledged the insurmountable character of differences between national legal orders in the area of law of sale, proposing an alternative, parallel European cross-border regulation applied according to the opt-in procedure. The architecture of


\textsuperscript{31} Ibidem.
this solution has been prepared due to the series of studies and documents beginning with the Communication of 2001, COM (2001) 398, 11.7.2001, were the Commission launched a process of consultation on the fragmented legal framework in the area of contract law and its hindering effects on cross-border trade. In July 2010, the Commission launched a 'Green Paper on policy options for progress towards a European contract law for consumers and businesses' (Green Paper), COM (2010) 348 final, 1.7.2010. Moreover, strengthening the expert knowledge on the proposed European regulation, the Commission set up the Expert Group on European contract law. This Group developed a Feasibility Study published on 3-rd of May 2011. Finally the gradual process lunched in 2001 led to the preparation of the Proposition on 2011. On 26.02.2014 the proposal for an optional European Sales Law for consumers and businesses was backed by a majority (416 votes for, 159 against and 65 abstentions) in the European Parliament.

The CESL in its form proposed by the EU commission consist in the appendix to the regulation and containing VIII Parts, 18 Chapters, 42 Sections, 186 Articles, including the following:

Part I 'Introductory provisions' sets out the general principles of contract law such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.

Part II 'Making a binding contract' contains provisions on the parties' right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. It includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

Part III 'Assessing what is in the contract' makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on

the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.

Part IV 'Obligations and remedies of the parties to a sales contract' contains rules on the remedies for non-performance of buyers and sellers.

Part V 'Obligations and remedies of the parties to a related services contract' concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance.

Part VI 'Damages and interest' contains supplementary common rules on damages for loss and on interest to be paid for late payment.

Part VII 'Restitution' explains the rules which apply on what must be returned when a contract is avoided or terminated.

Part VIII 'Prescription' regulates the effects of the lapse of time on the exercise of rights under a contract.

Meanwhile the EU parliament in its legislative resolution proposed amendments to the proposition of the EU Commission. Thus it is essential to remember that the lawmaking process is still going on and the content of the CESL seems to have been in constant flux in last 3 years. On the other hand it seems that the regulation is still supposed to establish CESL as a second contract law regime within the national law of each Member State. This important feature of the CESL has recently been emphasized by the EU Parliament in its resolution of 26.02.2014 amending the proposal and proposing that CESL should establish a comprehensive set of rules for distance contracts and in particular for online contracts. This limitation seems to narrow the scope of it’s applicability. However it is believed that this solution will” approximate” rather than harmonize or unify the respective regulations of contract in Member States by creating a uniform second contract- law regime for contracts within the narrow scope of its application. It has only been stipulated that this second regime should become an integral part of the legal order applicable in the territory of the Member States, which certainly refers to direct applicability. In so far as its scope allows and where parties have validly agreed to use it, the Common European Sales
Law should apply instead of the first national contract-law regime within that legal order. The regulation should thus be not only identical throughout the EU, but also applied in a consistent manner in different Member States, which certainly refers to judicial process and litigation shaping the interpretative practice of courts in Member States\(^{34}\).

Finally, the Parliament shifted the character of applicability of CESL from its voluntary character in a form of the so called opt-in clause, to the need of uniform application and direct applicability in Member States in case of to cross-border contracts for sale\(^{35}\).

The commentators emphasize the fact that those rules were primarily designed for commercial partners (B2B transactions)\(^{36}\). On the other hand not only business transactions are supposed to be regulated by CESL. So called non-merchant transactions do also lie within the scope of regulation (B2C transactions)\(^{37}\). It is an effect of the assumption, according to which the division between ordinary


citizens and professionals should be abolished. The distinction between consumer and commercial contracts is very often treated as problematic one. Additionally some authors stress that the unified European law of sales as well as future common regulation on contracts in general should abolish the distinction between commercial and consumer contracts, because this difference is thoroughly artificial and does not correspond with the economic reality. U. Mattei raises two principal objections for homogeneity of European contract law. Firstly, the separate market for consumers and separate market for producers does not exist in reality. The distinction is thus artificial and arbitrary, not taking the economic reality into account. Accordingly, the main problem of contract law is how to merge supply and demand into a single market. Secondly, the so called “schizophrenic contract law” with two sets of rules, one for consumers and the other for producers is based on the concept of status in case of standards of proof, vitiating elements or unfair contractual terms, whereas drafters should concentrates on contract rather than on status of parties involved in transactions. Both arguments are supported by the reasoning based on the concept of economic efficiency.

On the other hand many authors stressed the significance of the principle of solidarity in contract law. Within the context of CESL

38 Ibidem.
40 On the efficiency of the EU consumer regulations and the so called “consumerism” as an important characteristic of the EU legislation cf. R. Pardolesi, “Contratti dei consumatori e armonizzazione: minimax e commiato?” Foro Italiano., 5(2012), p.177.
41 On the proposition of solidarity and substantive equivalence in contract cf. T. Wilhelmson, Social Contract Law and European Integration, Darmouth 1995 passim. The discussion about the so called “protective contract law” or “solidarity in contract law” is firmly influenced by some adherents of Critical Legal Studies. Cf. D. Kennedy, “The political Stakes in ‘merely technical’ Issues of
solidarity means in fact that the concept of contract is based on two main contradictory principles: autonomy of parties and protection of weaker party. The principle of freedom of contracts has been explicitly stated in art. 1 CESL, according to which:

“Art 1.1 Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.

Art 1.2 Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.”

On the other hand CESL contains many consumer protecting institutions. These institutions may be divided in two groups. The first one includes some procedural means of control and limitation of the bargaining principle such as: fraud (art. 49 CESL) and threats (art. 50 CESL). Additionally substantial control of contractual terms is possible under art. 51 CESL which refers to unfair terms of contracts leading to exploitation due to excessive bargaining power. The potential scope of application of this provision if fairly limited. Article 51 CESL states, that:

“Article 51 Unfair exploitation

A party may avoid a contract if, at the time of the conclusion of the contract:

(a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and

(b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party’s situation by taking an excessive benefit or unfair advantage.”

This provision seems to reflect the principle of solidarity and the concept of so called “protective contract law” in full extend.43

---

According to the art. 51 CESL the distorted balance may be improved by the court if some requirements are accomplished. Firstly, the party is to be treated as a weaker one if the special relationship such as trust or dependency may be established or in some special circumstances such as economic distress, urgent needs, or because of special characteristic of that party such as; improvidence, ignorance, inexperience, lack of bargaining skill. Secondly, a weaker party may raise the defense of excessive benefit or unfair advantage if the other party exploited the situation of the weaker party. Such exploitation potentially takes place in two cases; the stronger party knew or should have known about the weakness of the weaker party and took advantage of such a situation which finally led to gross unfairness or excessive benefit.

Meanwhile quite recently the scope of applicability of this regime has been seriously broaden by the legislative intervention of the EU Parliament, which amended the proposal of the commission and proposed the art 50a CESL, which stipulates that:

“1. Where a third party for whose acts a person is responsible or who, with that person's assent, is involved in the making of a contract:

(a) causes a mistake, or knows of, or could be expected to know of, a mistake, or

(b) is guilty of fraud or threats or unfair exploitation, remedies under this Chapter shall be available as if the behaviour or knowledge had been that of the person with responsibility or giving assent.

2. Where a third party for whose acts a person is not responsible and who does not have the person's assent to be involved in the making of a contract is guilty of fraud or threats, remedies under this Chapter shall be available if that person knew or could reasonably be expected to have
known of the relevant facts, or at the time of avoidance did not act in reliance on the contract.”

It seems that the concept of excessive benefit or unfair advantage is \textit{prima facie} very broad. Additionally the major terms applied in this provision, such as “urgent needs”, “lack in bargaining skill” or “excessive benefit”, are quite vague. Eventually it is very difficult to foresee potential consequences of this rule in practice.

The art. 51 of CESL additionally refers to gross unfairness and excessive benefit. The concept of gross unfairness is not absolutely new. Both American and English law sometimes used it in case of unconscionability or undue influence. The same cannot be said about “excessive benefit”. The problem arises against what kind of standard this “excessive benefit” should be measured, how it should be assessed. To put it in other words there is a question, whether the standard of proper (in opposition to an excessive one) benefit taken out of contract exists and if it exists how it can be reconstructed by courts. Still there is a serious doubt whether the protection of weaker party is not excessive from procedural and substantial perspective. There are many potential difficulties with the standard of proof. Finally it may seem that CESL does not adopt the principle of security and certainty of legal positions, which is fundamental especially in commercial context. This is of exceptional importance if the proper scope of regulation and its potential function on the ground of European legal environment is taken into account. The authors of CESL have identified two main purposes of this regulation. The first may be characterized as partial codification of common European commercial law (\textit{legis mercatoriae europeae}) in order to intensify common European commerce and strengthen common European market. This purpose may be accomplished only if the rules of CESL will finally by accepted by parties (especially

business parties) as a kind of standard set of rules. Being just rules applied by the opt-in procedure they are not obligatory in national legal system as default rules and their normative significance depends heavily on the interest of actors\textsuperscript{45}. In this context the question arises, whether the principles are sound in lights of contemporary economics and whether they may attract the attention of entrepreneurs, especially in case of B2B transactions.

**Contract formation and enforcement as a bargaining problem within a light of non-cooperative game theory**

The concept of Pareto–optimum regarded as a form of commutative justice does not determine which division of the gain from exchange is just or fair. According to the standard economics, all distributions situated on the contract curve are Pareto-optimal, independent of the precise division of gain between the parties. It stems from the definition of Pareto-improvement that only the utility of one contractor may be maximised whereas the other remains unchanged. The Edgeworth’s Box illustrates this kind of indeterminacy. Identification of Pareto-efficient contract with a just or fair contract leads in fact to tautology. The parties enter the contract because in maximises their utility. It does not mean, however, that the parties agree on the level their utility is maximised. In one word, the contract may be Pareto-efficient and at the same time it may be still regarded as unfair.

On the other hand the problem of freedom of contract and its limits resulting from the requirement of substantial equivalence between performance and counter-performance may be analysed on the basis of game theory\textsuperscript{46}. As mentioned before, synallagma is just the kind of interaction between contracting parties. Such an interaction takes

\textsuperscript{45} Art. 1.101 PECL.
three forms: firstly, genetic synallagma which is a description of co-
ordination problem, secondly functional synallagma encapsulates
division problem, and thirdly conditional synallagma is a legal
description of defection problem and possible non-performance.

According to M. A. Eisenberg the contract law is in fact created as
a response to the problem of non-performance. The situation in
which one party performs its obligation and the other does not,
reminds a typical Prisoner’s Dilemma game\textsuperscript{47}. If the contract law is
a response to the Prisoner’s Dilemma than it may be analysed on
one hand, from the perspective of non-cooperative game theory,
and cooperative game theory on the other (as an agreement over the
rate of exchange). Additionally, the distribution of surplus of utility
gained through the contract typically results from the bargaining
process. Then we may assume, that the formation of contract and
formation of its terms is also a result of bargaining process\textsuperscript{48}.

Therefore, a question arises whether it is possible to predict the res-
ult of bargaining within such a process and whether this result may
be regarded as fair. In this context one may rely on the model pro-
posed by J. L Coleman, D. D. Heckathorn and S. M. Maser who
provided the game theory analysis of default rules and disclosure in
contract law\textsuperscript{49}. They stress a need to encapsulate the whole

\textsuperscript{46} A. Katz, “The Strategic Structure of Offer and Acceptance: Game Theory and


\textsuperscript{48} This approach has been also criticised. E. Rasmusen points out that contract
formation is based rather on negotiation process than bargaining. Negotiations
tend to set the terms of agreement, whereas bargaining is just a redistribute
process of rent seeking. Cf. E. Rasmusen, “a Model of Negotiation, Not Bar-

\textsuperscript{49} J. L Coleman, D. D. Heckathorn and S. M. Maser, „A Bargaining Theory Ap-
proach to Default Rules in Contract Law”, Harvard Journal of Law and Public
Policy 12 (1989) p.639
decision-making calculus implemented when the individuals use in drafting contracts.

In this model contracting is regarded as a parallel process to the three kinds of synallagma: genetic, functional and conditional. It seems that the analyses of only one of them does not provide the stable basis for the bargaining theory of contract, because all three types of synallagma are connected in the sense that together they create a set of constraints within which a contract formation may take place. Synallagma thus understood reflects the general rules of the contracting game.

Contracting encapsulates three problems; coordination, division, defection. Each of these problems may be separately described as a Prisoner’s Dilemma. The contracting cannot be regarded as an isolated feature of rational decision, as there are in fact three such characteristics which interact between themselves. This problem can be captured in the so-called “divisible Prisoner’s Dilemmas”\(^{50}\). In this game each player has to make a triple choice: whether to contract or not, which terms of contract to choose (contract 1 or 2), and whether to perform or to defect.

This game which is in fact a single non-cooperative game may be transformed in two cooperative games by virtue of the process of “backward induction”. The first cooperative game deals with negotiating over enforcement costs. These costs include the safeguards of compliance (e.g. the exchange of hostages or collateral clause). The second game involves negotiations over the gains from trade (split of cooperative surplus). In this way the outcomes of one game influences the potential payoffs of the next game. The main assumption is that if information is complete, cooperative games are solved. The solution is based on another assumption, namely, that the contract will minimize the sum of the costs imposed by one

---

player on another one. In fact, this is a restatement of a well-known and controversial “minimax relative concession” proposed by D. Gauthier.

**Fig. 2. Divisible Prisoner’s Dilemma** (adopted from: J. L Coleman, D. D. Heckathorn and S. M. Maser, „A Bargaining Theory Approach to Default Rules in Contract Law”)

<table>
<thead>
<tr>
<th>Player A</th>
<th>Player B</th>
<th>Non Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contract 1</strong></td>
<td><strong>Contract 2</strong></td>
<td><strong>B free rides</strong></td>
</tr>
<tr>
<td><strong>Contract 1</strong></td>
<td>Status quo</td>
<td>3,11</td>
</tr>
<tr>
<td>19,7</td>
<td><strong>9,2</strong></td>
<td></td>
</tr>
<tr>
<td>C₁</td>
<td>D</td>
<td><strong>NP₃</strong></td>
</tr>
<tr>
<td><strong>Status Quo</strong></td>
<td><strong>Contract 2</strong></td>
<td><strong>B free rides</strong></td>
</tr>
<tr>
<td>9,2</td>
<td>16,10</td>
<td>3,11</td>
</tr>
<tr>
<td>D</td>
<td>C₂</td>
<td><strong>NP₃</strong></td>
</tr>
<tr>
<td><strong>A free rides</strong></td>
<td><strong>A free rides</strong></td>
<td><strong>Status quo</strong></td>
</tr>
<tr>
<td>22,1</td>
<td>22,1</td>
<td>9,2</td>
</tr>
<tr>
<td>Npa</td>
<td>Npa</td>
<td>D</td>
</tr>
</tbody>
</table>

---

Coordination problem is resolved, if both parties share a common interest in contracting ($C_1, C_2$ respectively) over individual action ($D$). A division problem may be captured as a choice between the offer of A (contract 1) and the offer of B (contract 2). In fact both have to agree on one contract.

The problem of bargaining and fixing terms of contract is exactly based on this. J. L Coleman, D. D. Heckathorn and S. M. Maser try to solve the problem taking the assumption that there is some joined rationality of agents. This assumption is based on the interpretation of the bargaining theory by D. Gauthier as well. According to this interpretation, players may make binding concessions so that they can minimise their claims respectively, maximising the joint result. In fact this assumption allows Gauthier to presuppose that players in Prisoner’s Dilemma game will cooperate.

The terms of agreement to cooperate between parties specifies the actions that should be carried out and the rewards and punishments relating to compliance or defection. A three-dimensional choice includes generally three phases of contracting: firstly pre-phase, when the decision whether to seek a contract is taken. Rational parties would cooperate on the assumption that cooperation will create a join gain or cooperative surplus. Secondly, there is the negotiation phase in which the parties have to agree upon the terms of contract. Thirdly, there is the post-phase in which the parties make the decision whether to perform the obligation or to break the contract.

The pre phase is based in this model on joint rationality. If $U_i$ is the expected utility of party $i$ and $D_i$ is utility from disagreement, $U = (U_a, U_b)$ is a given agreement’s utility vector, and $U' = (U'_a, U'_b)$ is any other feasible agreement’s utility vector, $U$ is jointly rational if for each feasible outcome $U'$, $U_a > U'_a$ or $U_b > U'_b$.

---

The negotiations phase is based on concession rationality. This kind of rationality requires concessions made by the parties. Typically, concession is understood as agreeing to an outcome less preferred than the most preferred outcome. Assuming that $C_1$ is a best hope outcome of A and $C_2$ is the best hope outcome of B, the parties’ best hopes outcomes are situated on the opposite ends of the contract curve. In those circumstances there are two possibilities: either one party (player) makes all concessions agreeing on the others’ player best hope outcome or both parties will make such concessions. In this model, bargaining in fact depends on the allocation of concessions. Under conditions of perfect information, each player will agree to an outcome only if the concessions required from him correspond to the concessions of the other player. J. L Coleman, D. D. Heckathorn and S. M. Maser state that on assumption of equal rationality of the parties each party makes equal concessions.

The post-phase is dominated by individual rationality. In this phase, where the payoffs from cooperation are fixed, the problem of defection dominates. In this model the authors assume that defection will take place if $U_i < D_i$. Such a situation means that within the process of bargaining the concessions of $i$ led to the situation when the utility from disagreement is lower than from performance of agreement. This in fact means that in the process of contract formation there is little room for harsh bargains. Defection depends on utility awarded by the contract — the lower awarded utility, the higher incentive for defection. Correspondingly, hard bargain will result in the increasing of incentive for defection.

Nevertheless, while taking into account the payoffs in the divisible Prisoner’s Dilemma defection in case of the performance may be a dominant strategy. It is a common knowledge that in case of half-performed contracts (contracts where one party as a first one performed its obligation), defection and taking advantage from the performance already rendered by other party is a dominant strategy. In
this place it should only be mentioned that the very existence of contract law is a just response for this problem. Defecting party within the legal system does no longer play in Prisoner’s Dilemma game. Then if one loses the case as a defendant, the defecting party must theoretically pay judicial costs and pay damages. This changes the payoffs in a drastic way. On the other hand, the system in which contracts are not enforceable is also imaginable. This solution would require exchanging hostages and real threats that would also change the rules of exchange so in the end there would be no longer a Prisoner’s Dilemma situation. This is, however, too expensive method to implement and in this sense contractual system saves those resources and diminishes a price of exchange.

It should also be observed that J. L Coleman, D. D. Heckathorn and S. M. Maser assume that the criteria of fairness should be endogenous to transaction relationships. In their model of bargaining “in the shadow of law”, contracting is supposed not to be constrained by any external standards of fairness. In fact, along with Gauthier, they regard the process of rational contracting as specifying the relevant conception of fairness.

The above-mentioned authors of the model assume that law may play a role of a cognitive resource for the parties. Taking into account the form of divisible Prisoner’s Dilemma, it may be true that legal rules will save transaction resources by the way of solving two problems: coordination and defection. The problem of coordination (genetic synallagma) is solved by the system of an offer and acceptance and special rules determining the moment and the way in which the contract is concluded. The problem of defection is

---


55 The so called Mailbox rule Adams v. Lindsell 1 B. & Ald. 681, 106, Eng. Rep. 250 (1818) seems to be one of such rules; the offer is accepted since the letter of acceptance is put to the mailbox. The other rules indicate the time when the message containing the acceptance reached the offeree or came into offerees’
tackled by the rule that grants damages in case of breach or in some special cases, the specific performance, may be ordered by the court. There is also a commonly accepted rule stating that performance and counter-performance should be exchanged at the same time. According to the principle of conditional synallagma, in case of non-performance, the exception of *non adimpleti contractus* may be raised by the defendant against the plaintiff who claims performance but has not completed his obligation.

This does not however solve the problem of the equivalence in contract. There is no rule supporting one fixed rate of exchange. J. L Coleman, D. D. Heckathorn and S. M. Maser admit that the problem of the third party’s (court’s) intervention depends on the amount of endogenous transaction resources. If resources are scarce there is a good reason for such intervention. One of the best resources’ provider is just a free market which may protect against defection before the obligation is performed. On the other hand the access to the market will increase the set of alternatives and shift the disagreement point.

**Unfairness of contracts and the Nash solution to bargaining problem**

Bearing in mind that the position of the parties (players) in bargaining situation depends predominantly on the set of alternatives (disagreement point) the bargaining problem could plausibly be analysed in two different institutional environments: firstly, as a free Coasian trading on perfectly competitive market and secondly,
as institutionalized bargaining in a situation close to the bimono-poly.\textsuperscript{56}

Intuitively it seems that envy-free rules don’t exist outside the institution within which both parties operate. In first case they are depending exclusively on the subjective comparison of the outcomes based on individual preferences or the rule of fairness is regarded as \textit{ex post} (the rule changes accordingly with the changes of bargaining solution). In the second case, the standard for interpersonal comparison may be fixed \textit{ex ante} but the rule is contextual and it influences as such the individual preferences in similar situations to the extent that hypothetical unfairness of the solution is diminished (as such the rules of justice incorporated within the society may be regarded as fair for this society or institution, as in case of Rawlsian model of justice\textsuperscript{57} or the ethical preferences in Harsanyi\textsuperscript{58}, where the subjective preferences are changed by the ethical preferences accepted under the assumption of equiprobability).

In this case I presume that the typical “face to face” bargaining should be placed in one of the two contexts mentioned above and being extremely unrealistic: in the first case; total individualism, in the second total \textit{ex post} collectivism. Moreover, in order to place the bargaining situation in relatively realistic circumstances some empirical data should be provided. Firstly, the game theory treats its rule as the exclusive. The best example of this statement is the interpretation of the Nash bargaining solution. Secondly, the experimental ultimatum game proves that the solution chosen by the play-

\textsuperscript{56} Cf. the remark of K. Binmore, \textit{Game Theory and the Social Contract II, Just Playing}, Cam. Mass.-London 1998, p. 137, who notes that: „Insofar as practical applications are concerned, the claim that bargaining outcomes will be approximately Pareto-efficient when transaction costs are small becomes particularly suspect when one of the bargainers has a large outside option”.


ers equals to the real outcome of 50/50 to 60/40 in case of the division of 100, with the other subgame of a perfect split 99/1.\textsuperscript{59} The explanation of these results is possible if we take into account the rules of fairness changing the individual preferences so that the result reaches almost 50/50. This is what may be subscribed as an “ethical” or fairness rule expectation, i.e. the expectation not only in terms of utility maximization, but also a distributive fairness in given situation\textsuperscript{60}.

It seems that this “distributive fairness expectations” does not belong to the bargaining process itself. In one word it is an exogenous factor and as such requires some “Archimedean point”. The problem of a fair distribution is in fact not a part of private law\textsuperscript{61}. J. L Coleman, D. D. Heckathorn and S. M. Maser claim however that the problem of division and fairness is crucial for private law\textsuperscript{62}. Notwithstanding their theory of transactional resources they claim that their model of bargaining implies that when courts impose distributive justice schemes on contracting parties it is in the interests of these parties. This intervention is “contextual” in the sense that distribution does not revoke any general principles of justice. It is limited to the scope of outcomes within which the parties would have bargained. On the other hand the authors suggest that by acting efficiently the courts usually base their solutions on widely accepted principles of fairness and distributive justice.


\textsuperscript{60} The situation changes if the sum to be divided is bigger. It seems, that if the sum is big in comparison to the budget of the player, the result of the game will correspond with the subgame perfect equilibrium. In this situation the split is supposed to attain 99/1.


The model provided by J. L. Coleman, D. D. Heckathorn and S. M. Maser and especially their interpretation seems to be questionable. It suggests that although fairness should be endogenous to the bargaining process and the result of bargaining process should be fair by definition, in some cases the intervention of court is necessary. Such an intervention should not be “exogenous”. These assumptions are in my opinion contradictory. Criticising this model I would also like to point out some methodological problems related to the version of a bargaining theory adopted by those authors. In fact they have implemented the bargaining theory as proposed by Gauthier and adopted his model to the problem of contracting.

The bargaining theory presented by Gauthier includes some basic still controversial assumptions. Gauthier assumes that agents are able to comply with mutually advantageous constrains. The agent may be called “constrained maximiser”. This assumption leads Gauthier to the conclusion that rational players can cooperate in the Prisoner’s Dilemma game. In fact Gauthier’s players implement strongly dominated strategies. This assumption seems to be based on the fallacy of the twins. Assuming the existence of complete information and full rationality of the players, one can assert that both of them will make the same choice so that two outcomes in Prisoner’s Dilemma are possible: defect/defect or cooperate/cooperate. The problem is that the model of rationality presupposed by the game theory would defend the choice of the second strategy.63

D. Gauthier formulates also the principle of “mini-max relative concession”. Regarding the bargaining process as a two-stage process of claim and concession and taking into account that each player is equally rational, each of them tend to minimize his/her concession assuming that the other will do the same. On the other hand, as K. Binmore suggests, concessions are costly and it is diffic-

---

cult to explain why rational players would regard the initial claims as relevant.

In conclusion we may comment that the implementation of Gauthier’s model of bargaining is perhaps not the optimal instrument to explain the bargaining process and that it is doubtful whether it may provide a stable basis for the theory of contract.\(^{64}\)

Hence I would like to concentrate exclusively on the division problem. The problem may be presented as another non-cooperative game, namely Rubinstein’s bargaining game\(^ {65}\). In this game both players are making proposals (offers and counter offers) until one of the offers is accepted\(^ {66}\). The factor of time in which the agreement is reached is taken into account, so that \(\delta\) represents the amount of decrease for a party for each period of time.

If A offers \(x\), he retains the share \(1-x\). Additionally the discount of time should be taken into account. In these circumstances the counteroffer from B is more attractive for A than his next offer if it gives \((1-x)\delta\). The game illustrates the thesis that the outcome of the bargaining process is diminishing in time (“the cake is shrinking”), so that the sooner one offer is accepted, the better.

This game has a unique subgame-perfect equilibrium: A offers B: \(\delta/(1+\delta)\) and does not accept any counteroffer from B. B accepts any offer equal or greater than \(\delta/(1+\delta)\) or makes a counteroffer of \((1-x)\delta\). A receives \(1-x\) or \(1/(1+\delta)\). The strategy of A is never accepting a counteroffer, taking into account that the B’s counteroffer is not larger than \((1-x)\delta\). The best strategy of B is to take the initial offer.

---


Thus A makes the offer large enough so that B is not able to make a counteroffer preventing repetition of the same offer. The model assumes that in special case ($\tau \to 0$) where there is no time interval between the rejection of proposal and a new proposal there is virtually the advantage of the party who makes the offer first.

There are no incentives to cheat in this game and no mechanism for sustaining commitments is required. Within time the game converges to Nash bargaining solution. Additionally the possible asymmetries between the parties result from the different attitudes to the passage of time. In fact the interpretation of Rubinstein’s bargaining game stresses that the more patient party has more bargaining power. The difference does not lie in the bargaining skill because both parties are rational optimisers.

The result of the game corresponds to the Nash solution to the bargaining problem. Bargaining solution is a function $f(P,c)$, where $P$ denotes payoff space, and $c$ denotes conflict point, such as,

$$(P,c) \to f(P,c) = \arg \max (u_A-c_A)(u_B- c_B)$$

The bargaining outcome is represented in utilities ($u_A$, $u_B$). The Nash bargaining solution satisfies four axioms: independence of equivalent utility representation, symmetry, independence of irrelevant alternatives and weak efficiency (Pareto-optimality).

Fig. 3 Nash bargaining solution (based on J. F. Nash, “The Bargaining Problem”, Econometrica 50)

---

According to the fig. 3 point $Q$ coincides with Nash bargaining solution. At the same time $\tan \alpha$ expresses the ratio of exchange $u'/v'$ and $\tan \alpha = (u_A - c_A)/(u_B - c_B)$.

It is important to note that if the players in Rubinstein’s bargaining game had the eternity in which to bargain then the game would have had very appealing characteristics. The model assumes that in special case ($\tau \to 0$) where there is no time interval between the rejection of proposal and a new proposal there is virtually the advantage of the party who makes the offer first. There are no incentives to cheat in this game and no mechanism for sustaining commitments is required. Within time the game converges to Nash
bargaining solution. Additionally the possible asymmetries between the parties result from the different attitudes to the passage of time.

In fact the interpretation of Rubinstein’s bargaining game stresses that the more patient party has more bargaining power. The difference does not lie in the bargaining skill because both parties are rational optimizers. All those characteristics of the Rubinstein game are feasible under the assumption that bargaining is costless. If transaction costs are zero, the lapse of time between offer and counter-offer does not matter. As R. Coase has rightly observed, the peculiar feature of the zero transaction cost world is that: “when there are no costs of making transactions, it costs nothing to speed them up, so that eternity can be experienced in a split second”\(^{68}\). This means that the Coasian zero transaction cost world corresponds to the Rubinstein’s bargaining game with no time interval between the rejection of proposal and a new proposal.

This observation certainly does not exhaust the advantages of modeling a hypothetical bargain in lines of the Rubinstein bargaining game. The results of the application of the model to evaluation of the real face to face bargains leading to contracts seem however unclear, since the majority of transactions are not concluded in a zero transaction cost world. On the other hand the correspondence between the solution to the Rubinstein bargaining game and the Nash bargaining solution strengthens the argument for the application of the later as a benchmark for the evaluation of bargaining process even if the Nash solution seems to refer to subjective conditions such as parties’ risk aversion.

It is also worth mentioning that some weaknesses of Nash solution have recently been diminished\(^{69}\). For example A. Rubinstein, Z. Safra and W. Thomson presented an interpretation of Nash solution

---


based on reference to alternatives-preferences instead of utility functions. As A. Rubinsten observes, this would lead to transformation of Nash solution from utility sensitive solution concept into a convention.\textsuperscript{70}

\textbf{Conclusion}

Those observations generally prove two suggestions. Firstly, the freedom of contract may be ex post limited in cases in which the result is inefficient and thus leads to socially undesirable effects. From this perspective it is however arguable whether the restrictions of the freedom of contract may be legitimate. It seems that in the cases in which the voluntarily agreed contracts lead to potential impoverishment of a weaker party, the welfare system and a public policy seem to be more adequate instruments than the contract law. However the standard concept of hypothetical contract may be implemented in those circumstances under some conditions, namely the contract should be grossly unequal which is reflected in the concept of “excessive benefit” or “gross unfairness” in art. 51 CESL.

Secondly, the disproportion should be proved to have resulted from a typical procedural vitiating element. Within the context of CESL these elements are explicitly enumerated in art. 51. The criterion of efficient allocation and fair distribution may be reconstructed in two ways, depending on whether the excessive benefit resulted from involuntary market exchange (“contract failure”) or the gross unfairness was a result of contract entered into in dual-monopoly (“market failure”). In the first case a hypothetical contract should be reconstructed in accordance with the criterion of efficient allocation in competitive equilibrium. The concept of hypothetical consent should justify the legal intervention. In the second case a hypothetical contract should reflect the criterion based on potential solution to bargaining problem, typically the Nash solution. The solution to the bargaining problem provides a Pareto-efficient outcome (this

being one of the axioms formulated by Nash). In those circumstances it seems that the basis of the legitimacy of such solution is endogenous, thus the solution predicts the result of bargaining process. Hence, the requirement of fairness and in contracts is not meaningless if contextualized (market or non-market environment) and specified according to some usually accepted assumptions such as Pareto-efficiency, symmetry, invariance. The reconstruction of such criterion for fair and efficient hypothetical contract within a scope of judicial governance is thus purported by a model of bargaining deployed within a framework of the game theory.
CONDITIONS OF FAIRNESS OF JUDGMENT UNDER CIVIL PROCEDURE

EDYTA GAPSKA

John Paul II Catholic University of Lublin

Abstract: One of the constituents of the principle of the right to court is procedural justice, which gives the opportunity to deliver factually and legally correct judgments. Procedural fairness is guaranteed, inter alia, by equal rights, openness and transparent rules of procedure, the right to be informed and be heard as well as the right to receive judgment fulfilling definite formal requirements – such as preciseness, predictability and sustainability. Apart from procedural fairness there is another, material aspect of justice, which refers to universal values, such as dignity of a human being. This aspect of justice is not legally sanctioned, nevertheless it should lie behind each phase of establishing and applying law and its regulations.

Introduction

Court proceeding is associated with investigation of truth and search for justice. Furthermore, fair procedure and fairly established institutions accountable for course of proceedings in view of execution of the right to judgement to be pronounced by court, gains importance. Nevertheless, fair judgment poses outstanding issue not only in the normative aspect but also, and perhaps above all, in the social aspect.

For the purpose of a closer look at this outstanding issue, the scope of the conceptual framework of ‘justice’ will be analysed particularly with regard to legal decision-making acts. Procedural guarantees for execution of justice under civil procedure will be the subject matter of further elaboration. And all this is to determine to what extent justice is normatively underdeveloped and what related consequences may arise in terms of human rights in the judicial and civil decision-making process.
Conceptual Framework of Fair Judgment

The attribute of ‘justice’, no matter how this notion is defined,1 is a kind of immanent and necessary property of any judgment. This is primarily due to the fact that making decisions, or more specifically giving judgments, is the focal point of the judiciary. The essence of the judiciary is determining what standard of the substantive law is to be applied to the established actual state of affairs that is deemed proven. In terms of applicable legal standards, decision is characterised by the fact that:

• it is taken by courts, i.e. state authorities with full political and procedural guarantees for proper judging (such as competence, independence, impartiality, open and immediate examination of a case)2;

• is taken within the framework of the so-called decisive freedom that provides for the possibility to investigate and qualify given facts3, and therefore, allows a judge to choose legal standards that reflect rights and obligations of legal subjects to the fullest possible extent (thus, fairly and justly);

• it is imperative in nature, i.e. it clearly and bindingly specifies legal consequences provided for in relevant standards in relation to subjects of proceedings.

---


From this perspective giving judgments, understood as settling legal disputes by courts, i.e. authorities of judicial independence that are characterised by means of specific principles of organisation and proceedings as well as special status of persons constituting them will sustain to be the act of determining what is fair in a given case. Therefore it is emphasised that ‘the first and most important requirement to be met by the civil procedure is to ensure fairness of judgments delivered by courts.’ A judge who has ‘the ability to find fair or righteous law’ will be the guarantor for fairness, which depends on broad education and understanding of contemporary life, and culture as well as mind and heart. The essence of the conceptual framework of ‘the judiciary’, even if intuitively understood, cannot be changed by the fact that its current scope is limited to the postulate of lawfulness. It is due to the stigma that has been left on the continental legal system by regarding the judiciary in a positivist and lawful way. In consonance with this approach, fair judgment is identified with a judge's decision that is in accordance with legal standards, that rather exhausts the concept of lawfulness and legalism, and therefore results in obedience to binding law and its regulations.

Apart from giving judgments in effect of judicial procedure of meting out justice, the second reason why one cannot a priori deny features of fairness of a judgment due to its nature, is the fact that judgments belong to the group of decisive acts. The features of all decisions, including but not limited to court decisions, are:

- legality in terms of the relation between decision and law, or more specifically, subordination of all procedural and substantive aspects of decision to normative requirements;
- rationality, i.e. ability to verify reasons for the decision;

---

4 Cf. the judgment of the Constitutional Tribunal of 12 December 2001, SK 26/01, OTK ZU 2001, no 8, item 258, p. 1370.
5 E. Waśkowski, System procesu cywilnego, Wilno (1932), p. 100.
• certainty or predictability of form and content of decision;
• binding nature that guarantees, in the case of circumstances provided for by law, inviolability and more generally sustainability of decision;
• effectiveness;
• and finally - justice, to which its own and autonomous significance is attributed on the one hand but at the same time regarded as aggregation and completion of all other factors that co-determine essence of decision.

Taking stance on the issue of the right to fair judgment is not possible without explaining what the term ‘fair’ means and the same should be taken into account in the context of decisions on judicial application of law. It is indicated that the criterion of justice could be decision’s conformity with the law in force or with applicable standards of law, provided that they are fair from the point of view of their external evaluation, possibility to deem a decision to be fair, regardless of its relationship with the law or internal justice of decision.\(^7\)

According to the first, legalistic conceptual framework of justice, decision is considered to be fair only if it is consistent with applicable standards of law in force. In view of this conceptual framework, justice is identified in terms of lawfulness, i.e. an absolute compliance with an act of law. In result, fair decision is a decision taken ‘under the rule of law’.\(^8\)

Illegalist conceptual framework of justice also makes decision's fairness dependant on compliance with applicable standards of law

---


in force but with those that need to be assessed to be fair. This conceptual framework allows not only to assess lawfulness of a decision but also conformity with generally accepted universal values.\(^9\)

From the perspective of an alegalist conceptual framework, decision's relationship with law has no effect on fairness. Fair decision is a decision taken in compliance with the standards of justice, regardless of the provisions of law in force to the extent that may indicate final arrangements.\(^10\) Therefore, subscribing to this conceptual framework allows to make decisions ‘above the rule of law’ or even to make illegal decisions.\(^11\)

According to a recent theory, decision's fairness is its internal property that is independent of any criteria. Such decision with its intrinsic value does not need any justifying relativisation.\(^12\)

When comparing those conceptual frameworks in order to identify relevant relationship between justice and lawfulness of judicial decisions, Montesquieu should be quoted: ‘Not everything that is law is therefore fair; but what is fair should become law,’ and what is fair corresponds to the inherent and inalienable dignity of a human being.\(^13\) However, normative reference to this dignity is uneasy, especially in the context of formation of judicial procedure. On the one hand, as it has already been mentioned, one cannot

---


\(^11\) The opinion that fair decision arises out of the idea of justice based on conscience and legal awareness of possibly greatest number of citizens can be placed on the borderline between the illegalist and alegalist conceptual framework. See A. Kość, *Podstawy filozofii prawa*, Lublin (1998), pp. 122-123.

\(^12\) J. Wróblewski, *Wartości...*, p. 189.

deny presence of justice in the course of creating law and judicial application. On the other hand, law that aspires to equal and transparent treatment of every person requires closed and as precise as possible definitions, and yet, justice cannot be defined in that way. From these reasons this notion is often simplified and reduced to legalism and lawfulness or only to respect towards equality that is often understood variably, usually in terms of measuring everybody by the same yardstick,\textsuperscript{14} therefore equal treatment by law for all individuals. Meanwhile, without denying importance of equality in justice, it should be noted that ‘there are unfair equalities and fair inequalities.’\textsuperscript{15} The latter ones include, for instance, the institution of exempting from court costs, appointing a procedural attorney-in-fact by court or instructing a party that is not represented by a professional attorney-in-fact about the admissibility, manner and time limit of appeal.\textsuperscript{16}

In shaping a fair decision, a tremendous role is played by a judge who ‘must be above all a man of deepest possible sense of fairness and justice’,\textsuperscript{17} who is a subject in the process of applying law only


\textsuperscript{16} Justice is also relativised and tested by subjective feeling of a subject, rights or obligations of whom are covered in judgment. Degree of such relativisation, as well as importance of the sense of justice in shaping opinion on fairness of court procedures, is expressed in numerous theories of intuitive law, according to which the sense of justice is taken as a basis to determine content of established and applicable law. This sense of injustice (the Anglo-Saxon free school of law) is described as: \textit{Rechtsgefühl} (German-Austrian free school of law), \textit{l’intuition réactive} (French school), \textit{sentimento giuridico} (Italian school). One of the followers of this theory, an American philosopher of law, Edmond Nathaniel Cahn even acknowledged that content of legal decisions prejudiced the sense of injustice. See: R.A. Tokarczyk, \textit{The sense of Injustice}, Indiana University Press 1975 and \textit{Confronting Injustice}, Little, Brown and Company (1966), quoted in R.A. Tokarczyk, \textit{Sprawiedliwość...}, p. 9.

\textsuperscript{17} M. Sałjan, \textit{Etyka zawodu sędziowskiego} (in:) \textit{Ius et lex. Księga jubileuszowa ku czci Profesora Adama Sirzembośa}, A. Dębński, A. Grześkowiak, K. Wiak,
to legal standards and own inner convictions. A judge's faithfulness to universal standards of justice that underlie the concept of human rights, allows to overcome the conflict between conscience and provisions of law. This conflict does not have to be, and nowadays usually is not, expressed in the content of standards that are clearly contrary to accepted standards of justice, especially that procedural standards are generally morally neutral. In principle, this conflict takes place only on mental plane associated with application of standards and definition of the scope of legal consequences specified therein. Consequently, it is noticeable that justice of judgment is decided to a large extent at the stage of selecting the most righteous legal arrangement in a given situation that takes into account dignity of a human being, including realms of social life and moral standards. Mere knowledge of law and its literal application without evaluating or balancing legal sanctions does not guarantee fair adjudication of a case. Furthermore, it can lead to ‘a conflict between postulates of lawfulness and postulates of justice,’ according to the following statement: *summum ius summa iniuria.*

**Principle of Procedural Fairness**

The Polish legislator has neither formulated nor sanctioned the obligation to issue a ruling corresponding to general principles of fairness and justice, which is justified in the field of civil proceedings not only by the fact that the Polish legal system belongs to the culture of continental law based on the concept of legal positivism

---


19 Judgment of the Constitutional Tribunal of 14 April1999, K 8/99, OTK 1999, no 3, item 41,


20 Which assumes, as it is recalled by W. Łączkowski, that law ‘is in force because and when it comes from the constitutionally competent authorities of the state and is established in accordance with legislative procedures. Validity
but also due to the principles governing adversarial civil procedure. The model of proceedings adopted by the Polish legislature indicates that the burden of responsibility for the outcome of a case rests upon the parties and consists in the obligation to prove allegations concerning the factual circumstances, from which the parties derive legal effects for themselves (*onus probandi*). The other burden resting upon the parties is preparing, collecting and submitting the evidence to a court which allows to settle a case (*onus proferendi*). In the context of the guarantee for proper adjudging, the so-called burden of supporting the procedure effective as of 3rd May 2012 (i.e. from the date of entry into force of amendments to the Code of Civil Proceedings enacted by the Act of 16 September 201121) is also important. It is aimed at reaching even further compilation of trial dossier, and therefore, increase in the discretionary power of a judge in terms of not taking into consideration evidence motions deemed late, even if they relate to events that are of vital importance for settling a case. It should also be remembered that in the course of civil procedure parties administer subject matter of a claim as well as respective procedural steps. Therefore court's role boils down to ensuring fair and efficient conduct of proceedings and legal assessment of entirety of procedural dossier provided by the parties in order to issue a binding decision. Although civil court enjoys powers to actively participate in collecting evidence (for instance, by admitting evidence *ex officio*) as well as to control procedural steps undertaken in respect of the subject matter of a procedure in an illegal way or in a manner that is not in conformity with principles of social intercourse, content of judgment being dependent mainly on operations of the parties duly fulfilling their procedural obligations. Since parties who are to deliver the dossier constituting the basis of judgment play such a significant role that it is difficult to make the postulate to settle a dispute respecting prin-

21 Journal of Laws No 233, item 1381.
principles of fairness and (objective) justice, a normative duty of court sanctioned by specific legal and procedural instruments.\textsuperscript{22}

In the course of civil procedure, a normative surrogate for substantive justice is the so-called procedural justice\textsuperscript{23} that consists in shaping procedural institutions in a way ensuring maximum guarantee of making objective, fair and just decisions.\textsuperscript{24} Such significance should be attributed to the statement contained in art. 45 par. 1 of the Constitution of the Republic of Poland that guarantees for every

\textsuperscript{22} However, in the literature supported by the case law of the Supreme Court, it is stated that ‘recognising individual interest as priority object of protection in civil procedure and mounting it on availability and contradictoriness does not lead in any way to abandonment of the assumption that judgment should be based on the actual state of affairs corresponding to reality. On the contrary, (...) such procedure is based on the belief that these principles constitute the best guarantee for finding truth and accurate and fair settlement.’ See: P. Grzegorczyk, \textit{Stabilność orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych} [in:] \textit{Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego. Serock k. Warszawy 24th-26th September 2009}, T. Ereciński, K. Weitz, Warszawa 2012, p. 126 and the literature invoked in footnote no 72 therein. However, this stance proves that judgment corresponding to the principles of fairness and justice is postulated for the purpose of civil procedure rather than normative requirement. Moreover, in view of the premises of the above-mentioned standpoint, not only law applicability but also law enforceability respect the principles of fairness and justice, therefore there being no conflict between applicable standards for a particular case and postulates of justice.

\textsuperscript{23} The importance of which has been emphasised, \textit{inter alia}, by M. Borucka-Arctowa who indicates that in order for procedure to be deemed fair, both procedure itself and final outcome are taken into consideration (\textit{Sprawiedliwość proceduralna...}, p. 27). Quoting P. Pernthaler, Z. Czeszejko-Sochacki highlights that the guarantee for fair and just court procedure is regarded as one of the major achievements of the democratic statehood (\textit{Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)}, Państwo i Prawo (1997), no. 11–12, p. 102).

individual ‘the right to a fair [...] hearing.’ Although the structure of the quoted constitutional norm does not preclude identifying a fair hearing with general function of courts and with application and interpretation of provisions of law in conformity with the social sense of justice, it indicates above all essential attributes of the very judicial procedure. In other words, the adopted structure and content of the principle of procedural fairness suggest that the criterion of fairness of judgments pronounced in the course of court proceedings is the procedure itself.

This procedural aspect of the guarantee to respect the right to court stems above all from equality of parties to proceedings to the extent that parties have a real possibility to benefit from any guarantees and procedural rights, including the right to be heard, the right to be informed and the right to present own reasons, clear principles

---

25 It is meaningful that the official title of art. 6 § 1 of the ECHR includes the term ‘right to fair civil trial’ which, in essence, is attributed to similar content of the ‘right to court’ provided for in art. 45 of the Constitution of the Republic of Poland. It results in the belief in the rightness of the thesis that ‘procedural justice’ is only a set of procedural guarantees accountable for judgment in the course of duly implemented procedure based on the principle of equality of parties and conducted by impartial and independent court. Such a conclusion results from the analysis of the concept of ‘the right to fair civil trial’ conducted by A. Włosińska, *Prawo do sprawiedliwego procesu cywilnego w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka* [in:] *Współczesne przemiany postępowania cywilnego*, P. Pogonowski, P. Cioch, E. Gapska, J. Nowińska eds.), Warszawa (2010), pp. 100-101.


28 See judgments of the Constitutional Tribunal of 11 June 2002, SK 5/02, of 19 February 2003, P 11/02 and of 30 July 2007, SK 1/06. Among the ‘constituents’ of the right to be heard, there are: the right to be informed, the right to take a stance, the right to take account of the stance, the right to be heard, the right to take notes. See: Z. Czeszejko-Sochacki, *Prawo do sądu*..., p. 101.

of procedure\textsuperscript{30} as well as the right to substantive judgment relevant to the outcome of properly (fairly) conducted proceedings.\textsuperscript{31} The right to obtain a binding settlement of a dispute within the above-mentioned meaning of procedural justice involves not only fairness of procedural steps undertaken by court in order to take a decision without undue delay\textsuperscript{32} but also judgement that displays certain characteristics of formal nature such as compliance with procedural principle, firmness, precision in terms of the scope of subjective and objective settlement, public announcement,\textsuperscript{33} as well as predictability and sustainability of judgment.

However, it should be noted that the above-mentioned requirements of procedural justice do not determine content of decision (judgment)\textsuperscript{34} but only create space for issuing fairest possible settlement while respecting equal rights of parties to proceedings. Therefore,

\footnotesize
\begin{itemize}
\item Z. Ziembiński, \textit{O pojmowaniu...}, pp. 175-176.
\item Specific instruments for examination of a case ‘in due time’ were implemented by the Act of 17 June 2004 on the complaint about violation of the right of a party to examination of a case under preparatory procedure conducted or supervised by a prosecutor and court procedure without undue delay (Journal of Laws 179, item 1843 as amended). Under the provisions of art. 1 par. 1 and art. 2 par. 2 of the above-mentioned Act, the right of a party to examination of a case without undue delay may be violated not only by inactivity but also due to irregular actions of court. In consequence, violation of the right to court is understood as any faulty action of court, including judgment that is in contravention of the provisions of the Code of Civil Procedure, which results in lengthening proceedings. See also H. Pietrzkowski, \textit{Zarys metodyki pracy sędziego w sprawach cywilnych}, Warszawa (2006), p. 37.
\item P. Pogonowski, \textit{Realizacja prawa do sądu...}, p. 11.
\item A similar stance was represented in judgment of the Constitutional Tribunal of 10 June 2003, SK 37/02, OTK-A 2003, no 6, p. 53. See also M. Borucka-Arctowa, \textit{Sprawiedliwość proceduralna...}, p. 28.
\end{itemize}
the obligation to conduct fair judicial proceedings does not guarantee settling a case on the basis of principles of substantive justice but their absence would lead to undermining the entire structure of the right to court; the essential feature being the requirement for balanced separation of powers and obligations of parties to any proceedings.

It must also be pointed out that these constituents of procedural justice should complement each other and intermingle. For example, predictability of the outcome of a case is correlate of coherence and internal logic of procedural mechanisms which allows to anticipate procedural and, to some extent, material consequences of actions undertaken in the course of court proceedings. In terms of settlement, predictability of the outcome may be also compared with the very content of judicial decision. This aspect of predictability allows to assume that provision of law used by court will determine content of judgement and will constitute its normative basis and, at the same time, grounds for formulating the principle that justifies a given decision and for the scope of the actual ascertain (the actual basis for decision). In its every sense, predictability is carried out by reliable, verifiable justifications indicating motives for settlement and presenting the attitude towards the stances of parties. Court's duty to justify pronounced decisions is necessary and obvious consequence of the adopted model of justice which manifests itself in striving for the fairest settlement as consistent with law as possible.

37 This objective is described in other words by P. Grzegorczyk (Stabilność orzeczeń sądowych..., pp. 121-122), who indicates that the purpose of civil procedure is not any judgment but judgment that is correct and stems from the claim for truth. Legitimacy of judgments is correct judgment-oriented as
by the Supreme Court, ‘one of the means to achieve this objective is comprehensive and extensive (both from the substantive and legal point of view) justification of judgment, especially if interests of parties are divergent and settlement must place one of these interests above the other. In such a case, particularly important role of justifying is to convince a party that stance in a case has been seriously considered, and if a case has been settled otherwise, it is due to important reasons’.\textsuperscript{38} Importance of justification cannot be boiled down solely to enabling appeal procedure concerning judgment and proceedings aimed at giving judgment in terms of actions and reasoning of a court of lower instance.\textsuperscript{39} Justification of a judicial decision should document its rationality. Convincing power of justification should inspire (especially in the belief of judgment's recipient) the certitude that court's decision is absolutely correct and fair and that it has been taken after exhaustive analysis of all circumstances of a case. Motives included in justification reflect and explain real reasons taken into consideration by a court when pro-

\textsuperscript{38} Reasons and grounds for judgment of the Supreme Court of 16 February 1994, III ARN 2/94, OSNP 1994, No 1, item 2.

nouncing a decision, therefore, they constitute an instrument of rationalisation of a given settlement. By means of these motives, a court indicates features determining correctness of a decision, i.e. validity (rightness) and legality, therefore, a court ‘presents transparency [...] and clarity of its actions to the public’.

Another important manifestation of procedural justice is: contradictoriness of civil procedure, its formalism, openness, balance between parties and as timely as possible closure of a case. All these aspects of fair trial must not only complete each other but also balance so that they allow for proper settlement both in the actual and legal aspect.

Non-compliance of judgement with any of the above-mentioned requirements, as well as pronouncement of judgment by a court without jurisdiction to hear a case or without the attribute of independence or impartiality may result in impairment or even exclusion of the right to court. Therefore, in order to create space needed to fulfil any guarantee resulting from the right to fair court, standards of procedural law account for institutions providing manifestations of this right with specified forms as far as civil procedure is concerned. Shaping court procedure in a way that will optimally provide everyone with the right to examine a case in accordance with the standards laid down in art. 45 par. 1 of the Constitution of the Republic of Poland becomes the execution of the right to court. This purpose is served by the ‘highest degree of regulation which is attributable to judicial application of law’.

---

42 E. Łętowska, _Pozaprocesowe znaczenie uzasadnienia sądowego_, Państwo i Prawo (1997), no 5, p. 8. The author says, _inter alia_, that reasons and grounds for judgment are the means of expression of the judiciary in a public debate.
43 Z. Czeszejko-Sochacki, _Prawo do sądu..._, p. 104.
influence court procedure, as well as what should be the result of such action.

In conclusion, it bears noting that civil procedure cannot be reproached with lack of instruments that serve fair and just decisions. However, bearing in mind that mere proceedings (although it is necessary to implement the principle of the right to court) do not automatically pre-judge the rightness of settlement, one should remember that fair judgement is pre-conditioned as much by making fair laws by the legislature, as by their application by courts with respect to human dignity.

Summary

Among values that are to be applied by a judge, the most significant place is taken by justice manifested in partial values implemented in various spheres of life, such as peace, security, order, etc.\textsuperscript{45} Thus, justice is not a matter of decision's conformity with law, therefore its legality. This feature determines correctness of judicial decisions, however, its acknowledgement does not automatically lead to

\textsuperscript{44} J. Wróblewski, \textit{Obiektywność decyzji prawnej}, Studia Prawno-Ekonomiczne (1972), no. 9, p. 7.

\textsuperscript{45} J. Wróblewski, \textit{Recenzja pracy C. Cossio pt. ‘El Derecho en el Derecho Judicial’ (Buenos Aires 1967)}, Państwo i Prawo (1969), no. 4–5, pp. 883–884. Cf. judgment of the Constitutional Tribunal of 10 June 2003, SK 37/02, OTKA 2003, No 6, item 53, in which it was stated, \textit{inter alia}, that ‘the obligation to examine a case fairly stipulated in art. 45 of the Constitution refers to court procedure. The requirement for fair examination of a case does not refer to the very content of judgement. From art. 45 of the Constitution, one cannot derive the general legal right to obtain court judgment, content of which is in accordance with the principles of justice. The general principle of conformity of court judgments with the principle of justice is represented and specified in specific constitutional provisions which implement the general principle of justice in various spheres of life. Content of court judgments is determined by substantive law standards. Judgment shall be assessed from the point of view of substantive law, whereas substantive law standards constituting the basis for judgment shall be assessed from the point of view of compliance with constitutional standards.’
the conclusion that decision can be deemed fair. The test of justice of decision considers the issue of its conformity with law to a small extent, namely, when recognising that applied legal standard represents the value of a human being;\(^{46}\) therefore, it is consistent with the universal system of values leading to the respect towards interests and dignity of man.\(^{47}\) These values are obviously derived from Christianity and their universality lies in the fact that they ‘require respect or even a sensible love for every man, appeal to the conscience and recognise inherent dignity of each human being regardless of what law has been established by the state legislator [...]. Justice is objective, universal and independent of the law in force at given time. Therefore, the role of conscience of a judge is invaluable in terms of perceiving justice.\(^{48}\) Responsibility for fair judge-


\(^{47}\) Cf. R. A. Tokarczyk, *Sprawiedliwość...*, p. 3.

\(^{48}\) W. Łączkowski, *Wymiar sprawiedliwości...*, pp. 230–231 and the literature referred to in footnote no 4 therein. According to the author ‘law made by the State does not have to ostentatiously and unceasingly invoke the Christian system of values as a source of justice. The most important is that content of law is not in fundamental conflict with this system. On the other hand, there is no rational reason to conceal this fact or deny it. The attitude of accepting the need for harmony between law and the Christian system of values coupled with the programmatic passing over the truth about the Christian sources of fair law may unnecessarily create an impression of moral ambiguity and incomprehensible embarrassment concealed under the guise of prudence, thoughtfulness and efficiency of actions. Meanwhile, law remaining in a serious conflict with the Christian system of values or, in other words, ignoring the natural law, most often leads to social pathologies or even tragedies of individuals and entire nations.’

For more information on this subject matter see also: W. Łączkowski, *Podstawy aksjologiczne prawa w orzecznictwie polskiego Trybunału Konstytucyjnego* (in:) *Kultura i prawo. Materiały I Międzynarodowej Konferencji na temat: Podstawy jedności europejskiej*. Lublin, 23\(^{\text{th}}\)–25\(^{\text{th}}\) September 1998, J. Krukowski, O. Theisen (eds), Lublin (1999), pp. 313-314. The author underlines that axiological foundations of law will have little practical significance in everyday work of a judge of common court, whose job is to execute law; however, it does not exempt the legislature from the obligation to
moment falls primarily on judges who, in terms of their discrentional
power, should take into account not only their experience and
common sense but also non-regulatory assessments and standards
resulting from the highest ethical standards characteristic of the
impeccable nature of a judge. These standards which shape a
judge's conscience cannot be formed in any way because it would
lead to relativisation of the conceptual framework of fair and just
decision based on the axiology of a particular judge. Applying the

establish fair law, i.e. law respecting the Christian values. The inability to
establish neutral law detached from any moral systems, ideological or
philosophical beliefs is discussed also by W. Łączkowski, Aksjologiczne
podstawy praworządności (in:) Iustitia Civitatis fundamentum. Księga pamięt-
kowa ku czci Profesora Wiesława Chrzanowskiego, H. Cioch, A. Dębiński, J.

49 Identified with the independent discretion of a judge. See: T. Wiśniewski,
kontrola dyskrecjonalizmu sędziowskiego przez sądy wyższego rzędu (in:) Ewolucja polskiego postępowania cywilnego wobec przemian politycznych,
społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Żjaz-
du Katedr Postępowania Cywilnego. Szczecin–Niechorze 28th–30th September
2007, H. Dolecki, K. Flaga-Gieruszyńska (eds), Warszawa (2009), p. 100. The
author, referring to B. Wojciechowski (Dyskrecjonalność sędziowska. Studium
teoretycznoprawne, Toruń 2004, pp. 63-64), states that: 'The discretion is the
possibility to make choice, however, a judge is restricted by law in his or her
actions and adjudicating is to be characterised by diligent procedure and the
requirement to take account of all circumstances of a case. A judge should
honour common standards of operation (e.g. rationality and fairness in
decision-making process) and take care of efficient execution of the postulate
of reliability.'

of specific conflict between independence of a judge, which assumes freedom
from purely subjective affections, emotions and beliefs, and the statement that
he or she must be guided by his or her inner sense of justice, fairness and
sensitivity is discussed by M. Safjan, Etyka..., pp. 271-272. This author argues
that it is possible to reconcile internal independence of judges with the
postulate of the sense of fairness and justice of judges [...]. Surely, the point is
not to make judges divest themselves of their own beliefs, system of values,
but to remain impartial (regardless their preferences) when judging and to
recognise the rightness of reasons even when they are not in full compliance
with a judge's vision of the world and axiology [...]. A judge's system of
beliefs, especially his or her political and ideological preferences should not
law according to one’s own conscience\textsuperscript{51} can be equalled with meting out justice only when a judge's conscience indicates a system of universal values which have their source in the Christian affirmation of dignity of a human being. A judge's conscience shaped in such a way requires a judge to perform evaluation ‘which corresponds as much as possible to the assessments expressed in applicable rules of law and legal culture in which a judge works and which he or she co-creates’.\textsuperscript{52} Such evaluation should be coupled with impartial assessment of actual circumstances and settling a case in accordance with his or her conscience, without any restrictions, influences and improper pressures.\textsuperscript{53}

The assessment of whether judicial decision is fair cannot lead to simplification in particular consisting in the identification of what is legal, lawful, logical with what is fair. It should be noted that referring to such weighty issues as human rights, including the right to court, there is no doubt that normative content should be shaped by concepts that represent the essence of those rights to the fullest extent. At the same time, those terms are provided with much poorer meaning which, in return, narrows expected guarantees and powers. This is also the case of justice which is obviously invoked

affect interpretation of law and decide on the content of decoded norm of law; a judge's axiology not only can but also should be apparent in the field of ‘decisive freedom of a judge where a judge searches for fair settlement.’ The ambiguity of the above-mentioned statement which relativises the possibility to resolve a case by a judge according to his or her system of values, has been objectified by the statement that ‘an ethically sensitive judge cannot comply with any law’ (ibidem, p. 272).

\textsuperscript{51} It is an obligation imposed on judges by the vow, the content of which is stipulated in art. 66 of the Act of 27\textsuperscript{th} July 2001 - Law on Common Courts (Journal Of Laws No. 98, item 1070 as amended),


in the context of the right to court; but at the same time its significance is limited to legality or fairness of court proceedings.

Confronting the concept of ‘justice’ in the context of judicial decisions with the principle of procedural justice that is respected in the Polish civil law, it can be noted that duties of courts in the scope of proceeding and adjudicating are constructed on the basis of the obligation of ‘due diligence’ and not the obligation of the ‘outcome.’\textsuperscript{54} Such due diligence manifested in implementation of postulates of fair or rather reliable procedure shall absolve from procedural liability for delivery of unjust ruling which still corresponds to law. When referring this conclusion to the title of this study, one should take account of the fact that civil court proceedings lack the basis for formulation of the thesis concerning existence of the right to substantively fair judgement. Issuance of fair settlement is therefore only postulated objective of civil proceedings to which all regulations contained in procedural standards, both those of instrumental and of substantive nature, are subordinated. At the same time it should be emphasized that only implementation of these standards is subject to legal verification and not achievement of the aforementioned goal. However, this goal is still subject to social and moral control, which leads to continuous reviving the debate over which imperative values should be protected by law and at the same time, with the fullest awareness that the right to court does not include the right to accurate settlement\textsuperscript{55} - one should not forget that justice has been prior to law. Justice should guide both law-making process as well as application of law so that any power and law is subject to fair and just settling a case.

\textsuperscript{54} P. Grzegorczyk, \textit{Stabilność orzeczeń sądowych...}, p. 137.

\textsuperscript{55} Cf. judgment of the Constitutional Tribunal of 10 January 2003, SK 37/02, OTK-A 2003, no 6, item 53.
Preliminary Studies for Identifying Graves From Ca 1800 BC in South-Eastern Poland

Monica Abreu-Głowacka, Dorota Lorkiewicz-Muszyńska, Czesław Żaba, Anna Hyrchała, Bartłomiej Bartcki, Eliza Michalak, Witold Pepiński, Agnieszka Przystańska, Tomasz Kulczyk, Wojciech Kociemba, Michał Rychlik, Tomasz Danyluk

Abstract: Graves discovered in Rogalin, district Hrubieszow, in the south-eastern region of Poland belonged to the Strzyzowska culture dated older than 1800 B.C.. The authors present preliminary anthropological and genetic studies based on bone material taken from the graves in order to obtain more comprehensive information on the bony structures of the skull, to determine the possible degree of kinship and the origin of the analysed human remains. Previous anthropological studies led to the identification of a biological profile including an estimated biological age and sex. Genetic studies have identified the biological sex and biostatistical analyses allowed to determine the possible degree of kinship between the human remains that were analysed.

Keywords: Ancient DNA, archaeology, anthropology, genetic studies.
Introduction

Since 2009 the Department of Archaeology at the Museum im. ks. St. Staszica of Hrubieszow has conducted archaeological research studies in Rogalin on the Strzyzowska culture which lived there during the Early Bronze Age. This culture in Poland appeared in the first half of the second millennium B.C. in the eastern part of the Lublin Upland. Its ceramic jars and ornaments with faience beads of copper located with the remains indicated that they definitely belonged to the Strzyzowska culture. Initially, this culture was treated as a local group of the Neolithic Corded Ware culture. Subsequent studies allowed to group the Strzyzowska culture with the cultures of the Early Bronze Age, i.e. partly being contemporary with the Mierzanowicka and Trzciniecka cultures.

In recent years molecular biology techniques have been introduced into biological anthropology. This has allowed to extract and classify different remains of DNA preserved in archaeological places and museums. DNA studies on archaeological material have supplied necessary information, and cooperation between archaeologists, anthropologists and geneticists in Poland is regulated by the Act of 23 July of 2003 for the protection and conservation of monuments (No. 162, item. 1568, with amendments).

The aim of this study was to identify the remains from the graveyard in Rogalin, Hrubieszow through genetic and anthropological

---

analysis and especially to present the importance of genetic testing for this study.

**Material and Methods**

*Material*

Archaeologists found 12 graves and labelled them: grave 0, grave 1, grave 2, grave 3, grave 4A, grave 5, grave 6A, grave 8, grave 9, grave 10A, grave 11, and grave 12. In grave 6A there was only a head and several vertebrae, but these were remains with valuable ornaments made of copper from the Bronze Age, such as faience beads and shell pendants. There was also a flint sickle. The archaeologists called these remains “Princess”, as the motifs that had been found there were the most valuable to date to be found in the Strzyzowska culture (Fig. 1). In grave 10A archaeologists found a perfectly preserved skeleton arranged in anatomical order with the arms crossed over the chest, equipped with a clothes bone pin, a bone belt buckle and a broken flint sickle. Ceramic jars typical of the Strzyzowska culture were not found with these remains. The status of “Warrior” was given to these remains due to the presence of flint knives, spears and arrowheads with an arc in this grave (Fig. 2).

Next to the remains of graves 4A, 6A and 10A archaeologists found fragments of bones belonging to children. These were called 4B, 6B and 10B, respectively. Bone fragments of the femur, humerus, vertebrae and left ulna bones were selected for genetic studies.
Figure 1. The grave 6A - „Princess”.

Figure 2. The grave 10A – „Warrior”.

Preliminary Studies for Identifying Graves From ca 1800 BC in South-Eastern Poland
Methods

Radiocarbon dating

Two graves (4A and 10A) were analysed using the radiocarbon technique with the use of carbon-14 (14C) in order to confirm the chronological origin of the remains.

Anthropological analysis

The first anthropological analysis of the remains was done by the Department of Anthropology at Maria Curie-Skłodowska University in Lublin. The analysis included estimating the age and sex of all the remains. However, the anthropological analysis conducted by the Department of Forensic Anthropology and Odontology at the Poznan University of Medical Science at this stage comprises only a study of the remains of the “Warrior” grave (10A).

Computer tomography and dental CT were used to obtain images for further investigation. CT scanning was performed with a GE Lightspeed CT scanner using a protocol allowing to obtain isotropic voxel slices 0.625mm thick. These slices were then used for secondary reconstruction (2D and 3D). The GE Advantage Windows 4.4 workstation equipped with GE Healthcare firmware was used.

Dental CT was performed using cone-beam tomography NewTom3G (QR Verona, Italy). Pantomographic reconstruction of dentition was obtained from axial images and was further used for dental age estimation. Estimation of the dental age was done according to the method published by Kvaal et al. (1995).

Reconstruction of geometry, which is the most important element of data analysis in image processing, is segmentation (extraction of anatomical structures from the CT image). 3D scanning of the skull was done using the optical scanner ATOS II (GOM).
Genetic analysis

Genetic studies were started at the end of 2012. Each stage of the genetic analysis was carried out by taking into account the criteria of authenticity in working with ancient DNA, such as:

- isolated workshops for each stage of work in the laboratory;
- sterile conditions in the laboratory;
- when working with ancient DNA other analysis should not be performed in the laboratory;
- negative controls;
- expected results: small fragments of genomic DNA and positive results of mtDNA;
- comparison of results of genetic profiles prepared by the research team;
- reproducibility studies;
- quantification of the DNA.

The bone samples were surface-sterilised by washing with 0.5% sodium hypochlorite and then rinsed with running deionised distilled water for 5 min. The bone samples were then air-dried and exposed to UV irradiation for 1h. The samples were grinded into fine powder using liquid nitrogen and a SPEX 6750 Freezer Mill (SPEX CertiPrep, Metuchen, NJ).

Isolation of DNA from 0.5g of bone power was performed twice with a GeneMatrix Bone DNA purification kit (EURx®, Poland) and
using the organic method (phenol-chloroform). After isolation the DNA was purified and concentrated using Amicon Ultra filtration column 30k, Montage® PCR Centrifugal Filter Devices (Millipore, USA). Measurement of the DNA concentration was performed using a Quantifiler™ Human DNA Quantification Kit (Applied Biosystems, USA) and the ABI Prism® 7500 Real-Time System (Applied Biosystems, USA).

PCR amplification was conducted twice using the Investigator® ESSplex Kit (Qiagen, Germany), PowerPlex® ESX 17 (Promega, USA) and AmpFLSTR® Yfiler (Applied Biosystems, USA). The PCR products were analysed by capillary electrophoresis using an ABI 310 Genetic Analyzer (Applied Biosystems, USA). Data were analysed by GeneMapper ID software version 3.2 (Life Technologies) with allelic ladders provided by the manufacturer. Y-SNP analysis was performed using Real-time PCR (Light Cycler 2.0, Roche Diagnostics) and the LightSNiP test (TIB® Molbiol, Germany). The LightSNiP test includes primers, molecular probes Simple®Probe and SNPs. Markers M213 and SRY1532.2 were analysed. These Y-SNPs were drawn from the literature and biallelic markers were used to cover haplogroups (A - R) recognised by the Y-chromosome consortium (YCC).

Biostatistical analysis was performed by using DNA-View software (DNA-View.com) based on the Polish population. The “pi” index (approximate likelihood-ratio that between the people compared there is a relationship of parents and children or not) and the

“si” index (approximate likelihood-ratio that between the people compared there is kinship) were calculated. The haplotypes Y-STR that were obtained were compared in the database www.yhrd.org.

Results and Discussion

The results obtained using the radiocarbon technique indicate that the highest probability (91%), was obtained in the range of 1776-1615 BC and 68% in the range of 1747-1845 B.C. for grave 10A; for grave 4A the highest probability, 95.4%, was obtained for 1900 B.C. and 68% in the range of 1880-1861 B.C.
The remains found in Rogalin, Hrubieszow were analysed by anthropologists at Maria Curie-Sklodowska University in Lublin. however they sex of the corpses from graves 3, 5, 6B, 9, 10B and 11 was not determined because of lack of sexual dimorphism due to young age of the individuals (Table 1).
The results of the genetic studies allowed to determine the biological sex of the remains analysed, which is very useful for the anthropological studies.
So far, the complete genetic profile of graves 4B, 6A, 8 and 10A has been determined using the STR-PCR method. However, the full genetic profile of the remains in graves 0, 2, 3, 4A, 5, 6B, 9, and 10B has not been obtained (Table 2 and Table 3). No amplification product and thus no genetic profile were obtained for the remains from graves 1, 11, and 12.

---

<table>
<thead>
<tr>
<th>Lp.</th>
<th>Nr pochówku</th>
<th>Pleć</th>
<th>Wiek</th>
<th>Kategoria wieku wg R. Martina</th>
<th>Uwagi</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0</td>
<td>M?</td>
<td>20 – 25 lat</td>
<td><em>Adultus</em></td>
<td>Fragmentarycznie zachowana czaszka z ułamkami żuchwy + niekompletny szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>2</td>
<td>1</td>
<td>M</td>
<td>40 – 45 lat</td>
<td><em>Maturus</em></td>
<td>Fragmentarycznie zachowana czaszka z ułamkami żuchwy + niekompletny szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>K</td>
<td>30 – 35 lat</td>
<td><em>Maturus</em></td>
<td>Fragmentarycznie zachowana czaszka z ułamkami żuchwy i kością grywkową + fragmenty szkieletu poza czaszkowego.</td>
</tr>
<tr>
<td>4</td>
<td>3</td>
<td>?</td>
<td>9 – 10 lat</td>
<td><em>Infans II</em></td>
<td>Niekompletna czaszka + fragmentarycznie zachowany szkielet poza czaszkowy. Dodatkowo fragment kości zwierzęcej.</td>
</tr>
<tr>
<td>5</td>
<td>4</td>
<td>K?</td>
<td>35 – 40 lat</td>
<td><em>Maturus</em></td>
<td>Niekompletna czaszka z żuchwą + szkielet poza czaszkowy zachowany fragmentarycznie. Dodatkowo kość dziecka (<em>Infans II</em>).</td>
</tr>
<tr>
<td>6</td>
<td>5</td>
<td>?</td>
<td>9 – 11 lat</td>
<td><em>Infans II</em></td>
<td>Fragmentarycznie zachowana czaszka z żuchwą + niekompletny szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>7</td>
<td>6</td>
<td>?</td>
<td>7 – 9 lat</td>
<td><em>Infans II</em></td>
<td>Ułamki czaszki + fragmentarycznie zachowany szkielet poza czaszkowy.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>K?</td>
<td>18 – 20 lat</td>
<td><em>Juvenis</em></td>
<td>Fragmentarycznie zachowana czaszka z ułamkami i niekompletnym szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>8</td>
<td>8</td>
<td>M?</td>
<td>25 – 30 lat</td>
<td><em>Adultus</em></td>
<td>Ułamki czaszki + fragmentarycznie zachowany szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>9</td>
<td>9</td>
<td>?</td>
<td>5 – 7 lat</td>
<td><em>Infans I</em></td>
<td>Czaszka z żuchwą + niekompletny szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>10</td>
<td>10</td>
<td>M</td>
<td>40 – 50 lat</td>
<td><em>Maturus</em></td>
<td>Czaszka z żuchwą + prawie kompletny szkielet poza czaszkowy.</td>
</tr>
<tr>
<td>11</td>
<td>11</td>
<td>?</td>
<td>12 – 14 lat</td>
<td><em>Infans II</em></td>
<td>Uszkodzona czaszka z żuchwą + niekompletny szkielet poza czaszkowy.</td>
</tr>
</tbody>
</table>

Table 1. The table shows research by archaeologists from the University of Lublin. The second column shows the number of the
Table 2. The genetics profiles obtained from the graves 0, 2, 3, 4A, 4B, 5, 6A, 6B and 8 by the using Investigator® ESSplex Kit (Qiagen, Germany).
Table 3. The genetic profiles obtained from the graves 9, 10A and 10B by Investigator® ESSplex Kit (Qiagen, Germany).

<table>
<thead>
<tr>
<th>Allele</th>
<th>G0 Grav 9</th>
<th>G10A Grav 10A</th>
<th>G10B Grav 10B</th>
</tr>
</thead>
<tbody>
<tr>
<td>amelogenin</td>
<td>X,Y</td>
<td>X,Y</td>
<td>XX</td>
</tr>
<tr>
<td>TH01</td>
<td>8,9,3</td>
<td>9,9,3</td>
<td>9,3,9,3</td>
</tr>
<tr>
<td>D3S1358</td>
<td>17,17</td>
<td>15,16</td>
<td>15,15</td>
</tr>
<tr>
<td>vWA</td>
<td>15</td>
<td>16,20</td>
<td>-</td>
</tr>
<tr>
<td>D21S11</td>
<td>30</td>
<td>30</td>
<td>-</td>
</tr>
<tr>
<td>D16S539</td>
<td>13</td>
<td>12,13</td>
<td>11,13</td>
</tr>
<tr>
<td>D1S1656</td>
<td>15</td>
<td>13,16</td>
<td>13,14</td>
</tr>
<tr>
<td>D19S433</td>
<td>12,13</td>
<td>13,14</td>
<td>13</td>
</tr>
<tr>
<td>D8S1179</td>
<td>14</td>
<td>13,14</td>
<td>11</td>
</tr>
<tr>
<td>D2S1338</td>
<td>17</td>
<td>17,19</td>
<td>19</td>
</tr>
<tr>
<td>D10S1248</td>
<td>13,15</td>
<td>15,16</td>
<td>13,16</td>
</tr>
<tr>
<td>D22S1045</td>
<td>11,15</td>
<td>12,15</td>
<td>11,15</td>
</tr>
<tr>
<td>D12S391</td>
<td>25</td>
<td>18</td>
<td>18</td>
</tr>
<tr>
<td>FGA</td>
<td>-</td>
<td>22,23</td>
<td>19,23</td>
</tr>
<tr>
<td>D2S441</td>
<td>11,14</td>
<td>10,11</td>
<td>11</td>
</tr>
<tr>
<td>D18S51</td>
<td>12,14</td>
<td>12,16</td>
<td>16,17</td>
</tr>
</tbody>
</table>

Anthropological, odontological and DNA analysis of the remains in 10A, i.e. the “Warrior” grave, allowed to establish that the skeleton was that of an adult man at a biological age of 40-50. It was dated
as belonging to the Bronze Age culture based on the equipment found in the grave and radiocarbon dating. A reconstruction of the skull was important for archivisation. It was possible to present the approximate appearance of the face by using 2D and 3D methods.

In the biostatistical analysis the value of “p” obtained does not indicate a father–son relationship between the remains analysed, however, in some cases the value “s” was more than 1000, thus indicating that there may have been a relationship of kinship among some of the people whose remains were found; i.e. between graves 2 and 8, 3 and 6A, 3 and 8, 8 and 4A, and 4B and 6B.

The most interesting results in this study were obtained in the analysis of remains from graves 9 and 10A using Y-STR markers. An identical haplotype between the remains analysed was obtained (Fig. 3). The obtained haplotype was not found in the YHRD.org database.
Genetic testing again clarified the controversy among archaeologists from the St. Staszica Museum in Hrubieszów regarding the true origin of the remains from grave 10A, i.e. the “Warrior” grave. When not connected with the remains of typical ceramic jars for the Strzyzowska culture, the archaeologists assumed that the ‘Warrior’ could have belonged to the Mierzanowicka culture. Kinship in the male line between the remains of graves 9 and 10A confirmed the
hypothesis established by the archaeologists that the remains of grave 10A belonged to the Strzyzowska culture.

The results obtained using Y-SNPs markers indicate that the remains of males from graves 5, 9 and 10A did not belong to haplogroups F and R1a1.

Genetic and anthropological studies will be continued in order to obtain more information about the remains found in Rogalin, Hrubieszow.

The results of the identification analysis which form the biological profile of the deceased depend to a large extent on the reliability of applied methods. All methods and modern techniques commonly used in forensic identification can be successfully applied in the analysis of historical remains. By using advanced methods, important information about the bony structures of the skull was obtained. Forensic experts added a small piece to the historical puzzle.
PROFESSIONAL ETHICS OF AN EXPERT WITNESS

BEATA KOSIBA

University of Warmia and Mazury in Olsztyn

Abstract: An expert witness plays one of the key roles in delivery of the justice, especially within the criminal proceedings. With raising complication and complexity of the modern world the judicial bodies have no choice but to rely significantly on the evidence provided by commissioned expert witnesses in order to determine the case. Therefore importance of professional ethics of an expert witness needs to be carefully considered and recognized as a fundamental issue, since appropriate moral conduct provides for unbiased provision of opinions that might decide on the outcome of the trial and future of the individuals in question.

Keywords: expert witness, professional ethics, forensic expertise

Introduction

Human, as a social being, exercises activities on many different layers of life. Each such activity is connected to decision making process and consequently is a subject of moral assessment. Being psychopsychical unity, human is naturally equipped with all the tools necessary for taking decisions. These tools are mind and will – and they are both enabling and taking responsibility for the decisions taken. Such responsibility for own decisions shall be particularly important to expert witnesses, since they are playing especially important role in investigations and judicial proceedings nowadays.

An expert witness is constituted when there is a need for special (expert) knowledge in order to assess circumstances that are important for determination of the case. It is a plain consequence of increasing specialization of different areas and fields of modern life. Therefore utilization of expert witnesses by law enforcement and judicial system institutions is constantly increasing, making expert's opinions even more important source of commonly accepted evidence. As M. Całkiewicz rightly pointed out, such evidence is in many cases considered 'the crown' one and in practice it
happens quite often that in case of existing reasonable doubts regarding the perpetrator or actual guilt, judicial bodies tend to shift the responsibility of judgment to the expert witness\(^1\).

It has to be also mentioned that judicial bodies can experience difficulties in correct assessment of expert's deliverables, especially these bearing very specialized knowledge, where means of control and verification are indeed limited. In reality in many cases because of such complexity of the expert's opinions, the control and verification is possible only to the certain extent – and this puts additional obligations on expert witness that extend beyond strict legal regulations\(^2\). In 2007 Corruption Report (Raport o Korupcji 2007) the Polish branch of Transparency International presented considerations regarding quality of deliverables of expert witnesses and corruption practices existing within this environment. It was pointed out that there is no real supervision mechanism existing concerning work of an expert witness and in reality they very rarely bear consequences of their low quality work and erroneous (if not false) opinions\(^3\).

The goal of the present paper is to present key issues concerning ethics that are relevant for the work of an expert witness. It is important since there is obvious need to establish the code of ethics of an expert witness – because of specific nature of research conducted, existing moral responsibility and lack of commonly agreed and verified standards of recruitment and performance of work tasks by expert witnesses.

\(^3\) Transparency International Polska, Raport o korupcji 2007.
Fundamental principles of ethics

Human being is naturally equipped with everything necessary to make choice for good, however within the structure of our personalities there are certain powers that not only do not comply with the good and moral obligations, but are strictly in conflict with them. It happens that human's will is not powerful enough to overcome resistance and take decisions in accordance with moral norms and requirements. In fact there is a split and inability to make choice for good, even if it is more desired than the bad – which is ultimately selected. A theory of moral virtues can be helpful here from the point of view of ethics⁴.

In the context of professional ethics, the theory of virtues can be used as reference point for moral assessment of actions of representatives of given professional group – including expert witnesses one. The moral virtue alone.(Greek: arete) is sustainable ability of will to make good⁵. This ability is not a primal one, but rather gained with moral actions. It is dependent on conscious upbringing and development – being confronted often with certain situations we get to know ourselves and in any given moment we can decide to commence work on shaping our moral virtues. It is important indeed, as performing professional actions human being is exposed to many situations where only thank to established moral virtues the good can be chosen – despite all the difficulties encountered.

In accordance with the Supreme Administrative Court ruling of 04.06.2001 (II SA 1434/00), an expert witness plays an important role in just judicial proceedings. Justice is therefore the first of moral virtues that are fundamental for actions of an expert witness.

And what is the justice? It concerns obligations relevant to human's life, no matter what is our approach to a given person. „Justice (…) concerns the rights of a fellow creature, which we shall always take

---

⁵ Ibidem, p. 292.
into account in our actions, no matter of our feelings to the person in question. An objective cognition of a human nature leads us to the conclusion that human has a number of natural rights: right to life, freedom, to knowledge, to possession (...). There are also more specific rights, gained by human over the course of life. At the same time also other humans surrounding the one in question (considered both as individuals and social groups) exercise exactly the same rights. Such concatenation of mutual rights between the people happens to be the very subject of the justice”\(^6\). So in strict terms the justice obligates an expert witness to recognize rights of other individuals and consequently his own obligations arising from this fact. It requires certain maturity of an expert since there is a danger that in cases bearing lot of emotional weight, negative emotions towards suspected perpetrator might in fact impact actions and assessment of said expert. At the other end specifics of profession of expert witness are such, that issued opinion is usually supporting one side of the judicial proceedings and is unfavorable to the other one. An important role is played here by internal determinations that enable human to issue his professional opinion without emotional impact, based solely on facts and knowledge gained in cognitive process. Should this not be the case, expert witness is trespassing the framework of justice, as the virtue of justice concerns only rights of fellow creatures.

The right to dignity is considered to be one of the basic human rights. From The Universal Declaration of Human Rights (UDHR), through all the legal regulations, to various codes of ethics, respect of dignity of human being is widely recognized and accepted. The dignity is indestructible value being fundamental for all areas of human's life. It is derived from the conscious and free nature of human and it calls for respect for the creature in both psychical and spiritual dimensions. Being psychopsychical unity the human is a center of all actions and cannot be considered just a mean to reach

---

for other goals. Reducing human being only to material dimension, making him just a tool for other goals is indeed wrong and it questions moral value of any actions taken. Dignity is therefore a value of a human, making him impossible to be reduced to any other value, and constituting as a goal of its own.

It has to be also noted, that dignity has to be considered both from the point of view of expert witness and the person who is the subject of issued opinion. This is because dignity requires respect for the person in question as well as all the other persons involved. Therefore justice for the person means recognition and affirmation – everything that is due for a human being.

The justice can be understood as respect, however honesty, truthfulness or righteousness are all another dimensions of the justice too. Justice is unable to predict and cover all the situations that can occur in real life. In such circumstances the sense of justice has to prevail by using commons sense, honest attitude and taking into account moral obligations. What is right concerns value greater than simple compliance with law – the good of the human being. Compliance with the law that protects human beings is undoubtedly the right thing. „Human justice is always based on the common regulations that are either unwritten – like customs, or written – like legal acts. When standards of conduct are being developed within various areas of human life, they refer to the situations that are occurring commonly in most of cases. But there are rare occasions that are not foreseen by the law, there are also situations covered by regulations but too complex and complicated to apply strict legal provisions. Actually application of the plain law in these situations can lead to injustice and contradict intentions of the lawmakers who enacted given laws or particular provisions”.

It all means that there are values higher than the law that should ultimately determine whether given action shall be undertaken or not. Such value is the

7 J. Woroniecki, op. cit., p. 82.
8 Ibidem, p. 82.
good of the individual who bears the virtue of righteousness. „It is clear then that justice shall play a leading role in human life, however it shall always be controlled by righteousness (…)”

The dimensions of the justice described above are relevant to so-called „cooperative justice”. It concerns situations when an individual has obligations to community. The most important obligation is then respecting the law that has been established for common good. Other kind of justice would be a distributive one – it concerns rights of individual versus group, that such individual is a part of. Distributive justice is about equal distribution of goods and equal access to goods as well as services available within given community.

Yet another kind of justice is interchangeable one, also commonly known as honesty or integrity. „It regulates interactions between members of society in such a way, that the subjects of rights and corresponding obligations are always separate individuals or social groups. It also concerns relations between individuals and social groups, while considering such groups as separate entities, that are not subordinates to the other parties.(…)”

The basic right exercised by a human being in relations with other humans is the right of life. It assumes the ability to make self-determination and consequently freedom to decide about yourself. The expert witnesses are being called mostly in criminal cases („the entities empowered to commission expert's work are exclusively the courts of law or other bodies conducting preparatory proceedings in criminal cases”11), and here their responsibility is particularly significant, as the sentences are of the most painful nature ( e.g. life imprisonment ). In cases of either civil or administrative nature the penalties are usually the fines or shorter prison time, often sus-

---

9 Ibidem, p. 83.
10 Ibidem, p. 75.
Beata Kosiba, *Professional Ethics of an Expert Witness*

Pended. Taking into account consequences of issued opinions, caution is really necessary as eventual error might have non-reversible results. „The opinion issued by an expert witness is an evidence in the proceedings before courts of law, as well as other judicial bodies and government institutions”\(^{12}\). There is no doubt then about real role and significance of expert witness opinion. False expert's opinion motivated by revenge or lack of interest in establishment of the truth would be considered moral abuse of the rights of live and freedom. Of course it will not be an abuse of justice when human in question will be punished following establishment of his blame on the basis of material truth. So a lot is dependent on honesty of expert and his opinion – therefore it is very important to act responsibly when conducting expert's work. This requires possession of appropriate competences within the field of expertise of a given expert. And such is one of the basic requirements of a candidate who applies for a function of expert witness. An expert is a person who is „possessing practical and theoretical special knowledge in given field of science, technology, arts, craft or any other competence that such person is established for as an expert”\(^{13}\). The competences are the key for performance of expert's work – and these need to be considered both from professional and moral points of view.

Interchangeable justice, already mentioned before (commonly called honesty) is strictly connected to material dimension of human life and in particular with property. Quite often both civil servants and expert witnesses are confronted with situations of possible corruption proposals (this also concerns distributive justice). The corruption is of course moral evil that crimines giving and taking parties. It has to be recognized that „injustice committed by humans and concerning the property can be divided into two groups, according to the prevailing motivation – it is either a desire

\(^{12}\) Ibidem.

\(^{13}\) Ibidem.
for profit or a will to make harm\textsuperscript{14}. Regarding unethical behavior of an expert witness both motivations are in fact possible. And both are morally unacceptable, since they contradict all the aforementioned values. By issuing false opinion, the dignity of human is being violated. His job, respect and good name, and in most extreme cases also health or even life is at stake and can be simply lost. Responsibility for consequences of such wrongdoing are of an expert witness and charge his conscience. No matter if an expert witness is issuing false opinion motivated by own profit, revenge, hate or anything else – the moral assessment is always unequivocally negative. An additional moral evil can be intensified by the fact of expectations of profits for certain way of performance of expert duties, especially if it is directed at the people who cannot bear expected costs and expenses.

Another motivation of erroneous behavior of an expert witness could be fear based on blackmailing or other threats from the suspected perpetrator or his associates. Such fact can diminish moral responsibility of an expert, but it does not make it void. Person that undertakes the burden of being an expert witness has to take into account the difficult situations that may occur and at the same time demonstrate fully professional attitude for duties he is expected to perform.

Situation that is considered a breach of principle of honesty is cooperation of expert witness with law enforcement institutions that extends beyond the framework set by legal acts. Since expert is supporting judicial system, he should keep objectivity in his opinions at all times. It would be absolutely unethical if an expert witness issues his opinions in accordance with expectations of e.g. public prosecutor in order to secure future orders for his work. It would be also against the legal regulations claiming that ,,institution of an expert witness belongs to judicial proceedings and was estab-

\textsuperscript{14} J. Woroniecki, \textit{op.cit.}, p. 274.
lished in order to secure correct functioning of broadly understood judicature and protect conditions for right performance of its legally defined tasks”\textsuperscript{15}. This undoubtedly assumes objectivity, impartiality and honesty – all of them constituting justice in performance of an expert witness duties.

Situation when public bodies established to assure correct functioning of judicial system act immoral, is automatically impacting an overall evaluation of such system in a way it is decreasing public trust for state institutions.

Therefore „the person of expert witness may not suggest any dishonesty or bias and the opinion he delivered – lack of professional knowledge at the highest achievable level”\textsuperscript{16}.

There is another dimension of interchangeable justice that is closely connected to honesty – truthfulness. It simply means one should tell only what he learned in accordance with the truth. Telling something that is not based on truth, or openly contradicts learned truth, would be of course an infringement. Still, human being is not a perfect creature and there is always possibility of an error. If an error is not intended, there is no responsibility for it. „We are obviously not responsible when we make an error without our fault, we tell untruth that we are not conscious of and our words reflect perfectly what we really think. We can only take blame for telling untruth when an error comes from fault in our thoughts, or – even worse – when the thought knows the truth but our words differ from it”\textsuperscript{17}. This concerns conduct when one is telling things he is not convinced are actual truth. „So even when our words are – by accident – truthful, we do lie, when they are not at the same time in accordance with our thoughts”\textsuperscript{18}. The lie is defined in a context of what

\begin{footnotes}
\item \textsuperscript{15} http://www.wroclaw.so.gov.pl/index.php?option=com_content&view=article&id=104&Itemid=123.
\item \textsuperscript{16} Ibidem.
\item \textsuperscript{17} J. Woroniecki, \textit{op. cit.}, p. 32
\item \textsuperscript{18} Ibidem, p. 340.
\end{footnotes}
human assess as a truth at a given moment in time, not to what is really an objective truth. Human is – as a person – a subject of actions and therefore he claims responsibility for what he is doing. However in a situation when an individual is telling something that does not reflect reality, but he is erroneously convinced it does, we can talk about untruth that is not a lie. A lie assumes conscious misleading. „You can speak so you can express what you think – even if we are wrong in our thinking, the fundamental offense will not be contradiction of our words with facts, but rather with thoughts and conviction of the one speaking”\(^{19}\). Truthfulness considered as justice prohibits us from telling untruth and mislead other parties. Therefore each and every opinion issued by an expert witness is immoral and contradicts honesty in performance of his duties.

Each of the aforementioned types of justice is generally derived from the virtue of discernment, which enables human to take right actions.

Discernment is the main virtue since human who is possessing this virtue is equipped with all the other moral competences. Discernment conditions all the ethical actions. „It is a sign of spiritual maturity of acting subject, his knowledge of people and the world, ability to select optimal behavior within binding moral norms in complicated real life situations, flexibility to make justified compromises and purity in defending non-negotiable borders of morality – in one word discernment equals real wisdom of a human being”\(^{20}\)

Discernment is specific cognition of mutually dependent approaches and phenomena that are subordinate to specific action, that takes the form of activities providing good for both given individuals and whole community. It means that the task of an expert witness is to assist in the best possible functioning of the judicial system he is a part of. The goal in the actions of a human shall be

\(^{19}\) Ibidem.

\(^{20}\) T. Ślipko, op.cit., p. 403, 404.
always specific good - in the actions of an expert witness this should be discovery of the truth within the framework of his expertise. As it has been already mentioned earlier, human being takes responsibility for all his conscious and free actions. In case these actions contradict moral norms, the consequences charge his conscience. The conscience is an instance where human is ultimately responsible. It cannot be deceived since it is constructed of the most fundamental acts of cognition of the reality which is an environment of all our practical activities. Conscience is also an experimental cognition of ourselves, our needs and fulfillment through making good and in material aspect through appropriate selection of given goods. To provide summary – conscience is a group of cognitive acts that are necessary to take rational decisions. The human has natural ability to distinguish values, to select the good and reject the bad. His conscience can be however distorted due to wrong upbringing or depraved will, motivated by disordered emotions, various flaws or wrong proclivities. Every human born, developed and living in certain community is prone to various pressures of his local environment. It is therefore important to develop moral integrity, right conscience, that will enable to take right and just decisions. An individual performing his job of any given profession has to act in accordance with correctly developed conscience to be the good man and good professional as well. So the ultimate concern is rightly shaped conscience that will be able to show what is valuable in a right moment in time.

**Ethics of expert witnesses in legal systems of different countries**

It has to be noted, that candidates to become expert witnesses in all the modern legal systems have to demonstrate not only necessary education, professional knowledge and confirmed experience

---

(including all relevant authorizations), but also right character and ability to perform their functions in an appropriate manner. Verification of competences of candidates is undertaken within two equal ways. In Austria and France there are committee exams, while in other countries there is documents verification process executed. In Germany such public verification of candidates to become expert witness is performed by established state certification bodies – mostly various industry chambers of commerce as well as associations of experts (like BVS)\(^2\). It has to be pointed out that an expert witness bears all legal consequences of his actions, which results with lack of any responsibility of state for consequences of erroneous opinions\(^2\). Quality of issued opinions is always a top concern. Expert witnesses are obligated to constantly improve their competences and professional skills. This can be demonstrated in particular on an example of France, where candidates need to prove they never breached honor, trust and never engaged in any inappropriate behavior, never made a mistake in professional activities, never breached professional regulations and have never been dismissed within disciplinary proceedings. They need to observe professional regulations and deontological code, behave properly and perform their professional functions with great care and dedication. Trespassing of the aforementioned rules might result in professional liability\(^2\).

In the United Kingdom there is an obligation to observe so-called fundamental principles, providing that and an expert witness should


\(^{23}\) Sołtyszewski I., Krassowski K., Bednarek M., Propozycja rozwiązań legislacyjnych dotycząca biegłego sądowego na tle unormowań w innych krajach, w: Kryminalistyka i inne nauki pomostowe w postępowaniu karnym, Olsztyn, 2009, p. 497-509.

keep high standards of both knowledge and experience within his field of expertise and also constantly update and develop his competences as well as education.

In the United States of America there is an obligation to include an information regarding competences of an expert witness in provided opinion, as well as list of publications he was author for the period of last 10 years, and also list of cases he was called in as an expert for the period of last 4 years.

In the German model the codes of good practices of the certification bodies lay down obligations regarding constant self-development (CPD), that should be observed in order to provide for high level and accuracy of the knowledge of public expert witnesses.

In Argentina the attention is being paid to the clean record of an expert witness. Since he should be free of any possible suspicions, a person that has been convicted may not perform expert's functions at all.

Conclusions

The issues of professional ethics should be a subject of particular attention of the community of expert witnesses. The proposal to develop the code of ethics is still valid and it can not only increase general trust in experts but also make experts more aware of existence of moral norms and considerations. Of course no written code can secure just and moral conduct of an expert witness if there is no internal pressure for this in the community of experts. Soft regulations – like aforementioned code – can only support appropriate conduct but not substitute legal acts. Also the goal of code is not to provide ready to use solutions but rather encourage reflection on one's conduct in complicated situations. In any case development of


26 Reference is made straight to prison time penalties, fines and any prohibitions regarding performance of professional activities.
the code seems to be not only justified but can in addition be a mean providing for better integration of expert witness community.
Abstract: Age determination of bloodstains became a promising method to facilitate investigation and provide important evidence for the court. A correlation model was developed to describe the impact of time on genomic DNA from forensic bloodstains. The results have shown that gDNA concentration and the level of its degradation may indicate a time range within which the bloodstains originated but the obtained data was not statistically significant in the case of samples collected between the year 2003 and 2012. Moreover, the findings imply that the choice of collection and preservation methods plays an important role in performing a reliable analysis by the quantitative real time (rtq) PCR system. The Whatman® Protein Saver 903 Card provides greater analyte sensitivity than medical gauze. Thus, the raw data depend on internal and external factors which occur during bloodstain samples processing.

Keywords: bloodstains ageing, rtqPCR, correlation model, blood preservation, DNA degradation
Introduction

Bloodstains belong to the most common biological evidence which is found at the scene of the crime and can provide information about a sequence of events, and therefore can facilitate the identification of victims and suspects. A great need for an effective technique to determine age of bloodstains comes from the fact that they occur as a result of physical trauma which is studied by forensic specialists. Thus, estimating age of a bloodstain may determine the time of the injury and then enable verification of alibi and narrow down the range of possible suspects. Although the methods based on bloodstains ageing have been developing for about eighty years, there is still lack of a reliable and simple technique with practical potential to be used in forensic cases. There are a few biological methods which have been used to estimate age of bloodstain. One of them is based on circadian rhythm dependent biomarkers. Enzyme-linked immunosorbent assays (ELISA) allow to measure the level of desired biomarkers – hormones. These include melatonin reaching a maximum level at night and cortisol increasing in the morning. In addition, it is supported by the fact that melatonin is stable under storage conditions for 28 days. 

1 Li B., Beveridge P., O’Hare W.T., Islam M.. The estimation of the age of a blood stain using reflectance spectroscopy with a microspectrophotometer, spectral pre-processing and linear discriminant analysis. Forensic Science International 2011; 198–204;
2 Li B., Beveridge P., O’Hare W.T., Islam M.. The age estimation of blood stains up to 30 days old using visible wavelength hyperspectral image analysis and linear discriminant analysis. Science and Justice 2013; 53: 270–277;
days, but in the case of cortisol, gradual breakdown is observed. Unfortunately, this technique does not determine the exact time of bloodstain origin but implies the daytime of bleeding and can be recognized as an innovative method of biomarkers application in forensic medicine. The development of molecular techniques has led to substantial progress in forensic studies estimating the age of bloodstains. However, the main problem lies in the stability of the genetic information forms exposed to different environmental factors before laboratory analysis. DNA is stable in the blood evidence only in the case of lack of bacteria growth, while RNA degrades rapidly in vitro. Thus, the degradation level of RNA may be useful to estimate the age of bloodstain whereas DNA requires a more sensitive technique for detection.

Taking into consideration physical methods, several approaches have been tested in an effort to estimate the age of a bloodstain. One of the simplest approaches uses spectroscopy to evaluate the change of blood colour during time exposure. This is due to the

---

oxidation of oxyhemoglobin to methemoglobin (MtB) and then to the hemichrome (HC) observed via spectra. Therefore, the majority of mechanisms rely on the transformations of hemoglobin into its derivatives.

An innovative assay has appeared with discovery of new protein marked as 'X'. The unknown protein is only detected in old bloodstains and is not related to heme. Moreover, the peak area of protein increases with age of bloodstain and the ratio of protein 'X' to heme is 0 for fresh blood and increases to 0.3 for bloodstains stored for fifty-two weeks in the dark at 37°C. Thus, the HPLC technique can be a useful tool in assessing the age of bloodstains10.

In conclusion, general studies are related to physical or biological properties of blood and provide valuable data which complement recent achievements in the field. Thanks to these developments, there is a strong likelihood that an effective method will eventually be developed.

**Materials and Methods**

Blood was drawn from 120 individuals (only men) at different time points ranging from 2003 to 2012 as a biological material used for a DNA paternity test. The blood was preserved on medical gauze in 2003-2009. From the middle of 2009 until 2012 the laboratory used Whatman® Protein Saver 903 Card. The samples were selected in order to obtain six of them every half a year and were stored at room temperature in laboratory with optimum humidity without harmful factors which could lead to DNA degradation.

To obtain material for further processing, each source material with bloodstain was cut with a cutting tool equipped with a steel, razor sharp cutting tip and a plunger for releasing the punched sample - Harris Uni-Core ™ 2.00. The tip and the cutting mat were cleaned after each sample extraction by rinsing with 70% ethanol and 5% Anderson S., Howard B., Hobbs G.R., Bishop C.P.. A method for determining the age of a bloodstain. Forensic Sci. Int. 2005; 148: 37–45;
sodium hypochlorite. The blood spots were cut out and positioned onto sterile 1.5 ml Eppendorf tube and placed in optimum storage conditions.

DNA from bloodstains was extracted by using PrepFiler® Forensic DNA Extraction Kit without BTA buffer. This method enables isolation of genomic DNA from different biological samples by facilitation reversible binding of DNA with magnetic particles resulting in high DNA recovery from samples with very low and high quantities of biological materials\textsuperscript{11}. All the isolation steps were performed according to the manufacturer’s protocol (Applied Biosystems, 2012). Extracted DNA was stored in -20°C.

Studies were done to analyze DNA from bloodstains at different time points. A real-time quantitative (rtq) PCR system was employed together with commercially available kit (Quantifiler® Human DNA Quantification Kit, Applied Biosystems), for the quantification and the level of degradation of human DNA in 120 samples. All the rtqPCR assays had the same volume of 25 µl and were performed on the 7500 Real-Time PCR system (Applied Biosystems). Quality and quantity results were received and analyzed by HID Real Time PCR Analysis Software v 1.1.

**Results and discussion**

The results are divided into two groups depending on the source of bloodstained material (medical gauze or Whatman® Protein Saver 903 Card).

<table>
<thead>
<tr>
<th>Year</th>
<th>Part of year</th>
<th>No of sample</th>
<th>DNA concentration (ng/µL)</th>
<th>Ct value</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>I</td>
<td>1</td>
<td>1,5026544</td>
<td>28,452318</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2</td>
<td>1,2007562</td>
<td>28,781048</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3</td>
<td>0,0239596</td>
<td>34,518295</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4</td>
<td>1,4433494</td>
<td>28,511337</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5</td>
<td>1,0058718</td>
<td>29,040619</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6</td>
<td>0,5035629</td>
<td>30,054739</td>
</tr>
<tr>
<td></td>
<td>II</td>
<td>7</td>
<td>0,0215508</td>
<td>34,673592</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8</td>
<td>0,0409895</td>
<td>33,731293</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9</td>
<td>0,0851931</td>
<td>32,658978</td>
</tr>
<tr>
<td></td>
<td></td>
<td>10</td>
<td>0,0406805</td>
<td>33,742382</td>
</tr>
<tr>
<td></td>
<td></td>
<td>11</td>
<td>0,1124892</td>
<td>32,251606</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12</td>
<td>0,0431082</td>
<td>33,657425</td>
</tr>
<tr>
<td>2004</td>
<td>I</td>
<td>13</td>
<td>0,0058953</td>
<td>36,573517</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14</td>
<td>0,0683066</td>
<td>32,982773</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15</td>
<td>0,0338637</td>
<td>34,0112</td>
</tr>
<tr>
<td></td>
<td></td>
<td>16</td>
<td>0,0132753</td>
<td>35,383736</td>
</tr>
<tr>
<td></td>
<td></td>
<td>17</td>
<td>0,0316698</td>
<td>34,109371</td>
</tr>
<tr>
<td></td>
<td></td>
<td>18</td>
<td>0,0347208</td>
<td>33,974564</td>
</tr>
<tr>
<td></td>
<td>II</td>
<td>19</td>
<td>0,0195986</td>
<td>34,812771</td>
</tr>
<tr>
<td></td>
<td></td>
<td>20</td>
<td>0,0198557</td>
<td>34,793671</td>
</tr>
<tr>
<td></td>
<td></td>
<td>21</td>
<td>0,0711707</td>
<td>32,922569</td>
</tr>
<tr>
<td></td>
<td></td>
<td>22</td>
<td>0,0099163</td>
<td>35,811325</td>
</tr>
<tr>
<td></td>
<td></td>
<td>23</td>
<td>0,0145915</td>
<td>35,245178</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24</td>
<td>0,0132066</td>
<td>35,391346</td>
</tr>
<tr>
<td>2005</td>
<td>I</td>
<td>25</td>
<td>0,0209115</td>
<td>34,717735</td>
</tr>
<tr>
<td></td>
<td></td>
<td>26</td>
<td>0,0260521</td>
<td>34,395573</td>
</tr>
<tr>
<td></td>
<td></td>
<td>27</td>
<td>0,0657986</td>
<td>33,037601</td>
</tr>
<tr>
<td></td>
<td></td>
<td>28</td>
<td>0,0441827</td>
<td>33,621338</td>
</tr>
</tbody>
</table>
Małgorzata Lenart, Jarosław Piątek, Krzysztof Safranow, Andrzej Ossowski, Grażyna Zielińska, Katarzyna Jałowińska, Marta Kuś, Karol Tejchman, Ewa Jasionowicz-Piątek, Katarzyna Kotowska, Mirosław Parafiniuk, Krzysztof Borowiak, *A Correlation Model For Bloodstains Ageing Based On The Qualitative And Quantitative Analysis Of Genomic DNA Via rtqPCR.*

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th></th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>II</td>
<td>29</td>
<td>0,0272584</td>
<td>34,329231</td>
</tr>
<tr>
<td></td>
<td>30</td>
<td>0,0741722</td>
<td>32,862022</td>
</tr>
<tr>
<td></td>
<td>31</td>
<td>0,9636906</td>
<td>29,103409</td>
</tr>
<tr>
<td></td>
<td>32</td>
<td>1,042531</td>
<td>28,988152</td>
</tr>
<tr>
<td></td>
<td>33</td>
<td>2,0582132</td>
<td>27,991201</td>
</tr>
<tr>
<td></td>
<td>34</td>
<td>1,6930019</td>
<td>28,277504</td>
</tr>
<tr>
<td></td>
<td>35</td>
<td>2,0579185</td>
<td>27,991411</td>
</tr>
<tr>
<td></td>
<td>36</td>
<td>1,5968136</td>
<td>28,363237</td>
</tr>
<tr>
<td></td>
<td>37</td>
<td>1,7654434</td>
<td>28,216093</td>
</tr>
<tr>
<td></td>
<td>38</td>
<td>1,2041408</td>
<td>28,776922</td>
</tr>
<tr>
<td></td>
<td>39</td>
<td>3,3871965</td>
<td>27,261042</td>
</tr>
<tr>
<td></td>
<td>40</td>
<td>2,249114</td>
<td>27,861197</td>
</tr>
<tr>
<td></td>
<td>41</td>
<td>2,2236958</td>
<td>27,877855</td>
</tr>
<tr>
<td></td>
<td>42</td>
<td>3,6960478</td>
<td>27,133142</td>
</tr>
<tr>
<td></td>
<td>43</td>
<td>1,7319474</td>
<td>28,244169</td>
</tr>
<tr>
<td></td>
<td>44</td>
<td>2,1715043</td>
<td>27,912666</td>
</tr>
<tr>
<td></td>
<td>45</td>
<td>1,9179479</td>
<td>28,094654</td>
</tr>
<tr>
<td></td>
<td>46</td>
<td>2,0887787</td>
<td>27,969595</td>
</tr>
<tr>
<td></td>
<td>47</td>
<td>3,4746017</td>
<td>27,2237</td>
</tr>
<tr>
<td></td>
<td>48</td>
<td>2,8793364</td>
<td>27,499134</td>
</tr>
<tr>
<td>II</td>
<td>49</td>
<td>1,1877207</td>
<td>28,797047</td>
</tr>
<tr>
<td></td>
<td>50</td>
<td>1,2145021</td>
<td>28,764364</td>
</tr>
<tr>
<td></td>
<td>51</td>
<td>2,1236362</td>
<td>27,945337</td>
</tr>
<tr>
<td></td>
<td>52</td>
<td>2,6917224</td>
<td>27,597891</td>
</tr>
<tr>
<td></td>
<td>53</td>
<td>1,761196</td>
<td>28,219624</td>
</tr>
<tr>
<td></td>
<td>54</td>
<td>1,7672938</td>
<td>28,214558</td>
</tr>
<tr>
<td></td>
<td>55</td>
<td>1,6538601</td>
<td>28,311789</td>
</tr>
<tr>
<td></td>
<td>56</td>
<td>1,6858985</td>
<td>28,283667</td>
</tr>
<tr>
<td></td>
<td>57</td>
<td>1,5195538</td>
<td>28,435926</td>
</tr>
</tbody>
</table>
Table 1. Quantity results for bloodstain samples preserved on medical gauze and collected between the year 2003 and the first part of 2009.
A Correlation Model For Bloodstains Ageing Based On The Qualitative And Quantitative Analysis Of Genomic DNA Via rtqPCR.

Fig. 1. Standard curve for bloodstain samples preserved on medical gauze and collected between 2003 and the first part of 2009.
Table 2. Quantity results for bloodstain samples collected between the second part of 2009 and 2012, preserved on Whatman® Protein Saver 903 Card

<table>
<thead>
<tr>
<th>Year</th>
<th>Part of year</th>
<th>No of sample</th>
<th>DNA concentration (ng/µL)</th>
<th>Ct value</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>I</td>
<td>79</td>
<td>1,1051003</td>
<td>29,47777</td>
</tr>
<tr>
<td></td>
<td></td>
<td>80</td>
<td>1,1491374</td>
<td>29,416996</td>
</tr>
<tr>
<td></td>
<td></td>
<td>81</td>
<td>1,5744749</td>
<td>28,927217</td>
</tr>
<tr>
<td></td>
<td></td>
<td>82</td>
<td>1,7979738</td>
<td>28,72077</td>
</tr>
<tr>
<td></td>
<td></td>
<td>83</td>
<td>2,6462526</td>
<td>28,19673</td>
</tr>
<tr>
<td></td>
<td></td>
<td>84</td>
<td>2,0313067</td>
<td>28,63094</td>
</tr>
<tr>
<td></td>
<td></td>
<td>85</td>
<td>2,1791472</td>
<td>28,421728</td>
</tr>
<tr>
<td></td>
<td></td>
<td>86</td>
<td>1,2289131</td>
<td>29,312607</td>
</tr>
<tr>
<td></td>
<td></td>
<td>87</td>
<td>1,7872106</td>
<td>28,730108</td>
</tr>
<tr>
<td></td>
<td></td>
<td>88</td>
<td>0,9686337</td>
<td>29,653782</td>
</tr>
<tr>
<td></td>
<td></td>
<td>89</td>
<td>1,9503299</td>
<td>28,594265</td>
</tr>
<tr>
<td></td>
<td></td>
<td>90</td>
<td>0,9656397</td>
<td>29,68558</td>
</tr>
<tr>
<td></td>
<td>II</td>
<td>91</td>
<td>2,5613909</td>
<td>28,170366</td>
</tr>
<tr>
<td></td>
<td></td>
<td>92</td>
<td>2,2802789</td>
<td>28,35173</td>
</tr>
<tr>
<td></td>
<td></td>
<td>93</td>
<td>1,7763703</td>
<td>28,739571</td>
</tr>
<tr>
<td></td>
<td></td>
<td>94</td>
<td>1,8702196</td>
<td>28,659498</td>
</tr>
<tr>
<td></td>
<td></td>
<td>95</td>
<td>2,9922574</td>
<td>27,928553</td>
</tr>
<tr>
<td></td>
<td></td>
<td>96</td>
<td>2,4690282</td>
<td>28,227486</td>
</tr>
<tr>
<td></td>
<td></td>
<td>97</td>
<td>1,7247666</td>
<td>28,785421</td>
</tr>
<tr>
<td></td>
<td></td>
<td>98</td>
<td>3,2049625</td>
<td>27,821747</td>
</tr>
<tr>
<td></td>
<td></td>
<td>99</td>
<td>1,6445792</td>
<td>28,859465</td>
</tr>
<tr>
<td></td>
<td></td>
<td>100</td>
<td>1,5856925</td>
<td>28,916176</td>
</tr>
<tr>
<td></td>
<td></td>
<td>101</td>
<td>2,7470937</td>
<td>28,061506</td>
</tr>
<tr>
<td></td>
<td></td>
<td>102</td>
<td>1,879723</td>
<td>28,65165</td>
</tr>
<tr>
<td></td>
<td></td>
<td>103</td>
<td>1,9924506</td>
<td>28,561033</td>
</tr>
<tr>
<td></td>
<td></td>
<td>104</td>
<td>1,3527511</td>
<td>29,163282</td>
</tr>
<tr>
<td></td>
<td></td>
<td>105</td>
<td>1,0941141</td>
<td>29,493309</td>
</tr>
<tr>
<td></td>
<td></td>
<td>106</td>
<td>2,7503333</td>
<td>28,059673</td>
</tr>
<tr>
<td></td>
<td></td>
<td>107</td>
<td>2,4980965</td>
<td>28,209282</td>
</tr>
<tr>
<td></td>
<td></td>
<td>108</td>
<td>1,733839</td>
<td>28,777262</td>
</tr>
<tr>
<td></td>
<td></td>
<td>109</td>
<td>2,9459822</td>
<td>27,952793</td>
</tr>
<tr>
<td></td>
<td></td>
<td>110</td>
<td>2,1932576</td>
<td>28,41189</td>
</tr>
<tr>
<td></td>
<td></td>
<td>111</td>
<td>1,734692</td>
<td>28,776497</td>
</tr>
<tr>
<td></td>
<td></td>
<td>112</td>
<td>1,5020446</td>
<td>29,000463</td>
</tr>
<tr>
<td></td>
<td></td>
<td>113</td>
<td>3,2761877</td>
<td>27,787561</td>
</tr>
<tr>
<td></td>
<td></td>
<td>114</td>
<td>3,2761877</td>
<td>27,787561</td>
</tr>
<tr>
<td></td>
<td></td>
<td>115</td>
<td>1,3384064</td>
<td>29,179863</td>
</tr>
<tr>
<td></td>
<td></td>
<td>116</td>
<td>1,4911262</td>
<td>29,01181</td>
</tr>
<tr>
<td></td>
<td></td>
<td>117</td>
<td>4,3460335</td>
<td>27,348068</td>
</tr>
<tr>
<td></td>
<td></td>
<td>118</td>
<td>1,6419432</td>
<td>28,861959</td>
</tr>
<tr>
<td></td>
<td></td>
<td>119</td>
<td>1,556702</td>
<td>29,158747</td>
</tr>
<tr>
<td></td>
<td></td>
<td>120</td>
<td>1,0038079</td>
<td>29,63</td>
</tr>
</tbody>
</table>
102 Małgorzata Lenart, Jarosław Piątek, Krzysztof Safranow, Andrzej Ossowski, Grażyna Zielińska, Katarzyna Jałowińska, Marta Kuś, Karol Tejchman, Ewa Jasionowicz-Piątek, Katarzyna Kotowska, Mirosław Parafiniuk, Krzysztof Borowiak, *A Correlation Model For Bloodstains Ageing Based On The Qualitative And Quantitative Analysis Of Genomic DNA Via rtqPCR.*

Fig. 2. A standard curve for bloodstain samples collected between the second part of 2009 and 2012 and preserved on Whatman® Protein Saver 903 Card.
Fig. 3. A correlation model of bloodstains ageing based on DNA quantity for samples collected between the second part of 2009 and 2012 and preserved on Whatman® Protein Saver 903 Card.

Fig. 4. A statistical interpretation of a correlation model of bloodstains ageing based on DNA quantity for samples collected between the second part of 2009 and 2012 and preserved on Whatman® Protein Saver 903 Card.
The analysis completed by ANOVA Kruskal-Wallis test.

Kruskal-Wallis test: $H(3,N=42) = .6611831 \ p = .8823$

Table 3. Statistical calculations for samples collected between the second part of 2009 and 2012 and preserved on Whatman® Protein Saver 903 Card by ANOVA Kruskal-Wallis test.

Significance level – $p=.8823$ (88%)

The obtained data have shown the effect of various factors on the quality and quantity of genomic DNA derived from bloodstains at different time points. A significant impact was observed in the case of the source of material for bloodstains preservation and DNA quantity for longer period. The bloodstains collected between 2003 and the first part of 2009 were preserved on medical gauze whereas the second group of samples (the second part of 2009 up to 2012) was stored on Whatman® Protein Saver 903 Card. The differences in the source of material were caused by a change in evolution of laboratory practice in DNA paternity testing requirements over a few years. Storage conditions were constant during the study, and...
therefore they are not considered a factor which could affect the results.
The data obtained from the first group of samples (2003-2009), which included quantities of DNA, appears to show significant fluctuations noticeable on a standard curve so they are excluded from statistical calculations. In addition, the average Ct value is 3.6 and indicates the progressive degradation of DNA. It may have been caused by the source of the material - i.e. medical gauze which was sterilised and bleached but there is no information about the type of chemical used. Probably, it was chlorine or hydrogen peroxide, both of which lead to DNA degradation due to oxidation during storage\textsuperscript{12}. It could be an explanation for high Ct values which corresponded with low DNA concentration\textsuperscript{13}. Another important aspect is the structure of storage material and since medical gauze is heterogeneous, it could affect a quantitative analysis of DNA. Also, significant deviations of Ct values were observed in the first two standards which are vital in determining the standard curve. This may be an effect of inhibitors which is the case often observed in laboratory practice but not well described\textsuperscript{14}. Other parameters also affected the analysis of the results. A slope of a standard curve is usually -3.3 with correlation coefficient (R\textsuperscript{2}) equal to 1. However, qPCR reaction is considered to be well carried out when the correlation coefficient is within the range 0.9 – 1, therefore R\textsuperscript{2} obtained in the level of 0.82 indicates a very low yield, which could be caused by the length of amplicon or the presence of secondary structures or inhibitors. Despite a repetition, the results exhibited the same tend-

\textsuperscript{12} McCord B., Opel K., Funes M., Zoppis S., Jantz L.M. An investigation of the effect of DNA degradation and inhibition on PCR amplification of single source and mixed forensic samples. National Institute of Justice, 2006; 91704-FL-IJ;


\textsuperscript{14} Nolan T, Hands RE, Ogunkolade BW, Bustin SA.. A qPCR assay for the detection of inhibitors in nucleic acid preparations. Anal. Biochem, 2006; 351:308 –10;
ency. Thus, first group of results was not considered very reliable and statistically significant and was therefore excluded from further analysis. The second group of results refers to the bloodstains samples dating from the second half of 2009 until 2012 which were preserved on Whatman ® 903 Protein Saver Card. The average of Ct value is 28.67 and is relatively constant for all the samples and DNA presents very good quality without DNA degradation. Moreover, the slope is -3.5 and correlaton coefficient is 0.99, which reached maksimum reaction efficiency. The type of storage material for bloodstains was an important factor to prevent the DNA degradation by modulation of nuclease activity. It was also pointed out that the most efficient preservation method was to dry bloodstains to obtain low water concentration which correlates with inactivation of endogenous enzymes. Hence, Whatman ® 903 Protein Saver Card was produced and was able to remove cations, reduce moisture and maintain natural pH.

The correlation model shows differences in DNA concentration within four years. DNA quantity is lower at the beginning of the period considered and reaches maximum concentration in 2012 so DNA concentration depends on time. It was proven that DNA is stable and no differences in its concentration were observed in bloodstains preserved in optimal temperature and humidity without


stabilization agents. However, it should be noted that different directions of DNA quantity analysis have been taken to evaluate genetic aspects of bloodstains in forensic medicine. Dissing in his work emphasises the importance of bloodstains storage as a factor which can influence DNA stability for further analysis in a laboratory. The purpose of this article is to determine how DNA quantity and quality correlate with time. This may determine the age of bloodstain and consequently help to reconstruct the sequence of events from the scene of the crime. By achieving this, bloodstains and the correlation model may constitute an important evidence in court.

Statistical calculations were performed using an ANOVA Kruskal-Wallis test which compares more than two groups of data from the experiment. The analysis of the results is shown in Table 3. The significance level calculated using ANOVA Kruskal-Wallis for samples from the second group is p = 0.8823, which indicates that the results do not differ significantly.

Nowadays, the variety of techniques allow to notice the biochemical and physical aspects of bloodstains aging. However, there is a considerable influence of environmental factors and storage material. These factors have a huge impact on further analysis. Hopefully, the obtained results could serve as acceptable and valuable evidence in court.

**Bibliography**


2. Ackermann K., Ballantyne K.N., Kayser M.. Estimating trace deposition time with circadian biomarkers: a prospect-
A Correlation Model For Bloodstains Ageing Based On The Qualitative And Quantitative Analysis Of Genomic DNA Via rtqPCR.


THE CONCEPT OF MANAGEMENT OF EUROPEAN UNION PROJECTS IN THE PUBLIC SECTOR

Paweł Romaniuk

University of Warmia and Mazury in Olsztyn

Abstract: Contemporary process management of EU projects, the ending is the EU financial perspective for 2007-2013, is an extremely important activity. Each managing EU funds must be aware that the correct identification of all possible risks in the implementation of EU projects, can contribute to more efficient control over all processes connected with it. Importantly, highly effective project management-supported by the EU has several aspects. It is both a skill personnel management, skilful co-operation between the partners implementing the project and financial management, allocated for the project. Depending on the nature of the project and its complexity, the phone may risk associated with future performance, and above all, the financing of such a project.

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

Introduction

Proper use of funds from the European Union depends on many elements. Among them, to a large extent can indicate an appropriate choice of the appropriate method of planning and effective management of all resources held by the entity, it is a human resource, resource material, intangible resource, information resource and financial resource. The responsibility for the success of the project largely depends on the skillful management of the project by the beneficiary, where the emphasis should be placed on the preparation of the project and the achievement of specified outcomes. Anyone who applies for EU measures can have no doubt the financial problems associated with the implementation of the project. Such problems can already occur at an early stage of preparing an application for funding under the various EU programs. In the initial programming period 2007 - 2013 - a problem with which most often faced by beneficiaries - was the
lack of precise normative regulations. This led to consequences in practice to a very diverse and inconsistent interpretation of laws and guidelines that hindered efficient process of implementation of EU projects.

The purpose of this article is to present the essence of the EU project management. The author also shows, based on their own experience as an internal auditor - referred to the behavior of the potential beneficiaries of EU funds in various stages of implementation of the EU project with potential threats.

**The concept of the project**

In an attempt to identify the etymological concept of the project indicate, however, that from a very distant past to the present day - the concept that appeared quite frequently in various literature and continually accompanied by any human activity. Modern times provide information that is carried out every day thousands of diverse projects. These include IT projects, construction, research, scientific and EU projects. The term of the project meant some action, which consists of a team of specified activities. These elements may include the start date of the project, the specific objectives and results, an indication of responsibility, developing a precise budget with a detailed schedule of activities and completion date.

When analyzing the above factors may be noted that the project is a large-scale and multi-tasking order, for which the most precisely defined requirements related to performance, cost, scope and time

---

of implementation. Project management is a very complex, because it must reconcile all concerned. What's more, it must also ensure that the objectives of the project, expected by the beneficiary, as well as be the same program assumptions and measures must be strictly devoted to the design assumptions3.

EU project is a proposed project, which is funded by the Community. It includes within its scope a specific area of operation, development or improvement of the organization as well (public or private), for which it was prepared. Importantly, in the case of projects co-financed from EU funds, are characterized by high complexity, uniqueness, innovation and sometimes quite a lot of risk exposure. Observation of the author raises some important tips. It appears advisable to develop the craft of certain procedures necessary to make changes that are necessary to implement the project. Quite a challenge, especially for small beneficiaries, who first reach the EU funds - becomes a bureaucracy and hence and the need to manage and preparation of various documents, such as: design documentation, environmental impact, or a request for payment.

**European Union project management**

In each project the EU there may be problems related to the future performance of such a project, the specific risks in the financing of such a project. Aware of the risks, each beneficiary of EU funds must prepare the most real financial engineering. Beneficiaries must also use all possible tools to prevent possible risks of the planned project, encroaching beyond mere risk. You have to remember that risk is associated with each activity. For this purpose you can use a variety of economic instruments. This includes things like Leasing

---

The main issue related to the implementation of any project is to identify them very real and achievable objectives, indicating adequate financial assumptions for them. It is about an estimate. The exact verification possibilities related to the implementation of the project relates to a large extent, the availability of funds for the project. It also includes the reality of major budget assumptions related to the possibility of the beneficiary of the settlement term financial obligations, or liquidity. It is essential to the timely completion of the project, in accordance with established schedules.

Stages of the European Union project

Management of all processes related to the implementation of the EU project, forces the persons responsible for the implementation of the project very thorough preparation for such activities. What is more, but before the beneficiary becomes aware of the desire to use EU funds must make a careful analysis of which program is best to use and what type of project will be implemented. Each project that is currently being implemented with the support of the European Union consists of the steps that are always the same for all projects assigned to the instruments of support:

1. Preparation of project documentation;
2. Formal and substantive project;
3. Signing the agreement on financing the project;
4. Implementation of the project;
5. Settlement of the project, together with payment of the grant on the basis of the proposals submitted for payment;

6. Implementation and maintenance of the project objectives.

7. Monitoring the sustainability of the project.

Below, the author of which is the internal auditor in the local government unit, based on his own experience and observation, will bring the life cycle of the EU project, supported financially European Union funds. Preparation of documentation is the most time-consuming process. It includes the preparation of the required documentation. The main document is here for funding. Depending, of which program the project is implemented, included are also various attachments and certificate. You also need to remember that the preparation of application documents, how important - may be treated as the end of the planning process.

The second area related to the evaluation of the project is focused on the application to the relevant institutions, followed by evaluation of the application. Such evaluation shall make different institutions depending on the specifics of the program. Evaluation of such proposals can be done in two modes: continuous or competition. Continuous mode is characterized by the fact that applications for funding under the specific program shall be adopted and are assessed on an ongoing basis. In contrast, competition mode has the specificity that once in a while is a call for proposals, in which beneficiaries report their ideas. Then a specific project is evaluated against the remaining complex in the competition proposals. At this stage, it is important for the project to tie in with the software program. Following the submission of the grant application is assessed such a project for formal and substantive.

The evaluation committee for formal design shall also consider whether the application is complete if it has all the necessary documents, attachments, and permits and if it is filed within the prescribed period. Formal evaluation is focused also on an assessment of whether the beneficiary is an entity authorized to submit the project. In contrast, substantive assessment is focused on
the evaluation and qualitative releasing the test project. As part of this evaluation, each project can receive a maximum of 100 points. However, to give support must, depending on the scheme, obtain at least 30 to 60 points.

If the beneficiary passes substantive assessment, the next step is to project financing agreement. Signed financing agreement, the beneficiary undertakes to implement exactly what was included in the grant application. For the recipient, signing a contract is a guarantee of funding, provided that the project will be implemented in the way that was planned. It should also be noted that the request for funding is always inseparable, but very important part of the financing agreement, which is always signed with a public institution. Project documentation is important not only because of the support received. It is also crucial for the settlement of the grant, which is awarded for the project funds.

For each beneficiary is extremely important to another area associated with the cycle of the project. The author believes that in spite of all the most important process of the project, and thus its management, it is the process of the project, which is vital to the whole project. Each beneficiary must remember that and the project should be clearly observing the schedule of material and financial. Very important is also the issue related to compliance with the time schedule of the project. Note should also be noted that in the course of the project is the possible range of changes associated with the shift schedule even if the change in estimate related. All of these changes, however, require the prior consent of the institution, which has signed a contract for financing the project.

Each stage of the project is evaluated related to the evaluation of the project (partial or comprehensive). In this process, especially

---


6 There, p. 19-33.
the way research is subject to the implementation of the planned investment, where the emphasis is on the identification of the project has been completed according to plan. Thanks to the regularity of the project grants are paid on the basis of the request to the Intermediate Managing applications prepared on the basis of actual expenditure.

The European Union, providing aid to Member States, much attention is focused on maintaining the objectives of the projects implemented by the beneficiaries. This is connected primarily with the ability to maintain the results in the specified term. By being by internal in their professional work noticed a scheme that targets particularly in infrastructure projects life of the project is 3 to 5 years. The beneficiaries of EU funds must skillfully manage the objectives of the project and must be aware of the checks they receive and maintain the sustainability of the project. In practice, it is customary that after five years, beneficiaries may only be flexible to take action and decisions related to further the future of the project.

The essence of risk management in EU projects

Any possible talks focused on the essence of risk management can focus on the causes and effects of the risk. Most often it is assumed that the risk arises when you call them and tell. In practice, the risk management of EU projects is a threat, where the beneficiary takes certain actions that are intended to reduce such risks. On the other hand, entities implementing EU projects should also be fully aware of the positive impact of risk on project management. This is made possible by far the greater involvement of employees in project management, or even support staff prepared to improve risk management procedures. By definition it can be concluded that the risk is the probability of occurrence of a specific event, which may result in difficulties in achieving designated by the objectives and tasks.
You also need to be aware that each event will be accompanied by greater economic or lower risk. Implementation of the EU project, and thus its economic management is an event, so you should be aware of the possible emergence of risk. The appearance of the risk management process of EU projects is the more likely, since they are characterized by certain economic and relationship in question. Project management is the process of EU primarily on risk identification, analysis of such risks and the response from the project managers at his instance. The risk management process in EU projects most often associated with the identification of risk with which each beneficiary may encounter. However, the process of risk management in EU projects can be said then, when such risk can be quantified. It is a skill which is quantitative determination of the possible risks. In public institutions, management of EU projects entity responsible for the risk management process is the top management of the entity that has a real impact on the risk management process. Modern institutions would establish four basic stages of the risk management process, risk identification, risk measurement, risk control and monitoring and control such risks, together with its monitoring.

The outcome of the risk analysis, which is an indication of the main reasons there is a risk, it can be a starting point for the development of procedures which set themselves the goal of limiting the hazards and risks to the successful implementation of the project. Issues related to the analysis of the risk occurring in the ongoing EU projects should be combined with skill and style of project management. The point here is largely on the ability to react to threats, as well as to the ability of management to run the activities and initiatives of the project management team. In any modern project management model EU must be a place for interaction of implementing the project. The most optimal model of such cooperation should be identified with the principle of shared

---

responsibility for the project undertaken. Moreover, an analysis of the risks associated with the management of the EU project can be compared to the designation on the map of potential hazards and identifying the result of damage caused by them. This is due to the fact that such risks may actually occur at different stages of the project. Everyone, even the smallest EU project is closed the whole. Frequently the process of risk management of EU projects includes identification of risks and the determination of its main causes, hazards and proper selection of the final choice to solve the problem or to minimize the effects of the occurrence of the risk.\(^8\)

The risk management process is the process of determining the risk along with the ability to take appropriate actions that are reasonable and adequate to the scale of the threat response to such risks. Therefore, the correct identification of hazards and risks allows you to prepare by beneficiaries implementing EU projects appropriate strategy. Often properly developed strategy action can eliminate or offset the risks at each stage of the project. It may also be a minor correction adopted indicators, which will not affect the normal process of the project. There are situations that in some cases the introduction of improvements to the flow of information between the various contractors work may be an appropriate means of minimizing the risks associated with congestion proper implementation of the project. To properly used EU funds necessary to become any current actions and reactions to possible emerging hazards associated with the implementation of EU projects. Accordingly quick response in relation to the scale of the risk is not always better means to rectify the errors. There are situations that the difficulties related to the implementation of EU projects cause build-up problems and are subject to making difficult decisions.

The author observed a tendency of repeating that in many cases, however, especially on infrastructure projects, risk mitigation

---

8 J. Roszkowski, A.P. Wiatrak, *Project management - the essence, the procedures and their application for the use of European Union funds*, Publisher SGGW, Warsaw, p. 98-103 (2005).
strategy may not be very effective. Reasonable in such a situation can become a transfer of risk to another entity. The implementation of each project has its own individual characteristics. All the possibilities for reducing the risk be carefully analyzed, assuming that the costs involved are included in the schedule of material and financial, and time. Implementation of specific remedies should always be taken in advance in relation to the potential risks of the project, which is not always possible. The use of such a method does not eliminate the risk, but it can protect the beneficiary against the negative effects of failure of the project. Most, however, can replace more of the following sources of risk, which most often very substantially affect the way the projects co-financed from EU funds:

- cancellation of the project;
- crucial delays in project implementation;
- exceeding a specific project budget.  

Preparation and implementation of projects co-financed from EU funds is often a very complex operation, requiring a particularly timely action, consistent with the assumptions and objectives. Important are primarily core competencies in the management of EU projects. We can include them substantive qualifications of project management, experience and personal qualities. Therefore, there is need for the selection of such persons, that his personality, integrity and conscientiousness will be able to skillfully manage EU projects, minimizing the occasion of the level of risk and potential dangers accompanying the absorption of EU funds.

---

Conclusion

In summary it can be seen that the implementation of EU projects - from the Polish entry to the European Union - has become an indispensable part of the implementation of regional policy. Every year, Poland uses EU funds to improve infrastructure broadly understood, moreover, supported by investment in human capital, financed by the European Social Fund, which Human Capital Operational Program. Management of EU projects is a complex and multi-threaded. Each project has its own specific and refers to the guidelines contained records of individual EU programs.

In contrast, the EU funds allocated for the implementation of the project, to be donated to the strictly defined in the grant application. By this development, however, sees a relationship. It consists in the fact that the more the beneficiary pursues EU projects, the better able to manage all processes associated with the absorption of EU funds. However, we must continually be aware of the possible dangers associated with the implementation of EU projects. The next financial perspective for 2014-2020 may be good evidence of the ability to use these funds in infrastructure projects and such, investing in the man himself.
THE HISTORICAL BACKGROUND
OF THE UNITED STATES PATENT LAW

EDYTA SOKALSKA

University of Warmia and Mazury in Olsztyn

Introduction

Patents are common kind of intellectual property. In the early colonial period in America there were no general laws providing for the issuing of patents. In the end of the 18-th century there were some standards procedures at the state level law but standard national patent law was needed. The Constitution of the United States included the provision for protecting intellectual properties.

The Patent Act of 1790 was the first federal patent statue in the sphere of organizing the patent law. Later, there were passed further acts (of 1793, of 1836, etc.) concerning the issue. In the period between 1793 and 1836 the patent system experienced an increase number of patent applications. The increase flow of applications highlighted a lot of problems with still loosely organized patent office. The United States Patent and Trademark Office is these days an agency in the U. S. Department of Commerce that issues patents and trademark registration for product and intellectual property identification.

It is noticeable that literature of the subject of the history of American patent law is quite impressive. As far as the American researchers are concerned there can be mentioned such researchers as Edward C. Walterschied¹, Morgan Sherwood², Gustavus A.

Weber\textsuperscript{3}, Lawrence M. Friedman\textsuperscript{4}, Kenneth W. Dobyns\textsuperscript{5}, David E. Martin, Pasquale J. Federico\textsuperscript{6}, Jim Bieberich\textsuperscript{7}. The individual authors on the basis of the analysis of the variety source of materials and literature represent an independent assessment of the events.

The aim of this essay is primarily the presentation of some aspects of the early history and beginnings of the American patent law. In the first section there are pointed out some events concerning patent systems in medieval times and some English influences on the American solutions in the sphere of creating the patent law. Further, there are introduced: the \textit{Patent Act of 1790} and the main acts concerning the issue, and at last – some aspects of the modern American patent law, especially – the institution of the United States Patent and Trademark Office.

\textbf{The patent customs and the influence of British practice on the american patent law}

It is significant that in the medieval times some sovereigns found a way to raise money without imposing taxes. They held some rights called “monopolies” on some kinds of production or innovation. It is generally considered that the history of patent law started with the \textit{Patent Statue} that was passed in Venice in 1474. The legal protection was the period of ten years. The similar patent protection


had also place in the patent systems in the other European countries. On the other hand, there is also some evidence that some form of patent rights there were even seen in ancient Greece, England and Florence.

In England by the 16-th century it was the form of “letters patent”. They were issued by the sovereign to inventors who petitioned and were approved. The English Crown granted letters patent on monopolies to people who were rich enough to pay for it. The Crown gained some money by the means of “letters patent” especially as some sorts of common goods (for example salt) or particular services were concerned. With the time, the circumstances in which they could be granted were limited and there were used to new inventions. In 1624 there was established a crucial document in the sphere of English history of patent law – the Statute of Monopolies. The English Parliament restricted the power of Crown, by declaring that the sovereign could issue letters patent only to inventors and introducers of projects of new original inventions for a fixed number of years. The period was limited to 14-years. It was the duration of two training periods for craft apprentices. It is widely considered that the Statute of Monopolies became the basis for the later development of patent law in England and other countries. Evolving from medieval origins, the English patent system recognized intellectual property in order to stimulate inventions.

It should be also taken into account that patent law developed also in France. Patents were granted by the sovereign and other institutions. The novelty of the invention was examined by the French Academy of Science. With the French Revolution there was created modern patent law.

During the XVIII\textsuperscript{th} century patent law in England there were established some principles that patents could be issued for improvements of the already existed machine and that principles or ideas that did not have practical application could also be patented.
legally. It was connected with the debate over James Watt’s steam engine.

The basis of English patent law spread over varied countries, especially with common law system. The granting of patents started to be viewed as a form of intellectual property right rather than economic privilege. The original English approach in the sphere of patent law was followed by the new American state and its Constitution. In the beginning the connections between American and English legal culture were very strong. That will be presented below.

The law of the United States was originally largely derived from the common law system of the English law, which was in force at the time of the Revolutionary War. The colonists who moved to the New World brought with them the legal traditions of their homelands. The vestiges of each system—English, Dutch, French and Spanish—can be found in the laws of the various states. The history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law. English common law was well-developed when the North American colonies were being settled, in the beginning by English colonists. When the English colonized North America, among various customs and goods they imported the common law. Since the common law was used as an ideological weapon in the American struggle for independence, cutting off the links with England brought some changes in the basic structure of the legal system but the content and method of the common law were absorbed into American culture and have never been replaced.

Through the action of judges and lawyers, common law in its early centuries laid the foundations of the modern Anglo-American law of contracts, torts, criminal law and the law of real property. While

---

there has been later statutory intervention in all these areas, the underlying governing principles and style of argument and decision-making are still those that worked out long ago in the emerging years of common law. When large sections of commercial law were codified, as in the English sale of goods act of 1893 and the twentieth century American Uniform Commercial Code, although some reforms were introduced, much of the statutory content represented a restatement of common law principles.

It is noticeable that while common law evolved in the royal courts and was enforced by royal officials, its fundamental justification from the beginning was the idea of tradition of customs of the English people. The common law theory rejected doctrines of absolute royal sovereignty that were part of the continental European tradition. Early declarations of the liberty of the subject and restrictions on royal power Magna Charta 1215 started to be seen as part of the common law tradition. That strengthened the view that the common law was an embodiment of fundamental liberties and human rights. American colonies were greatly influenced by this ideological aspect, especially during the war of independence against England. The Americans invoked their rights under the common law as against royal prerogatives and saw themselves not as rebels, but as exercising the best traditions of their English heritage.

The reception of common law in the United States was stimulated by the very popular and influential treatise Commentaries on the Laws of England by Sir William Blackstone, published in the late

---


eighteen century. “Blackstone combined great talent as a systematizer and expounder of the common law with a great literary grace and style. His treatise gave the common law a modern presentation in an orderly and attractive manner, whereas before it had been accessible only in thousands of cases in the law reports and in ancient and out-of-date institutional works. The development of the law also brilliantly linked by Blackstone with the constitutional and political history of England.” The work of Blackstone strengthened the continued reception of the common law from the American colonies into the constituent states. Because of the large measure of sovereignty of the states, common law has not exactly developed in the same way in every state. Despite the fact that a single common law was originally exported from England to America, a great variety of factors has led to the development of different common law rules in different states.

American society moderated the system and imposed new rules of law that more accurately reflected economic and social realities of the newly created country. “One hallmark of the new system was the merger of law and equity, and the power of a single judge to render both types of remedies in the appropriate cases (as opposed to English scheme of parallel systems). A second characteristic of the new system was the abolition of the common law power of judges to define crimes, and the substitution of the legislature as the body to identify criminal activity and to determine the appropriate

12 Alan B. Morrison, Fundamentals of American... 12.
13 Lawrence M. Friedman, American Law... 4-5 (2005).
range of punishment”\textsuperscript{15}. Colonists modified as well as adopted some aspects of common law that were appropriate.

**Creation of the American patent law**

On the 15-th of June 15 1776 New Hampshire became the first colony to declare its independence from the British Crown. In June 1776, a committee was appointed to draft what would latter become the *Articles of Confederation*. On July 4, 1776, the Congress under the *Articles of Confederation* issued the *Declaration of Independence* and adopted the resolution that a “plan of confederation be prepared and transmitted to the respective colonies for their consideration”\textsuperscript{16}. After considerable debate, the states agreed to the *Articles of Confederation*, which were finally ratified by all states in 1781.

As a direct result of the inadequacies of the *Articles of Confederation*, the situation deteriorated quickly after the end of the War of Independence. The Congress negotiated and approved a treaty with Britain in 1784 ending the war, but many states ignored its provisions and Congress under the *Articles of Confederation* could do nothing to force them to honor the treaty. State interference provided Britain with a justification for refusing to carry out many of its obligations under the treaty. There was no effective central regulator of disputes about interstate commerce, so trade wars erupted between states\textsuperscript{17}.

Some states sought to mediate disputes by meeting in conferences, and it was out of one such conference that the idea for a new charter of government emerged. A Virginian delegate to the conference—James Madison—suggested that the delegates at that conference call

\textsuperscript{15} James V. Calvi & Susan Coleman, *American Law and Legal Systems* 33 (6\textsuperscript{th} ed. 2009).

\textsuperscript{16} Henry S. Commager, *Documents of American history to1898* 5-100 (1968).

\textsuperscript{17} William Burnaham, *Introduction to the Law and Legal System of the United States* 2-3 (3\textsuperscript{rd} ed. 2002).
for a convention in Philadelphia in 1787 to discuss the question. The delegates to the convention were convinced that a stronger national government was necessary. Unfortunately, they disagreed on just how strong it should be. One group of delegates favored a strong national government capable of rising above regional differences. Other group argued against greater encroachment on the powers of the states than minimally necessary to avoid problems that had arisen under the Articles of Confederation.

For the most part, the Federalists’ view prevailed at the 1787 convention. However, significant compromises had to be made to accommodate states’ rights advocates. The debates among the delegates were repeated during the ratification process at ratification conventions in the states. Despite substantial initial opposition, the Constitution was ratified and the new government commenced on the 4th of March 1789.

A large part of the reasons why the Anti-Federalist and other opposed the Constitution had to do with a lack of a list of individual rights that citizens would enjoy the new stronger central government. Bills of Rights were a feature of many state constitutions. The Federalists resisted discussing the issue, believing that the most important goal was to establish a basic structure for governing the country as quickly as possible. They urged proponents of Bill of Rights to wait until the constitution was ratified and to add such a bill by way of amendment - a measure the Federalists agreed to support. The depth of feeling in favor of the Bill of Rights was demonstrated by the fact that five of thirteen states submitted demands for the Bill of Rights along with their ratifications. James Madison, who argued for delaying the question until ratification, drafted the

---

Bill of Rights, which became the first ten amendments to the Constitution when it was ratified in 1791.

As it was announced in the previous chapter, the English approach in the sphere of patent law was followed by the new American state and the Constitution. In the early colonial period there weren’t any general law providing for the issuing of patents. The inventors of new goods just appealed to the colonial governments to grant them the exclusive commercial rights to the products. Before general law acts concerning patent law system, the American colonies and later states started to issue commercial right and privileges separately in each state.

At the turn of the 18-th century American states started to issue general patents provisions rather than the case specific acts. At the state level there were standard procedures for applicants, the process of examining the products and the terms for patent holdings. Mostly, there were used in patent laws a 14-year term like in English practices. If the person in one state was interested in holding the patent for his invention also in the other state, the patentee had to apply separately also in the other state. It should be underlined here, that it was difficult to obtain patents in more than one state because of the costs and time. Of course, there were needed some standards in the issuing of patents as a new country was being built.

The U. S. Constitution formed the basis for federal laws. In the beginning, federal law traditionally focused on areas where there was an express grant of power to the federal government, like mil-

---

20 In 1641 Massachusetts General Court passed the commercial right for the period of ten years to Samuel Wilson. It was unofficially considered as the first patent in the U. S.

21 One of the first state general patents law was issued in South Carolina, see National Research Council, Global Dimensions of Intellectual Property Rights in Science and Technology 49 (1993).

22 About problems with state constitutions see Bruce Ackerman, We the People. Transformations 36-39 (2009).
tary, money, foreign affairs (especially international treaties), tariffs, intellectual property and mail. Everybody should agree that since the beginning of the 20-th century federal law has expanded into such areas as aviation, telecommunications, railroads, pharmaceuticals, antitrust and trademarks. States delegate lawmaking powers to a great amount of agencies, counties, cities and special districts.

It is noticeable that the American Constitution in Article I, Section 8 says that “The Congress shall have power […] to promote the Progress of science and useful arts, be securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”\(^{23}\). By this clause (although it uses neither word) copyright and patent protection of authors and inventors are authorized. It is described as a provision for protecting intellectual properties or as intellectual property clause. The American Constitution followed the original English approach that emphasized the development of new inventions as the advantage for the whole society.

The first federal U. S. statute in the sphere of patent law was the Patent Act of 1970. Partly it was crafted by Thomas Jefferson and “as a result it incorporated many of his believes including requirements for patents to have models submitted with all applications. Jefferson firmly believed that only American citizens should be afforded the benefits of obtaining patent rights. The act contradicts Washington’s request for “<<the introduction of new and useful inventions from abroad>>”, an issue that was later addressed by Congress in 1836”\(^{24}\). The statute consisted of seven sections. The patent gave the fourteen-year term of exclusive right to use the specific invention (like state statutes). There was no possibility to extend that term and some patentees argued that it was not enough

\(^{23}\) The U. S. Constitution, available at senate.gov/civics/constitution_item/constitution.htm (last visited Jan. 21, 2014).

time to be satisfied. It was time consuming to any invention to be commercialized. Being foreigners was also a problem to obtain a patent in the U.S., because those who weren’t citizens were not able to get the exclusive right of patent. Also, the examination process was criticized. It often discouraged the inventors to file applications. In other words, patents were too difficult to obtain. The Patent act of 1970 gave the power to grant or refuse patents to the Secretary of State, the Secretary of war and the Attorney General. It is worth mentioning that the Patent Act of 1790 is seen as a kind of compromise between the Federalists and Anti-Federalists.

In 1973 the Patent Act of 1970 was replaced by new patent law. “To address the shortcomings of the 1970 act, Thomas Jefferson wrote a bill that introduced in Congress on February 7, 1971. The bill proposed the elimination of the three-member cabinet panel requirement to grant a patent, and instead required only a signature of the Secretary of State. The bill stated that descriptions of newly issued patents be published in various newspapers, as well as filed with all the U. S. District Courts. Additionally, a provision that would protect the non-intentional, non-commercial use of patented invention from an infringement suit was included. Had this bill passed and remained in effect, many of the present-day’s legal issues regarding patents and intellectual property rights could have been avoided.”

Consequently, a new patent bill was introduced on the 1-st of March 1792 by Alexander Hamilton. “This bill addressed the issues of handling cases in which disputes regarding overlapping patents were handled. Hamilton proposed that the Supreme Court of the United States settle such arguments. Additionally, he inserted a provision that allotted the revenue from patent fees to be allocated for the purchasing of books and other scientific apparatus as well as for

---


26 Ibidem, 2.
the establishment of a national library. An examination of both Jefferson’s and Hamilton’s proposed legislation reveals that both sides of the political spectrum during this time were interested in the federal government’s promotion of scientific endeavors. The only significant debates were over the details of implementation and the Constitutionality of direct Federal support for science.²⁷

*The Patent Act of 1793* established a new system of the patent law. It joined the various elements of Hamilton’s and Jefferson’s bills. It created the Patent Board and the Department of State that was responsible for the issuance of patents. It was much easier to obtain the patent. The examination process was simplified. That was why during the period between 1793 and 1836 there was increased number of patents but on the other hand, the high number of applications caused the appearance of some problems concerning the organization of the patent office. There were a lot of patent lawsuits and in 1800 the Patent Act was amended and as a consequence the foreigners who had been residents of the U. S. for two-year time had the possibility to obtain patents.

In the half of the XIX-th century under the influence of some new economic views and philosophy the patent law criticized in England and other European countries. That was why there were some changes in the European patent law in the second part of the XIX-th century. In the United States the patent law also underwent some reforms. In 1836 a new federal Patent Law was enacted. “A major review of the law was undertaken in 1836 in response to complaints about the grant of patents for things that lacked novelty. Under this revision the Patent Office was set up as a part of the State Department and the specification had to be submitted to it and be examined for novelty before a patent would be granted. As a consequence, the provision of 1793 act requiring the inventor to distinguish his invention from the prior art was expanded to require the applicant to <<particularly specify and point out the part,
improvement or combination, which he claims as his own invention or discovery>>. This provision is the antecedent for modern claim drafting worldwide. Other features of the 1836 law were to codify the law relating to statutory bars, to clarify the law relating to cases of conflict between competing applications and to provide a mechanism for the possibility of obtaining a seven year extension to the basic fourteen year term in certain circumstances. The 1836 act also finally removed all limitation on the nationality or residence of those who could obtain United States patents. However, it did not end all discrimination on this score. U. S. citizens or residents intending to become citizens were charged $30.00, British subjects were charged $500.00 and all other foreigners $300.00”28. The reorganization of the patent office allowed for the better process of patent applications where everyone was able to get information as far as new patents were concerned, whether his or her invention was really original before filing for a patent. From that time, all the patents were officially renumbered.

It is worth mentioning that in the last decade of the IX-th century the economic depression resulted in the criticism of patent law. There were negative attitudes towards patents because the patents were then understood as a method for promoting monopolies. There was a number of amendments of the Patent Act of 1836. After World War II the modern patent law started to develop. In the United States in 1952 there was organized the basic structure for modern patent law and it continued to develop by way of case law.

These days the United States Patent and Trademark Office is an American agency in the Department of Commerce that issues patents to inventors and businesses for their inventions. It also provides with the trademark registration for products and intellectual property identification. The headquarters of The United States

28 Ibidem, 3.
Patent and Trademark Office is in Alexandria. The agency cooperates with the European Patent Office and Japan Patent Office\textsuperscript{29}.

**Conclusions**

Patent law has long and impressive history in The United States and Europe. The development of patents was important from the economic and legal point of view. The patent protection contributed to the promotion of inventions but in history it was also the way of enriching the sovereign. The United States legal system in the beginning was strictly connected with the British tradition and British solutions in the sphere of patent law. Patents were provided for in the U. S. Constitution and they were considered to be important to help the country to grow and prosper but also to reward the inventors. The original American patent law was created gradually and patent protection in the XIX-th century was stimulated by the significant economic, technological and natural science development. It should not be forgotten that up today the U. S. Constitution is seen as a legal basis for the United States patent system.

These days intellectual property gains in significance. With the social, technological and science evolution this type of property will be more important. Patents are the source of income of prosperous firms and the patent law should be clear and effective in order to fulfill the requirements of the inventors but also of the society.

**REFERENCES**


Bieberich J., *Significant Historical Patents of the United States, Historical Collec-

\textsuperscript{29} For more information, see an official website http://www.uspto.gov/ (last visited Feb. 21, 2014).
138 Edyta Sokalska, *The Historical Background of the United States Patent Law*


Commager H. S., *Documents of American History to 1898* (1968)


Lis-Staranowicz D., Legitymizacja sądowej kontroli prawa w Stanach Zjednoczonych Ameryki (Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego w Olsztynie, Olsztyn 2012)


Sokalska E., Federalizm and the American Court Organization, 13 Studia Prawnoustrojowe (2011)


*The U. S. Constitution*, available at [www.senate.gov/civics/constitution_item/constitution.htm](http://www.senate.gov/civics/constitution_item/constitution.htm)

Hopkins university Press, Baltimore 1924)


MEASURES FOR SAVING COMPANIES INTRINSIC VALUE.
THE SPANISH AND ITALIAN EXPERIENCE

LUIGI LAI

National Information Processing Institute Warsaw

Abstract: Insolvency's aggressive function is sometimes sublimated. Insolvency procedures are mainly seen as a method for company's assets liquidation, and considered as a way for satisfying the lawful demands of creditors. All this without any consideration for company's intrinsic value. Companies have an intrinsic value which has to be intended as the combination of the single company's true economic potential, the valuable assets. Often such intrinsic value is not easily quantifiable, but it has a fundamental importance. Insolvency Law, may have beside an aggressive function a restructuring function as well, which is increasingly acquiring a relevant importance in the insolvency framework. The article aims to highlight some important issues that might be considered when conducting an evaluation on international insolvency measures.

Insolvency's aggressive function is sometimes sublimated. Insolvency procedures are mainly seen as a method for company's assets liquidation, and considered as a way for satisfying the lawful demands of creditors. All this without any consideration for company's intrinsic value.

Companies have an intrinsic value which has to be intended as the combination of the single company's true economic potential, the valuable assets.

Often such intrinsic value is not easily quantifiable, but it has a fundamental importance. For example, values like:

• People jobs,
• Fiscal flow coming from the company,
• position in the international market.

All these are not simple words or simple economic quantities, these words represents something that goes beyond the simple economic
understanding and becomes something valuable, worthwhile to be saved.

However as afore-mentioned insolvency is often meant just as an executive procedure on the failed.

All attention is given to the insolvency's “vis actractiva” simply assessing creditors interest to the same extent as the “summum bonum”. Hence considering liquidation and the simultaneous appeasement of creditors were:

- the panacea for every matter related to insolvency.
- the sole worth to be settled.

Is that attempt totally correct?

At certain conditions It may occur that company's survival is crucial as well.

We may compare, for example, the company to a ship and the market to the ocean. As a ship crossing the ocean and the ocean's water is not always calm and perils may appear at any moment. Market's waters as the ocean's waters which the ship and the company have to go across maybe not always be calm and quite. A financial crisis as a sea storm may expose the company to huge perils and threats; in this same way, a company may overstep just a momentary lack of liquidity.

In the recent past insolvency law has attracted an increasing interest all around the globe; but still, when an average person thinks about insolvency law, this person generally takes into consideration mainly insolvency's aggressive function. This article tries to emphasizes how this attempt is not any more correct, and it examines how insolvency law is changing and it compares some new aspects of modern insolvency law in Italy and Spain. These new characteristics briefly analysed in this article, may be applied to demonstrate that insolvency law,may have beside an aggressive function a
restructuring function as well, which is increasingly acquiring a relevant importance in the insolvency framework. This article aims to highlight some important issues that might be considered when conducting an evaluation on international insolvency measures.

Considering the aforementioned Italy and Spain have tried to set new instruments for saving intrinsic company's value. Italy and Spain have two different approaches. While Spanish legislator provided tools for companies restructuring before the declaration of Insolvency, instead Italian Lawmaker set such possibility in the insolvency range i.e. when company has been already declared insolvent.

At first the article will examine the new Spanish regulation and then the Italian one. Spanish economy has been largely affected by the global economic crisis, the traditional function of Spanish insolvency legislation has been linked to the orderly satisfaction of the creditors of an insolvent common debtor. It was thought that execution levied by creditors against the debtor's assets could lead to inefficiencies and unfairness, with a fire sale of assets to the most diligent creditors, for this reason, individual executions were replaced by compulsory universal execution against the debtor's assets in order to use the proceeds to satisfy creditors.

However this traditional function presented many inefficiencies\(^1\), and it was not preserving companies intrinsic value\(^2\). For this reasons the Spanish Government had to reform the Spanish Insolvency Law\(^3\), in order to reconcile the two conflicting aims of the Insolvency Law:

---

\(^1\) Despite being effective, the Insolvency Law suffered relevant losses in value leading to a diminished ability to satisfy creditors.


\(^3\) The Spanish Insolvency Law, is known as “La Ley Concursal” Law nr. 22/2003, then subsequently modified.
• The traditional aim of satisfying creditors executing debtor’s assets;

• The aim of preserving the company for enabling the business to continue and its future profits to be used to achieve a better level of debt satisfaction for creditors.

The first reform was approved in 2009, it was an encouraging exercise in introducing advanced insolvency practices to provide anticipated solutions for distressed companies that were not able to find legal solutions to its financial problem.

A quite interesting piece of legislation was the introduction into Spanish law of the *imminent technical insolvency* (henceforth ITI), concept which was previously not known by the Spanish legal tradition.

The ITI concept lies in the idea that it is possible to anticipate the restructuring moment, in order to have sort of route shift enabling company to over cross the crisis. In this case there is no change in company's head officers, they are still the same but still it is sort of last bell for company restructuring before insolvency. A way to find a smooth solution for avoiding insolvency and eventually company's death.

If we compare a company to a human being, we might define insolvency as “company's death”. Considering the importance that companies have in modern economy, produces no surprise that the Spanish government set the ITI aiming at saving company's intrinsic value.

The ITI declaration sets new interventions tool as:

• Protection and promotion of preinsolvency alternatives

---

4 Subsequently emended in 2011.
5 In Spanish, *Inminente quiebra técnica*.
6 It is a legal concept borrowed from German Law.
Introduction of DIP\textsuperscript{7} financing concept

Refinancing agreements

Distressed debt trading and urgent sale of business

A very important change set by the 2009/2011 reform was the softening of a very important general principle of the Spanish Insolvency Law, due to which are cancelled all acts that are considerable as “harmful to the creditors interests” and are implemented within two years prior to the date of the declaration of the insolvency proceeding even though a fraudulent intention did not exist\textsuperscript{8}.

This reform gives a protection from clawback actions so to provide the refinancing agreements with more certainty\textsuperscript{9}.

The refinancing agreements must contain the following requirements:

1. Increase the funds available or modifies the debts terms.

2. The agreement has to be executed by creditors whose claims represent at least 60 percent of the debtor’s liabilities.

3. Technical opinion by an independent expert on plan feasibility

4. The refinancing agreement has to be validate by the court.

However it is due to be noticed that even if the other creditors whose claims represent 40 % of the debtor’s liabilities have not the

\textsuperscript{7} DIP financing (Debtor in possession financing) is a special form of financing provided for companies in financial distress.

\textsuperscript{8} Please see, art. 71, Spanish Insolvency law in Spanish, Ley Concursal. :<\text{http://noticias.juridicas.com/base_datos/Privado/l22-2003.t3.html#a71}> (last viewed 07November 2011).

\textsuperscript{9} Please see art. 71, paragraph 6, Spanish Insolvency law in Spanish, Ley Concursal. :<\text{http://noticias.juridicas.com/base_datos/Privado/l22-2003.t3.html#a71}> (last viewed 07November 2011).
possibility of challenging the refinancing agreements, the refinancing agreement can not be executed without the agreements of “in rem” creditors.\textsuperscript{10}

Considering the aforementioned the 2009/2011 reform is a positive step forward for providing anticipated solutions for distressed companies, however presents some features which need to be modified in order to make the preinsolvency agreement more effective and more popular, because the 2009/2011 reform has the merit of opening a “new rage of legal instruments”, but the use of such new legal instruments, in reality is still quite complicated.

On the contrary the Italian Lawmaker tried to answer to this arising problematic\textsuperscript{11} through the emanation of the Legislative Decree No.270/1999 (hereinafter 'Legislative Decree' or 'Decree').

This Decree is also known as 'Amministrazione Straordinaria' i.e. special administration for large companies in crisis. It aimed at providing a special insolvency procedure\textsuperscript{12} to deal with companies of national or regional economic importance. The Italian Legislator seek a new approach to bankruptcy law, the purpose was to modify the traditional view, proposing a more efficient alternative on the ground of company's survival importance.

The Decree is ultimately based on the belief that the best way to protect creditors and the company's social and economic value is to create a special legal framework capable to bring the company again \textit{in bonis}.

\textsuperscript{10} Creditors holding an “in rem” securities (Garancias Reales).

\textsuperscript{11} How to save Company Intrinsic Value and trying not to be invasive.

\textsuperscript{12} Here we may notice the difference, while Spanish legislator provided tools for companies restructuring, before the declaration of Insolvency, instead Italian Lawmaker set such possibility in the insolvency range i.e. when company has been already declared insolvent.
The European Commission and the European Court of Justice verified the Decree admissibility with reference to Community rules on State aids.

The Decree has been modified several times. The framework is composed by different classes of Special Administration (hereinafter 'SA'). The first kind of SA may be applied to companies characterized by:

- Occupying more than 200 employees.
- A certain level of indebtedness (above 2/3 of annual company's revenue)

After formally filed in court and in Ministry for Production Activities for the opening of an SA, the court had to nominate one or more Special Administrators. The Special Administrator has 30 days for completing a report on company's economic situation, and on company's future prospective; finally the court, based on the Special Administrator's report decides if the company may adequately continue the SA or on the contrary has to file for a normal assets liquidation procedure.

In 2003 a new type of SA was implemented by Decree No 344. This Decree was a novelization of previous Decree No.270/1999, and it is well known as 'Parmalat Decree', because it was approved just the day before Parmalat group filed for Special Administration. There is no need to explain that this novelization was tailored on the specific needs of that specific and peculiar situation.

Parmalat group was a multinational corporation; having become a leading global company in the production of milk and milk derivatives; as we all well know the company collapsed in 2003 with a 14bn Euro hole in its accounts and nowadays it is Europe's biggest bankruptcy case.

This Ministry changed name several times: Ministero dello Sviluppo Economico – Ministry for Economic Development.
This second type of SA, which we may define as Special Administration for large insolvent companies (hereinafter 'SALIC') contains some statement different to the general rules contained in Legislative Decree 270/1999.

The Company under SALIC is subject to a more rapid procedure, the Special Administrator is appointed directly by the Ministry. The petition for SALIC is conceded only subsequently that the Ministry ascertains the presence of the requisites. This Special Administrator is qualified as a public officer; in this case, a preliminary report on company's economic situation, and on company's future prospective is not \textit{ex ante} needed, the Special Administrator's appointment has not to be confirmed by the Insolvency Court where the company has the registered office, but the mentioned Special Administrator is under the supervision of a supervisory board.

The SALIC procedure differs from the SA because is devoted to rescuing large insolvent companies, companies whose uncontrolled defaulting would create a domino effect by far critical for the national economic system.

Despite the fact that Decree No 344/2003 was urged by the contingent situation, the Parmalat Decree has some undeniable qualities permitting the preservation of company's trading position:

- Facilitating a swift procedure for the large insolvent company in distress.
- Facilitating a large insolvent company's rapid fresh start.
- Allowing an effective restructuring of all the entire group.

The Parmalat Decree is not aiming at a simple company liquidation, but in the same breath the Decree can not be qualified as a covered mechanism for company's at any price survival; the Decree goal is to drive the company to restructuring through the medium of a strong cooperation among all the economic players involved (State, creditors, company, company's client, consumers).
By virtue of this different attempt the Special Administration for large insolvent companies allows preserving market, trading position and permits easing the restructuring process.

The requirements to apply for SALIC have changed during the present years, but the nowadays main criteria are:

- Employing at least 500 employees\textsuperscript{14}
- Accrued debts of at least Euro 300\textsuperscript{15} million including those arising from released guarantees\textsuperscript{16}

Within 180 days after the appointment the Special Administrator has to present a report to the Ministry and the Insolvency Court attesting:

- Reasons that provoked the situation of economic distress.
- Debtor’s activities, and list of creditors of the company.
- Strategy for recovering.

If the restructuring plan is not approved or not succeeded the Special Administrator propose a liquidation plan disposing the sale of the company’s assets.

A SALIC key factor stays on the composition with creditors; the Special Administrator attempts to find an agreement among creditors in order to, 'make the company start again'. The composition has

\textsuperscript{14} The first Decree version set a more strict criteria: The Company had to employ at least 1000 employs.

\textsuperscript{15} The first Decree version set a more strict criteria: accrued debts above Euro 1000 million.

\textsuperscript{16} It is referred to the well known Parmalat Bonds, the Company was exposed in the bond Market for over several million. Later on was approved a plan for composition with creditors, bond holders received a compensation by far lower than their bond value.
to be approved by creditors representing the majority of claims admitted to vote.\textsuperscript{17,18}

A second key factor lies in the extreme SALIC flexibility: In case the company has assets not matching with the company's core business\textsuperscript{19}, the Special Administrator may sell off business units by using private negotiations. This great adaptability in choosing company business units to sell, enables the company to concentrate on the core business, alleviating in such way the company economic charge, and permitting the company to keep authorization and licenses needed to implement its core business.

The Decree provides a remarkable legal mechanisms for regulating when the Insolvent Company is parent company for other several companies. When the parent company has been admitted to the SALIC procedure, the Special Administrator may file with Ministry for the admission to the procedure of the other insolvent companies of the group\textsuperscript{20}.

Then the Italian Legislator set a new piece of legislation\textsuperscript{21}, likewise the previous novelization, this new Decree as the name shows\textsuperscript{22} (\textit{nomen omen}) was an Alitalia crisis effect, nevertheless this novelization did not reach the same positive results as the previous Parmalat Decree.

\textsuperscript{17} Creditors as well have to file for admission with the Court.
\textsuperscript{18} Creditors are divided in classes depending on the title of the claim.
\textsuperscript{19} The Parmalat group had as well relevant assets in the hospitality industry. i.e. Parmatour.
\textsuperscript{20} An emendation to the Decree extended the notion of “companies part of the group” also to the parent company’s affiliates that maintain a contractual relationship – on an exclusive basis – with the parent company for the supply of services necessary to realize the parent company’s undertaking.
\textsuperscript{21} Legislative Decree No134/2008.
\textsuperscript{22} Also known as Alitalia Decree.
Alitalia was the largest airplane company in Italy and one of the largest in Europe. Due to the Country's geographical conformation; (a quite long and peninsula and two main islands characterized by a terrain mainly hilly and mountainous), Alitalia covered a fundamental function in the Italian transport system and provided essential public services. Alitalia crisis was not properly a novelty, however the plight reached such a level to require a resolute Government's intervention.

The Alitalia Decree extended the SALIC even to serious corporate failures lacking of a realistic plan for reassuring company financial equilibrium. This novelization set as well that the 'restructuring plan' could also consist in a simple transfer of business assets.

Alitalia filed for SALIC in Spring 2008, during the previous years efforts for fusion with other main airplane companies were unsuccessful. The company was concretely facing bankruptcy; at the same Alitalia became a main electoral campaign topic, the idea at the base of this new decree was to divide the company between a bad company and a good company, because till then no airplane company wanted to take over Alitalia with its huge accrued debts; for such reason a new procedure was set through which the Special Administrator could privately sell relevant Company assets.

---

23 The Author refers to the 'old' Alitalia Company: 'Alitalia - Linee Aeree Italiane S.p.A'


25 Quite peculiar indeed to define as a restructuring plan a plan consisting in a assets liquidation.

26 See Brown Stephen, Berlusconi's Alitalia election promise turns sour, uk.reuters.com/article/idUKLJ33345220080919 (last viewed 06 November 2011).

Concretely it permits the Special Administrator to enter into private negotiations with some qualified potential purchasers; those potential purchasers must ensure the continuity of the relevant service in compliance with legal requirements. The transfer price has to be set by a financial institution of high standing, identified in a decree by the minister for economic development.

Alitalia\textsuperscript{28} was going to be bought by a new fresh company company 'CAI\textsuperscript{29}srl\textsuperscript{30}', in consequence of the fact that AirOne, the second Italian airplane company, was a CAI member, the decree introduced an exceptional exemption from antitrust conditions for merger transactions.

When the exemption is put into use, the parties must inform the authority of the planned merger\textsuperscript{31}, proposing solutions to avoid risks of unfair prices or unjustifiably predominant positions, and if nevertheless this happens it should be a time limit by which any resulting monopolistic positions should be relinquished.

Alitalia most valuable assets were the public licenses the company had. For this reason has been set that where a business or a business unit in any way connected with the purpose licences, or concessions may be transferred to the purchaser.

In the Alitalia case it is visible how the SALIC procedure has lost its main aim and has been used for a political bailout. CAI just took

\textsuperscript{28} The author refers to Alitalia 'the good company' meaning the company deprived of the accrued debts and owner of the precious flight permissions and airport landing slots.

\textsuperscript{29} CAI stays for Compagnia Aerea Italiana.

\textsuperscript{30} In order to keep Alitalia in Italian hands the Italian government sponsored the creation of a new fresh company for Alitalia's 'bailout'. The company is formed by several large Italian companies. The CAI president is Mr Colaninno, president of Piaggio spa, the famous vespa producer.

\textsuperscript{31} The authority already knew about the merger, as CAI was a project sponsored by Italian government.
the best assets from the 'old Alitalia' which at the end remains an empty box covered with debts\textsuperscript{32}.

Bearing in mind what expressed in regards of the Italian Special administration, it is due to notice how the Parmalat Decree has been successful instead of the scarce results for the Alitalia Decree. The Parmalat Special Administrator Mr. Enrico Bondi helped the company go across very troubled times almost safely.

Without any doubt approaching the SALIC procedure has not been an easy period for the company, although Mr. Bondi, after selling off business units not pertaining to the Parmalat core business\textsuperscript{33}, pursued a successful composition plans with creditors. Those compositions were not 'idyllic' creditors lost a relevant part of their credits, but without being completely deprived\textsuperscript{34}.

Parmalat is still under SALIC procedure, nevertheless today Parmalat is still a company with a global presence, with more than 36,000 employees all around the world, and witnesses an example of good practice in restructuring large insolvent companies. Instead the Alitalia's insolvency case may not be defined as unexpected, it was clear from many years that the company was surviving just because of consistent state aids.

The company was lacking of any chance of surviving, it was not possible to organize a business plan capable of creating a financial equilibrium. Alitalia created huge debts for the country budgets, just because it was treated not like an economic case but as political case. The Prodi Government as the Berlusconi's one fearing public opinion preferred to save the company at any cost.

\textsuperscript{32} The Italian state took over the old Alitalia company, which deprived of its most valuable assets, was transformed in bad company.

\textsuperscript{33} I.e. Selling off Parma FC.

\textsuperscript{34} On October 1, 2005, by virtue of the Composition with Creditors approval, the assets and liabilities of the 16 companies included in the Composition have been transferred to the new Parmalat Group. (http://www.parmalat.net/en/investor_relations/legal_issues/).
Comparing the two cases, some differences are visible. Alitalia was a well known and preventable case, the previous efforts for an international merger failed because Alitalia was a public company and the political power did not agree in loosing the control on a relevant asset for the Italian Economy.\textsuperscript{35}

Instead the Parmalat case can be taken as an example for best practice in restructuring. The starting situation was very difficult; Parmalat as mentioned before has been one of the largest financial cracks in Europe, however due to the company assets values and market relevant positions, a safe bailout has been possible. Parmalat restructured its debt plan, and even if till now Parmalat is in SALIC, it is possible to affirm that the company is now safe thanks to: strong creditors cooperation which believed in company's survival; a good management capable of leading Parmalat outside of the darkest times; a good piece of legislation allowing enough flexibility.

**Conclusions**

As a conclusion it is possible to affirm that the Italian and the Spanish approaches are indeed quite different, however they try to find a solution to a common problem, Saving Companies Intrinsic Value, hence in this regard, they are two different aspects of the same phenomenon.

**Summary**

Considering the importance of the idea of “Companies Intrinsic Value”, this article analyses and compares the Spanish “Inminente Quiebra Tecnica” (Imminent Technical Insolvency) to the Italian “Amministrazione Straordinaria” (Special Administration). The

\textsuperscript{35} Some Politicians declared selling Alitalia to an international competitor would have been a danger for 'Italian economic independence', especially because the airplane companies interested in Alitalia were all public owned companies (i.e. Airfrance and Lufthansa.)
Luigi Lai, *Measures for Saving Companies Intrinsic Value. The Spanish and Italian Experience*

article aims at demonstrating that even if different this two legal tools shares same goals: Saving Companies Intrinsic Value and allowing sort of a “fresh start”.

**General Bibliography**


Emilio Beltrán, *Cinco años de aplicación de la Ley Concursal*, Arzandi 2009


Lai Luigi, “*Co jest Comi?”* Mida magazyn dla prawnikow. n.1 Aprile 2011. ISSN 2082 – 890X.


Prendes Pedro, *Los problemas de la Ley Concursal, I Congreso español de derecho de la insolvencia (Gijón, 16 a 18 de abril de 2009)*, Thomson.


INFORMED CONSENT IN THE CONTEXT OF OVER-THE-COUNTER ACCESS TO AN MULTI-EFFECT PHARMACEUTICAL AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

STEFAN KIRCHNER

University of Lapland, Rovaniemi, Finland

Introduction

Background

Currently (late March 2013), German authorities as well as medical and pharmaceutical experts are considering whether the pharmaceutical substance Ulipristal acetate (17α-Acetoxy-11β-[4-N,N-dimethylaminophenyl]-19-norpregna-4,9-diene-3,20-dione, UA) should be made available freely (over the counter, OTC), i.e., without the requirement of a prescription by a physician. This requires a discussion about the effects of this drug. It is my thesis, that already the availability of the pharmaceutical only with a regular physician’s prescription, but even more the prescription-free availability of this pharmaceutical, are incompatible with Germany’s Criminal Code (Strafgesetzbuch), its Constitution (Grundgesetz) and Germany’s obligations under the European Convention on

---


Human Rights (ECHR),\(^5\) the Convention on the Rights of the Child (CRC)\(^6\) and the International Covenant on Civil and Political Rights (ICCPR).\(^7\) Also authorities in other countries might run the risk of violating international human rights law, should they make UA as available as is now contemplated in Germany. In fact, as will be shown in this article, there is already today a significant threat to human rights of both pregnant women and unborn children. While the former risk will be explained later, the focus of this article will be on the latter risk, in particular in light of the International Covenant on Civil and Political Rights

**Ulipristal acetate and its effects**

UA is a selective progesteron receptor modulator.\(^8\) It has been approved by the European Medicines Agency (EMA) for use in the European Union in 2009.\(^9\) Already since April of last year, discussions are underway at the EMA whether UA should continue to be available only with a physician’s prescription.\(^10\) There appears to be a tendency in other EU member states towards making UA available over the counter.\(^11\) However, under Article 4 (4) of Directive 2001/83/EC,\(^12\) the EU’s member states have the last say in this mat-

\(^{5}\) For a consolidated text of the European Convention on Human Rights as amended by the protocols to it up to and including Protocol 14 see <http://www.echr.coe.int/Documents/Convention_ENG.pdf>, last accessed 7 April 2014.


\(^{9}\) Ibid.

\(^{10}\) Ibid.

\(^{11}\) Ibid.
Informed consent in the context of over-the-counter Access to an Multi-Effect Pharmaceutical and the International Covenant on Civil and Political Rights

In fact, most EU member states already make UA freely available. At the time of writing this article in late March 2014, discussions continue within the German government as to how to proceed. At the same time, the German government is at odds with the Bundesrat, the Federal Council in which Germany’s 16 states in lawmaking on the Federal level, over the availability of Levonorgestrel, an similar pharmaceutical. Of the 400,000 prescriptions filed in Germany per year for post-coital contraception, approximately 300,000 are for Levonorgestrel. In 2012, German public health insurance services paid for 50,000 daily doses of Levonorgestrel and 30,000 daily doses of Ulipristal acetate. It appears as if the dispute is mainly seen as political in nature.

Abortion legislation in Germany

When Germany was reunified in 1990, two very different abortion legislations came into contact with each other. While West Germany allowed abortion only under specific circumstances (Indikationenlösung - indications solution), East Germany, like many socialist countries, had long had a very liberal abortion legislation. Article 31 section 4 sentence 1 of the Unification Treaty (Einigungsvertrag) required that a new solution was found which

---


13 Supra, note 9.

14 Ibid.

15 Cf. also ibid.

16 Ibid.

17 Ibid.

18 Ibid.


was supposed to be an improvement over the legal situation in East and West with regard to both the protection of unborn life and the needs of the mother. This solution, however, had to be in line with West Germany’s constitution (the Grundgesetz or GG for short), which became binding also on the parts of Germany which before 3 October 1990 formed the German Democratic Republic. This difficulty led to a number of legislative attempts and a series of cases before the Federal Constitutional Court (Bundesverfassungsgericht). These decisions have caused a number of legislative changes in the 1990s which have led to the law as it is now. Overall, it has to be concluded that at least with regard to the protection of the right to life of the unborn child, the lofty goals set in Article 31 section 4 sentence 1 of the Unification treaty have not been reached.

The currently relevant case-law of the Constitutional Court makes it clear that both human dignity (Article 1 section 1 GG) and the right to life (Article 2 section 2 GG) apply already to the unborn child from the moment of conception. Accordingly, sections 218 et seq. of the Criminal Code prohibit abortion in principle but allow that neither the woman nor the physician who performs an abortion are punished, provided that specific conditions are met, for example an independent consultation prior to the abortion. The idea behind the consultation model is that the woman ought to be fully aware of the consequences of her decision which, after all, concerns life and death of her own unborn child. While every medical procedure requires the patient’s informed consent, the same applies even more to abortion. Contraception, on the other hand, is legal and easily available. Contraception for women in the form of pharmaceuticals usually requires a prescription by a physician (which is easy to get) but it is also not too uncommon for women, in particular those who have long used a specific pharmaceutical, to obtain their “pill”²² in question from pharmacies in other EU states where the require-

Informed consent in the context of over-the-counter Access to an Multi-Effect Pharmaceutical and the International Covenant on Civil and Political Rights

ments are less strict. The regular case, though, is still the prescription, which also is merely common sense as contraceptive pharmaceuticals have a serious effect on an extremely personal function of the female body.

**The right of pregnant women to be informed about the effects of Ulipristal acetate**

Many women who want to take contraceptives would never want to have an abortion and would fully accept her child were they to become pregnant despite not planning to do so. By advertising UA as a contraceptive and not informing users about its nidation-preventing effects, women are possibly tricked into having abortions. If pro-abortion activists demand that women have a choice over whether or not they have an abortion, one would think that they would also demand that women are given the information which is necessary to make this decision. This appears not to be the case as long as it is not made clear to women if a pharmaceutical, such as UA, also has abortive effects.

This follows from the fundamental principle of informed consent. Informed consent requires that the patient is given the necessary information to make a decision with regard to his or her medical treatment. This doctrine dates back at least to early 20th century jurisprudence in the United States of America, such as the 1905 decision in *Mohr v. Williams* by the Supreme Court of Minnesota, the 1906 verdict by the Supreme Court of Illinois in *Pratt v. Davis* and the 1914 decision by the Court of Appeals of New York in the

---

22 In Germany, contraceptive pharmaceuticals in pill-form are generally referred to simply as “die Pille” (“the pill”), a terminology which is widely understood to refer to the anti-baby-pill.


case of Mary E. Schloendorff v. The Society of the New York Hospital. In the latter case, it was summarized that “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. [...] This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.” Since then, the concept has entered legal systems around the world and is also supported by numerous domestic and international rules. But also outside biologic instruments, the notion that individuals should be free to consent to (or reject) medical treatments can be based on human rights norms. But the problem faced by a woman who were to take Ulipristal as a contraceptive, not knowing and not consenting to its abortofacient properties, is essentially similar to these old cases in which medical measures were taken which went beyond what the plaintiff had consented to. In the case of Ulipristal, the damage, though, would not only be done to the woman but also to her unborn child.

It could be argued that the way in which Ulipristal functions has to be among the information provided to the consumer in the packaging of the pharmaceutical. In this case, however, doing so will not be sufficient. The reason for this is not so much that many consumers hardly read the information, although this should also be taken into account, in particular in a most likely stressful situation in which there is a demand for an emergency contraceptive. When

26 Ibid.
27 See for example Iva Sorta-Bilajac, Informed consent in UNESCO’s bioethics documents, in: 1 JAHR – Annual of the Department of Social Sciences and Medical Humanities (2010), pp. 86 et seq., at pp. 88 et seq.
28 See below, III.
buying a pharmaceutical which is freely available, the patient has the ultimate responsibility for reading this information. The problem is more fundamental in nature. When one function of Ulipristal is advertised or commonly known - the use as an emergency contraceptive - the consumer might want to know about side effects. The consumer, however, has no obligation to even consider that Ulipristal might have abortive effects as well - because of the strict regulation of Abortion in Germany. The same will apply, mutatis mutandis, in other jurisdictions in which abortive pharmaceuticals are not freely available without a prescription, if at all. By making Ulipristal available over the counter while abortive drugs are not freely available, the lawmaker creates the impression that Ulipristal is not an abortive pharmaceutical. This, however, is not the case. Making Ulipristal freely available would therefore amount to misinforming the women who want to take it as a contraceptive. Women who want to buy a post-coital contraceptive but who are opposed to abortion could in this way be misled by the legislature. If pharmacists have a duty to inform their customers about the abortive properties of Ulipristal if their are mentioned in the written information which is provided with the pharmaceutical will remain at least doubtful in many jurisdictions. By making Ulipristal freely available, the lawmaker creates a risk that women’s consent when taking the drug does not amount to informed consent.

If Ulipristal acetate were freely available, the provisions of the German Criminal Code regarding abortions could easily be circumvented. In so far, the existing legislation on abortion, which has been created in order to comply with the requirements of Germany’s Federal Constitution, would be devalued - as would the Constitution’s provision on the right to life. With the legalization of at-will abortions after the 1990 reunification, Germany has begun to walk on a slippery slope. By making an abortifacient drug freely available, Germany would take a huge step away from the original intent of the drafters of the Constitution and would weaken the right
to life of the unborn child as well as the right of women to be informed about the effects of pharmaceuticals they will take, in general.

Authorities everywhere should take note of such developments. In an advancing society, women play a more important role in the workplace and will be more likely to demand easy access to contraceptives. Even leaving aside the damaging side-effects normal, non-abortifacient, can have on women as well as the threat posed by contraceptives to the natural environment, in particular to the water supply, and thereby to others, pharmaceuticals which, like UA, have an abortive effect in addition to a contraceptive effect deny women the full informed consent over medical procedures that is everybody’s right. If UA were made freely available, German authorities would contribute to the impression that this drug is only a contraceptive. After all, the law clearly regulations abortions in the Criminal Code and those who have to apply the law can rely on the basic assumption that the legal order is coherent in itself. This is no longer the case if the Criminal Code sets specific requirements for women to avoid punishment when having an abortion while an other rule (easier access to Ulipristal acetate) effectively allows for an easy and anonymous circumvention of existing criminal law rules. The fact that a pharmaceutical is abortifacient has to be made public. While normally a patient can be expected to read the information provided with a pharmaceutical, the risks for the unborn child which are associated with UA would justify going this important step further.

**International human rights obligations**

In addition, a number of human rights considerations have to be taken into account. In the following, attention will be paid to the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. The question to be asked is whether also the unborn child has a right to life. After all, the
unborn child is already a human being and therefore “the zygote, the embryo, the foetus (and also the newly born or the minor) are ['already[‘] persons, in that, though all the properties are not yet manifested in practice, or to the maximum degree, the conditions are nevertheless present which constitute the necessary support for the uninterrupted dynamic process which will consent the actual realization of these characteristics. Similarly, the moribund, the handicapped, people in comas, are ['still[‘] persons, in that even though the subjects are deprived of certain properties, the intrinsic possibility for their nature still exists.” It remains unclear whether the last sentence would also refer to cases of anencephaly, however, personality and dignity are inherent in every human being simply by virtue of being human. While separate concepts, neither is earned in any way but simply is: as “there is not any ontological difference between the stages of development [from conception to birth to adulthood and to death], we must recognize that every human being (even at the beginning or at the end of life) has the dignity and rights of a human person.”

Article 6 (1) CRC clarifies that every child has the “inherent” right to life, which can be understood as applying already before birth. India was among a small group of states which had been tasked with drafting what it today Article 6 CRC and in a 1988 meeting at the United Nations General Assembly, “[t]he representative from India stated that the text [of Article 6 CRC] had been drafted in order to cover the following main concerns: (a) the inherent right to life of the child, and (b) the focus on obligations for States parties to promote measures and conditions for the survival and development of the child.”

30 Ibid., p. 34.
Article 6 (5) ICCPR forbids the execution of a woman who is pregnant.\textsuperscript{31} One could argue that this norm would be superfluous if every unborn child would have the right to life, but the contrary is the case: There is no reason why the unborn child of a woman who has been sentenced to death should be treated differently than the unborn child of any other woman. Accordingly, it follows from Article 6 (5) of the International Covenant on Civil and Political Rights that the unborn child is not merely a part of the mother’s body. Accordingly, no unborn child may be killed. Accordingly, Article 6 (5) ICCPR (like paragraphs 2 to 6 of Article 6 ICCPR in general) provides a clearer view on the right to life, specifically in light of the possibility of the death penalty provided for in Article 6 (1) sentence 3 ICCPR. The basic rule however can be found in Article 6 (1) sentence 1 ICCPR, according to which “Every human being has the inherent right to life.”

Does the word “inherent” in this context means that already the unborn child, essentially every human being, has the right to life? As an international treaty, the text of the ICCPR in principle is to be interpreted in accordance with ordinary meaning of its wording. The ordinary meaning of the word “inherent” indicates that no other conditions have to be met. In other words, in order to have the right to life under Article 6 (1) sentence 1 ICCPR, it is enough to be a “human being”. The unborn child is a human being. The ordinary meaning of the wording of Article 6 (1) sentence 1 ICCPR therefore supports such a wide interpretation of the ICCPR.

The history of the drafting of the ICCPR has been used as evidence that the ICCPR originally was not meant to protect the unborn child.\textsuperscript{32} But the fact that no express provision including unborn chil-


\textsuperscript{32} Manfred Nowak, U.N. Covenant on Civil and Political Rights - CCPR Commentary, 1st ed., Engel, Kehl am Rhein (1993), p. 123 but see also ibid., there fn. 106 for reference to the view that the question is still open.
In the wording of Article 6 ICCPR has been adopted does not mean that the unborn child is not protected under this Covenant. Rather, the wording indicates that Article 6 ICCPR can very well be interpreted as protecting unborn children, too. If this is the case, however, any state which fails to enact domestic legislation which fully protects the unborn child’s right to life runs the risk of violating the International Covenant on Civil and Political Rights.

According to Article 6 (1) sentence 2 ICCPR, it is the obligation of every state which has ratified the International Covenant on Civil and Political Rights to ensure that this right is “protected by law.” The wording of this norm already indicates, much more even than that of the European Convention on Human Rights, that the state has a positive obligation to protect the right to life against interferences by others.

Were a country to make Ulipristal acetate available over the counter, it would appear next to impossible to consider the unborn child’s right to life to be protected in a manner which would not run afoul of Article 6 (1) sentences 1 and 2 ICCPR.

**Conclusions: International Human Rights Law**

**Consequences of making Ulipristal acetate available over the counter**

It is not sufficient for the state to refrain from violating human rights, states also have a positive duty to prevent infringements with Convention rights by non-state actors. This is particularly the case when it comes to the right to life and includes an obligation to establish domestic legal rules which protect human life effectively. This is by no means limited to intentional killings: the state is also

---

33 Ibid., p. 124 with further references.
obliged to protect every human life against unintentional destruction.

Were Germany to make UA available over the counter, the law in Germany would no longer be sufficiently coherent to make it clear to everybody that the life of the unborn child is protected as well. However, under both the European Convention on Human Rights and under German Constitutional Law the unborn child’s life is legally protected. Were this not the case, there would be no need for any form of abortion legislation: were the unborn life not of any legal value, there would be no need for regulation which would have the effect of protecting human life before birth. However, this is not the legal situation in Germany and the Federal Constitutional Court has decided so explicitly: According the the jurisprudence of Germany’s highest court, which also is one of the most important voices in human rights discourse in Europe, the unborn child has human dignity from the moment of conception.34 This conclusion is valid universally, has it is based on characteristics which are inherent in every human being. Even if one takes into account the phenomenon of twinning35 (more precisely: monozygotic twins, triplets etc.), the zygote, the first stage of development of the child after conception, already is an individual human being. That other individuals might come into existence later (or not) does not mean that the individual who is already there is less in existence.36 As such, he or she is worthy of the protection of the law, including the protection of the right to life.

While the discussion about the future of Ulipristal acetate continues in Germany, India, too, should take steps to ensure that the pharmaceutical - which has other uses as well37 - is made available when it is needed without putting unborn children at risk. This will require

34 Supra, note 22.
35 On the the phenomenon of twinning in this context see also Patrick Lee, Abortion and Unborn Human Life, 1st ed., 2nd printing, Catholic University of America Press, Washington D.C., pp. 90 et seq.
36 Ibid., p. 91.
limiting the availability of the pharmaceutical to cases in which it has been prescribed by a physician or similar safeguards.

REGULATORY MODELS OF INSIDER TRADING AND THE CONCEPT OF “USE OF INSIDE INFORMATION”

CARMEN ESTEVAN DE QUESADA

Abstract: Insider trading is usually described as trading in financial instruments while possessing inside information, and it is an activity prohibited in almost all developed legal systems. Regulatory models of insider trading are traditionally divided in two: the “fiduciary” approach, whose main example is the US system, and the “market protection” approach, which can be found in the European Union Law. The central issue of this paper is the analysis and comparison of these two regulatory philosophies, and the clarification of the underlying rationale of the European rules on insider trading –which is essential for the courts of the Member States in order to interpret national laws in conformity with European Union Law. Section II of the paper analyses from a comparative perspective the US and EU regulation of insider trading. Section III examines in detail the ECJ interpretation of one of the core concepts of Directive 2003/6/CE –that of “use of inside information” –, in order to determine the exact meaning and real scope of the European provision on insider trading.

Introduction

Insider trading has taken place in the stock markets almost since their creation,¹ but courts and legal doctrine did not start to pay attention to it until the end of the 19th century,² and the first regula-


² The pioneering country in this respect was the USA, where by the end of the 19th century the courts started to analyse the legality of this activity in the context of state law, focusing on trade operations made by officers and directors of companies. The first jurisprudence on the matter established the so-called “majority” or “no-duty” rule, according to which officers and directors were allowed to trade on the shares of their companies even when using inside information and liability would only arise in case of fraud: see Carpenter v. Danforth, 52 Barb. 581, 589 (N.Y. Sup. Ct. 1868), Grant v.
170 Carmen Estevan de Quesada, Regulatory models of insider trading and the concept of “use of inside information”

ations on this matter date back to the 1930’s only. During the second half of the last century there was an intense academic debate about the convenience to prohibit this activity. Although discussions on this question are not completely over, the majority of the legal scholarship is in favour of the prohibition, and the fact is that almost all developed legal systems include rules aimed at preventing this activity. Regulatory models of insider trading have been traditionally divided in two: the so-called “company law” or “fidu-
ciary” approach, whose main example is the US system, and the “securities market” or “market protection” approach, which can be found in the European Union Directives on the matter.\(^6\)

In the United States, the modern federal prohibition on insider trading has its basis in section 10(b) the Securities Exchange act of 1934 and has been further developed during the 20\(^{th}\) century by courts in a series of leading cases that will be discussed later. In any case, it is undisputed that the fiduciary origins of the prohibition – which go back to the beginning of the 20\(^{th}\) century– are still present in the application of this federal regulation and its subsequent developments by the SEC. In the European Union insider trading was first regulated by Directive 89/592/CEE.\(^7\) The shortcomings of this legislation, especially the lack of general rules against market manipulation, but also the weaknesses in the harmonisation of national insider trading rules, led the European legislators to enact in 2003 a new Directive on market manipulation\(^8\) that includes also the prohibition of insider trading.\(^9\)

This paper analyses these two main regulatory philosophies – the “fiduciary approach” taken in the US and the “market protection” approach of the EU– and clarifies the scope of the latter. To this aim, section II analyses from a comparative perspective the US and EU regulation of insider trading, and section III examines in depth

---


\(^9\) The core provisions of the European regulation on insider trading are to be found in art. 1 to 4 of Directive 2003/6/CE.
the exact meaning and real scope of the European provision on insider trading as established by the ECJ interpretation of one of the core concepts of Directive 2003/6/CE, that of “use of inside information”. Section IV concludes.

Regulatory models of insider trading in the US and the EU

Fiduciary approach

The origins of the US insider trading rules can be found at the beginning of the 20th century in the context of state common law, in a series of court decisions that shaped the first prohibitions of insider trading as a consequence of the fiduciary obligations of the so-called primary insiders, i.e. persons having the inside information due to a relationship of confidence with the company whose shares were traded.10

The federal prohibition of insider trading is based on section 10(b) of the Securities Exchange Act (SEA), later developed by the Securities Exchange Commission (SEC) with Rule 10b-5. Legal

10 After the «majority rule» (see supra n2), US courts progressively adopted the «minority» or «duty to disclose» rule, according to which directors and officers had a fiduciary obligation to disclose material non-public information to shareholders before trading with them (see Bainbridge supra n2, 4-9).

11 15 USC § 78j - Manipulative and deceptive devices.“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— (…) (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors”.

12 17 CFR § 240.10b-5 - Employment of manipulative and deceptive devices.“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to
doctrine has noted that regulating insider trading was not one of the aims of the SEA.\textsuperscript{13} In fact, both section 10(b) and Rule 10b-5 are general rules aimed at fighting manipulative or deceptive conducts in the markets that were used from the 1960s to tackle insider trading. This tendency was initiated by the SEC with the \textit{Cady} case,\textsuperscript{14} and upheld by the courts in the \textit{Texas Gulp Sulphur} case,\textsuperscript{15} in which the «disclose or abstain» rule was outlined –i.e. any person having an inside information has a duty either to disclose it before trading, or to abstain from trading–, taking as its basis the «equal access theory» –i.e. all investors operating in the securities markets have an equal right to access material information.\textsuperscript{16} The Supreme Court nuanced this approach in the \textit{Chiarella}\textsuperscript{17} and \textit{Dirks}\textsuperscript{18} cases, in which it established that liability for insider trading only arises when there is a duty to disclose information, and that this is the case only when the insider has a fiduciary duty towards the person with whom he or she trades.

Trying to fill in some of the regulatory gaps left by these two Supreme Court cases, the SEC adopted Rule 14e-3 that does not require a fiduciary duty for its violation, but that applies only in the context of tender offers.\textsuperscript{19} The Supreme Court on its side, expressly

\begin{itemize}
\item state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security”.
\end{itemize}

\textsuperscript{14} In re Cady, Roberts & Co (40 S.E.C. 907 [1961]).
\textsuperscript{16} Id., 848.
\textsuperscript{17} Chiarella v. United States, 445 U.S. 222 (1980).
\textsuperscript{18} Dirks v. SEC, 463 U.S. 646 (1983).
17 CFR § 240.14e-3 - Transactions in securities on the basis of material, nonpublic information in the context of tender offers. (a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from: 1. The offering person, 2. The issuer of the securities sought or to be sought by such tender offer, or 3. Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise. (…)


17 CFR § 240.10b-5-1 - Trading “on the basis of” material nonpublic information in insider trading cases. (a) General. The “manipulative and deceptive devices” prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information. (…) 17 CFR § 240.10b5-2 - Duties of trust or confidence in misappropriation insider trading cases. (a) Scope of Rule. This section shall apply to any violation of Section 10(b) of the Act (15 U.S.C.
As can be noted from the precedent comments, in spite of a certain trend towards an application of Rule 10b-5 more in line with a market-oriented regulation of insider trading, the US system is deeply anchored in the fiduciary philosophy, as shown by the Supreme Court case-law. Cases like Chiarella, Dirks and O’Hagan have highlighted that the insider trading offence always requires the breach of a fiduciary duty, even if courts have progressively modelled it in an expansive way. Consequently, this is also the approach taken by the SEC in Rules 10b-5(1) and 10b-5(2).

**Market protection**

The first country that adopted the “securities market” approach in regulating insider trading was France, with a regulatory philosophy similar to the US «equal access theory» but bringing it further

---

23 The SEC thesis in the Cady case and the case-law based on the «equal access theory» followed this orientation, more in line with the market protection rationale since it connected the infringement with the mere possession of inside information.

24 The first French provision on insider trading was article 162-1 of Law 66-537 on commercial companies (introduced by Ordonnance 67-833), which took as a model for regulation section 16 of the Securities Exchange Act of 1934 in the sense that it linked the concept of insider to the fact of having a certain status in the issuer of the securities (officers, directors and employees). Law 70-1208 subsequently modified article 10.1 of the Ordonnance including in it a criminal offense having a wider scope, given that it was based on the mere possession of the inside information (on the origins of the French regulation of insider trading, see C Umhoefer and A Pietrangosta, “Le Delit d'Initie: Insider Trading Law in France”, 30 Columbia Journal of Transnational Law 89 (1992), 95-108).
by taking as a basis for regulation the principles of market integrity and ideal equality of investors.\(^{25}\)

Directive 89/592/CEE took as the basic foundation of insider trading regulation the principle of market protection,\(^ {26}\) although some authors pointed out that this apparent market orientation maintained nevertheless some residues of the fiduciary philosophy, especially as far as the concept of insider was concerned.\(^ {27}\) As noted before, the shortcomings of this Directive led to the adoption of a new Directive aimed to regulate market abuses in general, including both insider trading and market manipulation.\(^ {28}\) Just like its 1989 predecessor, Directive 2003/6/CE is based on the market protection principle,\(^ {29}\) but its articles reflect a further step in this path—especially as far as the definitions of the different kinds of insiders\(^ {30}\)and

\(^{25}\) See Umhoefer and A Pietrancosta supra n 24, 116-120.

\(^{26}\) See Recitals 4, 5 and 6 of Directive 89/592/CEE.


\(^{29}\) See Recital 12, stating that “The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets”.

\(^{30}\) Primary insiders are persons who obtain inside information due to their special relationship with the issuer of the securities to which the information relates. The typical relationships to this effect are those described in letters a), b) and c) of article 2.1 of the Directive: membership of the administrative, management or supervisory bodies of the issuer; holding in the capital of the issuer; exercise of employment, profession or duties in the issuer. The Directive adds a fourth case in letter d), persons having the inside information by virtue of their criminal activities. Secondary insiders, also called tippees,
the prohibited conducts are concerned. While Directive 89/592/CEE established a difference between primary insiders – who were affected by the three classical prohibited conducts, i.e. trade, recommend to trade, or disclose the inside information to third parties—\(^{31}\) and secondary insiders – who were only affected by the prohibition to negotiate—\(^{32}\) Directive 2003/6/CE, even if maintaining the difference between both kinds of insiders, prohibits these same three conducts to all of them.\(^{33}\) This clearly reveals that the central point of the regulation of insider trading is the possession of the inside information, something that fits more clearly with the market protection philosophy that underlies Directive 2003/6/CE.

Another difference between both Directives can be found in the wording of the core prohibition of insider trading, i.e. to trade on the securities to which the information relates. Article 2 of Directive 89/592/CE states that Member States shall prohibit any person who possesses inside information “from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates”. Article 2 of Directive 2003/6/CE, on its side, states that Member States shall prohibit any person who possesses inside information “from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that informa-

---

\(^{31}\) Art. 2 and 3 of Directive 89/592/CEE.

\(^{32}\) Art. 4 of Directive 89/592/CEE. The existence of different prohibitions, depending on the kind of insider as defined by the existence or not of a relationship with the issuer, is one of the data that reflected the remains of the fiduciary philosophy in the Directive 89/592/CEE, as the legal scholarship pointed out in several occasions (see references supra n27).

\(^{33}\) Art. 4 of Directive 2003/6/CE states that the prohibitions stated in art. 2 and 3 also apply to secondary insiders.
tion relates”. As can be noted, the requirement of “taking advantage of that information with full knowledge of the facts” of the 1989 Directive becomes “using that information” in the 2003 Directive. This apparently widens the scope of application of the prohibition, thus connecting it more to the market protection approach.

The concept of “use of inside information” is one of the core points in the correct interpretation of the provisions of the Directive and it is extremely important in order to check properly the underlying rationale of this European regulation. This question is also crucial for national courts when interpreting domestic provisions on insider trading, since they have interpret national law in conformity with European Union law. Therefore, the following section deals with this matter, with a special focus on the European Court of Justice (ECJ) interpretation of the concept in its Judgement of 23 December 2009.

**Use of inside information contrary to the directive 2003/6/CE**

**General background**

The ECJ has dealt with insider trading in several occasions, most of them in preliminary ruling cases, but it has analysed the core concepts of the insider trading Directives in very few occasions. The Judgement of the ECJ of 23 December 2009 in Case 45/08, a preliminary ruling concerning the interpretation of Articles 2 and 14 of Directive 2003/6/EC, is probably one of the most significant ones in order to establish the ECJ jurisprudence on this important piece of legislation. It is therefore useful to analyse in some detail some of the most significant opinions expressed by the Court in this Judgement.

---

From the six questions posed to the ECJ, questions two and three are of special interest since they refer to the constitutive elements of insider dealing as detailed in article 2.1 of the Directive. They inquire whether art. 2.1 should be interpreted as meaning that the mere fact that a primary insider –who by definition possesses inside information– acquires or disposes of financial instruments to which that inside information relates, signifies in itself that he makes use of [that] inside information,\textsuperscript{35} or whether, on the contrary, application of art. 2 presupposes that a deliberate decision has been taken to use inside information.\textsuperscript{36} Ultimately, both questions relate to the concretion of the term “using” inside information, employed in art. 2.1, which is a central question in order to determine the real meaning of the European regulation on insider dealing, in terms of its regulatory philosophy.\textsuperscript{37}

An important point of the ECJ Judgment is the explicit recognition of the objective character of the insider trading prohibition stated in art. 2.1 of the Directive.\textsuperscript{38} According to the ECJ, this provision “does not expressly set out the subjective conditions in relation to

\textsuperscript{35}Second question (see Case 45/08 supra n34, §23).
\textsuperscript{36}Third question (see Case 45/08 supra n34, §23).
\textsuperscript{37}The importance of this judgement is clear, not only because it was the first Judgement of the ECJ dealing with the Directive 2003/6/CE, but also because –even if taking into account the previous Judgements dealing with Directive 89/592/CE– it was the first time that the ECJ analysed the core prohibition on insider trading, i.e. primary insiders’ trading on securities to which the inside information relates.

\textsuperscript{38}Case 45/08 supra n34, §35. Legal doctrine had already noted that the elimination of the subjective element of the prohibition established in art. 2.1 of Directive 2003/6/CE was one of the main changes in this Directive when compared to its predecessor: see E Avgouleas, “EU Securities regulation, a single regime for an integrated securities market: Harmonised we stand, harmonized we fail?” (Part 1 & Part 2), 22 Journal of International Banking Law and Regulation 79 and 153 (2007),154; PK Staikouras, “Four Years of MADness? – The new market abuse prohibition revisited: Integrated implementation through the lens of a critical, comparative analysis”, 19 European Business Law Review 775 (2008), 789.
the intention behind those material actions”, “does not state whether the primary insider must have been driven by a speculative intention, must have had a fraudulent intention or must have acted either deliberately or negligently”, and “does not expressly state whether it is necessary to establish that the inside information was decisive in the decision to enter into the market transaction at issue, or whether the primary insider had to be aware that the information in his possession was inside information”. 39

In fact, these words of the ECJ encompass two different, although related, issues. The first one is the lack of a subjective element in connection with the fact that the information was an inside information. To this respect, the ECJ follows the Commission’s opinion that primary insiders are aware that the information they possess is inside information, so that it is not necessary to prove the knowledge of that fact. 40 The second issue relates to the causal link between the possession of inside information and the prohibited conduct, a question that connects with the traditional debate between “possession” and “use” of inside information in insider trading cases.41

39 Case 45/08 supra n34, §32. This was also the opinion of the Advocate General (see Opinion of Advocate General Kokott in Case C 45/08, §§58, 60 and 61).

40 See Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM(2001) 281 final, 8. The reasoning of the Commission is that primary insiders receive inside information on a daily basis and that they are aware of the nature of this information. This is not necessarily the case of secondary insiders, and that is the reason why art. 4 of Directive 2003/6/CE requires an additional element in this case, i.e. that the “person knows, or ought to have known, that it is inside information”.

41 The insider trading prohibition can be articulated in two ways: according to the “possession” thesis, trading is prohibited when the person possesses inside information; according to the “use” thesis, the prohibition affects the use or exploitation of the inside information and it is therefore necessary to prove a connection between the mere possession of inside information and the decision to make the transaction (on this debate see E Hernández Sainz supra n1, 506-512).
Regarding this latter question, Directive 89/592/CEE clearly followed the “use” thesis, since it established the requirement of “taking advantage of that information with full knowledge of the facts”. The legal doctrine was of the opinion that Directive 2003/6/CE also followed this thesis when it employed the word “using”. The new point in the Spector case is the fact that, when analysing this word, the ECJ establishes a presumption of use that puts the Directive in an intermediate position between the “possession” and “use” thesis. According to the ECJ, there is no need to prove a conscious decision to use the inside information, given that “where such a market transaction is entered into while the author of that transaction is in possession of inside information, that information must, in principle, be deemed to have played a role in his decision-making”. The insider cannot get rid of the inside information while making the transaction; he or she cannot eliminate it from the whole set of data that lead him or her to take the decision to trade on the financial instruments to which the inside information related. The ECJ therefore considers that “Once the constituent elements of insider dealing laid down in Article 2(1) of Directive 2003/6 are satisfied, it is thus possible to assume an intention on the part of the author of that transaction”. This objective interpretation of the prohibition stated in art. 2.1, especially the presumption of the causal link between the possession of inside information and the transaction, connects with the market protection philosophy that underlies Directive 2003/6/CE.

43 Case 45/08 supra n34, §36.
44 Case 45/08 supra n34, §38.
45 Case 45/08 supra n34, §45, where the ECJ states: “The establishment of an effective and uniform system to prevent and sanction insider dealing with the legitimate aim of protecting the integrity of financial markets has thus led the
Even if the fact that this interpretation refers to the conduct of primary insiders can somehow blur this connection –given that primary insiders have a fiduciary relationship with the source of the inside information or with the company to whose financial instruments the inside information relates–, the rationale of the regulation becomes more evident in the second relevant question that the ECJ analyses: the identification of the interpretative criterion to delimit the real applicability of the prohibition.

**Operations contrary to the interests protected by the Directive**

As a consequence of the objective interpretation, the prohibition set out in art. 2.1 of the Directive encompasses in principle a wide range of conducts that the ECJ itself considers should not be prohibited, since they are not contrary to the interests protected by the Directive. It is therefore necessary to distinguish the “uses of inside information” that are contrary to these interests from those which are not, since only the former infringe the prohibition established in art. 2.1. To this aim it is imperative to refer to the goals pursued by the Directive.\(^{46}\) In this vein, the reasoning of the ECJ reflects with the highest possible clarity that the Directive’s underlying rationale is the protection of markets, since the aims of protecting the integrity of financial markets and enhancing investor confidence are configured as interpretative criteria of the prohibition of insider trading.\(^{47}\)

\(^{46}\) Case 45/08 supra n34, §§46-47.

\(^{47}\) The wording of the Directive itself already shows this trend. On the one hand, by the fact that secondary insiders are affected by the same prohibitions as primary insiders (art. 4), and on the other hand, by the replacement of the requirement of “taking advantage of that information with full knowledge of the facts” by that of “using that information” in art. 2.1. In this same vein, the recognition by the ECJ that the real scope of this provision has to be
When it comes to delimit what “uses of inside information” are prohibited by art. 2.1, two different questions have to be analysed: on the one hand, the question of the rebuttal of the presumption of causal link; on the other hand, the circumstances in which a “use of inside information” is not capable of infringing the interests protected by the Directive and therefore does not infringe that provision.

Rebuttal of the presumption

This question relates to the incorporation of the inside information to the decision-making process. In spite of its importance, and of the fact the ECJ itself mentions the right to rebut this presumption as a guarantee of the rights of the defence, the ECJ does not analyse it in depth. This is even more striking since the ECJ refers to some conducts that fit in this case, but that are not analysed from this point of view but from that of their possible contradictions with the goals of the Directive, such as the cases described in Recital 18 for instance.

As recognised by the ECJ, it is quite clear that the automatic application of the prohibition established in art. 2.1 to certain profession-
information relating to transactions carried out on the market by third parties, risks leading to a situation in which such persons are prohibited from carrying out their activity, an activity which is both legitimate and useful for the efficient functioning of the financial markets. But it could also be noted that these professionals do not operate as a consequence of the inside information, but simply because they are so instructed by third persons—who are the ones that decide the terms of the transactions, without having any inside information. It could therefore be argued that the inside information is not included in the decision-making process of these transactions, and that these cases reflect in fact scenarios where the presumption of a causal link between the insider information and the transaction can be rebutted.

Something similar happens in the cases described in art. 2.3 of the Directive, in which the only thing that the primary insider does is to execute a transaction designed before having the inside information. It is therefore evident that the inside information did not affect the decision-making process. This is an exception that is also recognized in other national regulations, like for instance that of the US, and that is justified precisely by the lack of connection between the inside information and the transaction.

---

51 Case 45/08 supra n34, §57.
52 Art. 2.3 contains an exception of the prohibition established in that article, in the following cases: “transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information”.
53 Rule 10b5(1)(c): Affirmative defenses. In the traditional debate between the thesis of “possession” or “use” of inside information, the SEC has traditionally adopted the former—as could be seen in Rule 14(e)3. However, in the last years the SEC seems to turn to a more “intermediate” position, similar to the one defended by the ECJ in the Spector case, since Rule 10b5(1) establishes the use of inside information as the applicability criterion, but then establishes a presumption of use (although with the exceptions contained in letter (c)).
In both Recital 18 and art. 2.3 cases, it is not necessary to analyse whether the transactions are contrary to the interests protected by the Directive, because these scenarios reflect situations in which there is no link between the inside information and the decision to make the transaction, and therefore they do not fit article 2.1 requirements.

Goals pursued by the Directive

In other cases mentioned in the Judgement and the Advocate General Opinion, namely the conducts described in Recitals 29 and 30 regarding mergers and takeover bids, there can be a causal link between the possession of the inside information and the decision to make the transaction on securities, and it is therefore necessary to analyse whether the transaction is contrary to the goals pursued by the Directive, as the ECJ points out. In this cases, the consideration that the transactions on securities are not prohibited by art. 2.1 should be based on the fact that they are not contrary to the goals pursued by the Directive, since these transactions would otherwise fit the wording of the prohibition.

It is therefore necessary to tackle the second of the previously mentioned questions – i.e. the specification of the cases in which the use of inside information is not contrary to the goals of the Directive, and that therefore do not infringe the prohibition stated in art. 2.1. To this aim, it is crucial to interpret the concepts of “integrity of Community financial markets” and “investor confidence”, which
Market integrity

The expression “market integrity”, used up to ten times in the Directive 2003/6/CE without defining it, can be interpreted in general terms in two ways. 57 One meaning of the word “integrity” is “the state of being whole and undivided”, and the expression “market integrity” can therefore mean that the market has in itself all the elements that are necessary for the investors to get a clear and true picture of it. Some sentences of the Directive can be interpreted in this sense, such as the ones referred to the prompt and fair disclosure of information to the public, 58 or to the collaboration between market undertakings and all economic actors on the one hand, and the national competent authorities for market abuse on the other. 59

A second meaning of “integrity” is “the quality of being honest and having strong moral principles”, and “market integrity” can therefore also refer to the fact that honesty should reign in the markets, and that the persons operating in them should follow an honest conduct. This second meaning is also present in the wording of the Directive, e.g. with sentences like “Market abuse harms the integrity of financial markets” 60 or with references to the fact that the lack of legislation in some Member States on issues like price

---

55 Recital 12: “Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. It is therefore advisable to adopt combined rules to combat both insider dealing and market manipulation. A single Directive will ensure throughout the Community the same framework for allocation of responsibilities, enforcement and cooperation” (emphasis added).

56 Case 45/08 supra n34, §61.

57 According to the Oxford English Dictionary.

58 Recital 24.

59 Recital 37.

60 Recital 2.
manipulation or dissemination of misleading information are examples of the incompleteness of the legal framework to protect market integrity.\footnote{Recital 11.}

In short, to guarantee market integrity –primary goal of the Directive– means both to guarantee that markets have all the elements and data that investors need in order to take adequate decisions, and to ensure that the rules of conduct in the market are fair and honest. In both aspects market integrity is undoubtedly connected with investor confidence, since this confidence is based both on the expectation that one can find in the market all necessary elements to make well informed and adequate transactions, and that participants in the market follow fair and honest rules. The wording of the Directive itself shows this connection when it refers to the “investor confidence in the integrity of financial markets”.\footnote{Recital 24.} Some of the elements that the Directive considers basic in order to ensure investors confidence –like the inexistence of loopholes in Community legislation which could be used for wrongful conduct,\footnote{Recital 13.} or the promotion of high standards of transparency in financial markets\footnote{Recital 43.}– are an essential part of market integrity. It can therefore be said that market integrity is a prerequisite for investor confidence. It is therefore necessary to analyse this second concept in order to determine the exact scope of the goals pursued by the Directive.

**Investor confidence**

Although the *Spector* Judgement does not analyse directly the concept of “market integrity” it does examines that of “investor confidence”, connecting it to the principle of equality between the contracting parties in stock market transactions. It is worth noting that this principle is the typical foundation of regulations following the so-called “market oriented” philosophy, and that it has not been
adopted by other regulatory systems that follow the fiduciary approach, like the US.\footnote{See section II.1 of this paper.}

The ECJ points out that investor confidence is based, among other things, in the guarantee that investors are “placed on an equal footing and protected against the improper use of inside information”\footnote{Case 45/08 supra n34, §47.}. This argument seems tautological at first sight, since it departs from the fact that insider trading is prohibited because it harms investor confidence and then states that this confidence is based on the belief that investors will be protected against insider trading. But there is no real tautology here, since investor confidence includes many other things in addition to the protection against insider trading.\footnote{As clearly shown by the phrase “inter alia” used by the ECJ.}

To start with, investor confidence is based on the principle of equality, a principle that includes the protection against insider trading but that is wider than this. This equality principle cannot be interpreted as a guarantee of an absolute equality –because this would turn unlawful any transaction in which there was any kind of inequality between the contracting parties–, not even as a guarantee of an absolute informative equality –because information asymmetries are inherent to the functioning of real markets–, but as an equality in the access to market information.\footnote{Case 45/08 supra n34, §49, referring to the Explanatory Memorandum of the Proposal of Directive.} The inequality in the access to market information is what gives the primary insider an unjustified economic advantage\footnote{Case 45/08 supra n34, §49.} and enables him or her to operate in the market without being exposed to the same risks as the rest of investors.\footnote{Case 45/08 supra n34, §52. The obtention of an economic advantage without exposing oneself to the same risks as the rest of investors on the market is a criterion that can be found in other legal fields, such as Antitrust Law for example: collusive practices prohibited by art. 101.1. TFEU have been defined...}
Equal access to information

To sum up, when analysing the goals pursued by Directive 2003/6/CE in order to determine whether a transaction by a primary insider infringes art. 2.1, one must ultimately examine whether there was an unequal access to information that gave him or her an unjustified economic advantage at the expense of other investors.

This final interpretative criterion supports the idea that Directive 2003/6/CE goes further than its 1989 predecessor into the “market protection” approach towards insider trading. On the one hand, because even if the unequal access to information seems to connect with the insider position and thus with the fiduciary approach, Directive 2003/6/CE includes among the primary insiders not only the typical categories already mentioned in Directive 89/592/CEE, but also any person who possesses inside information “by virtue of his criminal activities”, therefore widening the scope of subjects by the ECJ as “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition” (Case 48-69, Imperial Chemical Industries Ltd. v Commission of the European Communities, Judgment of the Court of 14 July 1972 (1972 ECR 619), §64).

This is another new feature of Directive 2003/6/CE, which cannot be analysed in detail in this paper due to space limitations. However, two questions – related to the existence of two groups of primary insiders, the three classical categories connected with fiduciary relationships on the one hand, and the fourth category of primary insiders by virtue of their criminal activities on the other – deserve a brief comment. The first question is whether it is convenient to assimilate both groups of primary insiders given that their situations are completely different: the first group includes persons that find themselves in the category of insider simply because of the position they are in –membership of the administrative, management or supervisory bodies of the issuer; holding in the capital of the issuer; exercise of his employment, profession or duties– and the subsequent relationship of confidence which links them to the source of the information; the second group obtains an inside information, that they would not have gained in normal circumstances, by virtue of their criminal activities. The second question is whether the reference to “criminal activities” has to be interpreted in the strict sense without including other illicit
affected by the prohibition, an expansive tendency typical of market protection regulations. On the other hand, because the unjustified advantage at the expense of other investors connects to the concept of inside information, something also typical of market protection regulations that are more focused on the concept of inside information and its possession than on the specification of the relationship between the insider and the source of the information.

Concluding remarks

The ECJ interpretation of the core provisions and concepts of Directive 2003/6/CE in the Spector case shed light on one of the central pillars of the European regulation on insider trading –the concept of “use of the inside information” employed in art. 2.1 of the Directive. This provision contains the central prohibition of the system –“using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates”– and the exact determination of its scope is essential for the correct determination of the rest of the prohibitions on this matter.

The analysis undertaken by the ECJ relates to a decisive question, that of the kind of conduct prohibited by the Directive by reference conducts such as unfair competition practices, in which case the latter would not fall in the concept of primary insiders according to the Directive.

72 Which by definition is non-public, in addition to being precise, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and, if made public, likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments (art. 1.1 of the Directive 2003/6/CE). The precise nature and the likelihood to affect the prices in case of being made public are further determined in art. 1 of Directive 2003/124/CE of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ L 339/70, of 24.12.2003).
to the well know thesis of “possession” or “use” of inside information. By establishing a presumption of a causal link between the possession of inside information and the trade on financial instruments to which the information relates, the ECJ places the Directive in an intermediate position between these two classical approaches, and consequently reinforces the underlying regulatory philosophy of market protection of the Directive. This market orientation also inspires the ECJ reflections regarding its analysis of the goals pursued by the Directive, final interpretative criterion in order to delimit the real extent of the prohibition, when it refers ultimately to the principle of equality of all investors in the access to information. Both elements —presumption of causal link and principle of equality in the access to information— are considered by the ECJ to be the central issues in the correct interpretation of the core prohibition of insider trading established in art. 2.1. This highly clarifies the significance of the European provision on this matter, something which is in turn an essential point for all national courts when interpreting their national rules.
OWNERSHIP OF THE STATE AND PRESERVATION OF ENVIRONMENTAL VALUES: THE CASE OF FENCED FISHING AREAS IN THE VENICE LAGOON

ALESSANDRO PALMIERI

University of Siena (Italy)

Abstract: The scenery of the Venice lagoon is characterized by the presence of a number of fenced areas, where a peculiar type of fishing –related to the seasonal migration of juveniles of species living in the Adriatic Sea, which move from the open sea to the littoral– has been carried out for centuries. In a series of disputes about the allocation of property rights over the said assets, the Italian Supreme Court, while affirming the lower courts' decisions and holding that ownership shall be vested in the public administration, pointed out that the State owes a duty to preserve the relevant features of the fishing basins as well as their specific utilization. Such an assignment of the entitlement is in line with the historical tendency, since the same answer had been given by the regulations enacted at the time when Venice and its territories were part of the Austro-Hungarian Empire. On the other side, the shaping of the governance structure, functional to the fulfillment of certain aims, looks rather innovative, and has its roots in the concept of property outlined in the Republican Constitution. Beyond formal criteria, public ownership, in situations that are analogous to the one faced by the judges in the mentioned cases, is deemed to be crucial in order to give effect to basic principles, such as the full development of human personality, and the safeguard of the natural landscape and the historical and artistic heritage of the Nation. Under this point of view, even formal requirements, set out by the legislature and specified by the courts, should be interpreted according to the goal of protecting and promoting fundamental rights. These landmark judgments urge legal scholars to rethink the traditional categorization of publicly owned land, and to formulate an approach more consistent with the evolution of the economic theory of common-pool resources.

Keywords: public ownership, commons, protection of the landscape, cultural heritage.

Fish farms in the Venice Lagoon: a long history and an arena of never-ending dispute

Due to geographical constraints, since the foundation of the city – which took place in the 5th century, when people who lived in some
cities of northern Italy, particularly vulnerable to the attacks of the barbarian hordes, sought safe refuge on the islands around the northern coast of the Adriatic Sea\(^1\)– it seems quite obvious that the activity of fishing has always been playing a crucial role in the life of Venice\(^2\). This article is going to focus on the controversies arising in connection with a traditional form of fishing, which has been carried out for many centuries in certain areas of the Venice Lagoon, known as *valli da pesca*, or simply *valli* (from the Latin word *vallum*, meaning wall), since their main feature is that they are fenced or semi-fenced. Through an extensive system of canals and lock gates, that covers a broad portion of the lagoon, Venetian fishermen practice a peculiar type of marine aquaculture, called *valli-cultura*, based on the seasonal migration of juveniles of species living in the Adriatic Sea, which move from the open sea to the littoral. In the areas we are dealing with, different marine animals are bred, such as eels, grey mullets, European seabasses and gilthead seabreams. Documents that date back to the 11\(^{th}\) century witness the presence of such areas in the Venice lagoon, as well as the exercise of *vallicultura*; but it was only in the 15\(^{th}\) century that large-scale aquaculture was practiced in the lagoons of the northern Adriatic Sea\(^3\).

Since the ages of the Republic of Venice, controversies have emerged about the ownership of *valli*. Provided that there was a public interest in the management of these areas, connected to the safeguard of the whole lagoon, and of the city itself, the *Serenissima* in the 16\(^{th}\) and in 17\(^{th}\) century enacted Decrees with the aim of

\(^1\) According to G. Parker, *Sovereign City. The City-state Through History*, Reaktion Books, London (2003), 79, «[i]t seems likely that most of the first inhabitants were from Aquileia close to the modern Trieste, which was one of the first places to be attacked by the Goths».


expropriating fish farms, at that time owned by monastic institutions or noblemen. After the mentioned Decrees, in practice, different regimes distinguished the fenced areas placed in the living lagoon from those situated in the dead lagoon. In the first zone, that is to say in the part of the lagoon featuring a direct and notable influence of sea water, valli were publicly owned. In the dead lagoon, which experience the effects of the periodical action of sea water exchange in a less accentuated way, valli remained privately owned.

The issue has been debated for a long time, and it has been clarified only recently, when the Italian Supreme Court decided three similar cases, holding that valli are property of the State. Indeed, after the fall of the Republic of Venice, when the city and its territories became part of the Austro-Hungarian Empire, the text of a specific provision, comprised in the 1841 Regulations on the policy of the lagoon, apparently acknowledged that all fenced areas in the lagoon belong to the State. However, some commentators argue that the private nature of fenced areas in the dead lagoon remained unaltered; moreover, according to the Austrian Civil Code, publicly owned land was subject to adverse possession. Notwithstanding the

---

advent of the Italian Kingdom, the 1841 Regulations stayed in force until 1936. In this period, we find judgments of the Venice Court of Appeal and of the Supreme Court, Florence Division, which confirmed the existence of privately owned areas in the lagoon. The regime of the *valli* was decisively influenced by the enactment in 1942 of the new Italian Civil Code and of the Admiralty Code. Article 822 of the Civil Code, while describing the public domain, includes in it waters as defined by specific provisions. This rule must be read in conjunction with article 28, lett. b, of the Admiralty Code (labeled “Public domain over waters”), which refers to lagoons that, at least for a certain period of the year, are connected with the open sea. Six years later, after Italy’s transition from Kingdom to Republic, a major change occurred in the Italian legal system; the entry into force of the 1948 Constitution prompted judges and scholars to construe the aforesaid statutory provisions in light of the principles enunciated by the Basic Law of the country. Amongst the various principles, the following should be taken into account while addressing the problem at issue: the key-role of the human being (article 2); the protection of the landscape (article 9); the acknowledgement of public ownership (article 42).

In any case, uncertainty reigned in the subsequent decades. In the 1990’s, a number of private companies sued various governmental departments claiming for the ownership of fenced areas in the lagoon. In some of these controversies Venice Court of First Instance delivered a decision in favor of the plaintiffs. On the contrary, Venice Court of Appeal held without hesitation that every fenced area in the lagoon is owned by the State. Three of such disputes came before the Italian Supreme Court, which affirmed the Appellate Court decisions, pointing out that the State, as the owner, is obliged to preserve the relevant features of the fishing basins and their specific utilization.

---

*For instance, see the judgment of 10 June 2008 (in *Dir. maritt.*, 2009, 782, with a comment by G. Morbidelli, *Sulla natura privata delle valli da pesca «morte» della laguna veneta*).*
The peculiarities of the Supreme Court judgments

The Italian Supreme Court finally held that fenced areas in the Venice lagoon are necessarily publicly owned. Due to the legal status of these immovable things, private individuals or companies cannot validly acquire property rights or interests on them, neither through negotiation (to which shall be deemed equivalent any other ‘juridical act’ capable to transfer the title) nor by exercising adverse possession or occupancy against the State.

On the one side, this conclusion seems firmly based on a rather formalistic argument. On the other side, we may see in it the attempt to open the path towards a new conception of public ownership, and, more broadly, towards a major overhaul in the classification of things.

First, there are reasons, although questionable, to believe that that the land at issue can fall within the statutory notion of public domain. At the time when the Civil Code entered into force, in light of the techniques up to then used for fencing the valli, one could quite easily argue that there was no real separation between those areas and the remaining part of the lagoon. So, notwithstanding the implementation –after the Second World War– of methods that led to a greater degree of isolation from the open sea (mere operational acts), the formal requirements to classify the valli as components of the public domain were met.

This could have been enough to enter the judgment in favor of the public administration. But the Grand Chamber of the Supreme Court felt the urge to add something more, with the aim of providing a more useful, and flexible, tool to address controversial issues regarding special types of resources, also shedding light on the proper way in which the powers granted to the owner should be interpreted and exercised.
Actually, the areas we are dealing with display special features: they serve economic interests, related not only to fishing, but also to tourism (mainly the so-called ecotourism); their role is fundamental in preserving the fragile ecosystem of the Venice Lagoon; they constitute the ideal habitat for some species of birds, little mammals and plants; although artificially designed, they have become since long an essential part of the landscape of the surroundings of Venice, this landscape being unique in the entire planet; areas where fish farming occurs are of a certain interest to the European Union institutions, as far as the placing on the market of aquaculture animals, and products thereof, is subject to specific requirements; the very type of fishing carried out there (vallicultura) is a value in itself, since it belongs to the cultural heritage of a significant part of the Country (especially if we go beyond—in line with the emerging tendencies—the culture-nature divide in cultural heritage).

In sum, these immovable things can be regarded as resources that generate utilities which are functional to the exercise of fundamental rights. In this respect, at least from the point of view of economics, one could classify valli amongst the ‘common-pool resources’ or simply ‘commons’. The Supreme judges do not directly mention

---


8 According to the economic theories, a common-pool resource may be defined as «a natural or man-made resource system that is sufficiently large to make it costly (but not impossible) to exclude potential beneficiaries from its use» (E. Ostrom, Governing the Commons, Cambridge University Press, New York, 1990, 30). The common-pool resources share two important characteristics: rivalry, which means that consumption of resource units subtracts those units from the amount available to others; partial or total non-exclusivity, that is to say difficulty in excluding potential beneficiaries from accessing the resource system, which
commons; and they also restrain from using equivalent definitions in the text of the relevant decisions. Nevertheless, their way of reasoning is undoubtedly inspired by the theory of commons. Such a judicial approach to the issue of public ownership is groundbreaking, especially if compared to the ordinary patterns followed by courts operating in a Civil Law system. Anyway, the idea that the concept of commons could be a useful tool for reorganizing property rules has been circulating between the legal scholars in Italy for the last decade.

Indeed, the current dominant vision still believes that, in the regime of things, there is a strong antithesis between ‘the public’ and ‘the private’, with no room for something different. But someone has argued that commons ought to break this dichotomy. And some steps have been taken in that direction. A group of jurists, chaired by Professor Stefano Rodotà, was conferred the task to review the existing provisions of the Civil Code that regulate public ownership. This Commission, established in 2007 by the Ministry for Justice, suggested a certain number of amendments. The proposal remained unheard by the Parliament. Despite the fact that in 2009 the Nobel prize for economics had been awarded to Elinor Ostrom for her landmark studies on this subject, the commons until recently were absent from public discussion, lacking interest for politics. It raises risks of free riding.

This opposition is criticized by U. Mattei, *The State, the Market, and some Preliminary Question about the Commons*, (2011), available at the URL http://works.bepress.com/ugo_mattei/40; the Author considers the dichotomy «a product of the modernist tradition still dominant today in law and in economics», and observes that «Commons can serve the crucial function of reintroducing social justice into the core of the legal and economic discourse by empowering the people to direct action».

By contrast, a significant number of legal scholars have been involved in the discussion about the profitability of such a renewed approach: see, among the recent literature, A. Lucarelli, *La democrazia dei beni comuni*, Laterza, Roma-Bari, 2013; E. Boscolo, *Beni pubblici, beni privati e beni comuni*, in Riv. giur. urbanistica, 2013, 341; M. Granieri, *Analisi economica dei beni comuni: una
is quite remarkable to observe that the expressions formulated by the said Commission have been almost literally followed by the Italian Supreme Court.

**Possible repercussions of establishing an intermediate regime between public and private ownership**

If one agrees with the statement that *valli* should be looked upon as commons (a label that seems suitable for a wide range of resources, both immovable –such as rivers, lakes, forests, nature parks in use for conservation purposes, and so on– and movable –such as wild animals and protected plants– things), one is faced with challenges never before considered.

In the cases decided by the Italian Supreme Court, ownership was granted to the State, adhering to the statutory provisions currently in force. Yet according to the theory of common pool resources, such an entitlement could be given to either public or private entities. The choice between the different options is of course of some importance, but it’s not really decisive, since the focus is shifted from who keeps the formal status of owner to how the different pre-

---

rogatives of the different stakeholders, not limited only to easements, are regulated and exercised (besides, we do not have to forget that we live in an age when a deeper change is going on: the shift from ownership to access). Indeed, as to the formal vestment, the situation is much more complex than the one may at first realize. It’s not a mere question of choice between the State and a private entity. From the public side, we ought at least to distinguish amongst central and local authorities. From the other side, there could be a variety of legal entities which may candidate themselves to the role of dominus (to be sure, a very special kind of rightholder).

The allocation of the main entitlement as well as of the other rights depends on multiple factors. Economists believe that there is not a single answer for every possible situation. More generally, the shaping of the rules that aim at taking into account the social benefits and costs of using the common-pool resource, so that the tragedy of the commons can be avoided, is highly linked with the specificities of each resource. Nevertheless, decision-makers, when called to construe the existing rules or to formulate new sets of rules, shall not ignore some basic points, highlighted by the economic literature, although these conclusions should not be taken as

---

In this respect, the literature on commons suggests that on some occasions local people acting together can do much better than the State. However, it has been argued that the State ought to maintain some crucial functions related to the governance of these resources (according to J. Mansbridge, *The role of the state in governing the commons*, in *Environmental Science & Policy* 36 (2014) 8-10, there are «at least four crucial roles for the higher levels of the state – roles that are intended to be illustrative, not exclusive. The first role is to threaten to impose a solution if local parties cannot come to a negotiated agreement. […] A second role of the state is to provide a source of relatively neutral information. […] A third role of the state is, from the earliest stages, to provide an arena for negotiating in which “low-cost, enforceable agreements can be reached”. […] A final, and traditionally most important, role of the state is to help in the necessary activities of monitoring compliance and sanctioning defection from compliance in the implementation phase after the negotiators have reached agreement»).
undeniable truths, but ought to be carefully verified, not in a vac-
uum, but in light of the concrete circumstances of each case.

The right to own assets characterized as common-pool resources, 
whoever has the legal title, must be accompanied by rules pertain-
ing to the governance of such a resource, tailored in order to ensure 
that the actions taken by the owner of the premises pursue goals 
which are consistent with the values to be preserved and pro-
pounded. Notably, governance rules must comprise effective means 
of reaction, even at an early stage, against conducts that may endan-
ger the soundness of the resource, selecting appropriately the plain-
tiffs who shall have locus standing before the courts. Besides, when 
the infringement of the said rules by the owner causes damages to a 
third party, in connection of the proper use of the resource, tortious 
liability must be imposed on the owner, to the extent necessary to 
provide incentives to adopt precautions ex ante. Under this respect, 
there is no reason why private and public owners should not be 
equally treated, as instead still happens on some occasions. For 
instance, if we give a glance at the Italian experience, the presump-
tion of liability set forth in article 2052 of the Civil Code does not 
apply to the public bodies which have been declared by statutes to 
be the wild animals’ owners; by contrast, some years ago, a strict 
liability regime has been extended to all the owners of public 
streets, provided that custody is conceivable.

Of course, there are many other details that need to be specified, 
and many other questions that need to be answered. The way in 
which the cases about the ownership of fenced fishing areas in the 
Venice Lagoon were solved opens up new horizons for the develop-
ment of an innovative regime of ownership, suitable for a group of 
resources. The topic offers an intriguing challenge for the years to 
come. Legal scholars, with the inevitable cooperation of other 
‘social scientists’, are called to engage in a rather stimulating con-
test that will probably lead towards the acceptance of a new cate-
gory.
**Abstract:** Acquisitive prescription is an original concept of the Roman legal thought. Already ancient Romans saw the need to eliminate ambiguity in law, seeing it as particularly harmful in relation to real estate, as the title to it is of paramount significance to any state. In ancient Rome, certain real estate was classified as res extra commercium and, being excluded from the private law transactions, it could not be subject to acquisitive prescription. This included real estate which was the property of the Roman state (res publicae) or of individual communes (res universitatis), such as streets, plazas or bridges. Other than the Italic real estate, which was excluded from legal transactions, there were also provincial lands, also excluded from acquisitive prescription, as they were property of the Roman people or of the emperor. However, this regulation underwent certain modifications throughout the centuries. The primary principle, pursuant to which provincial land could not become private property, was changed in the early days of the Principate. By virtue of a rescript of emperors Septimius Severus and Caracalla, issued in the year 199, private entities were granted the procedural institution of assertion of statute of limitations on the rei vindicatio of the quasi-owner of land. As a result of the blurring of differences between possession and ownership, which took place gradually in the post-Classical period, as well as of the differences between substantive and procedural law, this assertion morphed into one with the acquisition of property by prescription. This transformation was just one of the stages of the ongoing process of levelling the status of Italic land property, subject to individual ownership, with the provincial land property. The history of Poland, especially pertaining to the 20th and 21st centuries, proves how intimately the adopted model of ownership, in particular in relation to real estate, is linked to specific political and systemic concepts. In Polish post-war legislation, acquisitive prescription of state-owned real estate was also subject to numerous limitations, of which the most seri-

---

1 FIRA I, 437-442, G. 2,7; From the mid-3rd century BC, the provincial lands became subject to a division, whereas part of them constituted property of the Roman State, to which property tax on them was paid, while the part owned by the Senate or by the emperor could be given to natural persons to hold and use, which was a right similar to that of possession and which was protected by measures imitating those of protection of Quiritearian ownership. Such a natural person paid rent to the state for this land.

2 Dajczak W., Giaro T., Longchamps de Bérier F., Prawo rzymskie. U podstaw prawa prywatnego, Warszawa 2009, p. 387
ous one was the ban on acquisitive prescription of real estate owned by the State Treasury, in force between the years 1965 and 1990. Following the lifting of this ban, the legislator no longer discerned the level of protection of ownership depending on the carrier of rights, their subject or function. For this reason, acquisitive prescription of state-owned real estate is currently permitted to the same extent as of private-owned real estate. This prohibition, however, remains binding for real estate which, like in Rome, has the status of res publicae and is designated for public use, construed as the possibility to use by all interested persons.

Keywords: acquisitive praescriptio, real estate, the State Treasury, Poland

Acquisitive prescription, as a Roman institution, emerged as a result of historical development. Similarly to the case of Roman law, also in modern Polish civil law its exercise is limited. These limitations regard both the carrier of rights and the object of the acquisitive prescription. The latter limitations are related mostly to the division of things which may be subject to being traded and those excluded from transactions, both movable and immovable. Despite the fact that the legal regulations on acquisitive prescription offer no such distinction, in essence, objects excluded from trade may not be a subject of civil law transactions at all, which effectively impedes their acquisition by prescription. This group, besides res omnium communes, which may be enjoyed by all people, such as air, includes also res publicae. This category covers such real estate as, for instance, public roads, streets, parks, natural reserves. It is the property of the state or of territorial self-government units.

Certain features of real estate from the res publicae group make it impossible to acquire them by prescription. Most of all, they are designed to be used by all people, thus impeding their autonomous possession, which is the basic condition of acquisitive prescription. Moreover, they are a subject of interest and regulations of administrative law, for which reason the provisions on acquisitive prescription do not apply to them. Since they belong to the state or to the commune, these entities are to be considered the sole possessor of a public good. It must be remembered, however, that the exclusion of

---

3 Sohm R., The institutes of Roman law, Oxford 1892, p. 239.
Acquisitive Prescription of Real Estate Owned by the State Treasury in Poland.

Public goods from transactions does not follow from their features or essence, but from their designation. Therefore, if a thing like this fell into the exclusive possession of a specific person, it could have potentially been argued that it has lost its original character of a public good and that it may be subject to acquisitive prescription. Such state of affairs lasted only until the Civil Code came into effect, that is January 1\textsuperscript{st} 1965.

Provisions of substantive law from the year 1946 did not contain any bans on acquisitive prescription of state-owned real estate, with the reservation of regulations stipulated in the laws on agricultural land reform\textsuperscript{4}, as the only owner of such real estate could be the state.\textsuperscript{5} The Supreme Court generally assumed that, already from the moment that the decree on land reform of September 6\textsuperscript{th} 1944 came into force, it was no longer possible to acquire by prescription any part of real estate which the decree had designated for the purposes of the reform.\textsuperscript{6}

The aforementioned prohibition covered also the mortmain taken over by the state\textsuperscript{7}, which is evidenced by the judgements. The Supreme Court, pursuant to the act of 20.03.1950, emphasized that acquisition of ownership of these properties was subject to the same limitation as the acquisition of real estate designated for the purposes of the land reform\textsuperscript{8}. This was similar in the case of agrarian land, seized by the state on the basis of Art. 3 of the decree of 5.09.1947 on the takeover by the state of property belonging to per-

\textsuperscript{4} Decree of September 6th 1944 on land reform.
\textsuperscript{5} This is reflected in the judgement of the Supreme Court of 22.12.1996, III CR 309/66, OSNCP 1967, item 114.
\textsuperscript{6} Compare with the resolution of the Supreme Court of 7.06.1962, III CO 11/62, OSPiKA 1963, item 135.
\textsuperscript{7} Mortmain real estate includes real property of churches and religious associations which totalled about 221 thousand hectares in 1921 in Poland. Based on the act of 20.03.1950, it was taken over by the state (Church Fund).
\textsuperscript{8} Judgement of the Supreme Court of 7.06.1967, III CR 316/67, OSNCP 1968, item 166.
sons relocated to the USSR. One exception was agrarian land covered by the aforementioned act, if the time required for acquisitive prescription had elapsed prior to the decree entering into force.\(^9\)

The prohibition of acquisitive prescription of state-owned real estate was first directly introduced in the Act of 14.07.1961 on land management in cities and settlements (Journal of Laws no. 32, item 159 as amended). However, art. 7 of this act dealt only with state-owned real estate of certain type, namely the type indicated under art.1, that is located within the administrative limits of cities, as well as real estate located outside of those limits, but included in the municipal land use plan and conveyed for the performance of its economic goals.\(^10\) Just like in the case of the aforementioned decree, this law was not retroactive, either. For this reason, it was possible to acquire state real estate described under Art. 1 of this act until it came into effect.

Another exclusion was related to property of gromadas (in communist Poland between 1954 and 1972, gromadas constituted the lowest tier of local government) which, pursuant to the Act of 25.01.1958 on national councils, was deemed communal property and, based on the executive ordinance of 1962, it was transferred to the management and disposal of state authorities.\(^11\) Due to the above, this property was subject to state ownership as construed under art. 177 of the Civil Code, which introduced the general prohibition of acquisitive prescription of state-owned real estate. Until 1.01.1990, this kind of acquisition was not possible, even if the scope of control of a person who used a public road was equivalent to conditions required for autonomous possession. Similarly to pre-

---

\(^9\) The indicated decree was repealed by the Act of 26.10.1971 on regulating the ownership of farms.

\(^10\) Since the Civil Code, which stipulated a prohibition of acquisitive prescription of state-owned property, came into force in 1965, the aforementioned provision became obsolete and soon repealed by art. XX of the act introducing the Civil Code.

\(^11\) Decision of October 24th 2001, III CKN 430/00, OSNC 2002, no. 9, item 111.
Beata Kowalczyk, *Acquisitive Prescription of Real Estate Owned by the State Treasury in Poland.*

Previous regulations, this provision was not retroactive, which resulted in the effective acquisitive prescription of state property, as long as the time limit required for acquisition by prescription had elapsed prior to 1.01.1965, that is before the Civil Code came into force. At the time, Art. 7 of the Act on land management in cities and settlements was still in force, for which reason the state-owned real estate indicated therein was an exception. Interpretation of art. 177 in judgements was favourable for the state as, in its decision of 5.10.1987, the Supreme Court indicated that this provision precluded not only the acquisitive prescription of State Treasury, but also of shares in the joint ownership of state property.

This regulation was lifted by the Act of 28.07.1990 amending the Civil Code (Journal of Laws No. 55, item 321), pursuant to which art. 177 of the Civil Code was stricken off. From the moment of this novelization, it became possible to acquire by prescription real estate owned by the State Treasury to the same extent as real estate owned by natural persons. What is more, pursuant to Art. 10 of the novelization, the prescriptive period includes the period of possession of state-owned real estate prior to 1.10.1990, but it cannot exceed half of the current period of possession. In practice, the position of the Supreme Court was of paramount significance. According to this position, in light of these provisions, state-owned real estate which became communal property following the establishment of communes on 27.5.1990, is treated the same way.

Taking account of this important change, it is important to discuss other regulations related to certain types of real estate which may constitute state property. The largest group of land real estate owned by either the State Treasury or the territorial self-government units, are the stretches of land used for public roads. It is universally assumed, as I already mentioned, that they may not be subject to autonomous possession. This interpretation, however, was not sustained by the Supreme Court in its decision dated
24.06.2010 (IV CSK 40/10)\textsuperscript{12}, in which the court found that separate evaluation is necessary of the state of facts where the ability to use a part of a public road by citizens has been impeded as a result of actions taken by persons who are not the owners of this road. According to the Supreme Court, if a given person has taken control of a real estate designated for a public road, and used it \textit{cum animo reb sibi habendi} to the exclusion of others, then this person is its autonomous possessor. Such possession does not, however, lead to acquisitive prescription, as the ownership of public roads may only be exercised by the State Treasury or by the territorial self-government units. Similar remarks might be found in the resolution of the Supreme Court with the status of a legal principle dated May 26\textsuperscript{th} 2006 ((III CZP 19/06)\textsuperscript{13}, in which the Court emphasized that, if the object of control is a public road, it is necessary to distinguish between control in the form of use and control by users and the control exercised by public entities which acquired ownership of such land pursuant to the Act of 13.10.1998 on provisions implementing acts reforming public administration\textsuperscript{14}. The citizens' ability to use a public road has no features of possession of a specific civil right, while possession is of the public entity \textsuperscript{15}.

Forest real property is another type of real property which, pursuant to the Act of 28.09.1991 on forests, may be easily acquired by prescription\textsuperscript{16}. It is similar in the case of agrarian land which may be either partially or entirely acquired by prescription, which follows

\textsuperscript{12} OSNC 2011, no. 2, item 17.
\textsuperscript{13} OSNC 2006, no. 12, item 195.
\textsuperscript{14} Journal of Laws no. 133, item 872 as amended. In this act, "real estate taken over for public roads" is such real estate upon which a road was first constructed and then classified in its relevant category of public roads. This had to take place prior to 1.01.1999, that is the date on which public entities were awarded ownership of land under roads.
\textsuperscript{15} Moreover, the Court highlighted the fact that when public entities exercise duties reserved to owners of public roads in the period in which these roads are not their property, they in fact use the real estate taken over for public roads in the same way as if they were owned by the state or self-government.
not only from the general rule on the admissibility of acquisitive prescription of state-owned property, but is also confirmed in jurisprudence. The Supreme Court, in its resolution dated 14.05.1986, found it admissible to acquire by prescription a part of a residential land which is included in the inherited farm, by the heir who has not retained the right to inherit the farm, pursuant to the then-binding art. 160 of the Civil Code. Even though this article was repealed in relation to certain other entitlements, the remaining part of it remains in force.

Another regulation which should be brought up in the context of the discussed subject is the Water Law Act of July 28th 2001. This act distinguishes between the ownership of water and the ownership of sub-water land, which has been confirmed by the Supreme Court in the resolution passed by a bench of 7 judges, adopted on 18.11.1971 and having the status of a legal principle. The ownership of land under public water that is, pursuant to Art. 1a of this act - territorial sea waters, internal sea waters, including those of the Gdansk Bay, inland surface waters and underground waters, falls to the State Treasury. The legislator provides for civil law transactions related to such lands in certain special situations, but acquisitive property is not admitted, as it does not constitute a form of such transactions.

16 The indicated act stipulated limitations only in the case of derivative acquisition of ownership. This means that the alienating party must notify the relevant forest inspector of his or her intention to alienate the forest one month prior to conclusion of the contract.

17 Resolution of the Supreme Court dated 14.05.1986, III CZP 19/86, LexPolonica no. 302035

18 The Supreme Court in this resolution found that ownership of water is a category of water law, different from ownership as understood under Art. 140 of the Civil Code. See: III CZP 28/71, OSNCP 1972, no. 3, item 43. Pursuant to the judgement of the Supreme Court of 19.11.2004, (II CK 146/04, LexPolonica no. 1839825), it remains binding.

19 The term "legal transactions" should be understood as defined by the legislator under art. 13 of the Act of 21 August 1997 on management of real estate
Acquisition by prescription of land developed with buildings necessitates the simultaneous acquisition of perpetual usufruct, as only the buildings erected by the perpetual usufructor on the land of the State Treasury, of units of territorial self-government or of their associations, are deemed property separate from the land. Therefore, acquisitive prescription of only the buildings is not possible. All the more so since, when the land is handed over for perpetual usufruct, a contract for the sale of buildings is concluded at the same time. Ownership of buildings is accessory to the perpetual usufruct. Due to the above, if a building is acquired then, automatically, so is the perpetual usufruct. This principle does not relate only to derivative acquisition, but also to acquisition by prescription. Moreover, keeping in mind the resolution of the Supreme Court dated 11.12.1975, entered in the register of legal principles, it is important to underscore that the acquisition of perpetual usufruct is only possible against the previous perpetual usufructor. From this it follows that it is inadmissible for the possessor of a real estate owned by the State Treasury or by a unit of a territorial self-government to acquire by prescription the perpetual usufruct of such real estate.

The issues related to premises constituting separate property in a building which belongs to the State Treasury are currently regulated by the Act of 21.06.2001 on the protection of tenants' rights, communal housing stocks and Civil Code amendments (Journal of Laws of 2013, item 1304). Acquisitive prescription of premises which are part of the communal housing stock is not possible, as the basic premise of acquisitive prescription, that is autonomous possession, is not fulfilled in this case. Tenants use such premises on the basis

---

(uniform text: Journal of Laws of 2010, No. 102, item 651 as amended). In the case of land owned by the State Treasury, these transactions usually pertain to their handing over for usufruct if they are necessary for endeavours specified under Art. 20 of the Water Law Act, mostly related to transport, generation of energy or tourism.

---

of a contract of use, for which reason they are deemed lessees. Because of this, even if they possess premises for 50 years, this will not lead to acquisition by prescription. Even the occupation of premises without a legal title throughout such a long period of time would not result in acquisition of ownership as, pursuant to Art. 30 of the aforementioned act, such a person enters lease relations by virtue of the law. This regulation is related to the universally adopted principle, both in the jurisprudence and in the doctrine of law, in force under the Polish civil law regulations, according to which it is not possible for the separate ownership of premises to arise out of acquisition by prescription. This, however, does not preclude a tenant to acquire by prescription premises which constitute separate property following a relevant procedure. This procedure results in the obligatory entry in the land and property register, which, in principle, is of a declarative nature. One of the exceptions in this scope is the entry establishing separate property of premises, which is of constitutive nature. In the context of acquisition by prescription, this gives rise to profound consequences, as the course of acquisitive prescription may not begin until the moment that the entry is made, and the acquisitive prescription itself may only occur against the previous owner.

Having account of the above remarks, it is clear to say that the acquisition by prescription of property owned by the State Treasury in Poland has very few restrictions, of which the most stringent ones, prohibiting the acquisitive prescription of *res publicae*, may be traced all the way back to the Roman law. This should come as no surprise, given that they are necessary for the proper functioning of the society, as they satisfy civic, social, recreational, cultural and ecological needs of citizens. Therefore, it is not without importance how the ownership of this special type of real estate is shaped, who is entitled to it, what goals are pursued with its use and how it is protected. The lack of distinction between the intensity of protection of ownership depending on its type means that the protection of all any ownership should always be equally intensive and effec-
tive. On the one hand, the very existence of an actual economic owner is already a type of warranty to ensure that his or her property will be protected. On the other hand, however, in the case of the State Treasury and units of the territorial self-government, this warranty does not exist, as these entities are of an abstract nature, they are subject to numerous political powers and, due to the principle of term limits, the continuity of decisions made and the motivation to act efficiently may not always be seen to properly. It seems that M. Habdas was correct to conclude that it is necessary to shape such instruments for the protection of ownership of these entities so as to make this protection effective. This relates to real estate, in particular, as this type of property is one of the key components of the resources held by the State Treasury and by the territorial self-government units. It seems that most importance in this scope should be given to the principles of managing such real estate, which should mobilize owners to see to proper protection of their property. What is more, the entity which is the owner of a public good should take account of the fact that the object of their ownership is, in essence, a good of the entire society. For this reason, the reflection of this fact in legislation and jurisprudence is of highest importance.

---

THE ROLE OF LOCAL GOVERNMENT IN THE PERIOD OF TRANSFORMATIONAL CHANGE

PAWEŁ ROMANIUK

University of Warmia and Mazury in Olsztyn

Abstract: Taken after 1989, the efforts to decentralize public administration led to the creation of local government modeled on the experience of democratic European countries. Local government is the basic form of the organization of local public life. Local government has a legal personality and shall perform public tasks not made public to other authorities in their own and at their own risk. The provisions of the Polish Constitution of 4 April 1997, determine the position of local self-government and self-governance at the level of the fundamental principle of system state. An important document establishing formal powers of self-government is the European Charter of Local Self-Government. Respecting the state standards enshrined in the European Charter of Local Self-Government requires further regulations aimed at greater than previously empowerment of local government. It should be hoped that the dynamic economic development of the state, funds provided by the European Union, as well as regional policy with the increasing awareness, allow for the development of local government units. One of the main tasks of local government is satisfying local society's needs. To execute this task the local government should work very active to reach profitable relationships with the other entities in the environment.

Keywords: government, local government reform, transformation

Introduction

Taken after 1989, efforts to decentralize public administration led to the creation of local government modeled on the experience of democratic European countries. Among the many laws on local self-government should be replaced Law 17 October 1992 years expressing the essence of self-government and self-regulating legal status¹.

¹ See the Constitutional Act of 17 October 1992 on the mutual relations between the legislative and executive Polish Republic and the local government (Journal of Laws of 1992., No. 84, item 426).
Local government is the basic form of the organization of local public life and has legal personality and shall perform public tasks not made public to other authorities in their own and at their own risk. The provision of the Act strengthens the Polish Constitution, which regulates the position of local self-government and self-governance at the level of the chief principle of the political state. Another document establishing formal powers of self-government is the European Charter of Local Self-Government. Respecting the state standards enshrined in the European Charter of Local Self-Government requires further regulations aimed at greater than previously empowerment of local government. Analyzing the tested area, the author of the present publication will indicate the role of local government in shaping policy, detailing core competencies, which in transition gave rise to the decentralization of public authority.

Dynamics of fluids

All regimes of individual countries are subject to constant change. These changes concern in particular regimes of local authorities. The organization and operation of the latter is in fact a direct reflection of the state of consciousness of society, its traditions and skills, patterns of behavior, the state of the economy, the available technology, the environment and many other factors. They are subject to constant evolution. The economy is growing. There are new opportunities to travel and communications. People change their habits and acquire new skills. Therefore, the system self-government also needs to change. And so it happened and is happening. In all the countries of Western Europe, which have well-established

---

5 See point 2 of article 9 of the European Charter of Local Self-government.
and stable regimes, in the period after the Second World War - there have been many deep reforms of local government.

System in Poland underwent a particularly profound change. Regimes in the countries of Western Europe developed over centuries or decades. Poland had to carry out any reforms in a very short time, if you wanted to join the democratic countries. Therefore, the period of so-called political transformation would require great effort and overcome many difficulties. Any change benefits for some, it is detrimental to others. Any change requires an adjustment to her people and how they operate. And we know that the sooner you can change the law than human habit. That's why people are afraid of changes and often resist them. Meanwhile, without further reforms can not achieve the level of development of the former members of the European Union. Delays Polish compared to Western European countries are a consequence of the negative actions of the political system. The vast majority of the problems today are just connected with it. Therefore, considering the problems of self-government can not be conducted in isolation from the Polish concrete reality that Poland inherited from the old regime.

It included three main segments of the administrative system of the state. The first consisted of the local government, which was visible in rural and urban areas and in counties and was primarily responsible for meeting the collective needs of the local community. The second concerned the level of regional self-government, and was visible in the provinces. This level is responsible for regional development policy. The third level of authority included the government and the government (central and terrain). The supervision of these activities exercised provincial governors.

The reform liberated addition, many reforms in various fields, including police, fire, education, social welfare system, which as a

---

result of the reform were on the board of a decentralized. For the purposes of the reform in 1998 introduced several basic laws of systemic character, among them the public finance act and the civil service. In 2000 yet adopted a law on the principles of promoting regional development, which complements the earlier regional legislation.

Administrative reform 1998 he is today legal and political fact. Within a few months, has made a huge effort legislative and organizational. This was possible thanks to the use of previous experiences and materials (including project maps of the district and provincial). In October 1998, elections were held to the authorities representing all levels of local government. From 1 January 1999, a new administrative division of the state and local authorities have started to work at all levels and reformed Field governmental administration.

Furthermore, the introduction in 2002 of direct elections of mayors and presidents of cities constituted a substantial change in the political system. Cancelled collective managements, entrusting the heads of municipalities full authority. They achieved thanks to a very strong position, single-handedly managing the assets of the municipality and staff offices, as well as single-handedly taking administrative decisions. By modifying the internal organization of municipalities is not modified, however, the provisions relating to the powers and the relationship between mayors and councils, which led to many unnecessary conflicts.

**Local government – preliminary considerations**

In consideration of the relationship of local government entities environment should be noted that the government, as well as functioning entities within it form the inner area of cooperation and interdependence. You can even express the view that any actions of government relate to entities located in their environment, directly
or indirectly, and every action of these entities in a particular scale affects the position of the local government.

Legally authorized government is a fundamental function of the organization of local public life, and all running in its environment entities are more or less doomed to interact with the local authorities. Quality and results of this cooperation are largely dependent on the activity and adopted by the local forms of cooperation. In an attempt to determine the forms of cooperation with local government entities environment, it should be noted that this is only one of many possible ideas, and decisions about the forms of cooperation among the local government authorities. Since appointed by election of local authorities, the local community is expected to perform the tasks related to meeting its needs by, among others, selection of such measures, which will be the most effective way to support this implementation. It is also essential subordination of local authority’s fundamental principle of servitude to the residents.\(^7\)

Another equally worthy to emphasize the principle of self-government force in cooperation with the locals is the recognition of the residents for the parent. Respect the local government authority belonging community status of the parent is primarily due to the rights and responsibilities of the community in terms of:

- selection and dismissal of local authorities;
- verify the activities of local government;
- particular commitment in supporting the mission and strategy of local government.

**Directions of activities of local government**

Currently, a basic functioning government - municipal government, operates on the basis of the act of 8 March 1990 the local govern-

---

Local government is a public institution, to which all members of the community are mandatory. The decisions of local authorities apply to all residents. This differs from the voluntary associations of local government. Nobody can unsubscribe from the municipality or county. Local governments operate within the state. The State is the organization of all citizens, which is responsible for their safety and for creating opportunities for growth. The activities of local concerns, so only certain parts of public affairs and must be subordinated to the countrywide law and the interests of the citizens of the state as a whole. Therefore, only part of the issues is transferred to local governments, as their direct responsibility for which full responsibility. On the other hand always at the discretion of the government administration remain the case, which must be regulated in the same way across the country in the name of equality of all citizens.

The responsibility of the government must also keep all the institutions responsible for monitoring compliance with the law. Performance of the local government guarantee granted him the basic attributes of autonomy, in particular:

- legal personality;
- independent ownership and disposition of their assets;
- right to enact their own budget and dispose of their funds;
- borrowing, loans, issuance of bonds in accordance with the public finance act;
- own administration,
- right to determine how to carry out their tasks;

---

9 See act of 27 August 2009 on public finances (Journal of Laws of 2013 item 885, with amendments).
right to determine the organization of the office, own their own businesses and other entities.

Discussing issues of local relationships with the locals, it should be noted that the dividing line drawn between residents and the local government is contractual in nature, and purpose of this division is a contractual demarcation activities of local community functions associated with its management. The basic responsibilities of government bodies associated with the formation of relationships with the locals refer to:

• understand the needs and expectations of the population in terms of economic, social, cultural, or other affecting the quality of life, maintain regular contact with residents through reliable information about the plans and current activities of the local government;

• activation residents aiming to allow their wide participation in social activities in the form of participation in charitable organizations, local councils and participation in the work of local authorities;

• lawful and response capabilities of local authorities to complaints and requests of the population.

Developing these relationships can take many forms. The most commonly used are:

• organizing meetings with residents;

• organizing cultural events, sports and other designed to integrate with the local population.

Relations between the government and the investors and other economic actors are extremely important for both relations, because


they have a direct impact on the development of these entities as well as the development of local government. You can assume that the efficient organization and use by government bodies adapted to existing conditions methods of action translates into the development of business entities resulting in an increase in benefits also for the local government, even in the reduction of the unemployment rate and increase tax revenues. Self-government relations with business entities can be defined as a set of interdependencies. Taking this into consideration, you must agree with the opinion expressed by E. Wojciechowski, that "the success of the city, municipality creates the conditions for business success and vice versa".

The variety of business entities operating within local government, large and small operating locally makes their relationship with the government is not monolithic. Others will, because the relationship of local authorities to the industry locally from relationships with companies supra-local, as well as relationships with the municipal undertakings. This difference is, inter alia, that local authorities may not in all cases can also efficiently and using the same tools affect the functioning of the business.

**The activity of local governments in the public service mission**

In consideration of the cooperation between government entities environment should emphasize the role of residents and traders in supporting the activities of local authorities and the fact that both groups are the biggest beneficiaries of the benefits generated by the well-functioning government. The priorities in relations with gov-

---


The role of local government in the period of transformational change

government bodies operators include the creation of favorable conditions for attracting domestic and foreign investors. This may be encouraging:

- separation of cells in the organizational structure for cooperation with operators;
- possession of an integrated system with the scope of the database;
- development by the local government strategy of cooperation with operators;
- interaction with other actors in the implementation of such economic projects such as construction;
- infrastructure, social, and communication;
- recognition of the priority of personal contact local offices of entities

Appropriate relationships with potential investors require from the local government plans to take into account the spatial separation of the local government areas best suited to the location of the business, creating a modern infrastructure, increasing the attractiveness of the administrative unit for potential investors, as well as monitor the activities of the business in order to conduct a rational tax policy in the context of the constitutional powers of local government units in shaping taxes.

Ties occurring in the system, and depending on differences in the interests of individual operators require local authorities such activities, which on one hand will translate occurring depending on the factors of development of these entities, on the other hand will create conditions for the development of local government. The activi-

15 See article 217 of the Polish Constitution.
ties engaged in by the local government in the economic sphere, extract two directions. The first concerns located in the local government other than municipal companies, while the second relates to municipal bodies. The powers and possible action by the government will be much different compared to these two groups of subjects. In the first case, the actions of government are limited to the creation of favorable conditions for their development within their possibilities of legal, financial and organizational. In relation to companies owned by the local government may include direct, which requires obtaining the information necessary for making rational financial decisions, organizational, structural and personnel that will enable efficient implementation of their own tasks and other tasks of local government, and it is important that the activities of municipal enterprises in as little as possible in the budget of the local government.

The primary objective of the cooperation of local authorities and NGO’s to be defined in legal nomenclature, as public benefit organizations is to activate the participation of local community in the tasks carried out by local authorities. The activities of public benefit organizations within the functioning of the local bodies facilitates the selection of such tasks and methods of their implementation, which will most effectively protect the needs and expectations of citizens as well as to avoid or at least minimize the risk of putting the particular cases of narrow interest groups over the interests of the municipality\(^{16}\). The legal basis for the freedom of citizens to organize themselves and article 12 of the Polish Constitution, as well as, for example, the Code of Administrative Procedure\(^ {17}\).

Legal conditions providing for the participation of civil society organizations in the activities of public authorities reflect a commit-


The role of local government in the period of transformational change

ment to the creation of civil society. Activity in this area creates social capital of local government units, which in addition to innovative capital, tangible and financial constitutes the development potential of the territorial community. According to J. Forbriga civil society is seen as a whole, these social organizations, which are largely independent of the state, market and family that work for the common good, do not seek political power j does not refer to the radical and revolutionary methods.\(^\text{18}\)

Due to the nature and scope of the interests of charitable work in the form of foundations, religious organizations, organizations related to health, environmental organizations and educational, cultural and recreational activities. The activity of local authorities in this area of activity includes the development and approval by the legislative body of the local government cooperation with charitable organizations, sovereignty, partnership, effectiveness, and transparency.\(^\text{19}\)

Forms of local government cooperation with non-profit organizations include:

- transfer of public benefit organizations part of the public duties within the limits of the law to the provision of the necessary financial resources to implement them;

- granting organizations charitable status of the entity supporting initiatives and strategic plans of local authorities, as well as supporting their current activities;

\(^\text{18}\) See J. Forbrig, Civil Society: Poland, its neighbors and Western Europe, comparison, Reports and Analysis Centre for International Relations, Warsaw, p. 4-6 (2002).

• creation together with charitable organizations, advisory
groups to coordinate the actions taken, as well as the
exchange of information in this regard.

Relations with local authority’s political groups should be consid-
ered in two areas. The first area relates to internal relations occurring
between political parties in local government bodies (councils, offices). In the case of the council of the local government representa-
tives of various political options essential condition for ensur-
ing the effectiveness of its organs is stable coalition capable of setting and implementing strategic plans for the development of local government and to submit immediate resignation of party interests over the interests of the community. The ability to reach consensus councilors in matters concerning vital issues local gov-
ernment is a factor that determines the positive effects of its activi-
ties. Treatment of local government, as the arena of political struggle often leads to actions and attitudes distorting deci-
sion-making processes that hinder the behavior of the primacy of public interest 20.

The second area of activity involves various forms of influence on the government coalition of political parties to have support for the implementation of the strategic objectives of the community. The scope of the present study limits the analysis of the relationship between local government authorities and other stakeholders. It is impossible, however, to skip having a large extent the impact on the effectiveness of these measures the relationship of local authorities with the staff offices of municipalities, cities and counties, as well as interpersonal relations existing in these offices. The quality of the relationship is the result of internal organizational skills, inter-
personal, social superiors offices (mayor, mayor, president cities) performing the role of managers skills21.

The most important factors affecting interpersonal relationships in the office include:

- prestige of local government;
- attitude office staff to the mission and strategy;
- ratio of office staff to perform the duties imposed on them;
- management style office.

The reason for this is that the organizational skills and knowledge of management are not always the primary criterion that guided voters at direct elections for the posts of presidents, mayors and mayors. This may have important implications not only for interpersonal relations in the office, but also for self-selection strategy and its success. Important for the development of local self-government units are its relationships with entities external environment. In the growing competition of physical capital, financial and human ability to effective cooperation with entities external environment is part of the support, and often also talking about the pace of economic and social development of the local government units.

The basic idea of the characteristics of the municipality cooperation with entities of its external environment is expressed in the form of a hypothesis the view that no unit of local government is unable to function effectively in a competitive environment, isolating themselves from the external environment. In very general terms, a catalog of external forms of local government cooperation may include:

- exchange of experience between local government units in terms of economic, social, cultural, educational, health, safety, environmental protection, etc.;
- formation of unions, associations and agreements municipalities and counties to perform tasks beyond the capabili-

---

ties of individual units of local government, strengthening their bargaining power and the economic and social potential;

- cooperation with organizations with an international dimension, as trans-regional cooperation within the framework of various international organizations on both the income profile, as well as non-profit organizations, as well as cross-border cooperation in the framework of Euro-regions;

- cooperation with the institutions of the central government in matters relating to the local government;

- creating conditions for foreign and domestic entities, such as the separation of land suitable for investment, construction or modernization of infrastructure, rational tax policies, promotional activities, advertising and other.

Essential for the smooth functioning of local government within the standards, procedures and laws, including the laws and procedures of the European Union, is the use of scientific achievements by translating theoretical principles into practical action. As already mentioned, the local government to a greater or lesser extent, affects all operating entities within it, and the market economy can grow rapidly only those government units whose authorities are able to mobilize actors cooperating with them for effective work towards the development of trigger in the local communities habit of entrepreneurship, to create conditions for the residents of translating entrepreneurship into concrete actions in the economic or social. In addition, give the opportunity to skillfully reconcile the interests of various groups of the community with the interests of local government, to introduce to the subordinate offices of the elements of modern management and satisfy, within the possibilities of legal, financial and organizational needs of entities cooperating with the local government unit.
Conclusion

In summary, one can express the opinion that the quality of the relationship between the local government unit and its stakeholders internal and external environment largely depends on the development of the municipality, county or region. The role of the relationship is to create links and partnerships between local communities, traders, civil society organizations and other entities, which translates into an ability to function in a situation of conflict of interest. It is not doubtful that although many Polish local governments, especially in big cities, it can effectively compete with the local and leading European countries in terms of acquiring significant investments, creation of conditions for their implementation, as well as in areas such as exports, tourism services, a large some local governments do not keep up with the competition, deepening the existing polarization. It should be hoped that the dynamic economic development of the state, funds transferred from the European Union and the state's regional policy with the increasing awareness will allow for the gradual development of even those local government units.

It should also be noted that even the most meticulously prepared administrative reforms on a large scale, such as decentralization and the introduction of local government system, civil service legislation and changes in the organization of work of the government are only to establish the legal and organizational framework, which fill depends only on the activity and the positive attitude of the elite civil and administrative staff.

One of the main tasks or local government is satisfying local society's needs. To execute this task the local government should work very active to reach profitable relationships with the other entities in the environment. It is very important, that all entities and local government have benefit in it. The article presents some areas and forms of cooperation between local government and local society,
entities, public organizations, political groups and clerks in communes, cities and other polish administrative units.