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### Table of Contents

Mariola Lemonnier, *Comparative Law and Financial Market* .......................................................... 5

Maciej Rzewuski, *Legitimierende Funktion des Europäischen Nachlasszeugnisses im Lichte der Verordnung Nr. 650/2012 (Legitimate role of the European Certificate of Succession in the light of the Regulation No. 650/2012).* .......................................................... 18

Edyta Sokalska, *The Crisis of Representative Democracy – Deliberative Democracy as the Legitimization of State and Local Authorities.* .......................................................... 28


Ryan Kraski, *Defamation in the Age of Social Media: #LegalEvolution* ............................................. 52

Bronisław Sitek, *Evolution of the Sources of Law from the Roman Law to the Global Law.* .................. 60

Paolo Ciocia, *Juridical Language: Result of Social Decay?* ............................................................... 71

Anna Rataj, *Revolution or Evolution? The Emergence of the Constitution of the State of Israel.* ............ 76

Edyta Jóźwiak, *Adjusting Polish Law to the Regulations of the European Union in the Example of the Public Procurement Law Act.* ................................................................................... 83

Paweł Czaplicki, *Prawne aspekty obrotu walutami cyfrowymi w Polsce oraz niektórych państwach Unii Europejskiej- zagadnienia wybrane (Legal Aspects of Digital Currency Trading in Poland and some European Union Countries - Selected Issues).* .......................................................... 89

Daniel Francisco Nagao Menezes, Gerson Leite de Moraes, *Impact of New Information Technologies: Internet Access and Freedom of Speech as Fundamental Human Rights in Developed, Sub-developed and Underdeveloped Countries.* ................................................................................... 95

Munesh Nagpal, *Comparative Criminal Law.* ..................................................................................... 105

Magdalena Rzewuska, *Umkehrhypothes (Reverse Mortgage).* ......................................................... 118


Nadezda Ljubojev, *Legal Protection of the Computer Program in the Republic of Serbia.* ................... 133

Piotr Zamelski, *The Common Good as a Tool Allowing the Adjustment of the Awareness of Human Rights. The Need for Development.* ................................................................................... 142

Anna Bohdan, *Ewolucja regulacji prawnych dotyczących e-administracji gminnej w 2016 r. (The Evolution of Legislation Regarding Municipal e-Government in 2016).* .......................................................... 149

Piotr Herman, *The Impact of International Accounting Regulation for Criminal Liability.* .................. 158


Said Edaich, *Islamic finance in Europe: a statute between political ambiguity and legal uncertainty.* 179
Mariola Lemonnier*, Comparative Law and Financial Market

Abstract: The article points the relationship between comparative law and financial market. The author tries to show comparative law in historical, doctrinal light in Polish, French system with the specifics of comparative law. Comparative law indicates other lines of thinking in law and about the law, shows new criteria in interpreting the law. Financial market law was the first to transposed the Anglo-Saxon concepts into the system of continental law. The concept of regulation as a key definition is described as the practical application of solutions and the comparative method.

Keywords: concept of regulation, polish and french doctrine, Anglo-Saxon culture of law, concept of comparative law

The subject of comparative law can be various phenomena, for example, legal norm, legal institutions, branches of law, legal systems, groups of legal systems, judicature, procedures of creating or applying the law, theory of law, philosophy of law, sources of law, content of law and effectiveness of law. Teaching legislation is important and it includes doctrinal, historical, comparative research, of which goal is to criticize legal regulations in force and adoption of appropriate reforms.1

Global financial market is an economic phenomenon that, due to its character, can be used in comparative research.

The essence of comparative research

Great French comparative lawyer, Rene David wrote – «Il n’est de science du droit qu’universelle. Le droit comparé est l’un des éléments de cet universalisme, particulièrement important à notre époque, qui joue et est appelé plus encore à jouer un rôle de premier ordre pour la connaissance et le progrès du droit»2.

Comparative law is an element of universality of law, a particularly important element in our times, as it is playing the role in the progress of the law.

According to Ihering, law can’t be summarized as a commentary to the local jurisdiction. Law is only the work of an unworthy man and can’t be confused with justice, which is greater. René David obviously saw this problem in many of his writings. Comparative law according to prof. R. David is necessary for history and philosophy of law, for better understanding of our own law, for better understanding of your own law in order to function better in the international community3.

The concept of comparative law is criticized and replaced by the science in French – «comparative du droit» or the study of comparative law (études juridiques comparatives). Anglo-Saxon law is dominated by the term "comparative law", while German law uses the

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3 Idem.
notion of comparative law “Rechtsvergleichung” or comparative law (Vergleichendes Rechtswissenschaft)\(^4\).

Referring to the opinion of prof. Rene David, the term “comparative law” rather concerns the idea of autonomous discipline that hides under dependence on the knowledge of foreign law. In this case, comparative law is referred not to legal order, but as an autonomous discipline\(^5\).

The concepts refer to the essence of comparative law, which is not a new branch of positive law, but attention is paid to the method. However, some of the representatives of the legal science also believe that comparative law is a branch of law which deals with particular scientific investigations.

The subject of comparisons is the system of law, legislation, theoretical or systematic concepts. An important foundation of the comparisons is the history of the law. Comparing the law can take the form of translation of concepts, the implementation of foreign law, concepts into national law (through public and private international law or multi lingual legal cultures), the degree of influence of one legal culture on another or the impact of one legal system on another.

The development of comparative law is manifested by increased critical approach to law to make it more flexible or dynamic. Critical approach to law, of which the effect is, among others, the notion of regulation, contributed to implementation of theory and practice of classic law, new influences, alternative ways of thinking, maintaining a dose of criticism in legislation.

Comparative approach is a source of questions, reflections, opening to other solutions. Theory of comparative law is a means of interdisciplinarity and directs the knowledge of law towards law as cultural phenomenon in a specific context. Comparative law indicates other lines of thinking in the law and about the law, shows new criteria in interpreting the law. The law in comparative context may be assessed critically, subversively\(^6\).

**Competition between laws of particular countries**

The confrontation of foreign law is an old phenomenon. During expansion of international capital and changing the scale of economy into global, this process is more and more often applied. The idea of complementarity of laws and reception coexist with phenomenon of competition, struggle between legal systems.

For example, World Bank, established after the Second World War in order to finance and reconstruct Europe, took a polemical stand, which is still the subject of discussion and published a report entitled "Doing Business", in which poorer countries of the South were encouraged to adopt the system of common law, justifying that the countries of Roman-German tradition, through their laws, curb the development of trade with countries of Anglo-Saxon law.

Roman tradition, civil law and common law differ in the very general concept of law and inference methods. In common law, the judge is the most important, creating and formulating the law, formal law dominates over positive law and "remedies precede rights". Codification of law is the most important in civil law tradition, since Twelve Tables, in which emotional attitude towards the law can be observed. The act is the work of sovereign, who is

\(^4\) Cf. H. Batifol, *Problèmes de base de philosophie du droit*, LGDJ 1979, s. 300.


represented in the parliament, sometimes even in a form of the whole nation. The act is a source of law and norms are of general and abstract character.

Pierre Legrand wrote about differences in the methods of reasoning in both traditions that they are “insurmountable obstacles of epistemological character between common law and civil law.” English lawyer from tradition of common law and equity reasons pragmatically and empirically and on the basis of induction. Such lawyer attaches great significance to facts and doesn’t care about theoretical hypotheses.

A lawyer from civil law tradition reasons through deduction, systematics and abstract categories.

Historical school in the law of ius civile analyses the facts and uses a method of induction. The lawyers from "equity" system often use deduction. A lawyer and representative of common law, Lord Mansfield claimed that "common law is not based on particular parts, but on general rules applied in particular cases". 8

International community is understood via comparative law. Before UN Card had been signed, unification tendencies were expressed by Wedell Willkie – One world or no world!

An example of general competition of legal systems is international arbitration. Many countries apply this type of settling international disputes. International arbitration has many advantages. Current international agreements and internal law allows non-judicial settlement of disputes. Arbitration is a very old institution. In France, the Act of August 16-24, 1790 implemented arbitration as “the most reasonable means of settling disputes between citizens” (art. 1 of the Act). 9 The same act, in the very same article, indicated that legislator can’t do anything to reduce the importance of arbitration or other amicable forms of settling disputes (compromise).

In France, in 1981, by decree of Pierre Mauroy, arbitration as significant external and internal competition for national and foreign law was introduced. The autonomy of arbitration sentences in France was much higher than, for example, in Great Britain, because when the governing law was the last one, it had to be clearly indicated that both parties resign from judicial path in the dispute. (resignation from the so-called "special case").

National legislators perform acts of competition between legal systems, 10 at the request of professional environments (lawyers, entrepreneurs), treating as a kind of escalation of liberalism, which is sometimes called “the lowest price in the bidding of the laws” or legis shopping. Competition between national regulations is often accompanied by great ideals in some circumstances, especially in tax avoidance.

Examining a few foreign laws deepens national concepts, notions, rules and institutions. It helps to define basic values of a society, its feelings, sense of usefulness of various institutions.

Real sources of law (values, the so-called political correctness and media, groups of interest – lobby), in contrast with formal sources (acts, judicature, doctrine) are different in particular countries. In "Persian letters", Montesquieu showed mutual amazement of the French and Persians about customs, behaviours. The content of national law and internal law for every

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7 Pierre Legrand wrote «l’irréductible rupture épistémologique entre common law et civil law» European Legal Systems are not converging ,1996, International Comparative Law Quarterly, p. 79.
8 «La common law ne consiste pas en des espèces particulières, mais en des principes généraux illustres et appliqués par ces espèces» B. de Loynes de Fumichon,op.cit,s.27.
9 «le moyen le plus raisonnable de terminer les différends entre citoyens» (article 1er), tłum.własne.
10 This procedure was removed in 1979, but judges would still participate in an arbitration procedure. L'Arbitration Act of June 17, 1996 completely changed English law within the scope of arbitration.
institution, justification of the act and its basic goal are clearer through comparison with foreign law. Understanding of national law is improving if analytical study of foreign law is prepared.

The knowledge of foreign law allows to understand the methods of creating the law. Examining formal sources of law (law, judicature, doctrine) plays an important role. European continental way of combining abstract ideas with the law of general and impersonal character is against English pragmatism that doesn’t trust theories, which haven’t been proven yet. The law here is contained in the ruling, not in the act. The dominance of an act in the sources of law is of continental origin, which has impact both on the form and content of the law.

Codification is a feature of continental law. The French, since the 16th century, have had the will to codify their laws. The concept of codification is also a feature of French reasoning and formulating statements. The codes must be complete, logical and coherent. They must be expressed in language that is clear for the citizens. They are created in accordance with zeitgeist and no changes or adjustments are excluded.11

The knowledge of national law and methods of reasoning in the law may also be improved through studying the foreign law. Deduction that is derived from a general rule is different than induction, in which facts are used first. In the methods of teaching law, the logic of lecture does not start from case study, casuistry, the method of debate or solving cases are applied during exams.

Comparative law may contribute to accelerated development of science.

Philosophy of law easily free itself from the influence of national law, puts emphasis on foreign law. Philosophy of law accepts diversity of notions about the nature of the law, its function and symbols. The law is sometimes a synonym of freedom, and sometimes of compulsion. The law sometimes refers to the judiciary, sometimes to injustice. The law is sometimes basic value in social life and plays an important role, it is sometimes poorly assessed, treated with indifference, contempt.

The law fulfils a function of organization of social life, this function is sometimes mainly regulating (France), sometimes simply oriented towards social peace and it is contained in judicial functions (Great Britain). In some countries, the law is taken over by religion (archaic Roman law, Muslim law).

The main classifications and divisions into private and public law, civil and commercial law, legal regulations, property rights and personal rights, rights on movable and non-movable goods are characteristic of Roman law. The main concepts (constitution, people, things, obligations...), sources of law (acts, judicature, customs, doctrines), institutions of public law (state) and private law (ownership, family) are connected with all legal systems.

The anthropology of comparative law was very popular in the 19th century. This age was characterized by belief in ability of science to solve social, philosophical and moral problems.

When we talk about the law as a science, it is social science, because no universal laws can be formulated.

In public law, political cycles (monarchy, oligarchy, democracy) occur successively. Procedural law is changing, from the law of retaliation to submission to the law and then obligatory submission to penalty and aimed at voluntary arbitration. In private law, there is constant evolution towards consensualism, law of obligations and agreements. These theories are not universal laws of changes in the law, however, there are too many exceptions. The fate

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11 B. de Loynes de Fumichon, op. cit. *Introduction au droit comparé*, p.32 and sub.
of the law is more modest and uncertain than the fate of the sciences. Law is the science of coherent system of organized knowledge in the face of global economy.

The scientists are also interested in comparative law. Due to its character, it is regarded by some people as a prototype, a model of law, particularly critical and universal approach.

Legal comparatistics is particularly important in unification of modern legal relationships. The goal of applied research methods was to prepare significant suggestions, taking into consideration the fact that comparative legal research give results especially in a form of some noticeable doctrinal trends. Comparatistics enables to understand other laws through someone’s own solutions and vice versa, comparing is a natural way of human thinking.

Autonomous comparison only from someone’s own point of view is dangerous. Such autocentric perspective imposes individual way of looking at foreign law. There is nothing more dangerous than analysing the logic of foreign legislator from national perspective. The selection of the scope of comparison is also important, whether to select all countries, legal cultures or only traditions of selected countries. There are usually two approaches in the comparisons. The first comparison is made, for example, in homogeneous social background. In the second approach, you must focus on the differences and compare them.

The first stage of comparative method is the examination of foreign law. The institutions of compared foreign law need to be indicated and gaps and lack of accuracy in national law, resulting from comparison, must be found. One of French precursors of modern comparative law - Edouard Lambert, a professor at the University in Lyon, who combined 19th century thoughts with early 20th-century thoughts, claimed that the notion of comparative law has a double meaning, because its subject is an analysis of foreign law and comparing it with national law.

Comparative law has various functions. Firstly, it serves the development of positive national law. Secondly, it serves the harmonization and legal integration, of which example is the European Union. Moreover, comparative law fulfils, in some circumstances, more ambitious creative role, a designer of certain legal solutions or new legal institutions.

Reception is a complex process, in which new solution are sometimes rejected. The law is a "delicate matter", just like crystal that often crushes during international transport. Reception is caused by sovereign acts and comes from institutions that want modernize their law. Then, even the whole foreign code or new branch of the law may be adopted. Professor R. Carbonnier in France saw “three elements in the process of reception: sovereign act, global adoption of foreign law, by one act.”

Reception through mass transfer of the whole act of foreign law has impact on national character of the law. Prof. P. Koschaker, well-known Austrian professor within the scope of comparative law wrote that reception is not a question of quality, but of power of foreign law. For other people, reception is justified because it is a progression through usefulness. Rudolph von Jhering wrote that "reception of legal institutions is not a problem of nationality, but of usefulness of needs." Nobody thinks about origin +of useful things, moreover, no one will use

14 «La réception n'est pas une question de qualité, mais une question de puissance».
15 The author also criticized exegesis, further deliberations were made by Saleilles, Lambert.
things that come from far away if they have national things, or things better than foreign ones. Only a fool won’t take quinine as a medicine, juts because it grows in his garden”16.

Legal inference indicates to see how given notion is regulated in other countries, what are their solutions, formulas and methods that were successfully applied. “Why to cheat, when the model is from far away”, wrote prof. R. Carbonnier and that’s how he titled his article on comparative law about the myths of foreign legislator.17

Since the congress in Paris, common regulations were distinguished, norms on the basis of different legal reality. They wanted to create common statutory law (Edouard Lambert), whereas R. Saleilles wanted to drop immobility of exegesis of national lawyers to make lawyers feel free and to make them refer more to the spirit of the law.18 Their views show tendency to universality of the law, adoption of universal point of view. International organizations then started referring to general applied practice and opened to global law. The congress in Paris made people realize about the importance of comparative law. Comparative law is needed to compare national laws, to check how they respond to basic questions. Functional school took into consideration a function of comparative law in response to questions of global society. In comparative law, didactic, cognitive, law-making, ideological, integrational and interpretative functions are distinguished.19

Functional school was very important until the 90s of the 20th century, when new authors emerged such as R. Sacco20 and P. Legrand, who criticized the approach of functional school in its systematic quest for alleged similarities. It would mean that approach of legal systems to social problems is similar, as well as solutions to problems are similar.

Postmodernist school in comparative law is the continuation of postmodernist philosophy. This school pays attention to permanent discourse and logic of modernization of interpersonal relationships. Postmodernist school opposes modernist approach from the period of the Enlightenment. Modernism is an instrumental reflection of universal rightness, which also cause the degeneration of identity due to loosening of traditional common ties. G. Simmel thought that formal liberation of humans show their connections and personal relationships balanced by the fact that interpersonal relationships have now the features of the lack of identity and they are instrumentally expressed21. They are also emotionally neutral and a triumph of utilitarianism and calculated rationality. A representative of Frankfurt school - Charles Taylor distinguished three features of modernism – lack of great idea, domination of instrumental reason, lack of freedom, which results from the feelings of the citizens that they don’t have an authority between market and state. The postmodernists analyse social facts, emphasize fragmentation of diversity and lack of coherence. According to postmodernists, modern society

16 B. de Loynes de Fumichon, op.cit. Introduction au droit comparé, p.40 and subs."La réception d'institutions juridiques n'est pas une question de nationalité mais d'utilité et de besoin. Personne ne se soucie de se servir de quelque chose de lointain, quand il a, chez lui, un outil aussi bon ou meilleur. Mais seul un fou refuserait la quinine [ce fortifiant et médicament anti paludique] au seul motif qu'elle ne pousse pas dans son jardin".Own translation.
18 C. Jamin, Le vieux rêve d'Edouard Lambert et Raymond Saleilles revisité, RTDC 2000, no. 4.
19 Idem.
20 A representative of context method in comparative law claimed that "S'enquérir de la dimension muette du droit, qui définit une mentalité juridique dans une société donnée", -You need to find silent element in the law that defines legal mentality in a given society.Own translation.
is characterized by uncertainty, complexity and underdetermination. It lets us think that it is the beginning of new era in West European societies.22

What conclusions can be drawn by the lawyers? Diversity means that differences concern also ethics, forms of knowledge, social behaviours etc. Modern social relationships are characterized by the features of diversity, differences and variants. Nowadays, nobody looks for universal features, but differences in the comparative law.

A feature of pluralism is similar to comparative law, because it compares cultures, legal systems and emphasizes the differences between them. Nowadays, the concept of "ius unum" is not very popular. Postmodernist ideas currently come from American and Canadian thoughts – the professors Frankenberg and Berman take part in the movement "critical legal studies approche", that is, criticism of the law. This movement emphasizes the importance of strategy, which often destroy knowledge, positive law and judicature. Judicature in accordance with "critical legal studies approach" has social and political meaning, explains relations of power in the state. It should contain interpretation of subtexts of rulings and strategies adopted in the rulings or in passed acts. The postmodernists apply a method of deconstruction and verbal analysis, national law is a particularistic law in this aspect. Some of modern comparative lawyers propose cultural approach to foreign law – law may not be understood without cultural background. Prof. R. Sacco claimed that in order to compare foreign legal system, it must be first analysed by a lawyer from a given foreign system23.

Comparative law is the knowledge with critical aspect towards national law, therefore, it is particularistic, accepting external assessment for national law.

In France and many other EU countries, law is based on great codifications and achievements of the 21st century such as legal positivism, legal logic, hierarchy of the sources of law, division into private and public law. Abstract categorization is dominant in these achievements and comparative law is a mirror image with reference to it and sometimes expresses perverse criticism. If we assume that law is a cultural creation, it is maybe too distant from monolithic vision of reality oriented towards power of the law. Prof. Sacco, in his works, pay attention to what is not explained in the law and what must be taken into consideration in adoption of foreign law - history, sociology, anthropology, economy.

Silent judiciary is expressed in the cryptotypes being indirect data, which are characterized by legal inference. It is about checking of what doesn’t directly result from an analysis of a given legal system. Comparative law focuses on differences24, which shows its double role. History, values, similarities must also be taken into consideration while checking similarity of legal systems. It is the second function of comparative law. Both functions – teaching about differences and similarities lead to similar conclusions - legal systems are becoming more and more similar.

The so-called "emprunt juridique" is important in the postmodernist school. Such borrowings from other legal systems allow to identify similarities. Such borrowings have always existed, since the period of old civilizations - Greek, Roman. The borrowings exist also between Anglo-Saxon law and continental statutory law. An example can be a bank cheque. Within the scope

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22 B. de Loynes de Fumichon, op.cit.s.142.
23 A. Gambaro, R Sacco, L. Vogel, Traité de droit comparé - le droit de l'occident et d'ailleurs, LGDJ, 2011, p.113 and subs.
24 French president, J. Chirac, during his presidency, was very interested in maintaining cultural differences and asked if countries of German and Roman tradition have any strategy to promote the influence of civil law around the world.
of the law of competition and stock exchange, it can be emphasized that French law is based on American model, similarly to the law of supervision over regulated market. Looking for the origin of Polish stock exchange and French prototypes, we must remember that French model is based on American model. In private law, particularly in commercial law, borrowings from other systems are frequent. In 1860, Napoleon III wanted to create capitalist law, because French economy was vibrant then. Great Britain has become a model because it went through industrial revolution earlier. Modelled after Anglo-Saxon law, cheque law, big reform of commercial companies law or warranty agreements were adopted then.

Nowadays, reception of the concept of regulation to legal system of civil law, which has become the fact on the financial market, shows that theoretical concepts may be implemented as a result of no other methods of achieving effective system of national law or international in the conditions of global village, mass practice, globalization of economy, progressive corporatism of the beginning of the 21st century and many other social and economic phenomena. The unification of economic systems and bringing the system of civil law and common law closer as a result of integration in the European Union were also very important.

**Financial market law**

Financial markets are the subject of regulatory analysis as a method of impact of comparative method, and because of their intrinsic qualities they are a privileged laboratory for new methods and legal solutions. In addition, the first analyses of the effectiveness of the legislation concerned the financing system. Financial markets during crisis have such a significant socio-economic impact that they may damage systemic or sectoral stability in the state and/or abroad.

Financial markets have long been a melting pot for new trends and law transformations, often the first to be subject for new concepts. Importing any concept into continental law from Anglo-Saxon culture brings *nolens volens* important consequences.

The law of the financial market covers more and more private and public law institutions. One of the reasons is the need to keep up with financial and economic activity, the other reasons is that very important changes take place in EU law and to unify the rules of financing the economy through the capital market. For comparative law, financial market law is a particular subject of research because the financial exchange is global and the legal systems is not.

It is therefore important to indicate the specificity of the financial market and practice. It points out that the current market models with a strong borderline are the past of financial relations. Neoclassical theories have seen in the financial relationship a model a combination of spot, forward, or securitization assets, and are already far behind us.

The financial crisis of 2007-2008, the sovereign debt crisis, the rise in the number of organized markets in Europe and around the world has caused the return to normalization of financial relations, at least at European scale. This trend is evident in European initiatives, such as European Business Code, which demonstrates the growing role of the law.

The changes in the financial markets are the result of the continuing fight against time, the fight against risk, the struggle for profit at the earliest moment. Signum temporis of the financial market is almost half of transactions on high frequency trading, ie. platforms of very fast turnover. At the same time, we have moved from the market of professional intermediaries to the diversified (regulated) trading systems and trading platforms.

Removing barriers between markets is not accompanied by the removal of national law. Replacing it with European legislation ordinance as a direct applied law, emerged rather as a
result of the financial crisis, and support from corporate governance and compliance does not mean that applicable law is not searched for.

In this context, it is important to consider the specificity of national legislation in relation to other civil law systems, through commercial, economic, public, financial and tax laws. Financial market is the subject of economic and legal studies. However, differences between theory and practice of the market, between Polish and foreign market, between national and foreign practice show that there is a need to analyse financial market in terms of features of the market.

Operation, sales and transaction, which refer to the notion of the market, are synonymous terms. Even if, from legal point of view, object or law is the subject of a contract or agreement on the financial market, it is usually rejected by the market, which prefers such terms as operation, sales or transaction, because the word “contract” is used with reference to selected financial instruments and seems to limit some market transactions.

Financial market is also defined as a market of offered capitals and needed to finance investments. Demand for capital may come from various entities, for example, private or public entities, or even the state. The goal of financial market is also availability of capital at market price or option of continuation of financing. An investor takes a specific risk on the market and covering it and the price of covering is an element of decision about concluding a transaction. The investors go to the financial market, because they have confidence in organization of the market, and orders are made by the entities that have easy access to the market, and who are also professionals on the market.

Financial market has many particular functions, one of them is the allocation financial reserves between the operators of the market. It is also a place, where speculative transactions are made. Financial market may improve the state of company’s finances, it is also a source of capital for the state that is needed to finance public debt. Capital from financial market is needed in the operations of management of pension funds. The investment funds, insurance companies, banks and other institutional entities, called institutional investors also have the similar function on the market.

The concept of regulation

The concept of regulation is derived from global practice of large international concerns. It is a response to competition of legal systems and inability to unify too different issues. The concept of “regulation” is very important in applying the law, whereas, it is a stage and quasi-system in creating the law, and direction of research is called “young”. “Regulation” is a key definition for the phenomenon of globalization. French dictionary of legal terms defines the notion of regulation as a balance of changing entire structure, disorganized by normative intervention,

28 T. Nieborak paid attention to this feature, *Tworzenie i stosowanie prawa rynku finansowego a proces ekonomizacji prawa*, W.Naukowe, Poznań 2016 s.96 and sub. The author indicated narrow and broad perspective of regulation p.140-142.
the actions regulating a phenomenon of evolutive character29. From economic point of view, the dictionary defines regulation as an action partially directive and partially correcting the direction, adaptation and control exercised by the authority. The subject of actions is financial market that is related to the set of actions of dynamic, diversified and complex character, however, its goal is to find market balance. The regulations should lead to proper functioning of financial market open to competition, thanks to flexibility of regulating mechanisms, and not left to competition.

The notion of „regulation” is related to evolution of political thoughts and transformations in legal thoughts. The first author who introduced the notion of regulation into legal language in France was prof. Gerard Timsit30, who referred to the notions used in cybernetics or science of systems, because we need to refer to entire mechanism, which enables entire organizational structure to function in a constant way. Accepting that the term restrictions was taken from English term English „regulation” makes deliberations systemic in legal sciences and allows to analyse norms of statutory law against a backdrop of other norms applied in recent decades. Professor Timsit distinguished two reasons of emergence of regulation as a trend in the law of financial market. The first reason is „inability of the state and the second one is inability of the market” to effectively act in global finances31. In general, regulation is supposed to correct problems of market mechanism in order to protect general social goals, including regulated entities on the financial market.

Regulation should not replace market, but supplement it as a tool in the hands of a regulator32. Connection between regulation and market is very close, but mutually conditioned. Reconstructing the competition is not the only goal of regulation and it is not a mechanism excluding others. It is one of the goals of regulation, which is undoubtedly very clear. Levelling of regulation as a subsidiary mechanism for competition is one of many incorrect statements used to show the goal of regulation, in this case, it is a regulation of the financial market.

The regulation makes people aware of the effects of competition on the financial market. Competition is not sufficient to achieve effects, which can be achieved by the law. As a consequence, regulation as a paradigm is supplemented and removed by public legislator, both through norms of positive law and new forms of regulation.

Specific aspect of financial market favoured application of regulations. Complicated transactions of multilateral and transnational character, with a specific way of settlements have become a very fertile ground.

Pre-crisis experiences, both of non-financed companies and normal consumers, show that regulator has become groundless in the face of general crisis and crisis of confidence to the financial market. The European Union adopted various harmonizing and unifying regulations based on comparative legal research. Regulation was a hint for actions taken by European legislator.

29 G. Cornu, Vocabulaire Juridique, 8e éd., Puf, 2009, Paris, s. 792 -definition in French « L’équilibrage d’un ensemble mouvant d’initiatives naturellement désordonnées par des interventions normalisatrices, action de régler un phénomène évolutif”’.
Financial markets are the subject of comparative legal analysis as an impact method, and because of their intrinsic qualities, they are a privileged laboratory for new methods and legal solutions. In addition, the first analyses of the effectiveness of the legislation concerned the financing system. Financial markets during crisis have such a significant socio-economic impact that they may damage systemic or sectoral stability in Poland and/or abroad.

Regulation, self-regulation, deregulation are the terms frequently used in the law of financial market. Among terms and expressions concerning the functioning of financial market and related to regulation, there are such terms as comitology, supervision, mondialization, corporate governance, soft law.

New forms of regulations are parallel internal corporate normative systems, unnamed although broadly discussed in a theory of non-continental law, mainly Anglo-Saxon, called “compliance” in the environmental international.

A feature of modern regulation is concertation, compulsory, preventive and model character, sanctions such as warning means etc. However, new legal instruments are characterized by compulsory character and sometimes by new application of norms that have existed for a long time noticed as a result of comparative legal analysis.

Legal regulations have a natural dose of uncertainty, in this case, authority starts from legal constraint and ends with legislative authority of actual character – expressed mainly in recommendations, announcements, opinions etc. Comparative legal method of creating regulations favours better relations between regulating authority and addressee of regulations. Expected level of acceptance from addressees depends on the level of satisfaction of the participants of financial market.

Normative instruments of regulations are the codes of good practices, accepted or not by supervising authority of the market, social responsibility of the entrepreneurs as a norm, codes of ethics as an instrument, investor and its interest as the only entities that matter on the financial market. Soft law as a legal means was mainly developed on the basis of international law, and the very notion was used, for the first time, by Lord McNair. In theory, two types of soft law can be distinguished. The first type contains norms without sanctions. The second type does not include obligations. Both forms are regarded as soft law, that is, the law that can be modified and adapted to the will of entities, depending on the circumstances of a case. Classified as legal standards, as an announcement of abstract character, soft laws get normative value through application by the courts, although soft law is sometimes regarded as a synonym of uncertainty. Soft law is an issue that is frequently discussed in a doctrine, when we discuss regulations. Multitude of instruments used to the tools soft law shows how important subject of an analysis it has become for comparative law. Apart from classic forms such as opinions, instructions, recommendations, letters, agreements, admonitions etc. Anglo-Saxon law adds an open catalogue of soft law, texts of law interpretation (interpretative release), for example, in accounting law - (staff accounting bulletins) or staff legal bulletins.

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34 Cf. Z. Ofiarski, Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nadzoru Finansowego, (w) (red.) A. Jurkowska-Zaidler, M. Olszak, Prawo rynku finansowego, op.cit. p.137 and subs.

information lists about non-infringement of law in specific practices or (interpretative letters) general interpretations.\textsuperscript{36}

Soft law is usually used when we want to achieve desired effect without using sanctions in its normative, classic perspective. We expect that soft law will encourage entities to behave properly through appropriate argumentation.

Regulation is also a global trend. Sectoral organizations, which implement the rules and work out codes of procedure in order to regulate international finances, do not have transnational power. The main disadvantage of the solution is the lack of obliging rules imposed on particular countries. There isn’t any organization like World Trade Organization (WTO), which would create the rules and supervise obeying these rules by bodies settling disputes.\textsuperscript{37} As a consequence, definition of cooperation is delicate within this scope. Supervision of banks and financial markets remains decentralized or becomes decentralized at the level of countries and that’s when they should be compared.

The basic justification of working out the regulations is effectiveness, but it is mainly market justification.

Conclusions

Comparative law includes foreign law, due to subject and scope of research, it is close to universal law. Comparative law may serve as a model when it comes to direct goals (progress, development, legislative technique), long-term goals (harmonization of law, legal integration, understanding between nations, world peace). Comparative law is of universal character, because it covers the widest range of rights in all countries as a field of study. Comparative law is crucial for the development of legal science, it fulfils a critical function, it questions the legitimacy of rights, criticize the diversity of functions, contents and methods. This method of scientific analysis is a critical scientific scepticism that leads to a mutual understanding in the international community.

The concept of regulation in accordance with the French doctrine is perhaps the most important concept, which has been transposed from Anglo-Saxon culture to civil law culture.

In general, that was the case of "regulations" that were originally used to regulate the economy. Some authors have argued that regulation is an instrument of replantation, which does not explain the concept of Anglo-Saxon "regulation" (undoubtedly).

Part of the doctrine wonders about the effectiveness of regulation and particularly the effectiveness of supervision and the proper response, such as short-term speculation.

Reflection on the notion of regulation makes it possible to find the role of comparative and interdisciplinary research (law and economics) on common ground, where the current financial market law is based. Regulation as notion is similar to the process of making regulations, because the specificity of regulation lies in its content – it encompasses both hard law and soft law – and in the decisive role that supervisory authorities play both in the development and supervision of regulations.

In the United States, regulatory systems are created to test entities, practices, businesses or markets. The purpose of regulation is to force coherent and homogenous activity so as to create uniform practice. The FCA in GB defines regulatory system as business instructions or other

\textsuperscript{36} P. Amselek, L’évolution générale de la technique juridique dans les sociétés occidentales, RDP, 1982.
\textsuperscript{37} E. Bouretz, La défaillance de la régulation financière, RD. banc. et fin., N°5, Septembre 2009, dossier 26, N°7.
entities that act on the basis of statutes, including the rules and other norms, codes and case law, without excluding direct legislation such as EU ordinance.

Regulation is a key term for globalization. It is not yet known whether the law-making process in the form of regulation will turn out to be durable and whether the global legal order in search of other tools to influence the economy will not come up with another instrument of influence. In modern economics, the state has, for some time, a great deal of pressure from the market to release sectors that are under pressure from the public authority to some sectors of the economy, leaving the state monopoly behind and protecting and strengthening competition. In this context, regulation has emerged as a fashionable term as a set of techniques that allow the emergence and maintenance of the economic balance required by the market when it can’t sustain itself.
Abstract: In the European Union the number of succession cases with a foreign element is growing. One of the problems which occurs in practice, while solving such matters, is the issue of documenting the rights to the succession in a foreign state by a person who has a legal interest in it. Thus, a basic task of the European legislator is to ensure a quick and cheaper examination of cross-border succession matters. The implementation of this task requires that beneficiaries, enforcement legatees, executors of a will and administrators of the estate could easily prove their status and rights in another Member State. The European Certificate of Succession undoubtedly constitutes such an attempt to facilitate the achievement of this goal. The topic of the dissertation is a legitimate role of the succession certificate. Because of a limited framework of the study, the comments provided should not be treated as exhaustive arguments in the matter. My aim was rather to signal certain issues of evidentiary nature connected with the EU document and willingness to provoke a wider discussion in this subject.

Keywords: European Certificate of Succession, Succession Regulation No. 650/2012, inheritance, succession, bequeather, beneficiary, legitimate function

Einführung


Gemäß dem englischen Recht wird der Nachlass zuerst unter die Verwaltung eines durch den Erbnachlasser im Testament genannten executor übergeben und mangels einer solchen Verweisung - eines durch das Gericht genannten administrator. Das trust-Verhältnis muss dabei immer mittels einer speziellen Bescheinigung bestätigt werden (grant of probate oder letter of administration)3.


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4 M. Ferid, Le rattachement autonome de la transmission successorale en droit international privé, Res. des cours 1974, Band 142, S. 71 ff.


Das Auftreten von o.g. Urkunden in der europäischen Praxis stellt jedoch keinen Nachweis für die einheitliche Form, gleiche Rechtskraft oder einheitliche Zuständigkeit von Erbschaftsorganen für deren dar. Bezugnehmend auf die zunehmende Migration, welche mit dem freien Kapital-, Personen- und Vermögensverkehr sowie Wohnungs- und Arbeitsfreiheit ²⁰

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⁵ K. Peroń, Zarząd spadkiem w systemach prawnym kręgu germanskiego, Rejent 2006, Nr 2, S. 152 ff.
⁸ Amtsblatt der Europäischen Union L. 2012, Nr. 201, Pos. 107 n.F.
zusammenhängt, es wurde beschlossen, die Erbschaftsurkunden innerhalb der Europäischen Union zu vereinheitlichen. Diese Aufgabe sollen die Europäischen Nachlasszeugnissen erfüllen.

Der Inhalt des Europäischen Nachlasszeugnisses


Das Europäische Nachlasszeugnis wird zwecks dessen Vorlegung in einem anderen Mitgliedsstaat ausgestellt (Art. 62 Abs. 1 der Verordnung). Dessen Verwendung ist jedoch fakultativ (Abs. 2). Es ersetzt auch nicht die Innenurkunden, welche bisher zu ähnlichen Zwecken in den Mitgliedsstaaten der EU verwendet wurden. Ein Nachlasszeugnis ist dabei ein einheitliches Akt auf der Unionsebene, welches die Rechte auf die Erbschaft in allen Mitgliedsstaaten belegt, mit der Ausnahme von Großbritannien, Irland und Dänemark, welche bei der Annahme der Erbrechtsverordnung nicht tätig waren, daher weder durch diese Verordnung gebunden noch zu ihrer Anwendung verpflichtet sind (Motiven 82 und 83 der Prämambel zu der Erbrechtverordnung)12.

Gem. Art. 63 Abs. 1 der Verordnung Nr. 650/2012 kann das Europäische Nachlasszeugnis nicht nur durch die Erben, sondern auch durch die Berechtigten aus dem Vermächtnis, welche über direkte Rechte auf den Nachlass verfügen, Testamentsvollstrecker und Nachlassverwalter, die in einem anderen Mitgliedstaat ihren Status belegen müssen oder entsprechend: ihre Rechten als Erben oder Vermächtnisnehmer durchsetzen oder ihre Berechtigungen als Testamentsvollstrecker oder Nachlassverwalter ausführen müssen, verwendet werden. Mit dieser Urkunde kann u.a. folgendes belegt werden: der Status und die Rechte des Erben oder


Das Zeugnis enthält folgende Angaben, soweit dies für die Zwecke, zu denen es ausgestellt wird, erforderlich ist:

- die Bezeichnung und die Anschrift der Ausstellungsbehörde;

- das Aktenzeichen;

- die Umstände, aus denen die Ausstellungsbehörde ihre Zuständigkeit für die Ausstellung des Zeugnisses herleitet;

- das Ausstellungsdatum;

- Angaben zum Antragsteller: Name (gegebenenfalls Geburtsname), Vorname(n), Geschlecht, Geburtsdatum und -ort, Personenstand, Staatsangehörigkeit, Identifikationsnummer (sofern vorhanden), Anschrift und etwaiges Verwandschafts- oder Schwägerschaftsverhältnis zum Erblasser;

- Angaben zum Erblasser: Name (gegebenenfalls Geburtsname), Vorname(n), Geschlecht, Geburtsdatum und -ort, Personenstand, Staatsangehörigkeit, Identifikationsnummer (sofern vorhanden), Anschrift im Zeitpunkt seines Todes, Todesdatum und -ort;

- Angaben zu den Berechtigten: Name (gegebenenfalls Geburtsname), Vorname(n) und Identifikationsnummer (sofern vorhanden);

- Angaben zu einem vom Erblasser geschlossenen Ehevertrag oder, sofern zutreffend, einem vom Erblasser geschlossenen Vertrag im Zusammenhang mit einem Verhältnis, das nach dem auf dieses Verhältnis anwendbaren Recht mit der Ehe vergleichbare Wirkungen entfaltet, und Angaben zum ehelichen Güterstand oder einem vergleichbaren Güterstand;

- das auf die Rechtsnachfolge von Todes wegen anzuwendende Recht sowie die Umstände, auf deren Grundlage das anzuwendende Recht bestimmt wurde;

- Angaben darüber, ob für die Rechtsnachfolge von Todes wegen die gewillkürte oder die gesetzliche Erbfolge gilt, einschließlich Angaben zu den Umständen, aus denen sich die Rechte und/oder Befugnisse der Erben, Vermächtnisnehmer, Testamentsvollstrecker oder Nachlassverwalter herleiten;

**Ratio legis des Europäischen Nachlasszeugnisses**


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16 M. Zalucki, [in:] Unijne Rozporządzenie..., S. 286-287.


Die Einführung eines neuen Rechtsinstruments zu den Zwecken der Begründung der Rechtsnachfolge von Todes wegen sowie anderen Begünstigten aus der Erbschaft hängt vor allem mit der Tatsache zusammen, dass die staatsinternen Instrumente, deren Verkehr in der Verordnung gewährleistet würde, nur die Auswirkungen haben, welche ihnen laut der Rechtsordnung eines Ursprungmitgliedstaates zustehen. Dies betrifft insbesondere die

rechtlichen Voraussetzungen, welche aufgrund eines solchen Instruments entstehen, Schutz des guten Glaubens der Drittpersonen sowie das Verfahren, in dem Einwände gegen eine Urkunde erhoben werden können.

Ein Vorteil des Europäischen Nachlasszeugnisses ist die Erledigung aller betreffenden Angelegenheiten in einem Rechtsakt, was den Berechtigten die Gewinnung einer Urkunde erleichtern soll, welche ihren Status bestätigt. Ein einheitliches Prozessinstrument soll auch die Erbschaftsformalitäten in Bezug auf das zum Nachlass gehörende Vermögen, welches in verschiedenen Mitgliedstaaten belegen ist beschleunigen, indem den Erben oder Vermächtnisnehmern ein Verfahren zur Verfügung gestellt wird, in welchem sie ihre Rechte in verschiedenen Mitgliedstaaten, welche die Verordnung Nr. 650/2012 anwenden bestätigen können\(^\text{20}\). Ein zusätzlicher Faktor, welcher zu der Einführung des Europäischen Nachlasszeugnisses beigetragen hat, ist die wesentliche Diversität von staatsinternen Erbschaftsverfahren und bei manchen Mitgliedstaaten der Mangel an Prozessinstrumenten welche die ausreichende Sicherheit des Rechtsverkehrs *mortis causa* gewährleisten\(^\text{21}\).

### Die Beweisfunktion des Europäischen Nachlasszeugnisses

In der Literatur wird betont, dass das Europäische Nachlasszeugnis vor allem die Beweisfunktion hat. Dies wird in dem Motiv 71 der Präambel für die Verordnung Nr. 650/2012 bestätigt, nach welchem es als solches keinen vollstreckbaren Titel darstellen, aber Beweiskraft besitzen soll. Es wird daher angenommen, dass es ordentlich den Sachverhalt bestätigt, welcher aufgrund des anzuwendenden Rechts für die Rechtsnachfolge von Todes wegen oder eines anderen Rechts, welches für die bestimmten Fragen von Bedeutung ist ermittelt wurde, wie die materielle Wirksamkeit des Testaments oder einer anderen Verfügung von Todes wegen. Neben der Beweisfunktion, gewährleistet das Europäische Nachlasszeugnis den Schutz den Personen, welche Rechtsgeschäfte mit den dort genannten Personen abschließen. Zusätzlich erfüllt es eine Registerfunktion, da es eine Grundlage für die Eintragung des erworbenen Erbschaftsvermögens oder einer berechtigten Person in das zuständige staatsinterne Register darstellt\(^\text{22}\).

Die Hauptaufgabe des Europäischen Nachlasszeugnisses ist jedoch zweifellos die Bestätigung der Rechten von den in Art. 63 Abs. 1 der Erbrechtverordnung genannten Personen. Es geht vor allem um die Erben, Vermächtnisnehmer, welchen direkte Rechte auf die Erbschaft zustehen, die Testamentsvollstrecker oder Nachlassverwalter\(^\text{23}\).

Alle oben genannten Begriffe haben einen autonomen Charakter. Dieser Umstand wird durch eine begründete Rechtsprechung des Europäischen Gerichtshofs bestätigt, laut welcher sollen die Begriffe des europäischen Rechts unabhängig von den Begriffen interpretiert werden, welche in diesem Bereich in den internen Rechtsordnungen der Mitgliedstaaten funktionieren\(^\text{24}\). Solche Begriffe brauchen dabei auch nicht mit der Auslegung von Begriffen aus den anderen Vorschriften es europäischen oder internationalen Rechts vereinbar zu sein. Das Europäische Gerichtshof betont gleichzeitig den Bedarf, auf dem ganzen Hoheitsgebiet der Europäischen Union (gesellschaftlichen, supranationalen Ebene) eine autonomische und einheitliche

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20 Vgl. Motiv 67 der Präambel der Erbrechtsverordnung.
Begriffsauslegung anzuwenden, unter der Berücksichtigung deren Situationskontext. Sowohl das Gebot der einheitlichen Anwendung des Unionrechts als auch die Gleichheitsprinzipien weisen darauf hin, dass einem Inhalt einer aus dem europäischen Recht stammenden Norm, welche auf keine Rechtsordnung eines Mitgliedstaates konkret verweist, für die Bestimmung dessen Bedeutung und Umfang in der ganzen Union eine autonome und einheitliche Auslegung auferlegt werden soll, welche in der Anlehnung an den Zweck der bestimmten Regelung ermittelt werden soll 25.


Überzeugend ist die Ansicht, dass gemäß der Verordnung sind auch die Erben diejenigen Begünstigten, welche nach dem System von common law das Erbschaftsvermögen über einen personal representative erlangen. Solche Ansicht wird durch das o.g. Gebot der autonomen Auslegung des betreffenden Begriffs in dem Gemeinschaftsrecht begründet. Es scheint, dass die Einschränkungen, welche sich bei der Verwaltung der Erbschaft durch den personal repräsentative ergeben, auf dem Zeugnis stehen sollen 27.


Die Vorschrift des Art. 68 Buchst. n der Verordnung Nr. 650/2012 verlangt, dass in dem Nachlasszeugnis die Beschränkungen der Rechte von Erben oder Vermächtnisnehmern, welche sich aus dem anzuwendenden Recht in Bezug auf die Rechtsnachfolge von Todes wegen oder die Verfügung von Todes wegen ergeben, angegeben werden. Obwohl es sich aus dieser

29 M. Margoński, Charakter prawny..., S. 13.
Vorschrift nicht unmittelbar ergibt, welche Beschränkungen gemeint sind, scheint es hier, dass es sich vor allem um die nicht erfüllten Vermächtnisansprüchen handelt\textsuperscript{30}.

Das Europäische Nachlassschein kann letztendlich die Rechten der Testamentsvollstrecker und Nachlassverwalter bestätigen. Der Begriff des Testamentsvollstreckers bedeutet eine Person, welche gemäß dem Willen des Erblassers die Kompetenzen zustehen, die mit der Eröffnung des Erbfalls zusammenhängende Rechtsverhältnisse zu regeln, insbesondere, die Kompetenz über das Nachlassvermögen zu verwalten, unabhängig von dem Willen der Erben. Es handelt sich hier sowohl um den Testamentsvollstrecker gemäß den kontinentalen Rechtsordnungen als auch um einen executor, welcher in den Vorschriften von \textit{common law} erscheint. Dagegen wird als Nachlassverwalter eine Person verstanden, welche für die Verwaltung über das Erbschaftsvermögen bestellt ist, deren Kompetenzen sich nicht nach dem Willen des Erbnachlassers, sondern nach einer Rechtsnorm oder gerichtlichen Entscheidung richten. Es wird sich üblicherweise um einen kontinentalen Nachlasskurator oder einen angelsächsischen \textit{administrator} handeln\textsuperscript{31}.

\textbf{Teilzeugnis}

Auf dieser Stelle soll überlegt werden, ob ein Nachlasszeugnis die Erben immer vollständig legitimieren soll. Im primären Entwurf der Verordnung wurde nämlich eine Möglichkeit der Ausstellung von Teilzeugnissen vorgesehen\textsuperscript{32}. In der Endversion wurde jedoch solche Möglichkeit im Text der Verordnung nicht erfasst.

Nichtdestotrotz gemäß der Vorschrift aus Art. 63 Abs. 2 der Verordnung Nr. 650/2012 kann das Nachlasszeugnis für die Bestätigung einer oder mehreren Aspekten verwendet werden, welche in dieser Vorschrift genannt werden. Demnach scheint es, dass das Nachlasszeugnis sich auf die Belegung einiger mit dem Erbfall verbundenen Aspekte beschränken kann.

Bezugehmend auf die legitimierende Funktion des Nachlasszeugnisses bin ich der Meinung, dass es unbegründet wäre, nur einigen Erben oder Vermächtnisnehmer, welchen das Recht nur auf einen Vermögensgegenstand oder Vermögenswert zusteht, mit dem Nachlasszeugnis zu legitimieren. Solches unvollständige Teilschein könnte für die anderen Teilnehmer des Rechtsverkehrs irreführend sein, insbesondere für diejenigen, welche in den anderen Mitgliedstaaten der EU ihren Aufenthaltsort haben.

Die Norm aus Art. 63 Abs. 2 der Erbrechtsverordnung lässt dagegen die Bestätigung der Rechte von dinglichen Vermächtnisnehmer ohne die Berücksichtigung der Erben zu. Das Europäische Nachlasszeugnis kann analog auf die Bescheinigung von lediglich einigen Fällen des Erwerbs durch die dinglichen Vermächtnisnehmer, z.B. eines Vermächtnisses aus mehreren anderen verschiedenen Vermächtnissen hindeuten. Ziemlich oft wird auch mit dem Nachlasszeugnis allein der Testamentsvollstrecker und der Nachlassverwalter legitimiert, mit der Auslassung der Erben, die oft nur infolge der Handlungen der o.g. Rechtssubjekten ermittelt werden können was auch zeitaufwendig sein kann\textsuperscript{33}.

Bei der Überlegung der Ausstellung des Teilzeugnisses soll jeweils eine außerordentliche Vorsicht bewahrt werden. In der Literatur wird betont, dass „Vorsicht immer dort geboten ist, wo der Antrag auf die Ausstellung eines Teilzeugnisses zum Missbrauch durch die dort genannten Personen führen könnte. In der Situation, in welcher der Erbe die Ausstellung des

\textsuperscript{32} Art. 39 des Entwurfes der Verordnung, KOM (2009) 154.
\textsuperscript{33} M. Margoński, \textit{Charakter prawny...}, S. 17.
nur auf die Erbschaft eingeschränkten Nachlasszeugnisses beantragt, welches die
dazugehörenden Vermächtnisse auslässt, sollen die Einschränkungen aus den Vermächtnissen
im Inhalt des Nachlasszeugnisses berücksichtigt werden gem. Art. 68 Buchstabe n. der
Erbrechtsverordnung. Ähnlich sieht es aus, wenn ein Erbe die Ausstellung des Zeugnisses
beantragen würde, welches nur seine Rechte ausweist jedoch gleichzeitig ein
Testamentsvollstrecker genannt wurde, der jedoch durch das Zeugnis nicht legitimiert sein
könnte. Auch in solchem Fall soll das Zeugnis eine Anmerkung über die Bestellung eines
Testamentsvollstreckers beinhalten, und auf die sich aus der Verfügung von Todes wegen oder
Erbrechtsordnung ergebende Einschränkungen der Erben durch diesen Testamentsvollstrecker
hinweisen.\(^{34}\)

Es scheint dagegen weder möglich noch begründet, die Wirkung des Zeugnisses lediglich auf
das in dem bestimmten Mitgliedstaat gelegte Vermögen einzuschränken. Eine Ausnahme soll
die Situation darstellen, in welcher die Gerichtszuständigkeit gem. Art. 10 Abs. 2 der
Verordnung Nr. 650/2012 entschieden wird. In solchem Fall ist die Gerichtszuständigkeit
lediglich auf das Vermögen beschränkt, welches sich auf dem Hoheitsgebiet eines bestimmten
Mitgliedstaates befindet. Analogisch wird es bei der Einschränkung der Gerichtsbarkeit gem.
Art. 12 der Erbrechtsverordnung in dem Fall des Ausschlusses aus dem Umfang des Zeugnisses
der Vermögensgegenteile, welche sich in einem Drittstaat befinden, welcher die Verordnung
Nr. 650/2012 nicht anwendet.\(^{35}\)

Schlussfolgerung

Zweifellos hat das Europäische Nachlasszeugnis eine Reihe von diversen Funktionen, von der
Schutzfunktion bis zur Registerfunktion. Meiner Meinung nach ist jedoch die wichtigste
Funktion dieser Urkunde die ausgebaut legitimiende Funktion, welche mit mehreren
Aspekten von Erbfällen zusammenhängt.

Die Bedeutung des Nachlasszeugnisses wird umso größer, weil die Norm des Art. 69 Abs. 1
der Verordnung Nr. 650/2012 dem Nachlasszeugnis die Gültigkeit in allen Mitgliedstaaten
zuspricht, welche diese Verordnung anwenden. Die Rechtsfolgen dieser Urkunde treten dabei
automatisch und unbestritten ein und die Erbrechtsverordnung keine Legalisierungsverfahren
für dieses Zeugnis mehr vorsieht.

Bei der Ausstellung des Nachlasszeugnisses soll jedoch immer sehr vorsichtig gehandelt
werden, insbesondere in den Fällen, in welchen der Erbe, dinglicher Vermächtnisnehmer
Testamentsvollstrecker oder Nachlassverwalter die Einschränkung des Inhalts des Zeugnisses
oder die Ausstellung des Teilzeugnisses beantragt haben.

Zusammenfassend, es scheint, dass die Einführung einer einheitlichen Urkunde für das ganze
Unionsbereich (mit der Ausnahme von Großbritannien, Irland und Dänemark), welche die die
Rechtsnachfolge von Todes wegen bestätigt, in der nahe liegenden Zukunft die Gewinnung
der die Begünstigten aus dem Nachlass legitimierenden Urkunden erleichtern und dadurch
auch beschleunigen. Zweifellos wird die Ausstellung eines Nachlasszeugnisses immer bei den
Erbfällen mit grenzüberschreitendem Bezug begehrt.

\(^{34}\) M. Margoński, *Charakter prawny...*, S. 17.
\(^{35}\) A. Dutta, [w:] Münchener Kommentar..., Art. 64, Nb 3-7.
Edyta Sokalska*, The Crisis of Representative Democracy – Deliberative Democracy as the Legitimization of State and Local Authorities

Abstract: Public disappointment with the effectiveness of representative democracy, the alienation of citizens resulting from the feeling of the illusory influence on politics, and dissatisfaction with the negligence of decisions stimulated the search for the solution. The mechanisms of current democracy have not proved to be effective enough to be continued without any modernization concerning the increase of social legitimacy. The response to the crisis of representative democracy in the 21st century may be deliberative (participatory) democracy. Deliberative democracy is one of the potential directions of development of social organization. The search for opportunities to improve the current system results from the incompatibility of the present solutions to the times we live in. A significant impact on the devaluation of the system of representative democracy causes the development of technology, which results in the faster flow of ideas (the internet, the elimination of barriers of communication). Thus, for several years there have been some attempts to create different types of communication platforms on the axis citizens-authorities. Solutions of this type progressively have been entering into democratic practice. Therefore, most probably in the near future there is an expectation of varied platforms of public consultations, especially “public consultations on the Internet”. This will include all administrative levels - from the national (referenda via the Internet), ministerial level (specific consultations within ministries) to the local government (city, district, municipality).

Keywords: participatory democracy, deliberation, consultations, communication, legitimization

Introduction

The questions concerning the most appropriate form of government have been appearing from the establishment of the first state structures. Greek philosophers in antiquity tried to define the ideal political system, the ideal ruler, or the most appropriate law that would have given citizens the power to create an ideal system of government. The quest for the ideal form of statehood is also connected with the problem of legitimization of power. The issue of legitimization of power in a modern state is present in academic discourse at a variety of disciplines including philosophy of law, philosophy, political science, and sociology. The representatives of science try to answer the question how to making political authority trustworthy and legitimate. Rational justification was born in the Enlightenment era, contributing to shaping a vision of the future based on rational assumptions through critical analysis supported by verified truths derived from experience. Presently, philosophical reflection concerns the rationality and justice of political power in a world in which the universality of principles, norms and reason have been challenged1.

From the time when democracy has become the leading system of government of the countries of Western culture, it has been undergoing the constant transformation. The changes occur at doctrinal and institutional levels. The doctrinal level focuses on axiological justifications

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1 See, for example, Magdalena Żardecka-Nowak, Demokracja deliberatywna jako remedium na ponowoczesny kryzys legitimizacji władzy 29-30, Teka Kom. Polity. i Stos. Międzynar. – OL PAN (2008).
seeking to understand the meaning of key ideas of democracy. The second level concerns the organizational and institutional forms of democracy. In real political actions there are numerous dilemmas regarding the reconciliation between ideological and procedural plane. There could be mentioned here some issues related to the ambiguity of the contents of ideas connected with democracy: respecting the rights of minorities; the effectiveness of the decisions; the alienation of citizens who feel the illusory influence on the course of politics.

Contemporary issues concerning the best form of government can be reduced to the search for the most appropriate form of democratic system. Increasing dissatisfaction with the current form of democracy stimulates a constant trawl for the way to improve it. Democratic transformations take place in both: the doctrinal (where perceptions pertain to the key concepts of democracy and axiological reasoning) and institutional aspects. In the past century, in the practice of democratic European states, indirect procedural representative democracy was dominated by the institutional censorship, the exercise of citizens' electoral rights, and the control over the activities of representative bodies by the voters. The public disappointment with the effectiveness of this form of government, the alienation of citizens resulting from the feeling of illusory influence on politics, and dissatisfaction with the negligence of decisions stimulated the search for the solution to the crisis of representative democracy. The mechanisms of the current democracy have not proved to be effective enough, to be continued without any modernization concerning the increase of social legitimacy. The response to the crisis of representative democracy in the 21st century may be a deliberative (participatory) democracy. Deliberative democracy is one of the potential directions of development of the system of social organization. The search for opportunities to improve the current system results from the incompatibility of the present solutions to the times we live in.

The subject of this article is an attempt to characterize participatory democracy as a developing political form in the contemporary European states, with its advantages and disadvantages and public dialogue as an element of legitimation of power. In the beginning there will be presented some characteristics of deliberative democracy. Public dialogue and its forms which emphasize the participation of citizens in decision-making process are important aspects of deliberative democracy evolving today. So, mentioned above issues will be discussed in the second part of the publication, with particular emphasis on their significance in the Polish political system.

The literature on the trends concerning the development of deliberative democracy and the forms of social dialogue is quite impressive; particularly the publications of John S. Dryzek and James S. Fishkin are very valuable. It is also interesting to consider that such eminent philosophers as Jurgen Habermas and John Rawls emphasize the value of communication in a community as a sphere in which an autonomous individual has the opportunity to engage in common values and maximize the agreement through communication. The publications of Marek Rymsza, Tomasz Schimanek, Grzegorz Makowski, Anna Krajewska, and others in the field of Polish science can be mentioned here. It is also important to emphasize the importance of the reports of research teams in some programs financed by the European Union. Unfortunately, the modest scope of the article does not allow for exhaustive treatment of the subject, and mainly some Polish state experience will be taken into account.

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2 For more see Giovanni Sartori, Teoria demokracji, passim (1998).
3 See, for example, John S. Dryzek, Discursive Democracy: Politics, Policy, and Political Science (1990); Jurgen Habermas, Faktyczność i obowiązywanie, in: Teoria dyskursu wobec zagadnień demokratycznego państwa prawnego (2005); idem, Obywatelstwo a tożsamość narodowa. Rozważania nad przyszłością Europy (1993); John Rawls, Teoria sprawiedliwości (1994).
4 See the works included in Bibliography.
I. The benefits and flaws of participatory democracy

The concept of deliberative democracy emerged on a large scale in the 1980-s and has rapidly become the subject of the scientific discussion on philosophy of law and in political and sociological thought. The popularizer of the term of deliberative democracy became John S. Dryzek who manifested that the deliberate turn in the theory of democracy took place in the last decade of the XX-th century. This process was conceived in terms of the legitimacy of democracy thank to participation of citizens in active deliberation as a part of collective decision-making. He is of the opinion that emphasis on deliberation is not a new phenomenon because “antecedents can be found in the polis in ancient Greece, in political theory of contributors to the Western canon such as Edmund Burke and john Stuart Mill, and theorists from the early twentieth century such as John Dewey (1927). Still prior to 1990-s, the term deliberative democracy was used but rarely; the term was invented by Joseph Bessette (1980), and given impetus by Bernard Manin (1987) and Joshua Cohen (1989)”\(^5\).

Dryzek claims that „the final decade of the second millennium saw the theory of democracy take a strong deliberative turn. Increasingly, democratic legitimacy came to be seen in terms of the ability or opportunity to participate in effective deliberation on the part of those subject to collective decision. (Note that only the ability or opportunity to participate is at issue; people can choose not to deliberate.) Thus claims on behalf of or against such decisions have to be justified to these people in terms that, on reflection, they are capable of accepting”\(^6\). Deliberation in reception of John S. Dryzek is a social process distinguished from other forms of communication, open to the possibility of changing positions, preferences or views through interactions between participants of deliberation during its duration\(^7\). He also states that deliberative democracy can be placed fairly close to discursive democracy, but they are not synonymous, and „deliberation as a social process is distinguished from other kinds of communication in that deliberators are amenable to changing their judgments, preferences, and views during the course of interactions, which involve persuasion rather than coercion, manipulation, or deception. The essence of democracy itself is now widely taken to be deliberation, as opposed to voting, interest aggregation, constitutional rights, or even self-government. The deliberative turn represents a renewed concern with the authenticity of democracy: the degree to which democratic control is substantive rather than symbolic, and engaged by competent citizens”\(^8\). In this context, for Dryzek such philosophers as Habermas or Rawls are the most important liberal theorists and critical theorists of the late XX-th century who “lent their prestige to the deliberative turn by publishing major works in which they identified themselves as deliberative democrats”\(^9\).

It should be taken into account that the other American scholar - James S. Fishkin treats deliberative democracy as a natural consequence of representative democracy. He emphasizes that “much of the history of democratic reform has focused on the extension of political equality to groups that were previously left out because of race, ethnicity, religion, economic status, or gender. These extensions of the franchise are very great accomplishments. They increase the range of persons to whom the equal consideration posited by political equality is applied. Ta the same time the one person, one vote reforms, for the US House and for most state elections

\(^8\) John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, op.cit., 1; idem, *Democratization as Deliberative Capacity Building*, 42 Comparative Political Studies 1379-1402 (2009).
\(^9\) Idem, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, op. cit., 2.
has increased the degree of equality applied to those who are included.” At the same time he adds that these expansions of political equality were accompanied by increase opportunities for political participation combining two fundamental values: “the primary direction of democratic reform not only in the United States but in most of the major Western democracies has been a simultaneous movement in the direction of both increasing political equality and increasing opportunities for mass participation.” However, according to Fishkin, opening up political processes to facilitate mass participation has had an unexpected effect of lessening the realization of the third key value - deliberation.

Experimental forms of social participation in politics have undoubtedly become one of the reasons for the popularity of deliberative democracy. The movement to deliberation was linked to the belief in the possibility of a wider and more oriented participation of citizens in the democratic decision-making process. There appeared the possibility of perceiving the democracy not only as a decision-making mechanism or creation of political elites. The theory of social choice has confirmed that politics, as a purely strategic action, is susceptible to manipulation. Traditional social structures broke down and the traditional forms of life disappeared.

It is significant that greater legitimacy of collective decisions is enlisted among the benefits of deliberative democracy as a new form of democracy. The decisions are based on broad and understandable discussion; therefore they are more appreciated and respected. Multi-faceted consideration of the problem, the possibility of understanding of various positions, and minimizing the divisions of citizens by viewing things in a broader context go beyond the particular interests of social groups and individuals. The process of deliberation fosters the formation of partner relationships among varied groups and authorities.

The proponents of deliberative democracy see the field for reaching consensus on important social issues in creating situations in which citizens have the opportunity to debate or deliberate some impact on political decisions. Citizens are able to undertake such actions which will contribute to a greater legitimacy of political decisions through various forms of social and civil dialogue. Thank to free debates in which significant differences may be expressed, even if there will not be any possibility to reach a full agreement concerning the subject area, they will at least point out the areas of controversy, which can be identified and solved effectively in the future. Deliberative politics in a democratic state implies a model of civil society where, thank to various forms of social activity, citizens are aware of their rights, not only in the social discourse, but also in the realm of policy at both central and local levels. The basic forms of dialogue are social and civil consultations and other forms of dialogue.

In addition to the above-mentioned benefits of implementing deliberative policy, it should be also noted that the process of involvement of citizens and their organizations in decision-making processes has some positive effects for the state administration itself. Social organizations and citizens define serious social problems and provide detailed information that
can influence the government's final decisions. In this context, there should be also pointed out that social participation sometimes encounters some difficulties and it is not devoid of some flaws. Participation of citizens in decision-making process is neither easy nor cheap. It sometimes faces many problems, as lack of public knowledge of the programs being implemented, slow decision-making procedures, or representation of narrow interest groups rather than public interest. In certain situations, it is better to limit participation in decision-making process rather than encourage it. As James S. Fishkin assumes, “our pursuit of participatory equality has been seriously flawed, even in terms of the two values it has focused on, participation and equality. Our actual practices of political participation suffer from participatory distortion - the people who choose to participate are unrepresentative of entire electorate. In the United States, those who actually participate are generally more white, more prosperous, and more educated by far than those who do not. In that sense, effective political equality has been achieved far less than the breakdown of formal barriers to participation (in terms of voting rights) would suggest.” He adds that a strong claim for political equality would attempt to minimalize participatory distortion, making those who choose participation as much like the entire electorate as possible.

II. Public dialogue

It’s worth mentioning that the classical instruments of participatory democracy are: elections, referendum, social dialogue and civil dialogue. It is generally accepted that another tool of social participation based on communication are social dialogue and civil dialogue, which sometimes are described together as public dialogue. They entertain political deliberation, which is the element of the participatory democracy. Deliberation is a form of discourse between various participants in a public debate. Its aim is to achieve the previous objective - usually a consensus on specific issues or political issues that require the decision. Hence, the deliberation could be defined as a form of communication of an argumentative character, open, free from coercion, guaranteeing to all participants equal access, as well as communication oriented to understand specific issues and achieve reasonable consensus for its evaluation, based on knowledge and aiming at implementing the common good.

The concept of social dialogue has emerged as the idea of peaceful conflict resolution in the collective labor relations with the participation of trade unions and employers' organizations.

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15 Dagonir Długosz and Jan Jakub Wygański are the authors of the participatory guide in which they identify six outcomes for the government: the society is informed better about the plans of government; the needs of the citizens are better understood, and thus satisfied by public services; more precise definition of priorities and better distribution of resources; quick information about emerging problems before they grow to large size; better profile of a public problems to solve; more credible justification and support for public authorities, Dagomir Długosz, Jan Jakub Wygański, Obywatele współdecydują. Przewodnik po partycypacji społecznej 12 (2005).


17 Ibidem, 50.

18 It should be emphasized that the provisions of the Polish Code of Administrative Procedure grants citizens and social organizations the ability to submit, in a special procedure, complaints, motions, petitions, letters, protests related to public administration. Citizens may also carry out direct action, such as happenings, blockades, demonstrations, etc., Jerzy Hauser, Jarosław Gömiński et al., Komunikacja i partycypacja społeczna 36 (1999).

(autonomous bilateral dialogue), as well as involving public authorities (trilateral dialogue); civil organizations - associations and foundations working for social interests and public interest; representatives of local governments as the representation of local labor and economic communities, as well as their competence in the performance of public duties\textsuperscript{20}. Over time, the formula of social dialogue has evolved, it turned out that in increasingly diverse and modern societies coercion of social interests cannot be reduced to a single dimension appointed by the labor relations. It became increasingly clear the need to expand social dialogue with elements of civil dialogue. The urgency to widen social dialogue with the elements of civil dialogue has begun more visible. That process of the arrangement of the directions of social development emerged not only at national, but also at regional and local levels. Its aim is to address the interests of various social groups in the process of taking decisions, determining the strategic objectives and development programs.

The participants of the civil dialogue are the government side composed of representatives of the executive and its bodies, and citizens organized in institutional forms of activity and operating within specific entities, for example social organizations as NGOs (non-governmental organizations) operating at social, economic, ideological, professional or territorial levels. So, civil dialogue goes beyond the problems associated only with the workplace. It may cover all issues related to the place and the mode of citizens’ action in the state and society. The state plays the major regulatory role. It provides and implements the law, establishes the spheres of dialogue, through legislative acts it defines the objectives, principles, subjective and objective scope and the form and technique of dialogue\textsuperscript{21}.

In the research of Elodie Fazi and Jeremy Smith civil dialogue includes such features as: „an interaction between public institutions and civil society organizations, rather than a unilateral relationship. It thus goes beyond information and communication, and is based on mutual recognition and responsiveness; civil dialogue covers various degrees of formalization, ranging from informal to legally recognized structures, from ad hoc to continuous character; civil dialogue also covers different degrees of involvement from civil society organizations, ranging from information to consultation and active participation; civil dialogue takes place alongside the whole policy-making process which includes the following phases: agenda setting, policy definition decision-making, implementation, evaluation, feedback; it involves civil society organizations acting in the public interest”\textsuperscript{22}.

Civil society organizations in civil dialogue play the role of the additional channel of articulation of values, goals, aspirations and the interests of a society. It can be assumed that this dialogue is a systematic process of communication recognized in relatively stable and specific procedures. It can be realized through some instruments such as public consultations\textsuperscript{23},


\textsuperscript{21} Edyta Sokalska, Znaczenie konsultacji społecznych w demokracji partycypacyjnej, 14/3 Opolskie Studia Administracyjno-Prawne 163-176 (2016).

\textsuperscript{22} Elodie Fazi, Jeremy Smith, Civil dialogue: making it work better, op.cit., 95.

\textsuperscript{23} Generally, the consultations take place within the local communities and they serve to optimize decisions. It is justified because the addressee of those decisions is generally a municipal community, and so in fact, the source of authority of the municipal authorities. For more see Grzegorz Makowski, Międzynarodowe standardy partycypacji publicznej na poziomie lokalnym. Analiza wybranych aktów prawa porównawczego 11-23, in: Prawo a partycypacja publiczna, ed. P. Sobiesiak-Penszko (2013);
public hearings, various forums and platforms of understanding where the participants can meet and agree on the reasons and decisions, but under the condition that the participants of these procedures represent not so much the position of an individual but the interests of groups or the organization on behalf of which they occur. Civil dialogue is mainly aimed at strengthening the participation of citizens in public life and increasing the sense of impact on democratic management processes. It promotes socialization of decision-making mechanisms that take into account diverse points of view of social actors; balancing the public interest; preparing the solutions of better quality by obtaining a broader and multidimensional knowledge on these issues; preparing the social partners for the effective implementation of public policy programs and the acquisition of joint responsibility for their implementation; supplementation of traditional forms of controlling in public administration.

In the last decade of the XX-th century (not only in Europe) we can observe the emergence of legislative acts concerning the participation of citizens in public life. It is worth emphasizing that these acts emerge at various levels: local (self-governmental area), state and international. They involve the participation of individuals in the management of various areas such as social issues or ecological security. The role of social participation became increasingly important. It became a necessary condition for social acceptance of a great amount of political decisions. Deliberative democracy became a project aimed at the increase of forms of direct democracy, where social groups and active citizens in the process of debate strive for rational political decisions. This is an attractive state model with its advantages, but it is also exposed to certain risks. The diverse experience of European states is an integral part of their political systems and public life. The diversity of forms of participation gives a real opportunity to shape the policies of a state, region or local government. Dissemination of forms of social participation in Poland is desirable because of the improvement of the quality of representative democracy and making weaken particular interests of political parties.

In the European Union, social dialogue and civil dialogue serve to adapt the economy to the challenges of globalization and the processes of integration. At the same time, their aim is to increase the acceptance for administrative actions related to social and economic reforms. Civil dialogue seems to be less institutionalized than social dialogue. Social consultations are an important form used in civil dialogue. Unfortunately, sometimes they can be subjected to some possible dysfunctions.

Public dialogue in deliberative democracy expresses the will and ability to live together. The debate becomes an important aspect of political life and it is the answer to the crisis of legitimacy in a modern democratic state. Citizens themselves implement solutions in the area of administration, social affairs and economy through their participation in contemporary public dialogue. A significant impact on the devaluation of the system of representative democracy is the development of technology, which results in the faster flow of ideas (the internet, the elimination of barriers of communication). Thus, for several years there have been attempts to create different types of communication platforms on the axis citizens-authorities. Solutions of this type progressively enter into democratic practice. Therefore, most probably in the near

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24 The exchange of information concerning planned, possible solutions can be carried out using the following techniques: complaints and requests, listening to public opinion, public meetings, focus groups, citizen panels, requests for proposals, written consultations; see, Misztal Wojciech, *Dialog obywatelski we współczesnej Polsce* 157-159 (2011).


future there is an expectation of varied platforms of public consultations, especially “public consultations on the Internet”. This will include all administrative levels - from the national (referenda via the Internet), ministerial level (specific consultations within ministries) to the local government (city, district, municipality).

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Abstract: The EU Court of Justice (CJEU) approach to solving cases of clashes of collective bargaining with the freedoms of the internal market is noticeably different from how the same Court resolves clashes of collective bargaining with the rules of economic competition. This difference has been the subject of disputes before the CJEU, but to date it persists despite the tensions that it raises due its practical consequences. The problem lies in the fact that while the CJEU is very accommodating towards the collective bargaining process in antitrust cases, it is strikingly unfriendly in cases involving the freedoms of the internal market. In them, the CJEU constantly assesses the exercise of the fundamental right to collective bargaining and action as a possible exception to the freedoms of movement that could only be justified by an overriding reason in public interest provided its defence passes the strict proportionality test. The study examines whether such a different approach is legally justified and concludes that the real problem lies not so much in the diversity of approaches as such, but in how deep and significant this difference is. In the end, the study seeks to offer a solution that would remove this sharp contradiction and the socio-political tensions that are caused by it.

Keywords: EU Court of Justice, collective bargaining, fundamental social rights, freedoms of the internal market, protection of competition, proportionality test.

Introduction

A comparative analysis fulfilling the title of this study has its roots, at least in part, in a political rather than legal discussion. Since infamous decisions of the CJEU in Viking and Laval cases¹, European left-wing forces and trade unions are searching for a way to safeguard employment rights and standards, especially those collectively negotiated between social partners, against the freedoms of the EU internal market. The European Trade Union Confederation (ETUC) already proposed in 2008 the so-called Social Progress Protocol, which would fundamentally complement the EU primary law on this issue.² Its purpose should be a clear superiority of the exercise of social rights over the exercise of market freedoms when they come into conflict with each other, as it used to be the case in Viking, Laval and other judgments, usually referred to as the “Laval Quartet,” and in which the freedoms of movement prevailed over a fundamental social right.³

¹ The international Transport Workers’ federation and the Finnish Seamen’s Union (Viking), CJEU C-438/05, ECLI:EU:C:2007:772, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, CJEU C-341/05, ECLI:EU:C:2007:809.
² The ETUC proposal from March 18, 2008 says: Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence. See for details: https://www.etuc.org/proposal-social-progress-protocol (last visited July 11, 2017). This key requirement was retained in the later modified text of the Protocol.
³ The Laval quartet contains Viking and Laval judgments plus the CJEU decisions in cases Rüffert, C-346/06, ECLI:EU:C:2008:189 and Commission v. Luxembourg, C-319/06, ECLI:EU:C:2008:350. Only the latter judgment differs from the rest of the “Laval Quartet” in that the CJEU did not examine there the claims arising
A less radical variation of this requirement of trade unions, discussed both in the literature\(^4\) as well as in the CJEU hearings\(^5\), is looking for a way to grant collective bargaining and its results a certain form of immunity from the internal market freedoms such as the one enjoyed by collective bargaining, thanks to the CJEU, from competition law application. Such a solution requires a legal review that would try to answer the question whether and how it is possible in EU law to find reasons why collective bargaining should or should not be treated the same when it comes into conflict with competition rules on one side and with the freedoms of movement on the other.

In the following text, we will first outline how the CJEU treats social dialogue and its results in cases where it harms the principles of free movement and undistorted competition. From the comparison and the difference shown, the question will arise whether and how much it could and should be otherwise. To this end, the links between EU internal market law and EU competition law will be explored so that the possibility of converging the justifications of exemptions from these rules can be considered. In the last part, the implications and practical solutions to the prevailing divergence of the CJEU approaches to situations involving the two aforementioned sets of EU rules will be reflected on.

Conflict of collective bargaining with freedoms of movement and with undistorted competition

The importance and support of social dialogue (collective bargaining) and respect for the diversity of national habits and systems are mentioned in Articles 151 and 152 of the Treaty on the Functioning of the EU (TFEU). The right to collective bargaining and action is also recognised as a fundamental right in Article 28 of the EU Charter of Fundamental Rights.\(^6\) Thus, in EU law, collective bargaining is granted formal recognition. The EU even promises to support this fundamental right of social partners, as well as their right to defend their bargaining positions and the results of their bargaining by collective actions. This legal recognition is in itself a sufficient reason to claim that such a right, when getting into conflict with other protected rights and freedoms, cannot be easily written off as an automatic victim.

Moreover, the clash in the title of this chapter refers to more than the clash with a "strong opponent". The right at stake, including the agreement between social partners as its material expression, is relevant for the present analysis by being able to come into conflict with freedoms of the internal market and with the protection of undistorted competition at the same time, within one and the same CJEU case.\(^7\) This conflict arises because the set of subjects governed by the law of the internal market and by competition law partially overlap. In the name of EU law effet utile, the internal market rules are not applied by the CJEU solely to measures enacted by Member States but also by private subjects to whom it has been given authority - or

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\(^5\) See for instance the AG Trstenjak Opinion in European Commission v. Federal Republic of Germany, CJEU C-271/08, ECLI:EU:C:2010:183, paras 37, 48-68.

\(^6\) Regulation of trade unions’ rights, on the other hand, is explicitly excluded from the EU’s harmonization competence (Article 137 EC, now 153(3) TFEU) and remains also outside the scope of application of the other Treaty provisions, however that “autonomy” must be exercised by the Members States in compliance with EU law, i.e. with the rules of internal market and undistorted competition that both enjoy within EU law the fundamental status of public policy rules.

\(^7\) See for instance the CJEU decision in Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft, C-350/07, ECLI:EU:C:2009:127.
recognised autonomy - to regulate collectively certain types of behaviour. From the other end, the competition rules also apply, via Article 4 (3) TEU (duty of loyalty), to acts that Member States take iure imperii and that force undertakings into anti-competitive behaviour or replace competitive markets with unjustified monopolies.

Of special interest here are the cases where the result of collective bargaining is, for example, a compulsory scheme of employee insurance, whose management is entrusted to a single entity. As a result, this market segment becomes inaccessible to providers of the same service from other EU countries. Then, in a situation where some of the entities involved in the insurance scheme are in the position of undertakings and their agreement simultaneously amounts to a broad scale regulation with a widely negative impact on the freedom of movement, there will be a clash with both types of EU rules. The requirement for a certain consistency of the CJEU’s approach to solving such conflicts therefore imposes itself quite naturally. Although the following comparison will necessarily include cases where there has not been such a cross-check of collective bargaining from the two perspectives in the same judgment, these will always be cases in which organised social partners (or just the employees part of such partnership) by exercising their right to collective bargaining and action challenged either the freedom of movement or the rules of undistorted competition.

To demonstrate how the CJEU resolves the conflict of this right with the freedoms of movement, the aforementioned Viking and Laval judgments will suffice as they are currently referred to by the CJEU as the relevant case law. The factual details of these cases, which are easily traceable, are not that important here because only the way the CJEU adopted to resolve the conflict of collective bargaining and action with freedoms of movement (of services and establishment) matters here. The CJEU in this case law recognises, on one hand, that the EU has not only an economic but also a social purpose. Therefore, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy and that the right to collective bargaining, even the right to take collective action, including the right to strike, are fundamental rights recognised by EU law.

However further on, this socially friendly position is abandoned by the CJEU in its reasoning, and the exercise of a fundamental right is subjected to the one-sided proportionality test as if the freedom of movement is restricted by an “ordinary” barrier. And such a barrier must be, according to the classical proportionality test, appropriate and strictly necessary to achieve (or protect) an overriding reason in public interest, otherwise it cannot prevail over fundamental market freedom. Protection of workers could, according to the CJEU, represent such an overriding reason; however, the action securing it would only be legitimate if the jobs or

9 See for instance the CJEU decisions in Centro Servizi Speditporto, C-96/94, EU:C:1995:308, or in Consorzio Industrie Fiammiferi (CIF), C-198/01, EU:C:2003:430; for the more recent (i.e. post-Lisbon) decisions see, for example Anonima Petroli Italiana SpA, C-183/13 to C-187/13, C-194/13, C-195/14, and C-208/13, EU:C:2014:2147.
11 The cases of the “Laval Quartet” are maybe the most commented decisions of the CJEU in the past decade. The “Laval case” has currently (July 11, 2017) 14 800 000 matches in Google Search, the „Viking case“ has as many as 38 500 000. All Laval Quartet cases have made their way into textbooks of EU law and can thus easily be studied from numerous sources besides, of course, the official Eur-lex database. For the list of major academic comments on the cases see: McCann Adam, The CJEU on Trial: Economic Mobility and Social Justice. European Review of Private Law No 5 (2014), p. 759, note 105.
conditions of employment at issue were jeopardised or under serious threat. The opposite question, whether the exercise of a fundamental freedom pursues any publicly or socially valuable goal is not asked by the CJEU. Therefore, the test is one-sidedly applied only to the exercise of a fundamental right that must justify itself, while the exercise of a fundamental freedom has, in the eyes of the CJEU, an absolute status and does not necessitate any justification. Moreover, the CJEU is quite strict and demanding towards the fundamental right at issue as, for instance, jobs or conditions of employment must be jeopardised or under serious threat to justify the defence of trade unions. No collective action of trade unions would be admissible if its aim is to just strengthen their bargaining position or if it is taken as a preemptive measure.

No wonder such an approach of the CJEU to clashes of collective labour rights with freedoms of the internal market provoked a long series of critical reactions. Formally, a fundamental right is not treated as such and must justify itself in front of the freedom to conduct business (generally speaking). Exclusion of this part of social-labour law from the EU harmonisation powers by Article 153(3) TFEU looks rather insignificant as the limits to Member States’ autonomy are rather narrow and strictly scrutinised by the CJEU. Also, where EU directives are relevant for a case (as the 96/71/EC Directive on posting of worker in services in Laval, or in the more recent case Alemo-Herron the 2001/23/EC Directive safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses) the CJEU submits the right conferred to Member States to introduce a higher standard of protection to the same scrutiny of compliance with fundamental market freedoms. Practically speaking, the model of social peace-making in industrial relations, embedded especially in Scandinavian countries or Germany in their long-standing tradition of collective bargaining, has found itself jeopardised or under serious threat because of this CJEU case law.

For part of our comparison concerning competition law, the pre-Lisbon CJEU judgments in cases Albany, Brentjens and Drijvende Bokken and their post-Lisbon counterparts among CJEU decisions, i.e. the cases Kattner Stahlbau, AG2R Prévoyance and FNV Kunsten, must be taken into consideration. The CJEU recognises in them that it is beyond question that a certain restriction to competition is inherent in collective agreements. Such a restriction of competition could, however, be acceptable as the EU has to not only ensure that competition in the internal market is not distorted but also to develop a policy in the social sphere. It therefore follows from an interpretation of the provisions of the Treaty that agreements entered into in

12 The international Transport Workers´ federation and the Finnish Seamen’s Union (Viking), CJEU C-438/05, ECLI:EU:C:2007:772, paras 80, 81, 83.
14 Mark Alemo-Herron and Others v Parkwood Leisure Ltd. CJEU C-426/11, ECLI:EU:C:2013:521.
the context of collective bargaining that are aimed at improving work and employment conditions are, by virtue of their nature and purpose, to be regarded as not falling within the scope of EU competition law. The opposite approach, i.e. their subjection to competition law articles of the Treaty, would mean, according to the CJEU, that social policy objectives pursued by such collective agreements would be seriously undermined.

Even though the immunity of collective bargaining is not automatic or absolute as the conditions of “nature and purpose” apply, the CJEU only succinctly (just three sentences in Albany judgment\(^\text{18}\)) reviews whether these conditions are satisfied. Surely, a collective agreement directly aimed at a protectionist closure of a sector or something similar, rather disconnected from improvement of work and employment conditions, would disqualify such an agreement from exemption. In a similar vein, the participation of self-employed tradesmen, i.e. of professionals instead of employees, in an agreement would lead to a cartel falling within the scope of Article 101(1) TFEU and not to a collective agreement to which this Article is not applicable. However recently, the CJEU extended this collective bargaining immunity from competition rules also to agreements that are concluded by so-called false self-employed, i.e. by tradesmen or professionals that are only formally independent and provide services to an undertaking under the same conditions as if they were employed and could not enjoy any of the real independence of entrepreneurs.\(^\text{19}\)

Similar openness or even leniency is professed by the CJEU when a collective agreement creates or selects an undertaking to administrate, e.g., an insurance fund into which companies and their employees have an obligation to contribute, and there is a danger that this undertaking abuses its dominant position. A kind of rule of reason test is then applied by the CJEU. The market behaviour of such an undertaking is scrutinised under the auspices of Art 106 TFEU. This scrutiny applies to an undertaking that is being entrusted with a social service of general interest whose provision would be unsustainable under economically acceptable conditions if the undertaking in charge is subject to competitive pressures. Thus, even if collective bargaining leads to a monopoly, such a monopoly can enjoy an exception from EU competition rules.\(^\text{20}\)

Although briefly outlined, the difference between the CJEU’s approach to the conflict of the same (or closely related) collective social-labour right with the rules of free movement and the rules of undistorted competition is sufficiently striking. Certainly, the comparison also shows, one must admit, that the CJEU’s approach to the exemptions from both sets of rules contains elements of the rule of reason or proportionality, since in both types of cases the CJEU recognises the existence of the EU’s economic and social objectives and the need for their complementarity and balanced fulfilment. In both types of cases, the CJEU also inspects the purpose of collective bargaining or of the action to support its results. In the event of a conflict with the freedoms of movement, this purpose should reflect an overriding reason in public interest (e.g. the protection of seriously endangered jobs or conditions of employment). In the event of a conflict with the rules of competition, the purpose should lie in improving work and employment conditions. However, in other essential features, the CJEU’s approach is fundamentally different.

In the event of a collision with the freedom of movement, the CJEU applies a traditional test designed to assess any type of obstacle that may restrict it. Although, in this case, the hindrance is a fundamental right recognised by EU primary law and the CJEU case-law, under the one-
sided proportionality test this right does not receive any special attention in any way, and “the nominal equal ranking of fundamental freedoms and fundamental social rights...is transformed into a de facto hierarchy ”21 (to the detriment of social rights). In the event of a conflict with the competition rules, the CJEU in the Albany decision created ex novo an exception on the basis of the plurality of Treaty objectives that could not have been achieved if agreements between social partners were not conditionally excluded from the application of Article 101 TFEU because a certain restriction of competition is inherent in such agreements. The existence or protection of a fundamental right is not even mentioned in the competition cases, not even in the post-Lisbon decisions when the Charter of Fundamental Rights is already a mandatory part of EU primary law.

Despite this absence of attribution of fundamental status to collective bargaining in competition law decisions, the CJEU approach there could easily be described as very friendly. Contrary to that, the CJEU approach in cases concerning internal market freedoms looks rather unsympathetic regarding the same social partners’ activities and defence of its outcomes. The fact that this difference is perceived as noticeably uneven can be demonstrated on the proposals (so far rejected by CJEU22) to extend the Albany-type exception to cases of clashes between collective bargaining and freedoms of the internal market as well as on the aforementioned Social Progress Protocol that would like to invert the current de facto priority of internal market freedoms into de iure preponderance of fundamental social rights.

How many different regimes of exceptions’ justification?

From the brief comparison of the CJEU’s approach to the two types of clashes, it is clear that the core of the problem lies in the conditions of granting and justifying exceptions from the two systems of rules. Further on, the main goal would thus not be to compare the enforcement of internal market freedoms with the enforcement of competition law in the EU from all possible angles. The aim is to inspect whether there is room and reason for the CJEU to harmonise the exception granting when the collective bargaining clashes with one and the other type of EU rules.

To support the thesis of a substantial convergence or even certain harmonisation of the system of granting and justifying exceptions, two main groups of arguments can be put forward. The first group of arguments is based on the identical targeting of both the internal market and the protection of competition, the second group then, in a consequentialist manner, points to the problem of maintaining a different approach in practice.

The first, purpose-based argumentation provides the following justification. Protocol 27 to the existing Treaties says that “the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted…”. And Article 3 stipulates in paragraph 3 that “The Union shall establish an internal market” and outlines very wide understanding of it, going definitely beyond traditional free movement of goods, persons, services and capital. This wider understanding of the internal market is there for “…sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment…” including in this broad set of internal market features also the scientific and technological advancement, fight

21 Höpner Martin, op cit supra note 4, p. 10
22 The international Transport Workers’ federation and the Finnish Seamen’s Union (Viking), CJEU C-438/05, ECLI:EU:C:2007:772, paras 48-55. Also the AG Trstenjak Opinion in European Commission v. Federal Republic of Germany, CJEU C-271/08, ECLI:EU:C:2010:183, paras 63-68.
against social exclusion and discrimination, promotion of social justice, protection of equality between women and men, solidarity between generations, protection of the rights of the child, promotion of economic, social and territorial cohesion, solidarity among Member States, respect for cultural and linguistic diversity and the safeguard of Europe's cultural heritage.

This coincidence of missions, within the meaning of the Protocol 27, is easy to document e.g. by quoting Mémoires of Jean Monnet\(^{23}\) or by references to the Spaak Report.\(^{24}\) Already the “founding fathers” of European integration took the protection of competition as a necessary measure of negative integration that must safeguard the common market (created by the public policy removal of tariff and non-tariff barriers to trade) against private interests that could divide it anew by their cartels and monopolies. The same logic stipulating that the protection of competition has to support (among other objectives) the maintenance and functioning of the common (today internal) market can be found in the rich CJEU competition case law, from the very first Grundig-Consten decision of 1964\(^{25}\) up to the recent decisions of the post-Lisbon period.\(^{26}\) The accent on the link between the internal market and the protection of competition brought about by the Treaty of Lisbon, even made some authors believe that the protection of competition should nowadays have no other purpose than the achievement of the priority EU objective of internal market.

Some supporters of the identity of missions’ thesis go even further and infer from the broad definition of features and attributes of the internal market set out in Article 3 (3) TEU, as well as from the case law of the European Court of Justice in the field of competition, which refers to welfare or well-being of Europeans\(^{27}\) that the common goal of both sets of rules is welfare or directly social welfare.\(^{28}\) If the EU is to become a highly competitive social market economy, if all the EU’s activities must under the so-called horizontal social clause of Article 9 TFEU take into account requirements linked to the promotion of a high level of employment etc. and if the recent EU strategic documents (like The Roman Declaration of the European Council, Parliament and Commission of March 2017\(^{29}\), European Pillar of Social Rights advocated by the Commission since 2016\(^{30}\)) openly call for "social Europe", such a radical alignment of the two policies is not a fruit of mere speculation. In any case, it can be concluded that collective rights of employees should receive a very similar degree of recognition in competition and free movement case decisions.

Consequentialist argumentation points to the growing overlap of both sets of rules (of internal market and competition protection) described briefly in the previous chapter. The existence of

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\(^{24}\) Rapport de Spaak, Comité intergouvernemental créé par la conférence de Messine, 21. 4. 1956, p. 53-54.

\(^{25}\) Établissements Consten S.à.r.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, CJEU (joined cases) 56 and 58/64, ECLI:EU:C:1966:41.

\(^{26}\) The necessity to sustain the internal market was used in the CJEU competition law decisions (for instance): Football Association Premier League, CJEU C-403/08 and 429/08, ECLI:EU:C:2011:631, paras 139 and 140, Pierre Fabre Dermo-Cosmétique, CJEU C-439/09, ECLI:EU:C:2011:649, para 44, E.ON Ruhrgas AG, CJEU T-360/09, ECLI:EU:T:2012:332, para 146, Deltafina SpA, CJEU T-29/05, ECLI:EU:T:2010:355, para 166, and many others.


cases in which the collective bargaining and, in particular, the limiting nature of its outcomes may hinder access to the market in the same manner as to the competition on that market naturally call for greater consistency. A potential new competitor could perceive restrictions of competition and of free movement as the same kind of a barrier to development of his/her business. In such situations, it would be desirable to avoid conflicting assessments and contradictory decisions on potential exemptions when in the same case a barrier to the free movement and an infringement of competition are considered.31

Although the rules of the internal market and the protection of competition are provided separately in different parts of TFEU and, in the same vein, the TFEU also separately regulates the categories and justifications of possible exceptions to them, it cannot be inferred from the EU primary law that EU legislators created two incommensurable regimes that can never converge. TFEU does not even mention the exercise of a fundamental right as a possible derogation from the freedoms of movement, so the CJEU had to examine (also in Viking, Laval case-law) whether the exercise of the fundamental right to collective bargaining and action corresponded to an overriding reason in public interest.32 Likewise, the CJEU has had to creatively deduce the non-application of the competition rules to social dialogue aimed at improving the working and employment conditions from the plurality of EU objectives, not from any specific treaty clause. The fact that TFEU regulates certain exceptions from the freedoms of movement and others from the prohibition of cartels (which the Commission’s soft law extends also to the assessment of abuses of a dominant position33) does not therefore have to limit the CJEU in adopting a creative approach that would enable the convergence of the two exceptions’ justification regimes.

On the other hand, however, the existing differences between the legal delimitation of the EU internal market rules and the EU competition rules (as well as the standards of their practical implementation) do not allow consideration about the identity or the full harmonisation of their exemption systems. The following examples of differences tell a lot about difficulty of any far-reaching convergence. Competition law usually deals with major structural cases not the insignificant ones while the freedoms of movement are essential also to individuals and the smallest businesses. Thus a number of authors point out that the de minimis rule (and in general all exclusions derived from market share of the relevant market) cannot be transferred from the competition law to cases of restrictions of market freedoms.34 Competition is protected in EU


32 The CJEU extended the scope of free movement exemptions also by introducing a broad category of mandatory requirements that had not been mentioned in the founding Treaties. On top of that it excluded from the free movement of goods requirements the wide area of sales regulations or marketing modalities, if they are indistinctly applicable to domestic and imported goods. See Criminal proceedings against Bernard Keck and Daniel Mithouard, CJEU (joined cases) C-267/91 and C-268/91, ECLI:EU:C:1993:905, paras 16-17.


law against three quite sharply defined types of anti-competitive behaviour (cartels, abuse of dominant position, mergers leading to significant impediment to competition) of undertakings which can sometimes but not always correspond to a certain type of barrier to the freedoms of movement. Conversely, the existence of an internal market barrier is often construed very broadly (see the broad definition of measures having an effect equivalent to quantitative restrictions in Dassonville judgment\textsuperscript{35}), to the extent that the "restriction" remains the “the most controversial concept of internal market law”\textsuperscript{36}. Any harmonized system of exemptions and their justifications would have to face the difficulty of coping with this practical incongruence.

The main difference, however, concerns the importance of the two sets of rules and can be summarised into saying that while the competition rules are about certain patterns of trade, the market freedoms are about the trade as such.\textsuperscript{37} This qualitative difference can be well shown in the comparison with the situation at an individual state level. States commonly recognise that market competition is not the optimal solution for all types of sectors or activities (even though three decades of neo-liberal economic ideology reduced the scope of such recognition) and this partial exclusion or regulation of competition does not jeopardise the cohesion or market character of the national economy, although it may have an impact on efficiency or the pace of innovations.\textsuperscript{38} Conversely, restrictions on the movement of goods, services, workers, companies or capital within the same national economy would certainly be the cause of its decomposition and of the loss of its free-market attributes, if not of a return to feudal particularism or directly to serfdom. Returning to the EU internal market, it is rather obvious that competition between undertakings, which is efficiency-driven, is rarely directly concerned with the nationality or origin of sellers and buyers involved. Anti-competitive behaviour can surely divide the internal market according to Member State borders but solely if it is profitable – very often for a company or companies with a European-wide distribution that want/s to trade freely but under conditions favourable for themselves. On the other hand, the barriers to free movement are very often against any fusion of national markets as such as they amount to a material ban on certain goods, services and/or providers from a certain Member State.

It can thus be maintained that if there is very little or no national preference in private barriers to competition, a certain protectionism is quite often tacitly present in the local trade unions’ insistence on application of locally-made social agreements to new entrants from other Member States.\textsuperscript{39} Social partners can be allowed to agree on the choice of just one provider of compulsory employees’ insurance without infringing on competition rules, but they cannot indirectly stipulate that this choice will be limited by the nationality or origin of that provider if they do not want to infringe free movement rules. Their agreement may thus be competition-destructive, but not internal market-destructive.

\textsuperscript{35} Procureur du Roi v Benoît and Gustave Dassonville, CJEU C- 8/74, ECLI:EU:C:1974:82, para 5.
\textsuperscript{37} See Højnik Janja, op. cit. supra note 34, p. 38.
\textsuperscript{38} For general discussion on the topic see: Stucke Maurice E., Is competition always good?, \textit{Journal of Antitrust Enforcement} Vol. 1. Issue 1 (2013), p. 162-197. Moreover, in many of EU Member States the role of services in general interest remains important as well as the size of State aid granted to undertakings. These are examples of a partial or a temporary setting aside of undistorted competition while the prohibition of direct discrimination (of suppliers, services providers, investors, employees etc.) based on nationality is always maintained.
\textsuperscript{39} This conclusion is based on the premise that the cost-based competition is legitimate within the EU, although it is obvious that, in some cases, it can cause social tensions and its limitations can be politically justifiable. For an opposite claim see: Countouris Nicola and Engblom Samuel, „Protection or Protectionism?“ - A legal deconstruction of the emerging false dilemma in European integration, CL Labour Rights Institute On-Line Working Papers – LRI WP 1 (2015). http://www.ucl.ac.uk/laws/lri/papers/1%20-2015%20-%20Protection%20or%20Protectionism.pdf (last visited July 11, 2017).
One may conclude from such argumentation that freedoms of movement are not only more general as to their application, but also more vital for the European integration than the freedom to compete which looks in such a comparison like a specific and complementary set of measures. If such a conclusion is correct, then the following one can claim that the CJEU can be stricter and more demanding when it protects the freedoms of the internal market than when it protects competition on that market. Even if the criteria and methods of justification of exceptions to the application of both sets of rules should not be strikingly different – for reasons explained above – and social dialogue should not be deprived of its practical importance in both types of cases, the requirement of a complete or predominant analogy of the CJEU approaches would reflect neither the formal and material differences between the internal market and the protection of competition, nor their unequal importance for the existence of the EU.

Who moves first – CJEU or EU legislator?

It is clear from the analysis that the CJEU approach to conflicts of internal market rules and the protection of competition ones with the fundamental right to collective bargaining and action is indeed different. The very fact of difference can be justified by the different importance of the internal market rules and competition rules for the very existence of the “union”, which was founded and built on the functional blending of the national markets of Member States. Unlike those who propose a full analogy of the CJEU approaches to exceptions’ granting and thus the recognition of the Albany-type exception in cases of the clash of the fundamental social right with freedom of movement (or a certain analogy with the Keck-formula, which excluded from the scope of the free movement of goods the sales conditions and marketing modalities), this analysis leads to the conclusion that the maintenance of the divergent approaches by the CJEU is justified. The fact that the CJEU consistently refuses in its judgments (unfortunately without any deeper analysis of reasons) to accept such analogies is thus not the main subject of our criticism.

On the contrary, the criticism here is directed at the fact that the CJEU’s approach to the clashes between the two sets of rules and the fundamental right to collective bargaining and action has been so far very strikingly different, very welcoming in the event of a conflict with the rules of competition and notoriously unsympathetic in the event of a conflict with the freedoms of movement. Such a substantial difference is unjustified and the solution of clashes with the freedoms of movement is legally problematic and politically damaging.

From the legal point of view, it has been repeatedly suggested by analysts, and even proposed to the CJEU in the Opinion of the Advocate General, that this Court should adopt as the standard test for the conflict of fundamental rights with fundamental freedoms the one that it had already applied in the Schmidberger case. There, the CJEU opted for a two-sided proportionality test for the conflict of freedom of movement of goods with fundamental civic rights (freedom of expression and assembly). The main added-value of “Schmidberger test” consists in the fact that its two-sidedness would preserve the equality of both EU protected values (rights and freedoms) as it would examine not only whether a fundamental right may restrict a fundamental market freedom but also whether a fundamental market freedom may restrict a fundamental

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40 Criminal proceedings against Bernard Keck and Daniel Mithouard, CJEU, CJEU C-267/91 and C-268/91, ECLI:EU:C:1993:905, paras 16-17.
41 More detailed, albeit not exhaustive analysis was provided in the Opinion of AG Trstenjak, European Commission v. Federal Republic of Germany, CJEU C-271/08, ECLI:EU:C:2010:183, paras 63-68.
42 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, CJEU C-112/00, ECLI:EU:C:2003:333. AG Trstenjak in her Opinion European Commission v. Federal Republic of Germany, CJEU C-271/08, ECLI:EU:C:2010:183, paras 193-195, refers directly to the “Schmidberger test” as to the example to follow.
right. The almost humiliating approach to the exercise of a fundamental social right would be removed as the freedom to conduct business through free movement would also have to justify itself. Even though the victory of social rights over business freedoms (as proposed by ETUC in the Social Progress Protocol) would be far from guaranteed, the criticism that the CJEU recognises collective social rights only formally, not in practical decision-making, would lose its merits.\textsuperscript{43}

Unfortunately, the fear that the CJEU would maintain further on its deeply differentiated approach has its practical consequences. The EU legislator took account of differences in social partnership traditions and achievements between Member States already in the past decades, which is reflected in the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (in Art. 3), Directive 98/59/EC on collective redundancies (in Art. 5) or the Directive 2001/23/EC safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (so-called acquired rights directive) (in Arts. 3 and 8). These provisions of EU secondary law require (under certain conditions) respect for the collectively agreed standards of employment, employees’ pay and benefits. The problem is that, in the interpretation of the CJEU judges, these directives have not prevented the prevalence of freedoms of movement over the defence of social dialogue results. In the Member States with higher wage levels and stronger trade unions, the pressure increases, pushing for the tightening of amendments of these directives that would halt any similar overstatement of entrepreneurial freedoms, or, in the popular vocabulary, would prevent all wage and social dumping coming from poorer Member States.

In the same way the previous version of the Public Procurement Directive from 2004, i.e. the Directive 2004/18/EC on public procurement and public service contracts, stated in its Preamble (recital 34) that “collective agreements, at both the national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law.” The Directive 2014/24/EU, which has replaced it, already defends collective agreements at five places in the Preamble. On top of that, in the normative provisions (Article 18), it also requires that the performance of public contracts with economic operators complied, among others, with collective agreements.\textsuperscript{44} The purpose of this comparison is to highlight the emerging trend that is being strengthened in the post-crisis EU secondary legislation and the most significant example of which would probably become the amendment to the aforementioned Directive 96/71/EC if it includes the requirement of “equal pay for equal work in the same place”, which would be apply to all posted workers in cross-border provision of services.\textsuperscript{45} Such a change will mean the end of price advantage in export of services enjoyed up to now by “poorer” Member States that cannot but compete mainly with lower labour costs because they are not the home of major multinational companies and their internationally renowned brands. Thus, the problem that has been sharpened by the CJEU insistence on its “Laval quartet” case law would be resolved to the satisfaction of the richer part and to the


detriment of the poorer part of the EU, which can hardly be described as a path towards an “ever closer union”.

From this point of view, it would undoubtedly be better if, for example, the strengthened wording of the horizontal social clause of Article 9 of TFEU or the addition of the Social Progress Protocol (but not in the wording calling for the absolute priority of fundamental social rights over the freedoms of movement) push the CJEU to balance the test, which it applies to cases of conflict of collectively bargained rights with the freedoms of movement (which would also remove the striking difference between the justification regimes for exceptions from the two sets of rules analysed here). However, these are changes to primary law that are politically disproportionately more demanding than the aforementioned changes to EU directives adopted by the ordinary legislative procedure (i.e. by a qualified majority in the Council).

Conclusions – path dependency or something more?

A simple conclusion that there really is a problem with the way the CJEU assesses the exemptions for collective bargaining, being rather unresponsive in the cases of a conflict with the freedoms of the internal market and quite friendly in the event of a conflict with competition rules, would apply without reservation to the method, or to the tests applied by judges in Luxembourg. Regarding the outcomes of its decision-taking, the conclusion must be far more cautious. It is quite understandable that even in the application of the one-sided proportionality test to a socially legitimate obstacle to an internal market freedom, the CJEU may adopt a very socially accommodating approach by mitigating the stringency of test requirements, as it was the case for instance in its AGET Iraklis decision of December 2016.46 So the criticism addressed so far to the CJEU’s reluctance to reduce the difference between the two exemptions’ justification regimes cannot be extended to a general assertion that the CJEU has been so far unilaterally neo-liberal and dogmatically advocated the freedoms of the EU internal market. It is certainly not possible to infer from the analysis made that the CJEU has been a priori biased to the detriment of employees’ rights protection (which would also be inconsistent with its socially-friendly approach in competition cases).

The difference in conflict-solving techniques used by CJEU, which raises so many ideological and political passions, must be attributed to something else. From today’s point of view, there may be a simple “path dependency”, the natural tendency of any court to maintain the continuity of its jurisprudence and its reluctance to change the approach that has worked for many years. But this does not explain the origin of the differentiated approach. It does not answer the question why the CJEU adopted a very helpful approach to the exemption for collective bargaining under the competition rules at the end of the 1990s and then, after 2000, a blatantly contrasting approach to assessing the conflicts of collective bargaining with freedoms of the internal market. In the previous text, it was concluded that the internal market and the protection of competition are, despite their interdependence, different and unequally important for the existence and continuation of European integration as such. As an extension of this conclusion, the following explanation can be forwarded at this point.

In the field of competition protection, the CJEU can behave as a “manager” as it is a policy entrusted in full to the exclusive competence of the EU. Under its rules, that have not substantially changed in primary EU law since the EEC Rome Treaty, the CJEU has always had the final word regarding all definitions, principles and exceptions. An undivided power gives a quite comfortable position and the possibility to develop a unitary EU approach instead

of balancing between European and national solutions in the same type of cases. The latter balancing is precisely the situation in the internal market law which is the subject of shared competences between the EU and the Member States. In the cases involving the conflict between economic freedoms and social rights, such a competence sharing is even underlined by the fact the EEC-founding compromise had conferred the trade enhancing competencies to integration bodies while the social protective competencies had been left in the hands of the Member States. Following the ordo-liberal economic constitution of European integration, the market opening measures did not require a constant political compromise-making, and therefore rules of free movement could have been developed in a rather technocratic way by the European regulator. Contrary to that, the search for a politically sensitive compromise between capital and labour had to be conducted and legitimated at the Member State level. As a body of European integration, the CJEU is thus "genetically" bound to the mission of developing the internal market freedoms and defending them against all sorts of the obstacles (erected at the Member State level). It is not an independent manager as in the protection of competition, here it is far more an internal market defender.

Even though the analysed difference in CJEU approaches may be explicable and understandable, it does not change much at the conclusion of this study that it has long been time for the CJEU to abandon his way of resolving the conflicts between the collective bargained rights of workers and the freedoms of the internal market that it took ten years ago in the "Laval quartet" judgments. A substantially more balanced approach, which corresponds to a two-sided proportionality test examining not only the parameters of the exercise of fundamental social right but also that of the fundamental freedom of the internal market, would better correspond to the spirit of the Treaty of Lisbon and the political needs of the current EU.
Ryan Kraski*, Defamation in the Age of Social Media: #LegalEvolution

Abstract: This article discusses the corresponding rise in social media usage and the widespread increase of defamation claims. First describing the emergence of social media outlets such as Facebook and Twitter, this article goes on to explain the foundations of defamation law. This article puts the two together and details a number of cases in which social media defamation claims were brought and the issues arising therefrom. Finally, this article sets forth some alternative measures to alleviate the damage to injured plaintiffs, while ideally avoiding litigation.

Keywords: Defamation, Tort, Social Media, Public Figure, Communications Decency Act

Following 2010, there was a precipitous 216% increase in the number of defamation lawsuits. Since many homeowner’s insurance policies cover defamation lawsuits, these claims have transformed previously undesirable defendants into larger targets. This instant jump in the number of defamation lawsuits is not just because of having more defendants with “deeper pockets,” rather, this is also a result of individuals’ access to social media. While giving people the ability to instantly broadcast their thoughts, social media outlets have revolutionized how peers, consumers, companies, and complete strangers interact. Social media has empowered people to confront their problems with a much louder voice than ever before, but, when these broadcasts damage reputations without having a factual basis, a growing number of parties are turning to the courts for relief.

It is the goal of this article to shed light on how some of the basic principles of defamation law are rapidly evolving. This article explores the growing usage of social media and how it interplays with existing defamation law. The primary areas of concern are changes in the public figure doctrine, how discovery is evolving, and who can be a defendant. Finally, there are a couple of recommendations for resolving future disputes in a quicker, more cost-effective manner. Without substantial changes, today’s defamation law regime is not well-suited to handle the modern reality that every person can instantly broadcast their thoughts to the world.

Growing usage of social media

By the end of 2016, over 69% of all Americans were connected through various social media outlets. More specifically, 68% of adults in the U.S. are on Facebook and 21% are on Twitter. Facebook was one of the first major networks to lower entry barriers into the public forum, and not long after Twitter did the same allowing its millions of users to publicly broadcast “tweets” of 140-characters or less to their followers. Twitter users may opt to have either a public or private account; for those that choose public, their tweets are instantly published to all of their


1 Matthew Lafferman, Do Facebook and Twitter Make You A Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199 (2013).
2 Id.
4 Id.
5 Matthew Ingram, Twitter and the Power of Giving People a Voice, GigaOM (Nov. 18, 2010), www.webcitation.org/6EmV188Hy.
followers with the click of the mouse. Similarly, Facebook also has a variety of security settings allowing users to determine what information will be shared.

Twitter’s creator, Jack Dorsey, defined a “tweet” as “a short burst of inconsequential information.” Mr. Dorsey clearly understated how consequential tweets can be. Prior to social networks such as Facebook and Twitter, news organizations held a monopoly on the news. Going from the “old-days” of no interaction between the media outlet and the target audience to today, the flow of information has been completely revolutionized. Today, people can post comments, add to blogs, and report their own stories through the social media outlets of their choice. With this virtual no-barrier entry into the public forum, users can broadly broadcast whatever they may be thinking; unfortunately, sometimes these thoughts end up damaging others’ reputations.

Defamation

For hundreds of years, people have sought to restore their reputations following false insults, remarks, or stories made by others. Although this bell cannot be “un-rung,” and the damage to one’s reputation cannot be entirely eliminated, the law seeks to return injured parties to their original positions. There are some instances where redaction of a comment is appropriate, but, often, injured parties seek monetary damages. This tortious remedy has over the centuries evolved into the defamation cause of action, which still continues to evolve.

Historically, injured parties sought to recover on damage to their reputations from large media companies with large bank-rolls. This was generally the case for two reasons: first, media outlets held the means to access the largest audiences, and, second, injured parties had no such access and could not equivocally repair their reputation in the same way that it was damaged. This inequality of access necessitated the growth of the defamation claim and for individuals to use courts as a forum to repair their reputations.

A defamation claim first requires that the plaintiff prove that the defendant published a statement to a third party. Second, the plaintiff must prove that the statement concerning the plaintiff was false. The defendant must have been at least negligent in making the statement.

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6 Robert J. Moore, *Twitter Data Analysis: An Investor’s Perspective*, TECHCRUNCH (Oct. 5, 2009), www.wbecitation.org/6FrLkJQhll (finding that fewer than 10 percent of Twitter users have private accounts).
10 Id.
11 Lafferman, supra note 1, at 242-43.
13 Id. at 435-36; e.g., Gertz v. Welch, 418 U.S. 323 (1974) (weighing the plaintiff’s media access along with its assumption of risk, the Court found that the defendant, a magazine publisher, cannot publish defamatory falsehoods against a non-public figure and invoke a constitutional privilege without inquiring into plaintiff’s public figure status).
14 Angelotti, supra note 12, at 435-36.
15 Gertz, 418 U.S. at 342-43.
16 Id.
17 Id; see also RESTATEMENT (SECOND) OF TORTS § 613 (1977) (describing that in cases where the defendant negligently makes the defamatory statement, the plaintiff must prove that the defendant failed to verify the truth of the statement).
And the statement harmed or caused damage to the plaintiff. But, in instances where the plaintiff is a “public figure,” the defendant must have been proven to have acted with “actual malice.” With the various circumstances that could come into play, the Supreme Court has added a lot of nuance to the “public figure doctrine.”

The public figure doctrine

In *New York Times Co. v. Sullivan*, the Supreme Court, for the first time, raised the standard of negligence to actual malice in order for a public figure to recover on a defamation claim. The Court explained that “public figures voluntarily exposed themselves to increased risk of injury and had significantly greater access to the channels of effective communication.” Furthermore, the Court acknowledged two main types of public figures. “General public figures” are individuals who voluntarily achieve an “especial prominence in society.” “Limited-purpose public figures” are individuals who thrust themselves into public controversies, with the possibility of achieving some influence. Also, in a third somewhat separate category, there are “involuntary public figures” who, although not injecting themselves, have assumed a role of special prominence in a public controversy.

In determining who is a limited-purpose public figure, courts usually apply a three-part test. First, the court considers whether it is a public controversy, second, whether the person plays a notable role in the controversy, and, third, whether the defamatory statement is connected to the plaintiff’s participation in the controversy. Distinguishing between general and limited-purpose public figures is important because the actual malice standard applies to all general public figures while only limited-purpose public figures who are defamed in the context of their role in a controversy must show actual malice.

In *Time, Inc. v. Firestone*, the Supreme Court signaled how difficult it is to quantify the notoriety necessary to become a public figure. The Court indicated that an individual must have more than a bit of local notoriety to be a public figure, but they were concerned about

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18 *Gertz*, 418 U.S. at 342-43.
20 *Id.* at 283-84.
21 *Gertz*, 418 U.S. at 342-43.
22 *Id.* at 344.
23 *Id.* at 345.
24 *Id.*
25 *Id.* at 351; see *Angelotti*, *supra* note 12, at 446-47 (trying to shape debate on public issues, possibly through the use of media, limited-purpose public figures are held to an actual malice standard only when their speech falls within the scope of that particular issue).
26 E.g., Dameron v. Wash. Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985) (finding that an air traffic controller assumed a role of special prominence in a public controversy, albeit by “sheer bad luck” of being the controller on duty at the time of a crash, he was labeled an involuntary public figure).
27 Trotter v. Enters, 818 F.2d 431, 433 (5th Cir. 1987).
28 *Accord* Mandel v. Phoenix, Inc., 456 F.3d 198, 202 (1st Cir. 2006); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 708 (4th Cir. 1991); Contemporary Mission, Inc. v. N.Y. Times Co., 842 F.2d 612, 617-18 (2d Cir. 1988) (leading to a determination that a public controversy exists is usually the fact that the controversy affects parties other than the litigants).
29 Trotter, 818 F.2d at 433; e.g. *Angelotti*, *supra* note 12, at 446-47 (finding plaintiffs to be limited-purpose public figures in the cases of a well-known football coach accused of fixing a football game, a General advocating security issues, and a professional dancer in an issue related to her performance).
30 1 LAW OF DEFAMATION § 2:8 (2d ed. 2013).
adoption of a definition encompassing too large of a class. Generally, courts have required the plaintiff’s assumption of risk to be some form of a voluntary action. Public figure status has been found in cases where people have gained notoriety in communities as small as surfing circles, local ethnic gatherings, sports circles and even small geographical locals.

Social media meets the courtroom

It is easily conceivable that a celebrity with thousands of online followers could get themselves into trouble with only a click of the mouse. After actress Courtney Love made off-colored comments about a certain fashion designer on her Twitter and MySpace accounts; she was immediately asked to take the comments down and retract her statements. Upon refusing to comply, Love was sued for defamation with the designer seeking both compensatory and punitive damages. The court denied Love’s claim that her speech was protected by California’s anti-SLAPP law because this was not a public dispute as contemplated by the law. Although this was just a private dispute, the fact that Love’s message was broadcasted to all of her followers, eventually led to Love paying a settlement of $430,000 plus interest.

Miss Universe v. Monnin is another example of a private controversy spilling out into a public forum. Here, a Miss Universe competitor took to social media after being eliminated from a competition. Essentially claiming that the entire competition was “rigged,” Mrs. Pennsylvania’s Facebook post drew broad media attention. Due to her statements causing a sponsor to withdraw its support of the pageant, an arbitration panel found her liable for $5 million.

Private figures embroiled in public debates

Other instances similarly show that there is an ever-increasing trend towards individuals, both plaintiffs and defendants, who would have previously been considered to be private, becoming embroiled in public affairs. For example, in 2009, a tenant posted on her Twitter account: “Who said sleeping in a moldy apartment was bad for you? Horizon Reality thinks its okay.” Although she posted it to only twenty followers, it caught Horizon’s attention. The court

32 Id. at 456-67.
33 W. Wat Hopkins, The Involuntary Public Figure: Not So Dead After All, 21 CARDOZO ARTS & ENT. L.J. 1, 21, 25-6 (2003); see also Zupnik v. Associated Press Inc., 31 F. Supp. 2d 70 (D. Conn. 1998) (finding that being married to a public figure can be sufficient to achieve limited-purpose public figure status).
35 Angelotti, supra note 12, at 470-71.
36 Id.
37 Id; see CAL. CIV. PROC. CODE § 425.16 (West 2011) (adopting the anti-SLAPP provision in 1992, California aimed to abate an increase in meritless lawsuits which could chill constitutionally protected speech); see also Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, 75 TEX. B.J. 402, 403 (2012) (ordering a Californian dentist, in 2009, to pay over $80,000 in attorney fees, the court found that the dentist’s lawsuit against a service review website was blocked by California’s Anti-SLAPP statute, thus protecting Constitutionally speech in the public interest by shifting attorney costs to unscrupulous plaintiffs).
38 Matthew Belloni, Courtney Love to pay $430,000 to Settle Twitter Defamation Case, THE HOLLYWOOD REPORTER (Mar. 3, 2011), www.webcitation.org/6Fc43RL3X.
40 Id. at 596.
41 Id. at 597.
42 Id.
43 Bruce, supra note 37, at 403.
44 Id.
dismissed Horizon’s $50,000 claim in 2010. But, in mLogica Inc. v. Karan, a Californian court found a $1.23 million verdict against a blogger. The defendant falsely posted that the tech company “never paid vendors” and engaged in “illegal business conduct.”

In Lynch v. Christie, a Maine court issued a $100,000 pre-judgment attachment on the defendant’s property because of Facebook posts claiming that a chiropractor (plaintiff) had sexually abused some patients. In Obsidian v. Cox, a defendant blogger posted online that the plaintiff, a financial advisory firm, committed “tax fraud,” “illegal and fraudulent activity,” and hired a “hitman to kill her.” Although the jury’s $2.5 million verdict was later dismissed, this case endured a trial and three years of appeals before the statements were found to be “opinion.”

The internet has drastically changed a number of aspects of defamation claims including private individuals’ access to public fora, the ease of damaging a person’s reputation, and difficulty in determining who actually should be a defendant in a defamation case. With the speed of dissemination on the internet, once the statement is published, the damage can occur instantaneously. And, in terms of identifying the defamer, a Twitter account, for example, only requires that the user provide a valid email address. This leaves plaintiffs following a trail of breadcrumbs to identify defendants via ambiguous email or Internet Protocol (IP) addresses.

Problems in discovery

Although anonymity is protected by the Constitution, the First Amendment affords no protection to defamatory speech. When a defamed plaintiff seeks to discover who his defamer is, he will have to satisfy one of two tests in order for a court to mandate an internet service provider to disclose a user’s information. Some courts have chosen to follow the New Jersey Superior Court’s requirement that a plaintiff: (1) make efforts to give online notice to the anonymous poster that he may be subject to a subpoena or application for order of disclosure, (2) directly quote the actionable online speech, (3) present evidence for a prima facie cause of action on the claims, and (4) make an argument to the court that the weight of the prima facie claims outweigh the poster’s 1st Amendment anonymous speech protections. Other courts have chosen to apply Delaware’s “summary judgment” test wherein a plaintiff must: (1) make an effort to notify the anonymous poster that he is subject to a subpoena or application for order of disclosure and (2) satisfy a summary judgment standard by providing the court with a prima facie case.

45 Id.
47 Id.
48 Lynch v. Christie, 486 F. App’x 884 (1st Cir. 2012).
49 Obsidian Fin. Grp. v. Cox, 740 F.3d 1284, 1287 (9th Cir. 2014).
50 Id. at 1294.
53 Jennifer O’Brien, Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases, 70 FORDHAM L. REV. 2745, 2745-46 (2002).
54 Corey M. Dennis, Social Media Defamation and Reputation Management in the Online Age, 17 J. INTERNET L. 1, 18 (2013).
55 Id.
57 Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005).
These various tests are strenuous measures ensuring defendants’ uninhibited right to free speech in light of the states’ important interest of providing a defamation remedy. Although, these legal tests presuppose, often incorrectly, that the content creators are capable of be traced. With a certain level of technological sophistication, online speakers can remain anonymous and avoid detection. Precautions such as changing IP addresses, ‘scrubbing’ data, creating fake email addresses, using anonymous proxies, and using shared computers, just to name a few, are enough to create serious difficulties in determining speakers’ identities. Assuming that a plaintiff can overcome one of the above legal tests to require an internet service provider to release a content creator’s identity, there is still no guarantee that they will be able to successfully do so. Thus, determining the defendant’s identity is one of the largest uphill battles for plaintiffs in these types of cases.

Who is the defendant?

In other types of traditional media, it is expected that the media entity could become liable for publishing and furthering a defamatory statement made by another party. This concept, applying to newspapers, book publishers and broadcasters, does not have the same application to social media. Congress passed Section 230 of the Communications Decency Act (CDA) protecting social networks from liability if: (1) the defendant is a “provider or user of an interactive computer service”; (2) the complaint seeks to hold the defendant liable as a “publisher or speaker”; and (3) the action is based on “information provided by another information content provider.” A benefit of the CDA is that it prevents the “chilling effect that regulation may have on internet speech.” And because Twitter and other social media outlets are identifiable as “provider[s]… of an interactive computer service,” they receive complete immunity from defamation suits over content created by their users.

In *F.T.C. v. LeadClick Media*, the Second Circuit Court of Appeals explored the extent of protection for “internet service providers” under the CDA. The defendant, LeadClick, managed a network of “publishers” and advertisers who would together create and publish advertisements on online media space owned by the defendant. The court shortly discussed the possibility of the defendant being an internet service provider, but dismissed the discussion as moot because “LeadClick [was] an information content provider . . . and is liable for its own content.” While the CDA would provide immunity to passive internet service providers, LeadClick overstepped these bounds by actively participating in the development of deceptive content, paying affiliates who they knew were producing false information, targeting banner space on legitimate news sites to maximize fake stories to larger audiences, and otherwise “materially contributing to the content’s alleged unlawfulness.” The CDA remains a strong shield for defendants, but, in order to be protected, they must remain neutral internet service providers and avoid active participation in content creation.

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59 Marko Vesely, *Defamation and Libel Meets Twitter*, WESTERN CANADA BUSINESS LITIGATION BLOG, (Sept. 22, 2010), www.webcitation.org/6FbkqBFwY.

60 Angelotti, *supra* note 12, at 466.


63 *Id.*

64 *F.T.C. v. LeadClick Media, LLC*, 838 F.3d 158 (2nd Cir. 2016).

65 *F.T.C. v. LeadClick Media, LLC*, 838 F.3d 158, 162 (2nd Cir. 2016)(indicating that the advertisements were visible through email marketing, banner ads, search-engine placement, as well as advertisement websites).

66 *Id.* at 176.

67 *Id.*
Options for going forward

The Gertz doctrine, although created before the internet era, has gone on to turn many more plaintiffs into public figures than the Supreme Court could have anticipated. This unintended consequence has arisen with social media users voluntarily assuming the risk of injury and subjecting themselves to limited-purpose public figure status.\(^\text{68}\) Perhaps when the public figure doctrine returns to the Supreme Court, they will fashion another test to sift through which social media users have become public figures, but not at the cost of eliminating the public figure doctrine; this would have the effect of chilling speech on the internet.\(^\text{69}\) On the other hand, if all social media users are considered to be public figures a lot of plaintiffs with damaged reputations would face the uphill battle of meeting the actual malice standard.\(^\text{70}\) Being labeled public figures would preclude recovery for most plaintiffs.\(^\text{71}\) One suggestion as to how to cure the public figure doctrine’s discrepancies with social media would be to shift the burden onto the defendant to make a showing that the plaintiff should be held to a public figure designation because he had greater access to the public than other social media users.\(^\text{72}\)

Considering the speed at which a person or company’s reputation can be damaged, it is essential to take precautions to actively manage one’s reputation nowadays. An individual can use social media to post positive information furthering their reputation, while monitoring for negative information posted by others. For managing a corporate reputation, companies should aim to build a positive online presence with social media profiles in order to counteract any negative online information.\(^\text{73}\) They must monitor professional review websites such as Yelp and Angie’s List and give prompt, positive responses that can mitigate reputational damage.\(^\text{74}\) Delta Airlines set a good example by giving sympathetic and apologetic responses, requesting the bloggers to message them and address their problems.\(^\text{75}\) Also, training employees to react appropriately to negative content can have a significant impact.\(^\text{76}\) And, of course, the option of a defamation lawsuit should be left open for the most extreme cases where a company realizes significant economic loss from online statements.\(^\text{77}\)

How not to manage a corporate reputation

In 2010, the car owned by college student Justin Kurtz was towed by T&J Towing of Kalamazoo, Michigan.\(^\text{78}\) Following Kurtz’s insistence that the towing company removed his parking permit, Kurtz created a Facebook group called “Kalamazoo Residents Against T&J

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\(^\text{69}\) Jeff Kosseff, Private or Public? Eliminating the Gertz Defamation Test, 2011 U. ILL. J.L. TECH & POL’Y 249, 272 (2011) (categorizing the majority of social media users as limited-purpose public figures could cause social media users to fear broadcasting their thoughts, this is the undesired effect of chilled free speech).


\(^\text{71}\) Kosseff, supra note 69.

\(^\text{72}\) Lafferman, supra note 1, at 232 (recognizing that, while everybody today is considerably more “public,” some individuals are more injected into social media than others); e.g. Helen Soteriou, Twitter Superstar: Win Friends and Influence Followers, BBC NEWS, (Apr. 12, 2014, 8:17 PM), http://www.bbc.com/news/technology-26919710 (describing the growing industry in Twitter persona maintenance and how to attract attention more effectively).

\(^\text{73}\) Corey M. Dennis, Social Media Defamation and Reputation Management in the Online Age, 17 J. INTERNET L. 1, 18-19 (2013).

\(^\text{74}\) Id.

\(^\text{75}\) Bruce, supra note 37, at 403.

\(^\text{76}\) Dennis, supra note 71.

\(^\text{77}\) Id.

\(^\text{78}\) JOHN G. BROWNING, THE LAWYER’S GUIDE TO SOCIAL NETWORKING 95 (Eddie Fournier ed., 2010).
The group grew to over 11,000 members, T&J lost over half of its commercial towing accounts, and the Better Business Bureau gave T&J an “F” rating due to the multiple complaints against their business methods. Instead of working with Kurtz to resolve his problem, T&J brought a $750,000 defamation suit against Kurtz. The defendant quickly invoked his right to free speech. Protection of a person’s right to speak honestly about a local company’s devious business tactics is just as essential as the First Amendment’s Protection of religious and political speech. Fortunately for T&J Towing, Michigan does not have an Anti-SLAPP statute. Eventually, T&J dropped the lawsuit, but not without first losing $174,000 in yearly profits, filing for Chapter 7 bankruptcy, and laying off some employees.

Conclusion

The current issues with defamation law are an example of technology outpacing the legal system. Given the significant increase of defamation claims, coupled with the serious damage that one statement can do, it is in everybody’s interest to maintain defamation causes of action, but only to exercise them as a last option. Social media users must be aware of their constantly expanding exposure to the world, and should take preventative measures such as active online personality management as well as providing effective and quick responses to negative content pertaining to them. When preventative measures fail and an individual’s reputation has been unrightfully damaged, a holistic, not solely legal, response should be made; these individuals should first request that the various social media networks remove the content, publish corrective counterstatements, issue cease and desist letters, and, when all else fails, pursue the available legal remedies. Perhaps future legal guidance will help resolve disputes in a faster, smarter, and more cost-effective manner, but, until then, individual users must adapt themselves to the nature of defamation in the age of social media.

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79 Id. at 96.  
80 Id.  
81 Dan Frosch, Venting Online Consumers Can Find Themselves in Court, THE NEW YORK TIMES (May 31, 2010), http://www.nytimes.com/2010/06/01/us/01slapp.html?pagewanted=all&_r=0.  
82 Id.  
Bronisław Sitek*, Evolution of the Sources of Law from the Roman Law to the Global Law

Abstract: The subject of the study is to show the evolution of the sources of law from the Roman law to the global law. The aim is to show that the positivist conception of the source of law is a product of a particular philosophy of law and that it is a subject to evolution. It cannot therefore be considered that the sources of law practiced in a given country are the only ones. This is the effect of multi-layered legal systems. The result of the research is to analyze the existence of the sources of law from the Roman law to the present, showing the endogenous and exogenous factors that had and influenced the creation of the law.

Keywords: Sources of law, Roman law, comparative law, globalization of sources of law, evolution of law.

Introduction

The students who start their law studies in Poland will meet with the propedeutical courses at the very beginning. One of these subjects is course called jurisprudence or also named as an introduction to jurisprudence or introduction to legal science. During the lectures of this subject, the law students learn the meaning of basic concepts and terms, among such as: law, the legal norm, the legal provision, the validity of the law or the collision and the interpretation rules. The term "source of law" is one of such concept1.

During the review of the most common law textbooks, the dichotomous division of the sources of law can be seen. The classic example is the L. Morawski’s textbook according to which the basic division of the sources of law in the formal sense is: the source of origin (fontes iuris oriundi) and the source of knowledge of the law (fontes iuris cognoscendi).2 At the heart of our interest are the first ones – it means we will look on the evolution of the sources of legal regulations. It is not about presenting the development of the legislative procedure, including the legislative initiative, but it is about the identification of exogenous or endogenous factors influencing on the form of the content of specific legal provisions. For the purposes of this study, the term "evolution" is used, although H.J. Berman uses the term "revolution"3 for describing the historical development of the legal system. It seems, however, that the term "evolution" is more neutral and adequate.

L. Morawski noted that the division of the sources of law into sources of origination and cognition does not reflect the richness of the materials used by courts and other law enforcement bodies…4. Hence, the other authors of jurisprudence textbooks ignore this scheme,

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1 SWPS Uniwersytet Humanistyczno-Społeczny w Warszawie.
2 Not in all countries, the first year students has the subject called the introduction to jurisprudence. There is no such course in the German educational system. Certain elements of teaching about the foundations of state and law are on the subject entitled: Staatsorganisationsrecht. This subject, however, does not occur in all law departments in Germany. In Italy, elements of jurisprudence can be found in such subjects as storia di diritto romano or filosofia del diritto.
3 See: L. Morawski, Wstęp do prawoznawstwa, Toruń 1999, pp. 1-6-107. This theorist of the law declares the division of the sources of law according to the normative conception.
going to the enumerating and discussing the sources of lawmaking – it means they give the static presentation of norms commonly used in the Polish legal system, often referring to the sources of law in the Anglo-Saxon system\(^5\). Another common division of sources of law which is often quoted in the law textbooks is the division on the customary law, the statutory law and the case law\(^6\).

To define the subject of research, it is necessary to define the concept of the origin of the law itself. The doctrine assumes that the term is understood as the factors influencing the development of the content of legal regulations in the material sense, as well as the lawmakers and the effects of their activities (the origin of the rule of law in a formal sense)\(^7\).

Therefore, the subject of this paper is to show the dynamics of lawmaking by showing the variability of law-making practices in connection with doctrinal discourse. The dynamics of the sources of lawmaking do not allow realizing the postulate of positivist jurisprudence view with a closed, coherent and complete legal system. This particular myth of positivist doctrine is based on the autonomy of the legal system. The legal-historical analysis with the use of the legal-comparative method will allow describing the evolution of law-making practices and doctrinal views in connection with the political, social and cultural environment. It is extremely important to state that the historical element allows for an explicit emphasis on the element of evolution. In the doctrine you can find numerous examples of such studies as, for example, the work of T. Giaro on the evolution of soft law\(^8\).

Because of limited publication requirements, the size of this publication is limited to illustrating the evolution of the origins in the view of doctrine, in the Roman law, in the canon law and in the optics of contemporary political, social and cultural transformations.

The sources of law in the views of doctrines

The idea of a democratic state, proclaimed by the doctrine of law, constitutionally guaranteed at least since the middle of the twentieth century, has given rise to such values as: good law, rational law, decent state, ethical state, legal certainty, observance of the legal norms enacted by state authorities or respect for legislative procedures\(^9\). J. Wróblewski wrote in 1981 about democratic law-making procedures, based on the unjustified axiology of the socio-political system. However, it cannot be forgotten that for J. Wróblewski, the prototype of a democratic state, mentioned in the article 7 of the Constitution of the Polish People's Republic of 1952, was a socialist state. Nevertheless, the notion of socialist democracy was somewhat correlated with the idea of democracy developed in the Western culture. This lawyer further wrote that a rational legislator should take into account the public opinion in order to evaluate legislative initiatives\(^10\). Hence much later in 2008, S. L. Stadniczeńko wrote: "The citizens are entitled to


certain values, and the enacted by state institutions the law, rights and duties protect the individual...” According to this law theorist, the primary goal of the law is human being, not the state.

The winning parliamentary elections by V. Orban in Hungary in 2010, by PIS in Poland in 2015 and the presidential elections by D. Trump in the US in 2016 have given rise to wide debate on the legality of these authorities, especially in the area of new law. The government groups as well as the opposition accuse themselves of breaking the law, in the sense of the lawmaking procedures, especially the constitution. The demonstrations of opponents of the US Presidential Decree on the ban on entry into the United States by the citizens of the seven states where the dominant religion is Islam may be a good example of such situation.

Such a media and doctrinal debate is accompanied by a low level of social knowledge on the historical and current procedures or mechanisms of law making. This situation causes extreme polarization of views also in the legal doctrine. This is accompanied by the specific propaganda of political elites using a dialectic such as: the need to restore order, to defend the national values, to increase the tax collection, to stop the terrorist expansion, to stop the crime, the liquidation of poverty, renegotiating of the international agreements which are harmful to the country, the liquidation of political corruption, the increase of penalties for criminals, etc. These slogans inspire politicians to create a new "better" law which de facto is to be instrumental in increasing public support for the rulers. The dichotomial thinking patterns are often used to present various phenomena in extreme aspects, such as: fair and unjust, good and bad, progressive and backward, true and false. Such social engineering techniques provoke provocative pseudoscientific declarations, including those expressed by the famous lawyers. Their scientific claims are built not on scientific premises, but on unreflectively accepted political, social or cultural beliefs, which are often identical to the programs of political parties being currently in power.

In legal doctrine, it is generally accepted that the characteristic of legal reasoning is its rationality. However, there are the questions: what does this rationality mean in this case? And then, who should set the criteria for rationality of legal inference? The doctrine? According to R. Tokarczyk, the concept of rationality is not unequivocal. For some, it is the thought created in the process of academic teaching, often conceived of as well-founded and undoubted views. In the meantime, the legal doctrines are often the "reflexions of political, social and cultural doctrines" and thus often contain elements of political ideology and political programs. The legal doctrines have a strong genetic link to the state and real power.

According to A. Watson, the consideration of the sources of law cannot be based only on the theoretical assumptions, but above all, on the basis of historical experience. It is impossible to disagree with this American lawyer. The analysis of the history of political, social and economic doctrines makes it possible to realize such notions as the rational lawmaker, the right or just law, and the autonomy of law. The historical analysis allows us to indicate periods when the

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12 This is the so-called: a false dichotomy, used in order to show the principle of contradiction. It is also used by the rulers in the erroneous conviction of the possibility of changing prejudices, beliefs or social emotions also by creating so-called: "better law". See: E. De Bono, Wodna logika. Wypłyn na szerokie wody kreatywności, translation into Polish: O. Kwiecien-Maniewska, Gliwice 2011, p. 58. Electronic version [access: 7.02.2017].
law was under strong influence of theology (papal law of the ancient Rome or the teaching of the Church reflected in the imperial constitutions in the period after the edition of the Milanese Edict of 313), politics or economy. 

Particularly noteworthy is the reminder of the role of law, and especially how it was formed in the two totalitarian systems of the XX century. In fascism, the Nazi doctrine was the primary source of lawmaking what can be seen in such examples as: the famous Nuremberg Laws of 15th September 1935 (the racial laws proclaimed at the Nuremberg Rally of the Nazi Party - NSDAP) and the Führer's views. It is important here to show the statement of major von Lüttwitz-Randau, a literary character, but perfectly reflecting the mentality and conviction of the legal elite of the Third Reich. According to the above-mentioned major, the Führer was inspired when he talked about the law. In this optics it was justified to skip in the judicial or administrative practice any established regulation. Such application of law, according to him, was justified because it serves the national interest. In his view, such an understanding of inspiration or source of law was a manifestation of the courage of the German people. The program of the new law was preached in isolation from the Roman law. Hence, in German law, the legal principle: nullum crimen sine lege (no penalty without a law) was replaced by nullum crimen sine poena (no crime without punishment). 

On the other hand, the authors of the legal norms in the communist system, especially in Soviet Russia were inspired by different message. K. Marx in the Manifesto foresaw the creation of a revolutionary consciousness in the working class. In practice, this phrase was used in particular by W. Lenin and his successor - J. Stalin. The seminal vaguely defined revolutionary consciousness was the source of all norms of conduct. It was in the name of the lack of revolutionary awareness that the commissioners, not the judges, massively gave death sentences. It was not until the late 1930s, that the concept of revolutionary consciousness was replaced by the concept of law created and sanctioned by the state in order to strengthen social relations beneficial to the ruling class.

According to R. Tokarczyk, the effect of comparative studies may also be the source of the law. One of the objectives of comparative research is the pursuit of unification, harmonization, or integration of law at international level, or at least between two legal systems. This unification, harmonization or integration of law is the result of reasoning or legal inference, but based not on abstract assumptions, but on political, economic or cultural determinants. Today, all these three conditions are the natural environment for the creation of the law. According to L. Leszczyński, this is a confrontation between universalism and particularism. The victory of the universalisation of legal axiology is evident, and with

The sources of Roman law

The interest of Romanists in the sources of Roman law was largely due to the creation of laws outside of Corpus Iuris Civilis. It was therefore a work aimed mainly at gathering materials to

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get to know the specific provisions of Roman law\textsuperscript{21}. Marginally, they were interested in the topic of the source of the law along with an analysis of the political, cultural and social determinants underlying the concrete solutions and legal provisions. These issues were essentially undertaken only in the textbooks of Roman law. The exception here is the work done by T. Dydyński, who presented the sources of knowledge and arising of law quite extensively. This Romanist competently stated that \textit{the law of every nation is a manifestation of spiritual and moral responsibility and it is developed under the influence of external, historical circumstances and accidents}. \textsuperscript{22}

In the textbooks of Roman law one can find several ways of presenting the sources of Roman law. The traditional model of the presentation of sources of Roman law is based on the systematic sources of law proposed in Gaius Institutions 1.2\textsuperscript{23}. Such a method is represented, among others, by a textbook written by W. Wołodkiewicz and M. Zabłocka\textsuperscript{24}. Another systematic source of the Roman law was found in older writings and was linked to the political systems of ancient Rome - that is with: the royal system, the republican system, Principate and Dominate times\textsuperscript{25}. There is another systematism, quite innovative, that can be found in the textbook of Roman law written by W. Dajczak, T. Giaro and F. Longchamps de Berie. These authors have presented the origins of Roman law in connection with the presentation of the different periods of development of this legal system\textsuperscript{26}.

Having in mind the limited size of this publication, I will limit myself to illustrating the variations in the ways in which Roman law was created in conjunction with ongoing political, social or cultural change. A separate issue but very similar to the presented problem of various endogenous influences on the creation of the law, is the question of influence on the interpretation of the provisions of law, already in the Roman law, as it was written by F. Longchamps de Berie\textsuperscript{27}.

The king was the oldest source of the foundation of law. The concrete legislation dating from the royal period was collected by the Sextus Papyrus (\textit{ius civile Papirianum}). The extinguishment of this source of law came with the expulsion of the kings around 510 BC. This event should be classified as political factors that influenced the conversion of a previously established legal order, including the way in which the law was created\textsuperscript{28}. Another important political and at the same time social event, which influenced the way the law was created, was the struggle between the plebeians and the patricians. The social inequalities, especially in the area of law making process, created the secession of the plebeians and created an alternative system of public bodies with the plebeian tribune at the head. However, the appearance of a new form of creation of legal rules (\textit{plebiscita}) at the plebeian assemblies (\textit{concilia plebis}) was

\textsuperscript{21} For example it can be: \textit{Fontes Iuris Romani Antejustiniani}, in usum scholarum ediderunt S. Riccobono, J. Baviera, C. Ferrini, J. Furlani, V. Arangio-Ruiz juris antecessores, Firenze 2007.

\textsuperscript{22} Historya źródeł prawa rzymskiego, Warszawa 1904, pp.14-15.

\textsuperscript{23} Constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium.

\textsuperscript{24} Prawo rzymskie. Instytucje, Warsaw 2009, pp. 46-68. This systematization was adopted in the older textbooks of Roman law. See: W. Rozwadowski, Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł, Warsaw 1991, pp. 34-42.


\textsuperscript{26} Prawo rzymskie. U podstaw prawa prywatnego, Warsaw 2014, pp. 39-92.

\textsuperscript{27} Summum ius summa iniuria. O ideologicznych założeniach w interpretacji starożytnych tekstów źródłowych, [in:] P. Sadowski, A. Szymański, Historia prawa w służbie sprawiedliwości, Opole 2006, pp. 70 and the following.

\textsuperscript{28} D. 1.2.2.3 (Pomp. I. sing. en firiditi): Exactis deinde regibus lege tribunica omnes leges haec exoleverunt iterumque coeptit populus Romanus incerto magis iure et consuetudine aliqua uti quam per latam legem, idque prope viginti annis passus est.
the most important change, in the year of 287, the plebiscite based on *lex Hortensia* obtained the same power as the acts (lex) adopted at the people’s congregation (comitia). 29.

The social transformations or needs related to the need to settle civil disputes have resulted in establishing the procedural rules (*leges actiones*) 30. And although originally they were available only for *cives Romanorum*, they became not only an impulse but, above all, the leaven of modern civilized judicial system – it means the procedural law. The establishment of the Praetorian office, first in the city in 367 BC (*praetor urbanus*), and then in 242 BC the praetor who administers justice among foreigners (*praetor peregrinus*) was the same category of inspiration that influenced the creation of new legal solutions. The praetors not only settled court cases, but first of all, in the praetorians edicts, they created a new private law or they adapted old *ius civile* to the new social conditions, thus forming one of the main masses of Roman law called the *ius honorarium* 31. The need to adapt the law to the changing demands of life meant that every praetor issued an edict every year, making appropriate edits to the edict of its predecessors (*edictum tralaticium*). Together with the change of the political system in Rome, the real power of the praetors of creating the law was in competition with the powers of the emperor. Hence, the emperor Hadrian in 130 BC, ordered his lawyer Salvius Julian to finalize the edict and thus close the lawful activity of the praetors. In this way the *edictum perpetuum* 32 was created. It was a closed set of legal regulation, in the sense of today’s codes.

The way in which the Roman law was created is also reflected in the resolutions of the Roman Senate. *Senatus consulta* has become one of the main sources of law in the time of emperor August. The increasing importance of the Senate’s resolutions for the legal order of ancient Rome was due to the slow disappearance of election assemblies and the limitation of their role to the electoral functions. *Senatus consultum* initially had the power of law *- legis vicem obtinent*. 33

Quite quickly, the emperors realized that the creation of the law was a manifestation of real power and thus the strengthening of the senate’s position. As a result, they started the practice of inspiring individual senators with the idea of adopting new resolutions of specific content, in accordance with the will of the emperor. Sometimes, the emperor himself applied for a resolution, and at that time such legal act was called *oratio principis in senatu habita*, meaning the emperor’s speech in the Senate. At that time, the voting on a specific resolution was purely formal action. 34

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29 D. 1.2.2.8 (Pomp. l. sing. enchiridii): Mox cum revocata est plebs, quia multae discordiae nascebantur de his plebis scitis, pro legibus placuit et ea observari lege Hortensia: et ita factum est, ut inter plebis scita et legem species constituendi interesseret, potestas autem eadem esset.

30 D. 1.2.2.6 (Pomp. l. sing. enchiridii): Deinde ex his legibus eodem tempore fere actiones compositae sunt, quibis inter se homines disciperent: quas actiones ne populus prout vellet institueret certas solemnesque esse voluerunt: et appellantur haec pars iuris legis actiones, id est legitimae actiones.

31 D. 1.2.2.10 (Pomp. l. sing. enchiridii): Eodem tempore et magistratus iura reddebat et ut scirent cives, quod ius de quaque re quisque dicturus esset sequae praemuniret “praemunirent”, edicta proponebant. Quae edicta praetorum ius honorarium constituuerunt: honorarium dicitur, quod ab honore praetoris venerat. D. 1.1.7.1 (Papin. l. 2 definit.): Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorium sic nominatum.


33 D. 1.3.9 (Ulp. 16 ad ed.): Non ambigitur senatum ius facere posse. G. 1.4.

34 An example of the implementation of political ideologies into the content of legislation is: *Senatu consultum Pisonianum* z 20 December 20 AD. This was a Senate resolution on the rank of the verdict. In this case, the Roman senate served as the contemporary State Tribunal. Translation of the resolution into Polish language see: T. Fabiszak (ed.), *Uchwała senatu rzymskiego w sprawie Gnejusza Pizona ojca*, Poznań 1998. See also: D.S. Potter, *Political Theory in the Senatus Consultum Pisonianum*, American Journal of Philology, Volume 120, Number 1 (Whole Number 477), Spring 1999, pp. 65,88.
Briefly illustrating the evolution of the origins of Roman law, the impact of culture on Roman law, in particular in the period after Constantine the Great, has yet to be touched. After the Edict of Milan in 313, the Christianity had a significant influence on the content of the law. The effect of this influence was not only the adoption of the system of Christian values, which was evident in the introduction of new legislation aimed at limiting the freedom of divorce. Also, at the center of the imperial constitution, there were issues of exclusively religious affairs. The first 12 titles of the first book of the Justinian Code is a proof of this.

The jurisprudence, especially from the classical period was the most independent of political, cultural or social influences. Prudentes, fully liberal in the legal profession until the end of the classical period, were in fact able to create dogmatic constructs of concrete legal solutions. In this case, the evolution of this source of law has taken the most perfect and independent form. The Roman lawyers decided about the form of Roman law, which is applicable in the continental legal system.

The Canon law

The evolution of the understanding of the sources of law can also be noted in the Catholic Church. In the church of the first centuries, the source of the law was the teaching of Christ written down in the Gospels and in the writing of Saint Paul. Next, beginning with the end of the first century AD, they were the writings of the writers and Fathers of the Church. One of the early writers of the Church was St. Ignatius of Antioch. Starting from the end of the second century AD, the laws of the church began to take the form of canons enacted in synods and councils. The evolution of canonic law was also inspired by the Roman law. The religious content permeated the imperial constitution, but also the imperial regulations came into the content of the canons. Over time, the pope became a source of law-making process, which, like the Roman emperors, has taken center stage in the system of canon law.

In the era of 18th-century legal positivism, the Church sought to create an administrative structure analogous to the state. The Church was to be the same entity on the international scene as the state, having subordinates (faithful) and authority (pope). The third element of the definition of the state was the substitute of territory belonging to the ecclesiastical state. In the canonical doctrine, the Church was often described by the term perfect society (societas perfecta) and this was synonymous with the state. Such a concept of the Church also appeared in the documents of the Magisterium of the Church, such as in the apostolic constitution of Benedict XV Providentissima Mater Ecclesia of May 25, 1917 promulgating the Code of Canon Law of 1917.

The conception of the Church as a kind of state also determined the conception of canon law and its origins. In the late nineteenth century, H. Laemmer argued that Das Kirchenrecht (ius ecclesiasticum) ist der Inbegriff aller sowohl von Gott unmittelbar, als auch durch die Kirche kraft ihrer göttlichen Autorität gegebenen Vorschriften oder anerkannten Rechtsnormen...

Such a definition of ecclesiastical law, connected with the concept of the Church as a state, has also appeared in the catalog of the sources of this law. At the end of the XIX century, it was
considered that the natural law (*ius naturae, divinum*) was the sources of canon law but next to it they listed the *constitutiones pontificiae*, understood as legislative acts issued by the sovereign and the canons which were adopted by the general councils. In the latter case, however, the canons focused mainly on the issue of faith (*doctrina*). Therefore, the legal acts issued by the popes had stronger power and position.

The canon law became more of the positivist character with the introduction of the Code of Canon Law of 1917 (1917 CIC). In the first book, title I *De Legibus ecclesiasticis* of the 1917 CIC, no mention is made on natural law or the law of God, but the issues of the validity and nature of legal norms are regulated, as in the case of the norms of the law of the laity. The following titles covered: the common law, the rescripts, the dispensaries and privileges.

The change of the concept of the Church and its law, and thus the change of the origin of law took place during the Second Vatican Council. It cannot be concealed, however, that the Conciliar resolutions were the fruit of earlier theological discussion on the identity of the Church and on its mission. In the Conciliar Constitution *Lumen Gentium* - no 1, the Council Fathers stated that the Church is a sacrament and a sign and instrument of salvation. It means, that the church is not the same organization as the state. Also, the Church’s law is quite different from the law of the normal state. Therefore, the law of God has become an important element of the canon law. Thus, the issue of promulgation of canon law has been seen differently. The ecclesiastical law no longer solves the temporal matters.

In this respect, the possibility of canonization of secular law was foreseen. All these changes were later noted in the Code of Canon Law of 1983 (1983 CIC). While still a source of law is the custom and the general decrees issued by the competent legislator, yet their foundation must be in the laws of God. At the same time, there is a minimum content for positive acts, namely they cannot be against the law of God – for example the cannon 22 or the cannon 24 of the 1983 CIC. The legislator, therefore, is obliged by law to act in accordance with the law of God.

The sources of law between the positivist system and the free market economy, the welfare state and the globalization

H. Kelsen talks about the law in motion, that is, the law which is subject to continuous process of self-forming. The specific system of law is the result of the gradual construction of state order. This is the so-called the dynamic theory, which differs from the static theory of the origins of law, for which it would be ideal to create a closed system and consistent law, and consequently a closed system of lawmaking process. In positivist theory, the law is created by means of the act of establishing of the authorized body in certain forms. The legal acts are arranged hierarchically and the constitution is always at the top of the pyramid of various legal Centralization of the state legal order distinguishes it from the before-state order as well as from the and supranational and international order. In the system of positivist law, law-making procedures are also envisaged.

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40 See: R. Sobański, Kościół jako podmiot, pp. 54 and the following.
41 See. R. Sobański, Kościół - prawo - zbawienia, Katowice, 1979, p. 253 and the following.
The above-described characteristics of the positivist concept of law, embedded in a particular state system, are nowadays significantly diminished by the globalization processes inspired by various liberal (political), cultural and social theories.

One of the cornerstones of a free market economy is the elimination of as much customs and taxation limitations as possible, as well as increased of the labor and capital mobility. The realization of these basic demands of a free market economy leads to a gradual departure from the positivist concept of the legal system and its sources. The first example of this is the adaptation of national legislation to international law, such as the United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11th April 1980\textsuperscript{45}. Currently, the international law is becoming a source of making process.

This process is increasingly evident in the emerging regional economical as well as the political areas. The European Union is an example of such situation. The characteristic feature of the EU law is a completely different philosophy or organization of the creation of this law. The legislative initiative is essentially owned by the European Commission, which is not a classic executive body. The role of The role of European Parliament is completely different and very limited in the process of creating EU law compare to the traditional national parliaments. The EU law is also autonomous in relation to the law of the Member States, which in practice means that the EU law prevails over national law. The system of EU law is also not built on the principles of typical positivist concept of the legal system, as it is in the case of national systems, in particular when we talk about the principle of completeness and consistency. From this point of view, there are many contradictions in the EU law and the legislative initiatives are inspired by the results of scientific research, for example in the area of ecology, by the postulates of social movements or by the acute political needs. Hence, it is often a matter of constantly introducing new regulations to the same issues\textsuperscript{46}.

The social policy of individual states linked to social change has also strong influence on the shape of the origin of the law. The welfare state, whose concept was created in the 1950s, seeks to meet the different needs of the citizen. This fact is exploited by various political parties which, in order to win the election, make various populist promises to meet all social needs. The political assumptions become the inspiration for concrete legal solutions. The law therefore becomes an instrument in the hands of politicians who carry out their pre-election promises. In this perspective, the legislative procedures, and consequently the Parliament as the main legislative body, pursue the political will of a political group or its leader.

Lastly, we must also point to two other factors influencing the content of national or even international law. These determinants are, first of all, the large international corporations, most often acting as a dispersed legal structure – it means as independent commercial law firms, but at the same time they are strongly integrated by the management system. In this way, these corporations, often with huge capital surpassing the budgets of many countries in the world, can realistically impose specific legal solutions for the countries in whose territories they have branches. The impacts on legal solutions are aimed at:

- lowering environmental standards in relation to the requirements of international law,
- undercutting the technical standards to reduce spending and
- not respecting standards on human rights, in particular labor rights, such as the right to rest (length of work day longer than 8 hours), the employment of minors or the lack of social security.


\textsuperscript{46} See: F. Martinelli, Manuale di diritto dell’Unione Europea. Aspetti istituzionali e politiche dell’Unione, Napoli 2014, pp. 118-125.
The large sports organizations such as FIFA, UEFA or IOC are the second group of international organizations that can influence the content of legislation and adapt to the current needs of legislative procedures. Poland, wanting to organize a European Football Championship in 2012, had to agree to adjust its own national rules to UEFA requirements. The dictate of this organization revealed in the fact, that the only choice for Polish authorities was to agree to the UEFA requirements or to loss of the right to organize EURO 2012. For Poland, Euro 2012 had more propaganda, than business value. On the basis of the agreement concluded on 2nd May 2007 on the organization of the UEFA European Football Championship Final Round 2010/12, between UEFA and the organizers of EURO 2012 - the National Football Federations, the main reserves have been reserved for UEFA and the numerous duties and costs of the implementation fell on the organizing parties. The consequence of this was the commitment made by the Polish government pursuant to the Act of 7th September 2007 on the preparation of the final UEFA EURO 2012 European Football Championship (Journal of Law, 2007, no. 173, item 1219). The media unequivocally negatively assessed the provisions of the contract and the Act 47.

Conclusions

The dominant positivistic vision of law is evidently very strong in the didactic process, at least in law studies in Poland, as well as in the media and popular-science publications. This allows for a static presentation, often in a simplified way, of various concepts and institutions of law. One such concept is “the sources of the law”, which is narrow to the explanation of the meaning of this concept and to describing the outline the lawmaking process. Essentially, the exogenous and especially endogenous issues, such as politics, culture and society, influencing the emergence of specific legislations, are marginalized.

Already, in the Roman law, by analyzing the sources of knowledge of law and the associated ancient legal and non-jurisprudence literature, we can prove that the legal regulations have arisen in a certain and changing political, cultural and social environment. The lawmaking process was and still is today not only the cultural or social factor but it is primarily the political factor, which was perfectly illustrated by the discussion on the praetor’s edict and the resolutions of the Roman Senate.

The evolution of the origin of law can also be seen in the canon law or in the law of the largest religion in the world. In the first millennium of Christianity, the Christian doctrine, derived from the Gospel and the writings of St. Paul, had the biggest influence on the context of legal regulations. In the second millennium, the proper canon law was developed. However, due to the similarity of the structure of the Church to the form of the state, especially in the time of enlightenment, a system of canon law was built on the pattern of positivist systems. The Second Vatican Council brought the change of this conception and consequently the current Code of Canon Law of John Paul II came into being in 1983. The provisions of this Code were based on the theological basis.

Also today, under the influence of globalization, the positivistic concept of origins of law is experiencing far-reaching decline. In view of the multilateral nature of the law, it is not possible to build a system of power based on a system of law that is coherent and closed. The state is one of the subjects both on the internationally as well as nationally scene. The international organizations, especially the corporations and the international sports organizations, are quite effective in determining the content of the law in each country. There are also social and

political factors influencing the origins of the law. The social needs are increasingly provoking the new needs, which politicians, to win elections, use as a part of their political programs, and then implement them into law system. These actions, however, are very evident in the new legislation.

To conclude this work, it must be stated that modern sources of law are a rather labile and extremely dynamic concept, as it has been claimed by already mention H. Kelsen.
**Abstract:** There is close and bivalent relationship between the evolution of the language of law and social and political changes; also a connection between evolution/decline of juridical language and quality of democratic participation. The Italian language of the Constitution of 1948 was elegant, clear, deep, concise; it represented the locus of people’s identity. Nowadays, the quality of the regulatory production is declining proportionally to the quantity. The degenerative process implies difficulties of interpretation in the judicial contexts, and slowness in the administrative procedures. The clarity of the legal language is indispensable to guarantee of the being in force of the law.

**Keywords:** Juridical language, democracy, Constitution, law, participation.

The relationship between law and language can be considered from manifold views. It might be regarded as a linguistic and literary matter, or as a historical and philosophical issue, or according to its sociological implications, and a lot of others more, not to mention the obvious juridical one.

However, the different views are closely related.

As a matter of fact, even though the starting point of our discussion (specifically juridical on the theme “evolution of the law” within the modern sets of rules) the analysis, inevitably, flows into other fields of research, with a complex, web-like, interdisciplinary connections.

Generally speaking, law experts face semantic matters from a limited perspective, basically linked to the interpretative view, not extending beyond the borders of juridical culture. But, it is vital also to the juridical analysis, to place the use of the language in the center of its research, as language is an instrument of law, by which the lawyer has to forge meanings.

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3. “By means of the language we communicate, organize, govern our behaviours, but at the same time, by the usage of our lexicon, we produce some misunderstandings, spread misinformation, and introduce confusion in our social relationships”, A. VESPAZIANI, Il potere del linguaggio e le narrative processuali, in Anamorphosis, Rivista internazionale di diritto e Letteratura, Janiero, 2015, vol. 1, n. 1, p. 70.
recognize, build semantic, syntactic and pragmatic relationships. “If a branch demanding linguistic awareness exists, this is the jurists’ one”.4

There is a close and bivalent relationship between the evolution of the language of law and social and political changes.

I mean to define the starting point of our reflection within the borders of the relation between the evolution/decline of the juridical language, on the one side, and quality of democratic participation and economic development, on the other.

Therefore, I will consider the language of the law with reference to the sources arising the rules, that is, what might be defined “juridical law”, to have it distinguished from the one used in jurisprudence, that is, what is called “jurisprudential law”.

The nature of the two languages is structurally different, especially in the set of rules of civil law, like the Italian one.

The former (regulatory) is by itself, abstract, because of the generality of the members of a community on their whole, the predictability of the assumed event, and the given social control of the established relationships; the latter (jurisprudential) is retailed on a specific case, and refers to a particular situation already happened, in order to settle a dispute or inflict a fine. As a consequence, the legislator’s language is conceptual and formal; the judge’s one is concrete, solid, practical and pragmatic.

The legislator is required to turn into a body of laws the values and interests of most of the community to allow its peaceful cohabitation; the judge is demanded to argue the juridical reasons to support one’s decision about the specific case in conformity with the law.

Differences in the origin and structure of the language may be found at higher levels of the legal system, in the comparison between legislation and constitutional jurisprudence, where the former is in charge of disciplining the organization and defining the extent of the power; the latter of defending the foundations of the Constitutional State, as well as the creation of new roads towards individual and collective rights, thanks to methodical and evolutionary interpretations of the rules.

The structure of the regulatory framework expresses the current practice of legal action.

In Italy, the quality of the regulatory production is declining (within a context of general language quality decay) proportionally to the quantity that is increasing: the rules have become less understandable, but incredibly more numerous.

The language degeneration of the source of the Italian legal system (laws, decree law, ministerial decree) appears in the complexity of its texts, often disconnected and confused, incoherent as for the content, and expressed by means of a language, too much focused on technical terms and neurotic lexis, with long sentences and sub-clauses, full of references to other regulatory rules, unintelligible to the common citizen. 

This degenerative process implies difficulties of interpretation in the judicial contexts, and pathological slowness in the administrative procedures. It is the symptom of the decay of an age and of a self-referential practice of the legal function, of the crisis of trusty relations between citizens and institutions, more and more irrelevant to fellow men’s daily life.

The brightest example, within a wider frame, is the so called Budgetary Stability Law (once called ‘budgetary law’) that the Parliament must approve every year. It is a real juridical monster, usually made up of a unique article with hundreds of clauses, arranged without any logical link.

The citizen, actual addressee of the rules (though acquiring legal knowledge of the regulations thanks to their official publication) certainly is the only one excluded from their real knowledge.

The phenomenon is further substantial in relation to the top of the Constitutional hierarchy, because here the language of law is something more: it is the symbol of the public contract between the citizens and the State; it is the civil and democratic agreement of the civic society on which the public authority is based.

The juridical language of the Constitutions has to be clear, exact, precise, concise, within everyone’s reach, made up of neat and short sentences, and words that support the meaning of their living together. In fact, explicitness is not an embellishment, but it is essential for the validation of the rule, and its common share is at the base of the social pact with the State.

The need for clarity and accessibility to juridical language, foundations of democratic participation, was already present in the guidelines of the preparatory works of the Italian Constitution, where it is reported: “The Constitution should be as much clear as possible and such that the Italian people can understand it”. The language of the Constitution must be “loyal”, as underlined by the great jurist Pietro Calamandrei; it should allow the citizens to gain the sense of legality, that is that legal but prior moral bound, that implies the respect of the rules.

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12 For example, art.1 of the Financial Law 2016 for 2017 (l. 22.12.2016 n.232), under the same classification (Rubrica) “Quantitative measures for the fulfillment of the scheduled goals” contains 638 clauses concerning varied issues ranging from taxes to business budgets, university research activities, birth support, wideband communication technology, national trust for historical memories. All this without any chance for the citizens (and also for lots of workers in the field of law) to find out the issue of one’s concern.
14 P. CARETTI, Lingua e Costituzione, in www.rivistaaic.it n. 2/2014.
15 G. PINO, Il linguaggio dei diritti, in “Ragion pratica”, 31, 2008, pp. 393-409, notices that the constitutional regulations not only do imply values, but also declare values, proclaiming them within a juridical document.
The Italian language of the Constitution of 1948\(^{17}\), thanks to elegant, clear, deep, widespread words, represented the locus of people’s identity, a story-telling, the sharing of the value of the State, the construction of the future\(^{18}\).

The language of the fathers of the Constitution, expression of a high historical cooperation among different political forces, fulfilled the mission of transparency and led the country to unite around a central core of rights and duties and the general understanding of the functions of the Republican institutions. It was the result of a sensibility and of a refined political culture, aimed at the construction of the shared body of a democratic State, now apparently lost.\(^{19}\)

The simplification of the language was not a rhetorical exercise, but constituted a political project for participation and change, participated even in the choice and construction of simple words and brief sentences; in fact, “you *do not communicate using generic language systems, but always by means of specific linguistic patterns responding to the goals and ways of actual communicative relations*”\(^{20}\).

The clarity of the legal language is indispensable to make objective and lawful the expressed willing of the legislator, and is also guarantee of the being in force of the law. In fact, the value of this specific language is the concrete assertion of the law as the core of the entire body of rules and the legitimate power of the State\(^{21}\).

Although technical, as expressing juridical regulations, the language of the law cannot be isolated from other worlds and social contexts, and it must be connected with the lexicon really spoken and used by citizens, because the language constitutes the first instrument of democratic participation.\(^{22}\)

The formal existence of the on the respect of the procedures of approval and publication, must combine with the necessity of being effective in its relation with its addressee, that is the people, who is sovereign, and holds the legislative function.

Otherwise, the substantial truth of the power lying in people’s consent would be denied, well before the one assured by the formal respect of the rules of production.

Juridical language adjusts morphology and syntax to social and economic changes, and to the need for regulation of relations and safeguard of rights and interests, in different historical contexts; but, on the other hand, the technical language, as instrument of power, affects and determines cultural and political processes.


\(^{18}\) Unfortunately, it was not the case of further revisions of the constitutional text, specifically the last reform of 2016, rejected by means of referendum.


\(^{22}\) From another point of view, also the constitution of an “European law” cannot do without the analysis of the language that in Europe does not appear as a closed system. To shape a common juridical European community, the creation of a pattern of shared statements in the specific fields (e.g. civil, commercial, administrative, penal), is not enough , but requires the perception of the way in which this language originates in the its cores and structures, E CASTORINA, Linguaggio costituzionale e integrazione europea, in Federalismi.it n. 8/2009.
So, the vagueness of the legal language questions not only the being in force of the democratic principal, distancing the people from the institutions\textsuperscript{23}, but also dangers the professional and business relations among citizens. So doing, it reduces the potentialities of the economic and social developments of the Nation, because the several bounds and the lack of clarity within the activities of the public administration and private economics, make the system, in which the operators are called to work, untrustable.

If language is the expression of the soul and the legal one the representation of the relation between the power and the fellow men community, the evolving decline of the regulatory body is very telling.

\textsuperscript{23} Censis underlines the great gap between political power and people in Italy, “The institutions are not longer able to be a bridge between political dynamics and social dynamics” Censis Survey, Note, 2 dic 2016, in www.censis.it sec. Public Notes.
Anna Rataj*, Revolution or Evolution? The Emergence of the Constitution of the State of Israel

Abstract: The question whether Israel does or doesn’t have a constitution remained unanswered for many decades. The constitutional system of the State of Israel is built upon 12 basic laws which have been adopted by the Knesset for decades without following any special procedural requirements. At the same time, the Supreme Court undertook a difficult task of protecting human rights. Its law-making activity resulted in creating a judicial bill of rights. Part of the rights protected by this bill was regulated in two basic laws of 1992, which contained limitation clauses. According to the Supreme Court Justice Aharon Barak, this meant that these Basic Laws have a higher normative status than regular laws. His theory of the “constitutional revolution” resulted in the landmark decision of the Israeli Supreme Court re: Bank HaMizrachi (1995) where the Court decided that Israel does have a constitution and the Israeli courts are empowered to exercise the judicial review of laws. The paper discusses whether the emergence of the constitution in Israel is a result of a constitutional revolution of 1992 or rather evolution that took decades through the actions taken by the Knesset and the Supreme Court.

Keywords: Israel, constitution, Supreme Court, judicial activism, judicial lawmaking

I. Introduction and Historical Background

The question whether Israel does or doesn’t have a constitution is a tricky one. The answer will depend on the definition of a constitution and an approach that the respondent takes towards the existing constitutional framework in Israel. If we asked an average Israeli citizen whether his country has a constitution, he would probably answer in the negative. The affirmative answer given by the Israeli Supreme Court does not convince everyone; even some constitutional law scholars would not agree with it. One is indisputable: Israel has not yet managed to adopt a fully-fledged constitution in form of a document that would have a special place in hierarchy of laws and a special content typical for the highest law of the land. Nevertheless, the constitutional developments that took place over the decades in Israel bring up some interesting issues from the point of view of the constitution-making process.

The obligation to adopt a constitution for Israel was mentioned already in the United Nations resolution of 29 November 1947 which stated that “Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem (…) shall come into existence in Palestine (...) The Constituent Assembly of each State shall draft a democratic constitution for its State.”¹. When Israel was founded in 1948, the Declaration of Independence provided that the country will adopt a written democratic constitution: “The Constitution shall be adopted by the Elected Constituent Assembly not later than the 1 October 1948”². However, the elected constituency that later became the First Knesset, had not managed to fulfill this obligation. The constitutional debate that took place after the establishment of the State did not lead to the

* The author obtained her PhD degree from the Jagiellonian University in Kraków, defending her thesis on “The Israeli Supreme Court as a Constitutional Court”. The research project was financed from the sources of the National Science Center awarded by the decision no. DEC-2012/05/N/HS5/02557.


² Declaration of the Establishment of the State of Israel, IR 1 (1948) 1.
adoption of the constitution. Numerous political, social and ideological factors rendered reaching a compromise over the constitution impossible. The only tangible result of the constitutional debate was the Harari Resolution adopted on 13 June 1950 by the First Knesset, according to which:

“The Constitution shall be composed of individual chapters in such a manner that each of them shall constitute a basic law in itself. (...) all chapters together will form the State Constitution.”

The resolution was very scarce in its content. It did not set the time limit for the adoption of a constitution, nor did it precise what normative status the basic laws shall have. It did not establish the required Knesset majority or any procedure for the adoption of basic laws. In particular, it was not clear whether every single basic law shall have normative supremacy or only the final result of the intended constitution shall have one.

It would seem that the Knesset’s task was simple now: to adopt the future Israeli constitution chapter by chapter without having to look for the perfect “constitutional moment”. However, the political and military situation did not facilitate this process. Facing a constant threat to the existence of the state and dealing with internal ideological conflicts, the Knesset had struggled to determine the content of every single basic law. As it will be shown in the next paragraphs, it was particularly difficult for the Knesset to reach an agreement over the shape of guarantees of fundamental rights and freedoms. Mainly for this reason another character besides the Knesset started playing a crucial role in the constitution-making process in Israel, namely the Supreme Court.

II. The Enactment of the Basic Laws by the Knesset

First, it needs to be explained that due to the reason that the enactment of the basic laws by the Knesset took a few decades, in fact, they only confirmed institutional solutions that evolved in Israeli constitutional system during the years preceding their adoption. The political crises that existed already at the beginning of the Israeli statehood prevented the Knesset from undertaking the difficult task of introducing basic laws for almost 10 years. The first basic law was adopted only in 1958 by the Third Knesset. It was the Basic Law: The Knesset. It governed the elections to the legislative body and the functioning of it. In 1960 the Basic Law: Israel Lands was adopted. It is the shortest basic law (it contains only 3 provisions) and it governs the status of the state lands. This decade brought two more basic laws: the Basic Law: The President of the State (1964) and the Basic Law: The Government (1968), which was replaced by the Basic Law: The Government (1992) that introduced the direct elections of the prime minister. This experiment did not work well; therefore the law of 1992 was replaced by the currently binding Basic Law: The Government (2001). The Knesset managed to adopt also the following basic laws covering institutional framework: Basic Law: The State Economy (1975), Basic Law: The State

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3 Harari Resolution, Hebr. leg. פ_ATTACHMENT_9(1)_1440758924101.png
6 Basic Law: Israel Lands, SH 312 (1960) 56.
7 Basic Law: The President of the State, SH 428 (1964), 118.

Before the year 1992, the Knesset had adopted altogether 9 basic laws that covered the details of the functioning of the state. These basic laws had been adopted by a simple majority of the Knesset members without following any special procedural requirements. The Basic Law: The Knesset and the Basic Law: The Government contained so called entrenched clauses, i.e. articles which required an absolute or qualified majority of the Knesset members for their amendment.\textsuperscript{16} The presence of entrenched clauses indicated that the basic law might have a higher normative status than the ordinary legislation. The starting question asked by the Israeli constitutional law scholars was whether the Knesset had the power to adopt laws that would have a higher normative status. The majority claimed that the constituent power of the First Knesset was transferred to the next Knessets, therefore every Knesset has both the legislative and the constituent power.\textsuperscript{17} The majority claimed also that the Knesset acted within its constituent power while adopting basic laws. This would mean that the basic laws were granted the higher normative status.\textsuperscript{18}

The Knesset itself did not act as if the basic laws had a higher normative status. The lack of special procedure for adopting basic laws resulted in mixing the legislative and constituent power, making it possible to amend the basic laws by means of ordinary laws.\textsuperscript{19} Similarly, the Supreme Court’s decisions denied the higher normative status of the basic laws.\textsuperscript{20}

The year 1992 marks a turning point in the Israeli constitution-making process, for this is when the Knesset adopted two basic laws dealing with fundamental rights and freedoms: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, replaced in 1994 by the Basic Law: Freedom of Occupation.\textsuperscript{21} Their significance was immediately noticed by the Supreme Court Justice Aharon Barak who launched a scholarly campaign on the constitutional revolution in Israel (see below).

In 2014, the Knesset adopted the newest Israeli basic law, namely the Basic Law: Referendum.\textsuperscript{22} It gives the Knesset the possibility to conduct a referendum in case Israel would like to resign from a part of its territory.

III. The Supreme Court’s Contribution to the Israeli Constitution-Making

Due to an absence of action on the side of the Knesset with respect to fundamental rights and freedoms, the Supreme Court undertook a difficult task of protecting those rights despite the

\textsuperscript{12} Basic Law: The Army, SH 806 (1976) 154.
\textsuperscript{13} Basic Law: Jerusalem, Capital of Israel, SH 980 (1980) 186
\textsuperscript{14} Basic Law: Judiciary, SH 1110 (1984) 78.
\textsuperscript{16} With respect to Basic Law: The Knesset, articles 4 and 45 were entrenched from the very beginning. Later also articles 9a, 34, 44, 45a and 46 became entrenched. Basic Law: The Government contains only one entrenched clause which covers the whole law, requiring the absolute majority to amend any provision of it.
\textsuperscript{17} A. Shapira, Judicial Review..., p. 411.
\textsuperscript{20} CrA 107/73 Negev Automobile Services Station Ltd. v. State of Israel, 28 (1) PD [Piskei Din = Court Decisions] 640 (1974); HCl 148/73 Kaniel v. Minister of Justice, 27 (1) PD 794 (1973).
\textsuperscript{22} Basic Law: Referendum, SH 2443 (2014) 400.
lack of a proper constitutional framework. Acting in its capacity as the High Court of Justice\textsuperscript{23}, the Supreme Court heard direct petitions from Israeli citizens (and since 1967 also from inhabitants of the occupied territories) who claimed that actions by the government authorities had infringed upon their rights. The Supreme Court used its power to control the governmental actions on their conformity with the principles derived from the Declaration of Independence and the rule of law. Thanks to this judicial review of administrative decisions, the Supreme Court soon became the main defender of fundamental rights in Israel.\textsuperscript{24} Beginning with the Kol Ha’am\textsuperscript{25} decision of 1953, it started building up an ample case law granting protection to the rights that were not protected in Israeli positive law. The Supreme Court derived these rights from extra-statutory sources, such as: “the vision of the nation and its faith”\textsuperscript{26}, “the spirit expressed in the Declaration of Independence”\textsuperscript{27}, “the national way of life”\textsuperscript{28}, “basic principles derived from the character of our state as a freedom-loving state”\textsuperscript{29}, “an unwritten principle being a soul of our whole constitutional system”\textsuperscript{30}, or “constitutional principles being a basis of Israeli legislation”\textsuperscript{31}. Moreover, the Supreme Court decided that because Israel chose a democratic regime of the State with a rule of law, these supra-normative principles are binding in Israel despite not being expressed in a written constitution.\textsuperscript{32}

This law-making activity of the Supreme Court resulted in creating a firm body of judge-made law, described by some scholars as a “judicial” or “unwritten” bill of rights.\textsuperscript{33} This bill included among others such rights and freedoms as: freedom of speech and press\textsuperscript{34}, freedom of assembly,\textsuperscript{35} freedom of association,\textsuperscript{36} freedom of profession,\textsuperscript{37} freedom of movement\textsuperscript{38} and the right to equality.\textsuperscript{39} Before the enactment of the two basic laws dealing with fundamental rights in 1992, there was no formal bill of rights in Israel. The very strong position of the Supreme Court made it possible to impose the protection of fundamental rights in the lower Israeli courts, as the following statement summarizes:

“All those rights (…) are being claimed and enforced in our courts as matters of routine, and though nowhere enacted in so many words, form part and parcel of the law of Israel.”\textsuperscript{40}

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\textsuperscript{23} Basic Law: Judiciary (1984) grants the Supreme Court two capacities: it shall hear appeals against judgments and other decisions of the District Courts (sec. 15 (b)) and, when sitting as a High Court of Justice, it shall hear matters in which it deems necessary to grant relief for the sake of justice (sec. 15 (c)).


\textsuperscript{25} HCJ 73/53 Kol Ha’am v. Minister of Interior, 7 PD 871 (1953).

\textsuperscript{26} HCJ 10/48 Zeev v. Gubernik, 1 PD 85 (1948), p. 5.

\textsuperscript{27} HCJ 95/49 El Khouri v. Chief of Staff, 4 PD 34 (1950), p. 37 (PD Hebr.).

\textsuperscript{28} HCJ 73/53 Kol Ha’am v. Minister of Interior, 7 PD 871 (1953), p. 18.

\textsuperscript{29} HCJ 243/62 Israel Film Studios Ltd. v. Gerry, 16 PD 2407 (1962), p. 2415 (PD Hebr.).


\textsuperscript{32} HCJ 243/62 Israel Film Studios Ltd. v. Gerry, 16 PD 2407 (1962).


\textsuperscript{34} HCJ 73/53, Kol Ha’am v. Minister of Interior, 7 PD 871 (1953).


\textsuperscript{36} HCJ FH 16/61, Company Register v. Kardash, 16 PD 1209 (1962).

\textsuperscript{37} HCJ 1/49, Bejarano v. Minister of Police, 2 PD 80 (1949).

\textsuperscript{38} HCJ 111/53, Kaufman v. Minister of Interior, 7 PD 534 (1953).

\textsuperscript{39} HCJ 98/69, Bergman v. Minister of Finance and State Comptroller, 23 (1) PD 693 (1969).

Thus, the protection of fundamental rights in Israel was not a result of the legislative activity of the Knesset, but emerged in opposition to its passive role. It was the Supreme Court who defined the relations between the state and an individual.  

IV. Constitutional Revolution

As already mentioned, the year 1992 brought a new era in Israeli constitutional law. A very narrow part of the rights protected by the judicial bill of rights was regulated in the Basic Law: Human dignity and Liberty and Basic Law: Freedom of Occupation. The new basic laws were extraordinary not only because of their content (they granted protection to human dignity, ownership, liberty and freedom of occupation), but also due to their formal composition. Both laws contained a limitation clause with respect to the protected rights, which stated that: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.”  

According to the Supreme Court Justice Aharon Barak, by introducing limitation clauses to these Basic Laws, the Knesset limited itself which means that these Basic Laws have a higher normative status than regular laws. For Justice Barak, introducing limitation clauses to basic laws was a turning point in the development of the constitution-making process in Israel. During his speech at the doctor honoris causa awarding ceremony in Haifa he revealed his concept of the constitutional revolution in Israel:

“Not everyone knows this, but recently a revolution has occurred in Israel. I am speaking of a constitutional revolution, in which the Knesset, as the constitutive branch, enacted Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.”

When the new basic laws were being enacted, Justice Barak had been at the Supreme Court for 24 years already. He was the main driving force behind the changes that made the Israeli Supreme Court the most activist supreme court in the world. Knowing the political situation in Israel and the judicial activism of the Supreme Court Justices, he saw the chances of far-reaching consequences that the enactment of the new basic laws brought.

V. The Bank HaMizrachi Decision as a Completion of the Israeli Constitution

Justice Barak’s campaign of the constitutional revolution caused by two basic laws of 1992 found its grand finale in 1995 in the Supreme Court’s landmark decision re: Bank HaMizrachi (the so-called Israeli Marbury v. Madison). Only a narrow part of the 436-page long decision refers to the dispute itself. The vast majority of it is obiter dictum in form of opinions of the Justices who presented their scholar theories of constitutional law and constitutional adjudication in Israel. Three Justices wrote opinions of more than one hundred pages: the current president Justice Meir Shamgar (main opinion), the elected president Justice Aharon Barak (concurrent opinion) and Justice Mishel Cheshin (dissenting opinion). Six Justices joined Justice Barak’s opinion, writing only short contributions. Two main questions were discussed

44 Ibidem.
by the Justices: whether Israel has a constitution and whether Israeli courts have power to exercise judicial review of laws.

The Supreme Court ruled that the Knesset does have a constituent power and that it acted within this power when it was adopting basic laws. Thus, basic laws have a higher normative status than ordinary legislation. Justice Barak explained in his opinion that the enactment of the basic laws of 1992 brought a substantive change in the status of human rights under Israeli law. Such rights became constitutionally protected which means that they have a supra-legislative constitutional status. A regular law cannot infringe a protected human right unless the constitutional requirements set forth in the basic law have been met. The failure of a regular law to meet those requirements renders it unconstitutional. Such a law is constitutionally flawed and a court may declare it void. Thus, the new basic laws enabled the completion of the constitution-making process by granting protection to fundamental rights. As a result of it, Israel does have a constitution and the Israeli courts are empowered to exercise judicial review of laws. Quoting Justice Barak:

"A number of rights were transformed into constitutional supra-legislative rights. The Israeli politics became, with regard to human rights, a constitutional politics. Israeli law was constitutionalized." 48

VI. Conclusion: Revolution or evolution?

If we approve the Supreme Court’s opinion that Israel has a constitution, the following question will arise: is the emergence of the constitution a result of a revolution or rather evolution? Did Justice Aharon Barak have right when creating the constitutional revolution concept? Or is the emergence of the Israeli constitution rather a result of evolution that took decades through the actions taken by the Knesset and the Supreme Court?

There is no obvious answer to this question. The opinions on the briefly presented Israeli constitutional developments are diversified. They range from affirmation to a complete denial of the constitutional revolution concept which was thoroughly discussed in the Israeli subject matter literature. Below is a voice of approval expressed even before the Bank HaMizrahi decision by David Kretzmer, a constitutional law scholar who prophesized the way the Supreme Court was going to rule:

"I have little doubt that given the declared support of the leading justices on the Supreme Court for a bill of rights that will allow for judicial review, the suggested approach will be adopted by the Supreme Court. This means that the two new basic laws have introduced a mini-revolution into Israeli constitutional law by providing a sound basis for judicial review of legislation on grounds that it is inconsistent with human rights." 49

Another affirmative voice came from the former Minister of Justice Dan Meridor who directly contributed to the enactment of the new basic laws in 1992:

"Nevertheless, a considerable number of basic rights have been constitutionalized, and in fact we revolutionized the Israeli system, by what we called then the "Constitutional

47 Justice Barak’s opinion, CA 6821/93, United Mizrahi Bank v. Migdal Cooperative Village, 49 (4) PD 195 (1995), p. 139-140.
Revolution”. We allowed the Supreme Court, at least implicitly, to have judicial review over Knesset legislation regarding human rights”

Amnon Reichman, in turn, admits that there was a constitutional revolution, but it happened against the Knesset’s will and was mainly driven by Justice Aharon Barak’s unusual scholar and political activity in this field:

“This revolution, while based on two Basic Laws enacted by the Knesset in 1992, was nonetheless Court-driven in the sense that the Justices of the Supreme Court in the Bank HaMizrachi decision (1995) significantly expanded the rather modest mandate given in these two Basic Laws.”

A voice of disappointment for lack of democratic involvement in the process of the constitutionalization of Israeli law can be heard from Ori Aronson:

“Israel’s constitutional history is devoid of a ‘constitutional moment’ of serious participatory magnitude, and its ‘Constitutional Revolution’ is consistently criticized for having lacked a democratically robust deliberative dynamic.”

The concept of constitutional revolution was rejected by Justice Menachem Elon who saw the constitutionalization of Israeli law rather as a result of a long evolving process:

“As for me, I do not call it a 'constitutional revolution’. It is far from that. If there were revolutionaries in the Supreme Court, they belonged to the first generation. They created something from nothing. Without Basic Laws they decided on freedom of speech, freedom of vocation, etc., while applying the vision of the Declaration of Independence.”

And finally, a total criticism was expressed by an Austrian constitutional law scholar who examined the activity of the Israeli Supreme Court from the perspective of human rights in both Israel and occupied territories:

“I come rather to the conclusion that these laws are no "revolution" at all, since they did not bring any real "democratization" of the constitutional regime and legal order as a whole. Or to say it in other words: They did not bring any manifest improvement of the human rights situation in Israel and the Occupied Territories.”

More than 25 years have passed since the enactment of the new basic laws. The evaluation of the concept of constitutional revolution has changed, following the changes that it made in the legal and political system of Israel. Undoubtedly, Justice Barak’s presidency at the Supreme Court contributed significantly to the adoption of this concept in Israeli judicial practice, and even more so its introduction into the subject of constitutional law taught at Israeli universities.

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50 D. Meridor, Zionism and Democracy are the Only Way to Rule the Country, Justice no. 21 (1999), p. 4.
53 M. Elon, We are Bound to Anchor Decisions in the Values of a Jewish and Democratic State, Justice no. 17 (1998), p. 13.
Abstract: There is continuous work on rapprochement in understanding and accepting the intentions and effects of Public Procurement Law. European Union (EU) law is a special and autonomous legal order with the concepts of European integration and economic development behind all undertaken activities. The most popular current programs are the EU 2020 and Euro 2020 ECOFIN (Economic and Financial Affairs Council) which endorse member countries' economic right to conduct home affairs in their most important macroeconomic and structural matters. The results of integration efforts are described in the Public Procurement Lawbook, which came into force on July 28 2016, with some delay in relation to the implementation deadline (April 18, 2016). Implementation of the agreement with the EU took place in 2014; the 2014/24/EU (so-called Criticism) and 2014/25/EU (EU Public Procurement Law on Procurement and Appeal Procedures). However, this system is still young and therefore naturally associated with evolution, in both copyright management and doctrinal concepts.

Keywords: public procurement, international law, acts of the domestic law, statutory instrument, implementation of legal documents.

Introduction

The issue of introducing international norms into national legislation is a timeless theme. Law must continue to adapt to changing society, and this variability is an immanent feature of international relations. The main factors affecting state functioning are its constitution, legislation and sovereignty and these are subject to the processes of globalization and intra-community integration. After Poland became a Member State of the European Union in 2004, our legislators were obliged to adjust legislation to the new reality and the new standards related to it.

EU law is special because it is based on both the autonomy of the legal order and the purpose of generating unification of Member States’ legal systems. Moreover, EU law prevails where national legislation and EU law do not coincide. Moreover, the primary law of the EU does not explicitly refer to the subject of public procurement, but following the Treaty of Lisbon in 2009, EU legislation was governed by general principles which were often the basis of EU

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1 The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement which amends the two treaties which form the constitutional basis of the European Union (EU). The Treaty of Lisbon was signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009.[2] It amends the Maastricht Treaty (1993), known in updated form as the Treaty on European Union (2007) or TEU, and the Treaty of Rome (1957), known in updated form as the Treaty on the Functioning of the European Union (2007) or TFEU.[3] It also amends the attached treaty protocols as well as the Treaty establishing the European Atomic Energy Community (EURATOM). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community
Court of Justice rulings. It was only in 2014 that new regulations of the European Parliament and the Council on public procurement emerged.

Council Directive 2014/24/EU of the European Parliament on Public Procurement was published on 26 February 2014. The following further directives were published in conjunction: (1) Directive 2014/25/EU on awarding contracts by entities operating in the water, energy, transport and postal service sectors and (2) Directive 2014/23/EU on the granting of concessions. Poland was obliged to implement these by April 18, 2016.

Efficiency as the purpose of public procurement

Public procurement is making a purchase by paid contract; most generally for supplies, services or work. While this can be considered, "shopping", it is not their sole purpose because the "extra-purchase" importance of orders is also distinguished. The latter is particularly important for the purpose of this article because its core features are dynamics and variability. These result from the entire public procurement system being governed by combined national and EU law which makes these standards so broad that the laws can be very complex and acquire new meanings.

When discussing public procurement objectives, it is imperative to consider the efficiency of spending funds intended to purchase the subject of the contract. This provides an excellent example of how European standards influence the market of national regulation. EU law stresses that the efficiency must include rational economics in all purchases, including innovative purchases. The addition of this standard creates the possibility under Polish law of inspection by the Supreme Chamber of Control which, according to law, has the power to control orders in terms of legality, economy, purpose and reliability.

Public procurement is not solely a legal instrument. It also fulfills the functions of an economic instrument which shapes the contracting authority and the contractor both legally and economically. The EU coordination of procurement procedures is aimed at minimizing the risk of pursuing non-economic conditions by awarding contracting entities. The economic nature of contracts highlights that they are instruments which enable decisions to be made between work concession and public-private partnership.

T. Kocowski (2012) argues that public spending on public tasks must take place in an unquestionably effective manner. This indicates that the available resources should ensure maximum and optimal performance of public tasks, and the objective will be achieved by

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5Properly executed public procurement is an economically efficient order, ensuring a fast, innovative and open procedure for the best ratio between inputs and outputs.
6P. Nowicki, Efektywne zamówienia publiczne jako rezultat stosowania nowego podejścia do zamówień publicznych, PARP, Warszawa 2013 p. 9
9P. Nowicki, Efektywne zamówienia ... op.cit. p. 9.
11P. Nowicki, Efektywne zamówienia publiczne... op.cit. p. 9.
providing as much of the desired goods as possible, or by providing the widest range of services required\textsuperscript{12}. This position coincides with the interpretation of the word "effective"; defined in the Polish Language Dictionary as "giving good results, efficient"\textsuperscript{13}.

**Directive 2014/24/EU**

One method of adapting Polish law to EU standards is implementation of EU Council directives. Adopting the amendment to the Public Procurement Act was at that time a sufficient step in the implementation of the directives, and since the ‘vacatio legis’ adoption of the amendment - the legacy of most of the old regulations –it has contributed to greater legal certainty.

Despite the literal wording of the procurement procedure, Directive 2014/24/EU also regulates selected issues related to the implementation of public procurement contracts. Unlike the existing regulations of Directive 2004/18/EC which contain only limited provisions, Directive 2014/24/EU provides new and separate provisions aimed directly at the implementation stage of the contract\textsuperscript{14}. Thus, Directive 2014/24/EU goes beyond procedural issues related to the public procurement process itself and sometimes goes well beyond the scope of national law, and primarily civil law. This is another example of the process often referred to in the doctrine as the "Europeanization"\textsuperscript{15} of law, but this term normally refers to administrative law\textsuperscript{16}.

It is particularly emphasized that the Directive has bound the Member States since it came into force, not from the moment of its implementation. This is due, inter alia, to the fact that it is from the moment of the entry into force of the Directive that the Member State is obliged to take action to complete the full implementation of the Directive within the prescribed period. With the implementation deadline, the addressee of the directive is not only the specific Member State, but its standards should also become effective ‘erga omnes’ for all\textsuperscript{17}.

The European commission jurisprudence (ECJ) also observes that the obligation to interpret a national law in accordance with a given directive is governed by all national laws, both earlier and later than the present directive\textsuperscript{18}. It must consistently be stated that Directive 2014/24/EU is significant from its entry into force, even before it is implemented in the national legal order. Implementing the classical directive has brought many positive solutions, including:

- simplification of procurement procedures and their flexibility by: ‘better use of negotiations as a way of clarifying contract terms with contractors in order to obtain the


\textsuperscript{15}One of the key concepts describing the process of change taking place in the EU Member States has been Europeization since the 1990s, due to the increasing influence of EU policies and law. It points to the lack of one comprehensive definition of this notion, while pointing to the three essential areas where this "Europeanization" takes place, ie politics, politics and politics. (U. Sedeleier, [in:] E. Jones, A. Menon, S. Weatherill ed., The Oxford Handbook, p. 825.


\textsuperscript{17}Ibidem.

\textsuperscript{18}TSUE13.11.1990 in case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, Zb.Orz. 1990, p. I-04135;See also TSUE z 4.7.2006 r. in caseC-212/04, point108.
service that best suits the contracting authority's needs and reducing formalities at the stage of applying for a contract. 

- electrification of a significant part of the public procurement process (generally from mid-2018).

- promotion and exploitation of non-economic public procurement objectives such as environmental protection, social inclusion and innovation support.

- inclusion in public procurement issues related to compliance with labor law and social security, by explicitly adhering to the relevant provisions in public procurement contracts,

- ensurance of real participation in the execution of the contract of third parties on which the contractor's resources are referred.

The new rigorous approach to public procurement is directly linked to the EU 2020 and Euro 2020 ECOFIN assumptions which provide that Europe's economic development is based on enhanced surveillance in each Member State on key macroeconomic and structural policies.

The role of public procurement in the entire EU economy can not be undermined and all above-mentioned assumptions are designed to draw the Union out of impending crises, so it is not surprising that their regulations form the key components of anti-crisis measures.

Self-cleansing as a procedure implemented by EU directives

Under the specific support of the thesis on the positive influence of European law on Polish law, the following self-cleansing mechanism was introduced into our national legal order by the EU Directive. Self-cleansing was updated by the 2014/24/EU Classic Directive of 29 August 2014 and its definition is now contained in Art. 57 (6) of the Directive.

The characteristics of this phenomenon areas follows; the self-cleansing mechanism is related to the regulations governing the exclusion of the contractor from the procurement procedure, and its purpose is to exclude those contractors who do not meet the terms and conditions of the law and are therefore deemed to be non-compliant. This solution is considered rational spending of public funds because under this regulation “the contractor must, in order to avoid exclusion, prove that he has for any damage caused by the offense, or has committed...

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19. Limitation of the basic obligations of contractors to submit a statement of fulfillment of conditions in the form of standardized so- a single European order document (confirming compliance with the criteria for participation in the procedure, lack of grounds for exclusion of the contractor, selection criteria also for third parties and subcontractors), - restriction on the principle of requesting documents only from the contractor whose tender was chosen as the most advantageous, prohibition of requests for documents which the contracting authority has or may obtain from publicly available and free databases, the obligation to use the e-Certis system.


26. As mentioned in the previous part of the work, rational expenditure is to be understood as being performed in an effective manner and for the benefit of the contracting parties, which constitutes one of the objectives of public procurement.

to compensate, exhaustively explained the facts and circumstances, actively cooperates with the investigating bodies and has taken specific technical, organizational and personnel measures suitable for the prevention of further crimes or improper conduct.” The evidence is intended to demonstrate that the contractor is honest despite the grounds for exclusion. Article 57 (7) of the Directive reflects provisions of the Public Procurement Law which made these provisions more flexible regarding unnecessary elimination of experienced contractors.

Consequently, when discussing the objectives of public procurement law, such as ensuring a rational flow of public funds and actions aimed at equalizing contractors’ access to the public procurement market, the self-purification institution certainly fulfills its role. Therefore, the author feels this is an ideal example of positive impact of EU law on national regulations.

Proposals for legislative changes in public procurement law

Today we realize that the legislators regarded the last implementation as merely a prelude to major changes. The Ministry of Development and Public Procurement Office was already working on a new Public Procurement Law in August 2017. According to the timetable of work presented by Deputy Prime Minister Mateusz Morawiecki, a new concept of public procurement would be created by the end of 2017. This will be subject to extensive public consultation, and the bill should be ready in the first half of 2018. These actions confirm that the implementation stage of the directives is not yet completed.

The Deputy Prime Minister informed the Polish Press Agency about the reasons for the decision to review the public procurement law once again. His speech first pointed out that "positive changes have already been brought about last year’s amendment, even in the case of non-price criteria of evaluation of tenders or linking of contracts with labor law" (…) “But we did not accidentally talk about a minor amendment: Urgent adjustment of our rights to EU regulations”.

The President of the Public Procurement Office, Małgorzata Stręciwilk, added that this act must certainly accord with EU regulations, by “readily and comprehensively regulating all aspects of the process of preparing and awarding a public contract. It will be friendly to both contractors and contractees. It will be shaped in a way that will have beneficial effects on the development of the Polish economy’s potential.”

Conclusion

Finally, it must be emphasized that public procurement is a very important element of the Polish market, and thus the entire European Union marketplace. The role of procurement is so important not only because of the amount of public money spent but also through the way it affects the state. Therefore, the authority influences the direction of development by pursuing specific objectives. This involves, of course, the "shopping" and "off-the-shelf" objectives. Implementation of EU directives has thereby combined European and national laws and this applies not only to the implementation of individual national policies, but also to European Union policy.

All legal acts mentioned in this work regulate not only procedural matters related to the law of public procurement, but they also define the rights and obligations of the contracting authority.

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32 H. Nowicki Specyfikacja istotnych warunków zamówienia... op.cit. p.243.
as the entity responsible for preparing procurement procedure. The Member States and the European Commission have made an effort in recent years to help the contracting authorities fulfill the tasks assigned to them and to disseminate the concept of a new approach to public procurement. This includes creating the legal and institutional conditions that ensure the most efficient use of funds, and these conditions will certainly help eliminate barriers to procurement market access for small and medium-sized enterprises (SMEs). Activities undertaken so far include stimulating the development of innovation, electronic ordering and paying special attention to the ecological and social aspects which play an important role in stimulating development\textsuperscript{33}.

The rules that have been introduced by the amendment are undoubtedly a big change and entail a series of challenges for the system. An excellent example here is electronic ordering, because this practice will highlight how the new regulations will streamline their provision.

\textsuperscript{33}P. Nowicki, \textit{Efektywne zamówienia... op.cit.} p. 3.
Abstract: In the article, the author analyzed the legal aspects of digital currency trading in Poland and selected countries of the European Union. In the first place, he argued the need to create a legal definition of digital currency. Subsequently, he presented doubts arising from the tax law related to the functioning of business entities specialized in digital currency trading. The author in his article analyzed the issue of taxation of income taxes and the tax on goods and services contracts related to the sale of digital currency. In the remainder of the paper, the author analyzes the specificities of committing well-known crimes using digital currency. The deliberations also included an assessment of the direction of action taken by the state authorities to reduce the abovementioned negative phenomena. The author also introduced the idea of creation, the so-called, "Sandbox" launched in the United Kingdom. The legal framework applicable in the United Kingdom, Luxembourg and Germany concerning the licensing and management of digital currency trading entities has also been analyzed. The author also showed the evolution of the approach of state authorities to the issue of digital currency. In the summary, the author presented the conclusions of the analysis, including suggestions for actions that should be taken by the state authorities in the area in question.

Keywords: digital currency, legal definition, income tax, goods and services tax, economic crime, license, supervision

Wprowadzenie


Pawel Czaplicki*, Prawne aspekty obrotu walutami cyfrowymi w Polsce oraz niektórych państwach Unii Europejskiej- zagadnienia wybrane (Legal Aspects of Digital Currency Trading in Poland and some European Union Countries - Selected Issues)

Definicja walut cyfrowych

Jak zostało to już wskazane we wprowadzeniu do niniejszego opracowania, pierwszoplanowe wyzwanie dla prawników stanowi stworzenie legalnej definicji walut wirtualnych. Brakuje jej nie tylko w prawie polskim, ale też prawie unijnym i szeroko pojmowanym prawie międzynarodowym. W przygotowywanych przez organizacje pozarządowe oraz instytucje państwowe opracowaniach dotyczących tematyki walut cyfrowych podejmowane są liczne próby zdefiniowania problemu. Przykładowo można przywołać definicję zawartą w publikacji Europejskiego Banku Centralnego pt. „Virtual Currency Schemes – a further analysis” z lutego 2015 r. Zgodnie z jej treścią waluta cyfrowa to cyfrowa reprezentacja wartości niewyemitowana przez bank centralny, instytucję kredytową lub instytucję pieniądza elektronicznego, która w pewnych okolicznosciach może być użyta jako alternatywa dla pieniądze. Odmienną definicję zawarto natomiast w rezolucji Parlamentu Europejskiego z dnia 26 maja 2016 r. w sprawie walut wirtualnych. Jak stanowi treść przywołanej rezolucji waluty cyfrowe to inaczej „cyfrowa gotówka” lub cyfrowe wyznaczniki wartości, które nie są emitowane przez bank centralny ani organ publiczny, nie są wiązane z walutą fiducjarną i są przyjmowane przez osoby fizyczne lub prawne jako środek płatniczy. Mogą one być przekazywane, przechowywane bądź przesyłane drogą elektroniczną. Przywołane powyżej definicje walut cyfrowych wskazują ich najistotniejsze cechy. Po pierwsze, waluty cyfrowe reprezentują określoną wartość materialną. Ponadto, nie są one emitowane przez banki centralne ani organ publiczny. Również w obszarze obrotu walutami wirtualnymi powstały w obrębie tej gałęzi prawa różnorakie wątpliwości, które wymagają rozstrzygnięcia. Pierwszą z nich jest sposób opodatkowania umów związanych z obrotem walutami cyfrowymi podatkami dochodowymi. Rozwiązanie tego problemu przyniosła Odpowiedź Ministerstwa Rozwoju i Finansów na interpelację poselską nr 6655 z dnia 2 listopada 2016 r. (sygn.

Problematyka obrotu walutami cyfrowymi na gruncie prawa podatkowego

Naturalną konsekwencją pojawienia się na rynkach finansowych walut cyfrowych było powstanie podmiotów gospodarczych specjalizujących się w handlu walutami wirtualnymi. Nieodłącznym elementem prowadzenia każdej działalności gospodarczej są zagadnienia z zakresu prawa podatkowego. Również w obszarze obrotu walutami wirtualnymi powstały w obrębie tej gałęzi prawa różnorakie wątpliwości, które wymagają rozstrzygnięcia. Pierwszą z nich jest sposób opodatkowania umów związanych z obrotem walutami cyfrowymi podatkami dochodowymi. Rozwiązanie tego problemu przyniosła Odpowiedź Ministerstwa Rozwoju i Finansów na interpelację poselską nr 6655 z dnia 2 listopada 2016 r. (sygn.

Rozstrzygnięto w niej, że przychody z wymiany jednostek Bitcoin (dotyczy to również pozostałych walut cyfrowych) na walutę tradycyjną (krajową lub zagraniczną) powinny być zaliczane do źródła przychodu, jakim są prawa majątkowe. W związku z tym, transakcje te zostały objęte skalą podatkową (18, 19 lub 32 %). W związku z tym, transakcje te zostały objęte skalą podatkową (18, 19 lub 32 %).


Problematyka obrotu walutami cyfrowymi na gruncie prawa karnego

Niestety powstanie walut cyfrowych niesie ze sobą również pewne zagrożenia dla porządku prawnego państw Unii Europejskiej. Stało się ono bowiem okazją do rozszerzenia działalności na nieznany dotychczas obszar przez grupy przestępcze. W związku z obrotem kryptowalutami dochodzi do popełniania licznych przestępstw. Najczęściej są to dobrze znane prawu karnemu przestępstwa popełniane jednakże z wykorzystaniem nieznanych do tej pory organom ścigania metod.

Jednym z największych problemów w zakresie bezpieczeństwa i stabilności rynku walut cyfrowych są ataki hakerów na giełdy zajmujące się obrotem walutami cyfrowymi. Ataki te wiązą się jednocześnie z kradzieżą środków zgromadzonych na platformach wymiany walut.

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8 Zob. szerzej R. Bernat, Zwołanie z VAT waluty wirtualnej bitcoin-głosa do wyroku Trybunału Sprawiedliwości z 22.10.2015 r. w sprawie C-264/14, Skatteverket przeciwko David Hedqvist, Głosa, nr 1, Warszawa 2017, s. 109-116, P.M. Dudek, Waluta bitcoin-głosa do wyroku Trybunału Sprawiedliwości z 22.10.2015 r. w sprawie C-264/14 Skatteverket przeciwko Davidowi Hedqvistani, Europejski Przegląd Sądowy, nr 6, Warszawa 2016, s. 38 i n.
Jako przykłady najgłośniejszych tego typu przestępstw można wskazać atak na giełdę Bitfinex w Hongkongu w sierpniu 2016 r. oraz atak na polską giełdę Bitcurex w październiku 2016 r.11.

Kolejnym rodzajem przestępstw popełnianych przez grupy przestępcze z wykorzystaniem obrotu walutami cyfrowymi jest tzw. pranie brudnych pieniędzy. Przestępcy inwestując pochodzące z przestępstw środki obracają posiadanym przez siebie majątkiem w sposób, który w mniejszym stopniu podlega kontroli przez powołane do tego organy państwa, niż ma to miejsce w przypadku walut tradycyjnych. Pozytywnie w tym kontekście należy ocenić trwające prace nad projektem dyrektywy Parlamentu Europejskiego i Rady zmieniającej dyrektywę (UE) 2015/849 w sprawie zapobiegania wykorzystywaniu systemu finansowego do prania pieniędzy lub finansowania terroryzmu i zmieniającej dyrektywę 2009/101/WE COM(2016) 450 (tzw. AML V), dzięki której podmioty pośredniczące w obrocie walutami cyfrowymi będą zobowiązane do pozyskiwania określonych danych swoich klientów oraz rejestrowania wskazanych w dyrektywie kategorii transakcji, ze szczególnym uwzględnieniem tych, co do których istnieje podejrzenie, że mogą one mieć związek z praniem pieniędzy lub finansowaniem terroryzmu12.


Zasadnicze pytanie stanowi dlaczego przestępcy tak chętnie wykorzystują Bitcoin’a oraz inne waluty cyfrowe do realizowania swoich działań. Wskazać w tym zakresie należy, że waluty cyfrowe w porównaniu z walutami tradycyjnymi znacząco ułatwiają przestępcom pracę. Bitcoin charakteryzuje się bowiem szybkością obrotu, a ponadto jest weryfikowalny i wiarygodny. Z drugiej zaś strony, organy ścigania mają znacząco utrudniony proces kontroli i monitorowania przeprowadzanych z jego wykorzystaniem transakcji14.

Prawne aspekty obrotu walutami wirtualnymi w wybranych krajach UE

Polski ustawodawca nie podjął do tej pory (stan na dzień 15 września 2017 r.) żadnych działań w zakresie wprowadzenia do systemu prawa szczególnych regulacji prawnych obejmujących swoim zakresem walutę wirtualną. Z odmienną sytuacją mamy do czynienia w wybranych państwach Unii Europejskiej. W pierwszej kolejności, na uwagę zasługuje idea tworzenia, tzw.
„piaskownic” (ang. *Sandbox*), która z powodzeniem wykorzystywana jest w Wielkiej Brytanii. Jest to instytucja mająca na celu wspomaganie adaptacji podmiotów gospodarczych zajmujących się obrotem walutami wirtualnymi do warunków rynkowych. Pomyśl opiera się na wprowadzaniu rozwiązań prawnych służących ochronie startup’ów prowadzących działalność w zakresie innowacyjnych instrumentów na rynkach finansowych. Swoim zakresem obejmują one m.in. przedsiębiorców rozwijających swoją działalność w obszarze obrotu walutami cyfrowymi. Zarządzaniem *sandboxem* z założenia zajmuje się organ nadzoru finansowego danego kraju, który z jednej strony ma za zadanie chronić konsumentów, z drugiej zaś wspierać rozwój innowacyjnych przedsiębiorców. Organ zarządzający *sandboxem* jest jednocześnie odpowiedzialny za tworzenie wewnętrznych regulacji lub wytycznych wspomagających i usprawniających funkcjonowanie prowadzonego przez niego *sandboxa*. Zasadniczym celem działalności „piaskownic” jest zniwelowanie negatywnego oddziaływania obowiązujących w danym kraju ram prawnych, w jakich musiałby funkcjonować startup z zakresu FinTech w standardowych warunkach.

Drugą niezwykle istotną sферą funkcjonowania przedsiębiorców zajmujących się obrotem walutami cyfrowymi są regulacje dotyczące licencjonowania działalności tego typu podmiotów oraz sprawowania nad nimi nadzoru. Stosowne regulacje zostały wprowadzone do ustawodawstwa Wielkiej Brytanii, Luksemburga oraz Niemiec. Przykładowo w Wielkiej Brytanii wydano zezwolenie dla przedsiębiorstwa Circle Internet Financial Inc. zajmującego się kryptowalutami na działalność w formie licencjonowanego dostawcy usług płatniczych emitującego instrumenty płatnicze w formie pieniądza elektronicznego. Na uwagę zasługuje fakt, iż ta sama spółka od 2015 r. posiada licencję BitLicense uprawniającą do zorganizowanego obrotu Bitcoinem na terenie Stanu Nowy Jork w USA. Z podobną sytuacją mamy do czynienia w Luksemburgu, gdzie platforma wymiany kryptowalut Bitstamp uzyskała zezwolenie na działalność w charakterze instytucji płatniczej. Najszerzej zakrojona w zakresie obrotu walutami cyfrowymi reforma została przeprowadzona w Niemczech. W celu prowadzenia np. platformy wymiany kryptowalut w tym kraju, należy zarejestrować działalność w tamtejszym organie nadzoru finansowego. Na uwagę zasługuje fakt, iż wytyczne dotyczące tego, które rodzaje działalności gospodarczej związane z kryptowalutami objęte są ustawowymi ograniczeniami, ze względu na nadzór państwowy, zostały opublikowane w Niemczech już w 2013 r.

**Wnioski i postulaty**


Biorąc pod uwagę problemy pojawiające się w związku z obrotem walutami cyfrowymi oraz doświadczenia państw, które rozpoczęły już proces obejmowania ich w ramy systemu prawa należy podkreślić, że pierwszoplanowym zadaniem dla prawników jest stworzenie

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16 Ibidem, s. 10-11.
kompleksowej definicji walut cyfrowych. Pozwoli ona na usystematyzowanie wiedzy w zakresie kryptowalut oraz rozwianie wielu wątpliwości. Co więcej, należy postulować stworzenie w Polsce środowiska prawnego sprzyjającego rozwojowi start-upów działających na rynku kryptowalut. Godnym rozważenia w tym zakresie pomysłem jest podjęcie próby skonstruowania na wzór brytyjski polskiego odpowiednika, tzw. „piaskownicy”, za pomocą której możliwe będzie wspieranie rozwoju przedsiębiorstw działających w sektorze FinTech. W zakresie prawa podatkowego ujednoliczenie podejść organów skarbowych do omawianej problematyki mogłoby zapewnić wydanie ogólnej interpretacji podatkowej. Powinna ona zawierać kompleksowe odniesienie się do zagadnień podatkowych. Szczątkowe stanowisko Ministerstwa Rozwoju i Finansów w zakresie podatków dochodowych oraz podatku od towarów i usług wydaje się być w obecnym kształcie niewystarczające. W sferze egzekwowania prawa karnego należy przede wszystkim kształcić organy ścigania w zakresie możliwości wykorzystywania walut wirtualnych do popełniania przestępstw. Natomiast w wymiarze materialnym niezwykle pomocne dla nich mogłoby okazać się objęcie giełd obracających walutami cyfrowymi obowiązkiem zbierania danych pozwalających na identyfikację użytkowników.

Jak wskazuje zaprezentowana powyżej analiza obrót walutami cyfrowymi, nie tylko z ekonomicznego punktu widzenia, jest niezwykle złożonym i dynamicznie rozwijającym się zagadnieniem. Mnogość aspektów prawnych, które występują w związku z wprowadzeniem kryptowalut na rynki finansowe świadczy o doniosłości problemu również z prawnego punktu widzenia. Waluty cyfrowe powinny stanowić zatem obiekt zainteresowania zarówno ustawodawcy, organów ścigania, jak i prawników, którzy swoją wiedzą i doświadczeniem powinni wspierać systematyzację i stabilizację tego rynku.

Abstract: This paper deals with the impact of information technologies have caused in human and fundamental rights. The main focus is given to the right of Internet access and freedom of speech, both of them seen and understood as fundamental and human rights. The internet, in this context, is the primary environment in the analysis of the question. It stands out the emergence of so-called “fifth-generation rights”.

Keywords: Freedom of Expression, Internet Access, New Information Technologies.

Introduction

Innovations in technology have increased the possibilities for communication and protections of free expression and opinion, enabling anonymity, rapid information-sharing and cross-cultural dialogues. Technological changes have concurrently increased opportunities for State surveillance and interventions into individuals’ private communications.

Innovations in technology throughout the twentieth century changed the nature and implications of communication surveillance. The means by, and frequency with which people are able to communicate expanded significantly. The transition from fixed-line telephone systems to mobile telecommunication and the declining costs of communications services resulted in dramatic growth in telephone usage. The advent of the Internet saw the birth of a number of new tools and applications to communicate at no cost, or at very affordable rates. These advancements have enabled greater connectivity, facilitated the global flow of information and ideas, and increased the opportunities for economic growth and societal change.

In many countries, existing legislation and practices have not been reviewed and updated to address the threats and challenges of communications surveillance in the digital age. Traditional notions of access to written correspondence, for example, have been imported into laws permitting access to personal computers and other information and communications technologies, without consideration of the expanded uses of such devices and the implications for individuals’ rights.

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Human rights mechanisms have been equally slow to assess the human rights implications of the Internet and new technologies on communications surveillance and access to communications data. The consequences of expanding States’ surveillance powers and practices for the rights to privacy and freedom of opinion and expression, and the interdependence of those two rights, have yet to be comprehensively considered by the Human Rights Council, special procedures mandate holders or human rights treaty bodies.

The right to freedom of opinion and expression is guaranteed under articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which affirm that everyone has the right to hold opinions without interference, and to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers.

At the regional level, the right is protected by the African Charter on Human and Peoples’ Rights (art. 9), the American Convention on Human Rights (art. 13); and the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 10).

At both the international and regional levels, privacy is also unequivocally recognized as a fundamental human right. The right to privacy is enshrined by the Universal Declaration of Human Rights (art. 12), the International Covenant on Civil and Political Rights (ICCPR, art. 17), the Convention on the Rights of the Child (art. 16), and the International Convention on the Protection of All Migrant Workers and Members of Their Families (art. 14). At the regional level, the European Convention on Human Rights (art. 8) and the American Convention on Human Rights (art. 11) protect the right to privacy.

The right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression. Undue interference with individuals’ privacy can both directly and indirectly limit the free development and exchange of ideas. Restrictions of anonymity in communication, for example, have an evident chilling effect on victims of all forms of violence and abuse, who may be reluctant to report for fear of double victimization.

The main objective of the article is to create three categories of international protection of freedom of expression on the internet.

A) Countries that follow internally the legal recommendations of the United Nations and create mechanisms for the protection of freedom of expression on the Internet;

B) Countries that follow internally the legal recommendations of the United Nations and DO NOT create mechanisms for the protection of freedom of expression on the Internet;

C) Countries that do not follow the legal recommendations of the United Nations and have mechanisms to protect freedom of expression on the Internet;

D) Countries that do not follow the recommendations of the United Nations and DO NOT create mechanisms for the protection of freedom of expression on the Internet.

I. Discussion

Human rights, as is well known, have a historical composition. This means that depending on the historical moment, your mood will be different. This is especially relevant in this case, since the historical changes in the new information technology technologies certainly have a strong impact on the understanding - and amplification - of human and fundamental rights. And it is in the face of the historical evolution of existence of so-called fifth-generation rights, that is, those linked to the use of new technologies.
This refers to the idea of fifth generation rights in which social innovations and the media inevitably lead to the analysis of new needs that also imply new demands (new rights). Such demands are deeply related to the very use of the Internet as a communication mechanism. Likewise, the consideration of such rights is consistent with one of the pillars of human rights, which is, precisely, emancipation.

The emergence of new rights, in this case fifth generation rights, is also related to the shift from the paradigm of an industrial society to an information society. The characteristic of this new paradigm is the penetrability of the effects of the new technologies. If information is necessary

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1 Fundamental rights of 1st generation - There are five (5) generations or dimensions of rights enshrined in current doctrine. The first generation marked the passage from the authoritarian state to the rule of law, characterized by individual freedoms and state absenteeism. This generation of rights, fruit of the liberal-bourgeois thought of the eighteenth century, was recognized by the first written constitutions. However, its origins and development were marked by historical documents such as the Magna Carta 1215, signed by King John the Earth, the Peace of Westphalia of 1648, the Habeas Corpus Act of 1679, the Bill of Rights of 1688 and finally the declarations of rights American (1776) and French (1789). First generation rights cover public freedoms, as well as civil and political rights, mainly realizing the value of freedom. The holder of these rights is the individual, having therefore, as a characteristic characteristic, the subjectivity. They are rights that are opposable to the State, that is, they constitute rights of resistance and opposition to their possible offenses. While focusing on individual freedoms, the first constitutions and declarations to bring the rights of first generation also brought some rights of a social character. Such as the French declaration on human rights, which provided the guarantee of assistance to those in need, as well as the right of access to education. Even the Constitution of the Empire of Brazil, of 1824, inspired by the French declaration, provided for some social rights, such as public help and free primary education.

2nd generation fundamental rights - The emergence of second generation rights was driven by the 19th century European Industrial Revolution. As a result of the poor working conditions, movements appeared that sought labor claims and social assistance norms. Examples of these movements were the Cartist in England and the Paris Commune in France in 1848. The twentieth century then began marked by the First World War and by the establishment of social rights. Several documents bring in the text the prediction of social, cultural, economic, collective rights and substantial equality, real or material, no longer formal equality, only. Among these documents are the Constitution of Mexico (1917), Constitution of Weimar (1919), the first German Republic, the Treaty of Versailles (1919) and the Brazilian Constitution of 1934. The normativity and effectiveness of these documents initially varied according to the nature of these rights, which require material benefits from the State not always feasible due to limitations of means and resources. These rights, therefore, were initially included in the programmatic sphere of the State, that is, without any guarantee of fulfillment by means of procedural instruments such as those guaranteeing the rights of freedom of the first generation. The precept of immediate applicability of fundamental rights, as established, for example, in the 1988 Constitution, arises to try to resolve this crisis of observance and enforcement of second generation rights.

3rd generation fundamental rights - Third-generation fundamental rights, also called transindividual rights, stemmed from the profound changes undergone by the international community and the mass society through technological and scientific development. These changes have caused changes in economic and social relations and the consequent emergence of new problems, targets of worries worldwide, such as the preservation of the environment and protection of consumers. The human being, as part of a collectivity, is entitled to rights that involve solidarity and fraternity, that is, that go beyond the interests of the individual because they relate directly to the protection of mankind. They are rights containing a high level of humanism and universality. The doctrine points out, among third generation rights, the right to development, peace, the environment, property rights over the common heritage of humanity and communication.

4th Generation Fundamental Rights - Part of the doctrine considers as fourth generation fundamental rights those arising from the evolution of genetic engineering, related to the manipulation of the genetic patrimony, a process that can jeopardize human existence. Other doctrinal currents point out as fourth generation fundamental rights those introduced by political globalization, corresponding to the last phase of institutionalization of the social state. Highlights include the right to direct democracy, information and pluralism. The chains that define them do not consider them only a new guise for individual rights, but fundamental rights belonging to an autonomous dimension that must be globalized in the institutional field.

5th generation fundamental rights - Fifth-generation rights are, according to some scholars, related to the evolution of cybernetics and technologies such as virtual reality and the Internet. Other doctrinarians consider the right to peace, the supreme right of humanity and the axiom of participatory democracy, as a right of the fifth generation. Because of their relevance, they understand that this right must be treated in an autonomous dimension, unrelated to the third generation of rights, in which it is usually inserted.
for human activities all processes of our individual and collective existence are directly shaped (though certainly not determined) by the new technological environment.

In view of this, it is necessary to understand the idea of digital inclusion, in this work, seen through access rights and freedom of expression, both on the Internet. There is no denying that social and institutional relations are crossed by differentiating cultural values that translate into a play of power and domination. This game of power and domination in today's society is also influenced by new technologies. It is also possible to cite the recent political demonstrations in the North African region, where the Internet played a fundamental role in mobilizing the population in its demands for justice, and it is possible to affirm that the Internet has a great "democratizing potential".

If the virtual world is a reproduction of the "real world", if the Internet is seen and used as a medium for the propagation of contents and discourses, it is necessary to protect fundamental and human rights in its environment. With widespread use of new technologies, undue blocking and exaggerated or illegal control of information directly affect freedom of expression. At the same time that the technology extends the list of rights to be protected, its deprivation, in turn, causes the suppression of rights. If the right to formal education is a requirement for access to knowledge and culture, access to new technologies becomes a requirement of equal importance.

New technologies modify the social conditions in which people develop their discourse. The digital revolution, in the author's words, allows the broadening of cultural participation more comprehensively than the radio and television technologies provided in the past. However, at the same time, there is the possibility of limiting and controlling this participation by the technologies themselves. Democratic culture is one that gives everyone (regardless of whether they participate in an economic, political or cultural elite) the chance to participate in their production. At this point it is understood the value of access to new technologies as a fundamental requirement for the increase of this democratic cultural participation. De-linking discourse with economic elite, for example, is feasible because communication costs fall considerably with new technologies. Therefore, with lower costs, freedom of expression is also broadened.

Another important aspect of freedom of expression on the Internet is that, prior to the information revolution; the broad freedom to express and publish content was based on the ownership of the media (TV networks, communication satellites, newspapers, etc.). The linkage of discourse with the ownership of the media determines its political and ideological nature. With the feasibility of broad egalitarian communication and low cost, there is an expansion of freedom of expression. So much so that in countries where there is no independent media, the Internet, through collaborative platforms and social networks, contributes to widespread dissemination of facts and also to progress as a whole.

It is possible to affirm that freedom of expression allows and enables the exercise of other human rights. It is not only an individual right, but a right of collective composition, with important social reflexes for the community. Also worth mentioning is the regulation of content in digital media, which can occur in several ways. It is certain that, in the first analysis, the Federal Constitution of Brazil in its art forbids the anticipated control of content, read previous censorship. 5th, inc. IX². This circumstance, moreover, is what gives rise to the fact that

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² Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes: IX - é livre a expressão da atividade intelectual, artística, científica e de comunicação, independentemente de censura ou licença;

Art. 5 Everyone is equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in Brazil the inviolability of the right to life, liberty, equality, security and property, as follows: IX - the
providers do not have an active duty to monitor the content of their users. However, there is always the possibility of a legitimate and a posteriori control of the information, due, for example, to the publication of speeches with offensive or criminal content. With this, free speech is the rule and not the exception.

The problem gets new outlines, in turn, if it is considered the Web 2.0 call where users produce content by means of blogs, social networks, video sites, etc. This is further exacerbated by the lack of international harmonization on the issue. If the Internet is transnational, if the companies providing services in this environment are so, the inconsistency of the internal laws on the matter can cause someone in one country to be affected by the legal provisions of another. Moreover, the cultural differences between countries also influence the issue of blocking content on the Internet.

The issue also covers the problem of very wide locks. Under certain conditions and depending on the technical means used to carry out the blockade, there is a risk of blocking other content than what is considered illegal. In Brazil, the example of the case Daniella Cicarelli is cited which, due to a poorly enforced judicial order, promoted the blockade of the entire YouTube site in Brazil. Note that due to the video object of the demand blocked millions of videos that were not considered illegal. Other situations where the extended block can occur is when an Internet server hosts several sites, this situation, considered quite common and commonplace. If this server has a single IP address, if it is blocked, all other sites that are hosted on this server will also be blocked. As a rule, blocking content without explicit violation of a criminal law, without a specific court decision or even very broadly, also blocking legitimate content, as a rule, violates freedom of expression on the Internet.

In a study promoted by the Legislative Consultancy of the Chamber of Deputies entitled "Internet Legislation in Brazil", an analysis is made of the democratization of Internet access. In this study, the Federal Government's Digital Inclusion Plan is mentioned, as foreseen in the 2004-2007 Pluriannual Plan.

Among the objectives proposed is the expansion of the proportion of citizens with access to Information and Communication Technologies and also the expansion of community access centers to the Internet. In addition, it is also mentioned the broadband massification program, which includes the expansion of this access in schools and telecenters, as well as programs for the reconditioning of used computers. Likewise, the Brazilian government, through the so-called National Broadband Program (PNBL), established by Decree 7.175/2010 and maintained by the Management Committee of the Digital Inclusion Program (CGPID), has the main objective of "fostering and use and supply of information and communication technology goods and services ".

When a classification of the right of access to the Internet is a right of defense (regarding data protection) and a right against the State and individuals (as it must respect freedom of expression of intellectual, artistic, scientific and communication activity, regardless of censorship or license, is free;

3 Web 2.0 is a term used to designate a second generation of communities and services offered on the internet, having as concept the Web and through applications based on social networks and information technology. Web 2.0 was created in 2004 by the American company O'Reilly Media. The term does not refer to updating in technical specifications, but to a change in the way it is perceived by users and developers, that is, the interaction and participation environment that now encompasses many languages. Web 2.0 has increased the speed and ease of use of many applications and has been responsible for a significant increase in existing content on the Internet. The idea behind Web 2.0 is to make the online environment more dynamic and get users to collaborate on the content organization. Within this context Wikipedia, for example, is part of this new generation, as well as several interconnected online services, such as those offered by Windows Live, which includes search tools, e-mail, instant messaging, security programs and so on.
expression). It can also be understood with a subjective right of access (including through the requirement of public access terminals in libraries or public centers). It also has a negative dimension, since neither the State nor third parties can limit the right of access through the blocking of content (and here there is a clear connection with the prohibition of prior censorship, article 5, ninth of the Federal Constitution). On the other hand, the positive dimension requires "legal services that regulate and inform the right of access to the Internet, allowing it to reach the necessary effectiveness and effectiveness".

The effectiveness of the right goes through actions such as public policies of digital inclusion, as mentioned above. It is necessary to emphasize the consideration of access to the Internet as a fundamental right in the face of the development of information technology and its increasing use by society. A recent example of this development is related to the so-called Brazilian Access to Information Law. This law establishes, among other issues related to the transparency of public data, that public bodies will use the Internet both for publication of data and collection of requests for information. It is possible to perceive, in front of this, that the inc. XXXIII of art. 5 of the Constitution can be better exercised with the use of the Internet which justifies, among other reasons, access to the Internet as a fundamental right.

Because all agencies provide information and collect requests through the Internet, those who do not have Internet access also do not have access to such information. It is a shame that many private services - such as banks, airlines and all e-commerce in general - use the Internet to provide their activities. The context of expanding e-commerce means that in some cases products and those who have access to the Internet only consume services. In this way, and according to what has been exposed so far, it is important to note the importance of the right of Internet access even for the most basic consumption activities.

II. Analysis

The popularization of the Internet is one of the most important social phenomena in the contemporary world. Its repercussions on the study of law are already noticed, especially in the field of commercial law and criminal law. However, the question of the impact of the Network on the field of legal and social sciences is not summarized. It so happens that the Internet has truly changed everyone's life. It is linked to all aspects of our existence: work, social life, health, education. The State no longer dispenses with this tool. Preliminarily, it can be said that the Network has become very important for society. We try, with this study, to answer in what way and why. In fact, the Internet is so important that some people already claim that they can not live without it. Beyond a banal and unfounded empirical argumentation of this importance, we consider it necessary to demonstrate, through theoretical arguments and critical analysis, based on the most modern constitutionalist doctrine, how, given its social relevance, access to the world computer network can be considered a Fundamental right.

The worldwide web of computers that we know today results from a project of the American government initiated during the Cold War that wanted to create a network of communication composed of several sub-networks, in a decentralized way, allowing the compatibility between the group through the adoption of a same protocol of data transmission. Initially, this network was administered by the agency known as ARPANET. Its use by the academic community, initially, and later by the general public through the popularization of access providers, as well

\[4\] XXXIII - everyone has the right to receive from the public agencies information of their particular interest, or of collective or general interest, which shall be provided within the term of the law, under penalty of responsibility, except those whose secrecy is indispensable to the security of society and the State;
as the configuration of a simplified graphical interface, easy to handle by lay people, have made the Network the medium of communication use hundreds of millions of people worldwide.

Brazilian law 11.491, of December 19, 2006, which deals with the electronic judicial process, defines the Internet as a "form of distance communication with the use of communication networks" (article 1, § 2, paragraph II). Thus, over the Internet, Network or World Wide Web, we have "The vast collection of interconnected networks that use TCP / IP as protocol and that evolved from ARPANET in the late sixties and early seventies."

The elements that have made the Internet a social phenomenon are: the relative ease of acquiring access, the global structure, its decentralization, the speed of information transmission, and the double way in which this information is transmitted. This last feature distinguishes the Network from traditional mass media. The Internet creates a new public sphere, or a new commune, presenting similarity to the assemblies of the Greek city-states or the old meetings in the center of small towns, with a radical qualitative change regarding access to culture, knowledge and the information. Contrary to what some may claim the virtual world is not antagonistic to the real, it is not a non-existent, imaginary world.

It is a new kind of reality, another axis of existence. This new plan of social relations caused changes in the real or traditional plane of existence. This public sphere, unfortunately populated by the same individuals who inhabit the real world, reproduces in its midst similar problems. Initially a commune, where information circulated without any hierarchical or economic criteria, representing a legitimately democratic means of information (which is not to say popular), the Network gradually began to manifest the strong presence of large companies, imposing itself there too, the law of the market. These companies intend to occupy an increasing space in this environment, competing in an unequal way with individuals, establishing excessive number of commercial patents, seeking to eliminate free software, making the Internet a much more consumer space than the Internet user. This is the commodification of the Network. Likewise, social deviations such as racism and sexual discrimination are repeated, as well as the constant force for the emergence of hierarchies, even within spaces of discussion between people with the same characteristics.

There are some criticisms of this new public sphere. It is said that it allows the individual to inform himself only of what he wants, in addition to providing isolation in closed groups of discussion. Although we recognize that the criticism is not unfounded, we disagree with those who understand that the virtual public space has an influence of disaggregation on the people, influencing them in favor of individualization. We believe that this is a medium that encourages open, indiscriminate communication in a pluralistic and democratic way. The fact that it has some defects, like any other medium, does not demean or de-characterize the Network as a new public sphere, a social phenomenon.

The right to information deserves a prominent place in the list of Fundamental Rights; the freedoms of expression and communication are pillars of freedom in itself, of civil and political rights, of citizenship. Society is itself communication. Freedom of expression is, as opposed to democracy itself, an end in itself. Democracy serves man to optimize the realization of Fundamental Rights by the State. Freedom of expression is one of these Rights. It happens that the right to information and the right to freedom of expression are two sides of the same coin. Except when the information comes from the State, receiving it always means that the sender is not being inhibited in his activity, whether professional or amateur, to express himself. In this way, the right to information may have connotations of freedom to issue content, access to data by own research action, and finally, right to receive elements or informational messages - presumed to be by the State."
All these ideas and concepts are valid for a Democratic Rule of Law at any time or place. Information is an instrument of power. However, adding the Internet to the equation will inevitably complicate matters. Faced with totalitarianism, of which the State information monopoly is part, a democratic society requires an informative pluralism, as well as free access and free circulation of information. Despite being a democratic media par excellence since its popularization, the world network is subject to the same harms that afflict society, as we have already explained.

The right to privacy is directly linked to the exchange, voluntary or otherwise, of information between individuals and between individuals and the State. The exercise of freedom of expression is usually seen as antagonistic to the exercise of the right to privacy. This is a simplistic view: the concept of privacy needs to evolve to adapt to the computer world. A new issue arises from the development of the Internet and computing, which allowed the creation and maintenance of databases with infinite storage capacities, associated with the possibility of capturing the most varied range of data about the individual: what he buys in the supermarket, what you read in the library, what pages you visit on the Net, what medicines you take, when you last had a traffic ticket, etc.

The doctrine points out the need to restructure the concept of the right to intimacy to cover new situations. The police power of the State that threatens freedom of expression is the same that constantly breaks the barrier of citizens' private lives. The spatial spectrum of individuals' data monitoring becomes significantly extended by the possibilities of ubiquitous computing, while the temporal coverage of this monitoring grows along with the storage capacity: a government authority may, by simple access to the database a specific individual, to be informed of prenatal diagnosis of the latter. One of the reasons for the existence of private intimacy is the material impossibility of individual and meticulous monitoring and investigation of each citizen. But the police apparatus of the states slowly begins to overcome this barrier with the use of technology.

For some, the same technology that allows constant and intrusive monitoring can bring the solution of human rights violations in state actions like the one undertaken by the American government after the September 11 attacks. An advanced system would allow the tracing of suspects or offenders through the use of non-discriminatory data. It turns out that the search for suspects is currently driven by ethnic or social criteria, clearly discriminating. However, the use of personal data must also respect the principle of equality, which is constantly breached through the creation of profiles in business databases. The collection of information must follow the guiding principle according to which only the relevant data are collected and maintained for the purpose for which the database was created, at the same time that access to this data should be allowed only because of this goal.

The evolution of the right to privacy has led to the composition of a new, broader right based on the rights to personality, freedom, identity, equality, access and image. All these are weighed and evaluated under the prism of human dignity, creating then the notion of computer freedom or the right to self-determination. In its negative dimension, it implies an abstention of individuals and states from making public certain personal data concerning the identity or formations of the individual's image. In the positive dimension, it implies that the individual exercises control over the data about his person that are publicized, through the possibility of access, rectification and suppression of this data. The last significant evolution of this right to computer freedom with the idea of privacy and privacy, being, according to the interpretation of the Spanish Constitutional Court, a "fundamental right to the protection of personal data". This right is now independent and autonomous.

Confirming this disconnection of the idea of privacy, the protection of even personal data that are public and notorious is already recognized. We understand that the right to information
freedom presupposes a broad category of Fundamental Rights related to information: its emission, transmission, placement, storage and publicity. It is the construction we deem most appropriate for the Information Age. In addition, the term already indicates the intrinsic link between this category of rights and the Network.

Here we include all the rights just analyzed: the right to information in a strict sense, the right to freedom of expression, the right to privacy and the right to protection of personal data. The way in which the Internet is used will define the extent of the enforcement of these rights as well as the seriousness of their violations. As for the effectiveness of computer freedom, it is necessary to address the issue of mechanisms to contain the risks of violation, as well as the appropriate procedural tools to combat actual violations. In the first question, the Internet and technology appear as a solution to the problem they themselves helped create. International public opinion presses through the Internet countries and large companies that violate freedom of expression and the right to protection of personal data.

For example, international disclosure of the severe restrictions of such rights imposed in China can be mentioned, especially when penalties for the propagation of "anarchist and subversive" ideas are applied. The Internet functions as a containment mechanism in this regard. On the other hand, as has already been argued, the technology can be used to improve the investigative systems of state agencies, mitigating or avoiding violations of privacy or personal data.

Conclusion

Helping developing countries to enable their citizens to access the Internet is similar to giving them a tool that increases their chances of achieving sustainable economic growth.

The technology has brought, over the years, a modernization in the utilities of production, communication, study and interaction. Advances in electronic devices such as cell phones, computers, cameras, and sound equipment are some examples of this modernization obtained by the improvement of technology. It also came to influence the economic world, encouraging global competitiveness, as technological innovations support economic development, being present in the management and production of small and large enterprises.

The technology has brought a lot of improvements to the economy because it allows better results to be created in the planned studies, with less effort and cost, and to allow a much deeper development in the final product to be created. In the health area, for example, the use of technology allows more advanced medical devices to be made available to better serve the population with accurate and modern methods. These same health technologies also allow the government to have a leaner budget, taking into account that scientific studies prevent disease advances, which could lead to a government disbursement in the containment of pandemics, for example, much larger than investments in the technological advance.

The relation of conformity between the human being and the cyber world is unquestionable. Cybernetics is defined as a communication science applied both to living beings and machines, and can understand physical, physiological, psychological and transformational processes. The first ideas of the cybernetics appeared during World War II, developed by Wiener and Julian Bigelow that aimed at the improvement of the antiaircraft guns. This science brought with it the advancement of machines, which began to influence considerably in the day-to-day population, especially in the field of automation and information technology. It is cybernetics, having as a characteristic the computer science, which creates new perceptions of information and communication. Technological development has brought the internet to the fore, accompanied by an advance of the computerized systems where a global market has been created, which carries out virtually economic activities.
These economic activities range from payments made through the internet to the marketing of products among its usufructuaries, ranging from simple users to great negotiators. So the internet came to be used as human entertainment and triggered online commerce. The Internet has also become a means of communication between its browsers, enabling access to information about world events in a much more in-depth way than other means of communication and in real time. Today, it is possible to make via online payments of bills, bank transfers, consultation of balance or bank statement. Online e-commerce has joined the sympathy of all who let themselves be conquered by simplicity and comfort. There are many benefits to those who choose technology, but even the most advanced means of development to date has its negative side to be evaluated. When analyzed in a deeper way, the Information Age presents the contradictory side of this adherence between technology and development.

It undoubtedly assists in global and human development, but this technology has, in some way, been detrimental to or detrimental to its own development, since much of it has been due to a growing and unsustainable exploitation of limited natural resources and to the degradation of the environment. Thus, it is not abstruse to relate economic growth to the deterioration of nature and not to development.

To achieve lasting technological development, it is necessary to properly exploit renewable resources by creating a harmony between economic development and ecosystem preservation. However, for this idea to materialize, it is also important to consolidate a political and social system capable of eliminating inequalities and seeking solutions that benefit not only individual segments, but also all. If world development continues to follow in the same way, without a restructuring, economic development will have a setback since major losses would arise from technological progress itself.

Technology has been transforming the world economy and the lives of millions of people; however, it is necessary to prudently evaluate technological progress and economic development, so that these ambitions can coexist with the environment based on sustainable policies. The influence of technology on the global economic environment is inevitable. For, it has been helping the development of the economy by providing the emergence of new methods and economic practices in the global market. In analyzing the phenomena arising from technology in the economic environment, the question that hangs is: does the advancement of technology in the world tend to be beneficial or harmful over the years?
Abstract: In an era of rapid evolution of international criminal law, with much attention focused on global justice initiative, the comparative criminal study remains largely unexplored area and has attracted little attention as compared to the other disciplines of law whereas criminal law occupies an odd position in the field of comparative jurisprudence. Kevin John Heller and Markus D. Dubber’s The Handbook of Comparative Criminal Law is the first step towards filling this gap. This paper introduces the reader to the comparative criminal law on the basis of evolution, revolution and regresses in the legal system with the aim of placing it into a larger context by stimulating comparisons and discussions. The present paper is structured as follows: 1) Criminal law parochialism which is deeply bound up with the history of criminal law itself. 2) History of comparative criminal law with function and uses and also along with its limitations and its promises. 3) Selected topics in comparative criminal law with a general part and the specific part. 4) The comparative criminal law in a context which concludes that comparative criminal law has the potential to make an important contribution to criminal law.

Keywords: comparative law, criminal law, parochialism, comparative criminal law.

Introduction

In an era of rapid evolution of international criminal law, with much attention focused on the global justice initiative, the comparative criminal studies remain largely unexplored area and has attracted little attention as compared to the other disciplines of law. Kevin John Heller and Markus D. Dubber’s The Handbook of Comparative Criminal Law is the first step towards filling the gap. Heller and Dubber’s Handbook is a breakthrough not only because it pays due regard to comparative criminal studies, which have been largely neglected to date, but also it covers numerous jurisdiction with the express aim of stimulating comparison and discussion. Such a versatile approach can be read like professionally, a cutting-edge compendium of many criminal law systems in the world1, which is particularly helpful to international criminal law academics and practitioners. The Handbook provides a vital tool for thinking where the societies diverge on all the perennial questions, including the proper ambit of criminal law. The result of this collective effort is immensely valuable.

Comparative law is a special field of legal study that is dynamic and open to innovation and is not cemented to any particular special research approach of legal discipline2. Therefore, the comparative law is considered as an advanced academic study which compares, examines the different legal system, legal families, legal traditions, with an eye for the similarities and the differences. In recent years, the study of comparative law increased enormously, which plays an important role in the international harmonization and unification of laws, thereby leading to more international cooperation and better world order. No doubt that comparative law immensely gained importance over the years whereas comparative criminal law studies still remain unexplored and neglected area and have attracted little attention as compared to the other disciplines of law. Historically speaking, the study of comparative criminal law means, and has meant for quite some time, a comparative civil law first and foremost. Subsequently,
the comparative criminal law began as an academic discipline in Europe and as a result, in France, the most noteworthy event happened was the foundation of Chair of Comparative Criminal Law in the University of Paris in 1864\(^3\). Following this, a theoretical ambition starts with a great verve and high hopes, but comparative criminal law flattened out quickly and still cannot gain much attention as other disciplines of law. Which is disappointing as in today’s world where global justice initiative is on peek and globalization of world trade increasing, the volumes and scholarly research devoted to comparative criminal justice and comparative criminology rather than the comparative criminal study.

This paper introduces the reader to the comparative criminal law with an aim of placing it into larger context by stimulating comparisons and discussions along with the history of criminal law and the comparative criminal law, selected topics of comparative criminal law and the comparative criminal law in context, which focuses on how comparative analysis of criminal law can make an important contribution to criminal law in today’s world? In the first two sections of the paper, the main focus is on the history of criminal law and the comparative criminal law as well, which is worth exploring for its own sake and also in a hope to find out that, what are the challenges criminal comparatists faces even today? Further, this paper also discusses selected topics of comparative criminal law with the general part and the specific part of criminal law in the third section. Finally, in the fourth section, the paper concludes with the comparative criminal law in context by discussing that the criminal law is more parochial and more in need of critical analysis than any other discipline of law then why does comparative criminal law still followed by disappointing practices?

I. Criminal Law Parochialism

Traditionally, the criminal law, by its very nature, is one of the most parochial disciplines as compared to the other fields of law. It is the consequence of codification of criminal law that every country has adopted its own definition of offenses, its own conception of punishments, own principles for determining questions of self-defense, necessity, negligence and complicity, through which the criminal law has become state law, parochial law\(^4\). When it comes to implementing and analyzing the criminal law every country or state goes its own way, even some countries jurisdiction on criminal matters follow their citizens wherever they go, in ways which are not common in other areas of law. Therefore, criminal law is the most national, and to this extent, criminal law is the most parochial legal discipline.

Criminal law is considered as law of punishments, which proper concerns itself, with defining human action (as a prerequisite to any criminal liability), with criminal liability itself and its connection to culpability, accountability, imputability and responsibility with moral gradation of crime, with the definition and forms of inchoate crimes, with complicity, with the jurisdiction of punishment and so forth\(^5\). The criminal law begins with the foundation of law and legal system which generally concerns with the rights and obligations of individuals in society. But, in fact, criminal law is not uniform, as society changes so do the law changes, that govern behavior, which results in the development of the criminal law. Historically speaking, there was no criminal law in the uncivilized society. Criminal law has meant for quite some time, civil law. According to the first civilization, there was no difference between the civil law and criminal law. It is by the 6\(^{th}\) century Romans classification and jurisprudence provided the

\(^3\) Lèvy-UIIman, S.P.T.L.J. , 1925, 16.
\(^4\) See George P. Fletcher, Basic Concepts of Criminal Law, Oxford University Press,1998.
\(^5\) See, Leo Zaibert, University of Toronto Law Journal, (2012) 62
foundation of the distinction between civil law and criminal law in European law\(^6\). The first signs of modern distinction between the civil law and criminal law emerged during the Norman Invasion of England\(^7\).

Of all branches of law, criminal law historically has been the one most closely associated with sovereignty\(^8\). However, sovereign power can only be exercised within national borders to redress the crimes, which makes criminal law parochial. It’s useful to think of criminal law as having emerged from the householder’s virtually unlimited discretion to discipline a member of his household\(^9\). The Athenian and Roman societies are the highly stratified society. Each of these societies displayed as a different form of development of law, which in turn shape their definition of and respond to offending behavior. A common theme within these societies was that offenses essentially a harm against the individual rather than the state. Therefore, the victim seeks the private vengeance against an offender. In these societies, the rulers of the society have been granted certain rights to every citizen to expand the model of household governance from the family to the realm. With these rights, the Athenian oikonomos (householder) or the Roman paterfamilias enjoyed the unquestioned power to employ, against insider and outsider alike, whatever disciplinary sanctions are necessary to discharge his obligation to look after the welfare of his household\(^10\). In the medieval times, the criminal law based on the kinship, rather than the state authority. Political authority fell into the hands of local kings and landlords. Throughout the medieval period, it was believed that the only way to keep order was to make sure that the people were scared of the punishments given for the crimes committed. Criminal law was extremely discordant in the medieval times. Even the medieval householder (oikonomos) wielded the authority, to control and to punish, over his household – including his wife, offspring, servants, and animals – for the sake of maintaining the peace of his household\(^11\). In this household discipline, the sovereignty remains with the king and do not transfer to the people. This is essentially patriarchal of criminal law as a household discipline was served as the function of protecting the king’s peace, which is still followed in English law.

Subsequently, this model of criminal law as household governance was challenged at the age of Enlightenment. The era of Enlightenment also known as the age of reasons\(^12\), which provides the cause of legal reform with its essential political and philosophical principles: the rule of law, reason, liberty, and humanitarianism\(^13\), which uncovered a different method of thinking that sought to understand why people exhibit the criminal law. During the late 18\(^{th}\) century, the classical criminology theory fully developed. The establishment of legal codes, punishment, and reform of criminal law during the 19\(^{th}\) century changed the face of crime and criminal justice systems. Eventually, the age of Enlightenment established democracy as the form of government. These improvements and reforms over the year became the keystone of modern criminal law.

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\(^10\) See, the German offenses of (Hausfriedensbruch (breach of the house peace) even today. St GB § 123.


\(^12\) See, the German offenses of (Hausfriedensbruch (breach of the house peace) even today. St GB § 123.

The foundation of the modern criminal policy was laid by the Italian writer Cesare Beccaria (1738-1794), who was also known considered as the father of the classical criminal theory, in his famous book Dei delitti e delle pene (1764)\textsuperscript{14} which condemned the death penalty as well as corporal punishments. Some of the famous Enlightenment figures such as Voltaire (1694-1778), Charles Louis Secondat, baron de Montesquieu (1689-1755), Jeremy Bentham (1748-1832) challenged the penal practices and their jurisdictions. Thereby, the central Enlightenment figures like Voltaire (in France), Kant and P.J.A Feuerbach (in Germany), Bentham (in England), - and – most influentially – Beccaria (in Italy) recognized that infliction of punitive pain on the newly discovered autonomous citizen post the most difficult, and the most important challenge to Enlightenment political theory. It makes sense then, that the Enlightenment would trigger a systematic interest in the comparative analysis of criminal law and, in fact, an interest in comparative criminal law first and foremost, before an interest in any other forms of comparative analysis\textsuperscript{15}. The significance of Enlightenment critique for the appearance of the comparative criminal law as a discipline also helps to account for the fact that comparative criminal law not only began but also has struck considerably deeper roots in Continental Europe than in any other jurisprudence. The Enlightenment contribution to the philosophical jurisprudence of punishment penal reforms and the notion of comparative analysis of the criminal law cannot be underestimated.

II. Comparative Criminal Law

Historically, the comparative criminal law has always been one of the great promises which followed by disappointing practices. During the 18\textsuperscript{th} and 19\textsuperscript{th} century the comparative criminal law began with deeper roots in Europe, either in Germany or in Franc, or both, which turns high hopes and promises in comparative analysis of criminal law but it flattened out rapidly. Even, the massive International Encyclopedia of comparative law does not cover criminal law, devoting itself instead to virtually every aspect and variety of civil, commercial and economic laws\textsuperscript{16}. And yet, the fact is the comparative criminal law attains little attention as compared to the other disciplines of law. Even the professional criminal comparatists largely focus to accumulate foreign law material, rather than exploring its criminal roots. Quite often criminal comparatists are content to note the similarities and differences between the doctorial rules in two legal systems, without spending much time on their respective historical roots\textsuperscript{17}. This is unfortunate since comparative criminal law and legal history is so obviously related. Clearly, however, comparative research in criminal law without history makes no more sense. Yet every study in the comparative analysis has a historical component as characteristics of each legal system as well as the fact that the legal systems may share some commonalities generally can be explained by history. Even, more in-depth research in comparative legal history has a potential of providing better insights into the core of legal tradition and their relatedness. Talking about history, it is worth exploring that how the comparative criminal law evolved and develops over the centuries. Comparative criminal law tends to locate its origin in Germany in the early 19\textsuperscript{th} century — though some authors, particularly French comparatists, also point to roughly contemporaneous developments in France.\textsuperscript{18} More specifically, the comparative

\textsuperscript{17} See George P. Fletcher, Rethinking of criminal law (1978), ch 2.
\textsuperscript{18} See e.g., Marc Ancel, Introduction comparative aux codes pénal Eurpèens (1956), 5 (discussing Joseph-Louis-Elzèar Ortolan, Cours de législation pénal comparé (2 vols 1839-41)); also Jean Pradel, Droit pénal comparé (2\textsuperscript{nd} edn, 2002), 18-19 (discussing comparative aspects of pellegrino Rossi’s Traité de droit pénal (1829)).
criminal law begins in the wake of the Enlightenment’s fundamental critique of state power in general, and the state penal power in particular. P.J.A Feuerbach is one of the famous and leading figures of the Enlightenment criminal law and is often acknowledged as the father of the modern comparative criminal law.\(^{19}\) Comparative analysis, in Feuerbach’s view, was essential not only to the project of critical criminal law but also to the project of legal history in general. Note that Feuerbach’s conception of comparative law incorporates the study of legal history, among other things. One of the programmatic declaration of Feuerbach is as following:

Without knowledge of the real and the existing, without comparison of different legislation, without knowledge of their relation to the various conditions of peoples according to time, climate, and constitutions, a priori nonsense is inevitable.\(^{20}\)

Feuerbach criticizes the traditional natural law but that should not be misunderstood as a rejection of natural law. He simply thought traditional natural law had been going about that derivation in the wrong, purely rationalistic, and insufficiently positivistic way. Although, Feuerbach insists that universal principles of law be derived from the thorough appreciation of the legal norms of particular societies, which was impossible without the required careful study of each society’s ‘constitution’. The discovery of universals: Why does the legal scholar not yet have a comparative jurisprudence?... Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farther removed, create universal legal science, i.e., legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country.\(^{21}\)

For decades, Feuerbach labored on a large comparative project, which he alternately described as a ‘world history legislation’, a ‘universal legal history’, or simply a ‘universal jurisprudence’. To the end, he collected materials not only from Europe, but also from East Asia, Southeast Asia, the Middle East, and the United States.\(^{22}\) Feuerbach successfully captured the theoretical ambitions of comparative criminal law than anyone else and placed them within the context of a larger human and scientific endeavor.

It is often said that comparative law highlights the relativity of legal rules. Therefore, comparative analysis of criminal law course is desirable in the interest of knowledge. Although this reason appeals more to the scholar than to the practitioner, it is of some definite importance to the practicing attorney. If he is entitled on matters on foreign law, he will be able to pass this knowledge on to the general public. Think of Girard case where, through gross ignorance and stupidity in Washington, D.C., and elsewhere, especially on the part of members of the legal profession, the relation between the United States and Japan became strained. The Japanese themselves finally destroyed the myth of inquisitorial Japanese criminal justice and calmed the unduly alarmed public. If the American legal profession were properly had the knowledge on the principles of criminal justice abroad, no silly statement could have been made on the floor of Congress, no alarming stories could have appeared in the American press and American-Japanese relations would never have been strained.\(^{23}\) Thus, studying comparative criminal law can be beneficial in cross-border relationships. Despite this, the comparative analysis of criminal law can be useful in many ways to many people. More specially, the research on

\(^{19}\) See e.g., Walther Hug, ‘The History of Comparative Law’, (1932) 45 Harv LR 1027 ff, 1054 (Feuerbech ‘the first to conceive the science of comparative law’).

\(^{20}\) Feuerbach (n 17), 163 ff, 164.

\(^{21}\) Paul Johann Anselm Feuerbach, Anselm Feuerbachs Kleine Schriften vermischten Inhalts (1833), 163.


\(^{23}\) Two recent good articles which help to destroy the myth of inquisitorial continental criminal procedure are REED aspects of French criminal procedure, 17 La. L. Rev 730 (1957); MEVER, German criminal procedure: the position of defendant in court 41 A.B.A.J. 592 (1955).
Criminal law can help local actors, legislatures, theorists, practitioners to identify that their domestic criminal law may be need of change and it also helps to understand the criminal law globally and to solve international problems which can be beneficial for the world.

Traditionally, criminal comparatists face plenty of challenges while comparing the criminal law, so does, even today. It is worth discussing as it might be the reason that comparative criminal law is largely unexplored and neglected. The most important challenge in the analysis of comparative criminal law is the language barriers. The challenge of language barriers is not only concerned with the comparative criminal law but also it is a challenge to the comparative law in general. Thus, scarcity of English translation of foreign criminal statutes, case laws, scholarly, writings, textbooks, articles is remarkable, especially when German, Italian and Spanish criminal theory have achieved a very high level of sophistication and that lack of English translations hinders the propagation of Anglo-American criminal theory to jurisdictions steeped in the European Continental legal tradition. Perhaps, because of this, it happens that scholars on either side believe that they have come with the novel solution to a criminal law problem that – unbeknownst to them – has already been proposed by scholars hailing from a different tradition. In this concern, two cases are remarkable. Several decades ago, American criminal theorists Paul Robinson and George Fletcher famously debated whether and how much an “unknowingly justified” actors should be punished. Paul Robinson forcefully argues that justifications are objective and therefore – harms caused by the unknowingly justified actors ought to be justified even if they are acting for bad reasons.24 In contrast, George Fletcher argued that justifications must be earned by the actor. Consequently, Fletcher contended that unknowingly justified actors should be punished for a completed offense since they lack subjective awareness of the justifying factors, which is essentially their conduct is motivated by the right reasons.25 As a result, this debate would have surely argued for a long time that attempt liability ought to be imposed on unknowingly justified actors.

The facts of People vs. Acosta26 may be used to understand the theory of “objective imputation”. According to the theory of the “objective imputation”, the answer is straightforward. The defendant should not be held liable because the ex-ante risk is created by the defendant was possible to harm to those using the roads, whether they be pedestrians or other drivers. The notion that fair attribution of harms should be the product of a comparison between the ex-ante risks created by the defendants and the risk that actually ends up producing the harm is at least as old as the venerable Palsgraf v. Long Island Railroad case.27 It was there that Judge Cardozo famously stated that “the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is a risk to another or to others within the range of apprehension”. In doing so, he captured the essence of the modern continental doctrine of objective imputation.

Unfortunately, it is difficult to tell that this is the case. If an online search engine is used to look for the terms “objective imputation”, no Anglo-American case or scholarly writing will show up. It might then be tempting to conclude that there is no analog to the continental theory of “objective imputation” in Anglo-American criminal law. This conclusion, however, would be wrong. This is the classic illustration of how the scholar interested in gaining comparative insights could easily get lost in translation. While no Anglo-American court or scholar will use the terms “objective imputation” many will reference legal proximate causation. It would thus be quite useful for scholars to know that the Anglo-American causation inquiry is very similar.

26 284 Cal. Rptr. 117 (19991).
to the European continental ‘objective imputation’.

Besides this, these comparative insights highlight that the scarcity of English translation in criminal laws makes comparative analysis very difficult.

The Comparative criminal analysis is further complicated by historical and culture barrier that significantly contributes how comparative evolved in the world’s different legal system. Many important features of the Anglo-American criminal law, for instance, cannot be fully grasped without the first understanding historical role of the judge in common law countries. By the same token, several significant features of civil law approach criminal law can only be fully explained by the horrifying events that the people of many European and Latin American states experienced while their countries were governed by cruel authoritarian regimes. A failure to take into account how historical contingencies such as these shape the legal culture of different countries quite often leads to misapprehending the legal system of a particular jurisdiction.

Another challenge for the criminal comparatist is the legal barrier in which it is difficult to understand how the legal system being compared with each other in a way that may influence how each respective legal tradition approaches law in general and the criminal law in particular. While the problem in common law and civil law jurisdiction considerably varies, one particularly important difference is the manner in which lawyers in each jurisdiction reason their way through the legal problem. This influences how much weight each legal tradition affords to certain principles of criminal law.

These were some challenges which are faced by the criminal comparatist while comparing the criminal law. The challenges faced by the criminal comparatists are very obvious. It is the fact, that the language, history/culture, and legal aspects are the hindrances while comparing legal laws. Criminal comparatists get easily lost when embarking on comparative legal research mainly because of these challenges. Despite this, another main reason being there is that is no agreement on kind of methodology to be followed, nor even on the methodologies could be followed, and it is quite disappointing, as the modes or the methodology in this regard make little easier to compare the criminal law all around the world without hinderances. Therefore, the two modes of comparative criminal law are as follows:

- Hierarchical and unidirectional mode,
- Egalitarian or multidirectional.

The first – hierarchical or unidirectional – mode of comparative analysis operates within an imperialist framework that guides’ court’s application of English law to resolve disputes and to help develop other, lesser, system of law. This framework should not be obscured by frequent references to the application and development of a uniform common law within the British Empire or the commonwealth, which by definition recognizes no distinction between English and ‘foreign’ law. In this particular mode of comparative criminal law, the comparison proceeds from the assumption that domestic system is superior to the foreign one.

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29 Ibid.
30 This chaotic and unscientific situation has been well described by Esin Örüçü: “there are comparative lawyers who see comparative law as a science with its own separate spear. Others called comparative law merely a method of study and research or even a technique. Some regard it both as comparative method and comparative science of law, or see comparative law in more than one of these aspects. It is immediately obvious that those who see comparative law as a method only do not tell us what the method is, leaving this issue unanswered or very vaguely covered, and those who think and feel that comparative law must be more than a mere method do not seem to agree on what the subject matter is” (Örüçü 2007, p.62).
A second – egalitarian or multidirectional – mode of comparative criminal law in the common law world emerged in the United States after the American Revolution. Every federal system composed of independent bodies of state law offer opportunities for comparative analysis of law.\(^{32}\) Eventually, in U.S. each state – and more recently federal law as well – developed its own jurisprudence on a wide range of issues in criminal law. In the wake of the widespread reform and codification of criminal law in jurisdictions throughout the United States – with notable exceptions, such as California and federal criminal law – American criminal law today is essentially a creature of domestic comparative criminal law.\(^{33}\) This comparative criminal lawmaking was still tough of as a form of common lawmaking with the various, and increasingly different, rules fitting together into an increase incoherent whole.

**Functions and Uses of Comparative Criminal Law.** The function and uses of the comparative criminal law may be useful in two aspects: A tool for critically assessing domestic criminal law; A source of International criminal law. The comparative criminal law as a tool for critically assessing domestic criminal law may provide the critical assess to the domestic criminal law of the jurisdiction that is seeking to reform its law. It has been argued that one of the main functions of comparative criminal law - is not its chief function – is to assist in domestic criminal reform.\(^{34}\)

While this tool for the critical use of comparative criminal law is mostly applicable to legislative reforms. With regard to using the comparative criminal law to fuel legislative reform, it is sensible to look to what other countries are doing in an effort to find novel solutions to old problems.

Comparative criminal law also found its way into the judicial decision-making process. In the United States, this is most obviously the case in the Supreme Court’s death penalty jurisprudence. In Atkins v. Virginia, for example, the Supreme Court pointed out that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”.\(^{35}\) This – coupled with the fact that the vast majority of American jurisdiction prohibit the execution of mentally retarded offenders – helped support the court’s conclusion that the practice amounts to “cruel and unusual” punishment that violates the Eighth Amendment. Subsequently, in Roper v. Simmons, the high court was asked to assess the constitutionality of imposing the death penalty on the defendant who was a minor when he committed the offense. A majority of the member of the Supreme Court concluded that executing someone as punishment for the crime that was committed while under the age of 18 runs afoul the Eight Amendment in justifying its conclusion, the court pointed out “that only seven countries other than the United States have executed juvenile offenders since 1990”.\(^{36}\)

While the Supreme Court concedes that the practices of other countries are not determinative of the meaning of the constitution of the United States, it also acknowledged that the court frequently “refe[rs] to the laws of the other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments”.\(^{37}\)

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32 Cf already Karl Stooβ, Die Schweizerischen Strafgesetzbücher zur Vergleichung zusammengestellt(1890), Die Grundsätze des Schweizerischen Strafrechts vergleichend dargestellt (1892-3).

33 Consider in this regard the Model Penal Code for Latin America, a self-consiously (transnational) comparative project inspired by the ALIZ’s model penal code and uniform commercial code. Juan bustos Ramírez and and Manuel Valenzuela Bejas, Le système penal des pays de L’ Amerique Latine (trans jacqueline Bernat de elis, 1983) 7; see also Jeseheck, (n 38), 1 ff, 18 (model penal code as example of ‘regional’ comparative criminal law and reform project.

34 See e.g., Thomas Weigend, ‘Criminal Law and Criminal procedure, in Jan M. Smiths (ed), Elgar Encyclopedia of Comparative Law.


37 Ibid.
Finally, comparative law is also useful as a tool for enriching scholarly enterprises. It can be used in the classroom to help students better understand the strength and weaknesses of the domestic system of criminal law that they are learning about. For instance, the issue of whether criminal liability should be imposed for failing to rescue a stranger in need of help in circumstances in which doing so would not be costly or dangerous. As every American law student early in their basis substantive law courses, such omissions typically go unpunished in the United States. This might seem unremarkable to many American students, especially if they have already learned that such failures to rescue do not generally give rise to tort liability either. While perhaps some students will notice the obvious disconnect between law and morality in this context, most will likely conclude that this is just the standard legal answer to this question. Such passive acceptance of the American reticence to punish omissions to aid can be challenged by venturing into the realm comparative criminal law. Students are often surprised when they learn that punishing failure to rescue is the norm in most European and Latin American countries. This, in turn, allows to see that there need not be a disconnect between law and morality in this area and that the American approach to punishment failure to aid is by no means the universal way of thinking about this issue. The hope is that such comparative insights may help students broaden their perspectives and call into question entrenches domestic criminal doctrines.

Comparative criminal law also has been a source of International Criminal Law. International criminal law has gained increasing importance in recent years, especially after the adoption of the Rome Statute creating the International Criminal Court (ICC) international tribunals continuously make reference to the domestic criminal laws of different jurisdictions in order to fill gaps in international criminal law doctrines in accordance with the “general principle of law recognized by the civilized nations”.

A particularly rich example of this is the ICTY’s judgment in Prosecutor v. Drazen Erdemovic. the defendant claimed that this killing of dozens of innocent civilians should be excused pursuant to the defense of duress. The court explained in his reliance on comparative criminal law in this matter:

In order to arrive at a general principle relating to duress, we have undertaken a limited survey of the treatment of duress in the world’s legal systems. This survey is necessarily modest in its undertaking and it’s not a thorough comparative analysis. Its purpose is to derive, to the extent possible, a “general principle of law” as a source of international law.

After surveying the law of twenty-eight countries regarding this issue, the Court pointed out that most civil law jurisdictions seem to allow duress to be pleaded as a defense to the killing of innocent people, whereas most common law jurisdictions do not. The court, however, concluded that in the light of the overwhelming consensus in favor of allowing duress to be considered as a ground for reducing punishment.

Regardless of the merits of the holding in Erdemovic, the case highlights the special role that comparative criminal law plays in international criminal law adjudication. This role is even more obvious after the creation of the ICC, given that pursuant to the Rome Statute, the Court

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38 See Luis E. Chiesa, comparative criminal law, the Oxford Handbook of Criminal Law.
39 This is one of the conventionally accepted sources of international law, as recognized in Art. 38(1)(c) of the International Court of Justice Statute.
40 ICTY judgment of 7th October 1997.
41 Ibid., at paragraph 58.
42 Many scholars have found the analysis in Erdemovic wanting. See, e.g., my ‘Duress, Demanding Heroism and proportionality: The Erdemovic Case and Beyond’, (2008) 41 Vanderbilt Journal of Transnational Law 741.
must apply “general principles of law derived... from national laws of legal systems of the world”.43

III. Selected Topics in Comparative Criminal Law

Criminal law is divided into three aspects such as substantial criminal law, criminal procedure and the law of punishment, execution and sections. Substantial criminal law in general part concerns with the general principles of criminal law and in its specific part concerned with the specific offense definitions. Criminal law deals with the set of rules governing the series of proceedings in which the government enforces substantial criminal law. Substantial criminal law, a criminal law proper, traditionally has attracted less comparative interest than its sister disciplines criminal procedure and – at least historically – punishment execution.44 Even Feuerbach, whose main interest lay in substantial criminal law, showed programmatic enthusiasm for comparative substantial criminal law, but in fact produced more significant comparative work on criminal procedure (notably on the hotly contested question of lay participation in general, and of the jury in particular).45 This paper discusses the selected topics in comparative criminal law which have been drawn from substantial criminal law. It is worth exploring since the substantial criminal law has attracted less comparative interest.

- General part
  
  **Punishment theory.** Common law and civil law systems generally operate with the same palette of the rationale for punishment: retribution, general and deterrence, incapacitation, rehabilitation. German criminal law in 1933 adopted a two-track system that distinguishes between punishments and measures; only the latter may rely exclusively on consideration of incapacitation and rehabilitation, while ‘true’ punishments must reflect the defendant culpability.46 Rehabilitation has fallen into disfavor in the United States, where the dominant rationale for punishment of the War on Crime has been incapacitation, resulting in record incarceration rates and a renaissance of capital punishment. While rehabilitation continues to enjoy greater support in Continental systems, a new rationale for punishment has been championed in Continental criminal law. ‘positive general prevention’ attempts to justify the threat, imposition, and infliction of punishment not in terms of its effect on potential law-breakers but as a means to reinforce the commitment to law among the law-abiding. Positive general prevention is said to avoid both retribution’s barbaric pointlessness and deterrence’s immoral use of threats to cow citizens into compliance. In the end, however, it is unclear whether it does more than attaching a more palatable label to familiar, and familiarly troubled, rationales, not unlike rehabilitation’s failed to attempt to evade the problem of legitimation, altogether by redefining punishment as treatment.47

  **Victims.** The victims have undergone a ‘rediscovery’ in both Anglo-American and Continental criminal law in recent decades. In general, criminal proceedings, the victim

43 This mandate applies in circumstances in which the governing principles of law cannot be surmised from the Rome Statute itself or other international legal materials. See Art. 21(1) (c) of the Rome statute.
44 Some of the chestnuts of the comparative criminal procedure, touched upon in this essay, include the control, desirability, and inevitability of prosecutorial and police discretion, the rule of judges, prosecutors, and defence attorney in the criminal process, the place of lay participation in the criminal trial the control and legitimacy of plea bargaining, and – more recently – the procedural role of victims. Representative general comparative works on all three aspects of penal law appear in bibliography.
45 See handbook of comparative law
46 See Handbook of Comparative Law.
47 See Dubber (n 36), 113 ff, 131.
can appear as a parallel prosecutor (Nebenkläger), for instance, in sexual assault cases. In cases of petty crimes, the victim may even assume the role of private prosecutor (Privatkläger), such as in shoplifting prosecutions. In the United States, victims also have been granted various procedural rights, including – most notably – the right to contribute victim impact statements to be considered as sentencing, along with the right to consulted regarding lay agreements, the right to be accompanied to trial by a ‘victim’s advocates’, and so on. Upon closer inspection however it turns out that the victim’s renaissance in U.S. criminal law has been little to go with developments in civil law countries and, for that matter, in other common law countries, including the United Kingdom. The discovery of victim elsewhere was considerably less punitive in nature. For example, one of the central victims – based reforms in German criminal law was the introduction of the offer provision that permitted in resolution of certain criminal cases through victim-offender mediation, rather than through a traditional criminal trial (StGB §46 a).

Jurisdiction. Jurisdictions comparative analysis clarifies that different legal system has taken different approaches to the issue and they have given it a different level of attention. Anglo-American criminal law traditionally ignores the question of criminal jurisdiction. Criminal jurisdiction was territorial jurisdiction; it was simply taken for granted that the place of the crime determined jurisdiction. Even today, criminal jurisdiction in Anglo-American law is not covered in criminal law courses and continues to be treated as virtual synonyms with territoriality. This is puzzling since the basis of jurisdiction with federal criminal law leading the way in the United States. The federal criminal law contains no comprehensive in provision on jurisdiction in the non-territorial criminal jurisdiction. Even the introduction of non-territorial criminal jurisdiction is best seen not as the result of a deep reconsideration of a basis of the State’s punitive power, but rather as a reaffirmation of the Sovereign’s power to reassert its authority even beyond the polity’s geographical boundaries. Specific federal statutes, however, have extra-territorial reach, generally on the basis of the passive personality principle, which attaches criminal jurisdiction on the basis of the victim citizenship.

Principle of legality. Principle of legality most commonly associated with one particular common law interpretive principle - the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities except by clear and unambiguous language. As a principle of common law, this presumption operates in other common law jurisdiction, including the United Kingdom and New Zealand. The principle of legality is a human right and also a fundamental defense in criminal law prosecution according to which no crime or punishment can exist without a legal ground. The origin of the principle of liability date back to post-world War II when a set of compelling criminal statutes were established and the drafters of the Nuremberg Statute affirm the notion of individual criminal responsibility from a tri-dimensional perspective: legal, moral, and criminal. Principle of legality

brings into existence peace and restriction parliament in desired decision in recognition penalties.

**Analysis of criminal liability.** Criminal liability is something wherein there are accountability and responsibility to another by the ways of legal criminal section. Criminal liability has three basic principles: Mental state, prohibition act, and lack of legal jurisprudence. Analysis of criminal liability differs widely in common law and civil law. Criminal liability in common law consists two offense elements: (1) actus reus, (2) mens rea. Actus reus and mens rea are necessary and must exist simultaneously, but not sufficient. Criminal liability in civil consist: tatbestandsmäßigkeit (tipicidad, tipicità), Rechtswidrigkeit (antijuricidad, antiijuridicità), and Schuld (culpabilidad, colpevolezza). In the inquiry into tatbestandsmäßigkeit asked whether the accused’s conduct matches the definition of a criminal offense, and it is thus in the formal sense. The second level proves the formally criminal conduct’s Rechtswidrigkeit, or unlawfulness which is easily reframed as an inquiry into the presence or absence of justification. Assuming Tatbestandsmäßigkeit and Rechtswidrigkeit, the third and final prerequisite for criminal liability is Schuld, which might be rendered as guilt, responsibility or perhaps blameworthiness, or – to put it differentially once again – the absence of an excuse.

The elements in both common law and civil are so similar in nature but despite this, some general differences remain in common law and civil law.

- Special part

Special part of criminal law receives less attention than that of the General part of the criminal law. Special part is largely limited to key offenses like murder, theft, rape, homicide, and victimless crimes. Generally, special part of criminal law is any type of offense must derive from legislation. The concept of Rechtsgut (legally protected interest) plays the central role in the structure of the special part of continental criminal law, as well as in its theory of criminal law in general.\(^{52}\) In the special part, the scope of criminal law and the sort of interests and rights the criminal law is designed to protect Rechsgüter.

**Conclusion: Comparative Criminal Law in Context**

Comparative criminal law is best seen as one way to gain critical distance from a given system of criminal law by placing it within a larger context.\(^{53}\) Therefore, Comparative criminal law is best thought of as a spirit, an approach, an attitude rather than as a formal discipline. In this critical comparative spirit, any transnational comparison, domestic or foreign, internal or external, promises a fresh perspective, and to that extent, comparative criminal law has the potential to make an important contribution to criminal law, a subject that is both more parochial and more in need of critical analysis than any other form of law.

Additionally, by discussing the whole concept of comparative criminal law, it is clear that the criminal law is more parochial and more in need of critical analysis than any other disciplines of law. If criminal law breaks out of its parochial exceptionalism, then the future prosecutors, defense attorney, judges, legislators, and law professors can broad range of approaches to the common problem. For that, we need to focus on the comparative analysis of criminal law in


larger context. No doubt that comparative analysis still followed by disappointing practices and to overcome this, we need to apply sound methodology or modes of comparative criminal law which highlights similarities and differences between and within a legal tradition which in turn makes a contribution in the increasingly globalized world. Apparently, in a world where cross-border legal transactions and collaborations become the norm, where courts and government are increasingly inspired by their foreign counterparts, and where the need for international regulation of the many facets of life becomes more and more imminent, the comparative analysis must take on a broader mission. Through which we can better understand the other criminal law systems. And such better understanding, in turn, leads to progress in the development of criminal law and related field. Thereby, comparing the criminal law systems all around the world can be useful in international harmonization and unification of laws. Comparative criminal law takes an international perspective, and take it from this perspective we can improve human welfare and our legal order, whether national, regional, or international.
Abstract: This article deals with the mechanism of reverse mortgage functioning for years in numerous countries. It is a legal mechanism which has been introduced in order to provide financial security for the elderly. In a reverse mortgage and elderly person undertakes to transfer ownership to their property to the lender. In practice, most frequently an elderly person receives adequate monthly payments staying on their property. After their death, the property is taken over by the lender. The publication will only be limited to selected issues concerning reverse mortgage financing. The article will post also some postulates.

Keywords: reverse mortgage, pensioner, property.

Der vorliegende Artikel handelt von der Institution der Umkehrhypothek, die in das polnische Rechtssystem durch das Gesetz vom 23. Oktober 2014 eingeführt wurde und in vielen Ländern bereits seit Jahren funktioniert. Sie gehört international einer Gruppe rechtlicher Mechanismen, die als equity release bezeichnet wird, an. Die Dienstleistungen der Gruppe equity release teilen sich grundsätzlich in zwei Modelle:

- sog. Kreditmodell - reverse mortgage, auch lifetime mortgages genannt,
- sog. Verkaufsmodell - home reversion.


* University of Warmia and Mazury in Olsztyn.
3 ebd., S. 6.
6 ebd.
Aufgrund der Mehrsträngigkeit der Problematik und des begrenzten Umfangrahmens des Artikels wird die Publikation nur auf ausgewählte Fragen zur Institution der Umkehrhypothek eingegrenzt. Es werden Postulate de lege ferenda aufgestellt, die vielleicht zu einer weitgehenden Diskussion in der gegenständlichen Materie anregen und es beeinflussen, dass die Institution der Umkehrhypothek endlich real in Anspruch genommen werden kann.


Bei der Bezeichnung „ältere Menschen“ wird in der Gesetzgebung vieler Länder oft keine Mindestgrenze in Bezug auf das Alter genannt, und so lässt zum Beispiel Großbritannien diesartige Richtlinien aus. Oftmals liegen die Institutionen, die eine Umkehrhypothek anbieten, selbst eine Mindestaltergrenze fest und diese gilt dann als eine notwendige Bedingung, um sich um eine solche Finanzierungsquelle bemühen zu können. Relativ oft

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9 ebd., S. 29.
10 ebd.
12 ebd.
13 ebd.
behalten sich diese Institutionen vor, dass ein Kreditnehmer mindestens 60 Jahre alt sein soll – so zum Beispiel in der Schweiz oder in Finnland.

Das Anbieten der Finanzdienstleistung Umkehrhypothek unterliegt in vielen Ländern der Aufsicht durch spezialisierte Institutionen. In Großbritannien beispielsweise übt diese Funktion die Finanzmarktaufsichtsbehörde (Financial Supervision Authority) aus.


Oft behalten sich die Institutionen, die eine Umkehrhypothek anbieten, vor, dass nach dem Tod des Kreditnehmers zu entsprechenden Abrechnungen mit seinen Erben kommt. So gehen beispielsweise die ungarischen Institutionen vor.

Die polnischen Regelungen über die Umkehrhypothek enthält das Gesetz vom 23. Oktober 2014 über die Umkehrhypothek (Ustawa o odwróconym kredycie hipotecznym). Kraft seiner Vorschriften kann den Vertrag zur Umkehrhypothek mit der Bank eine natürliche Person abschließen, die Eigentümer bzw. Miteigentümer einer Immobilie ist oder die über ein genossenschaftliches Eigentumsrecht an einer Wohnung bzw. einen Anteil an diesem Recht verfügt, oder aber über ein Erbnießbrauchrecht bzw. einen Anteil an diesem Recht verfügt. Der Vertrag verpflichtet einerseits den Kreditgeber zur Auszahlung eines bestimmten Geldbetrages zu Händen des Kreditnehmers und andererseits den Kreditnehmer zur Bestellung einer Rückzahlungssicherheit dieses Betrages samt Zinsen und sonstigen Kosten (Art. 4 u. o.k.h.). Die Forderungssicherung kann erfolgen durch:


• Bestellung einer Hypothek an der Immobilie oder einem der oben genannten Rechte,

• Eintragung im Grundbuch eines Anspruchs auf die Übertragung des Eigentums an der Immobilie oder an einem der oben genannten Rechte zugunsten des Kreditgebers (Art. 5 Abs. 1 u.ö.k.h.).

Wichtig ist, dass die Bank die Gewährung dieser Kreditierungsform vom Abschluss einer Versicherung gegen unvorhersehbare Ereignisse für die als Sicherheit ihrer Forderungen bestellten Immobilie, durch den Kreditnehmer abhängig machen kann (Art. 5 Abs. 3 u.ö.k.h.). Der Gesetzgeber definiert dabei aber keinen Mindestbetrag, für welchen die Immobilie versichert werden sollte. Ich denke, dass aus der Sicht des Interesses der Bank ein solcher Vorbehalt von großer Bedeutung wäre.

Die Festsetzung der Kredithöhe erfolgt auf Grundlage des ermittelten Wertes der Immobilie, die Gegenstand der Forderungssicherung ist (Art. 6 u.ö.k.h.). Ein Vertrag zur Umkehrhypothek soll Information darüber enthalten, wie die Bank ihre Verpflichtungen erfüllen wird, unter Angabe, ob die Auszahlung einmalig erfolgt oder auf Raten verteilt wird. Im letzteren Fall ist es notwendig, die Laufzeit der Zahlungen anzugeben. Dabei ist es zu berücksichtigen, dass diese nicht länger dauern darf als bis zum Tag des Todes des Kreditnehmers (Art. 7 Abs. 1 u.ö.k.h.).

Der polnische Gesetzgeber hat eine Vorschrift eingeführt, mit welcher der Bank eine Pflicht zur Vorlage dem Kreditnehmer, in Papier oder in elektronischer Form, eines sog. Merkblatts in einer Frist von nicht weniger als 14 Tagen vor dem Abschluss des Vertrages zur Umkehrhypothek, auferlegt wurde (Art. 8 Abs. 1 u.ö.k.h.). Dieses Merkblatt hat die grundlegenden Informationen zu enthalten, und zwar: Angaben zu Bank, Höhe und Berechnungsweise bei Festlegung des Kreditbetrages im Rahmen der Umkehrhypothek, Termin und Verfahren der Auszahlung des Kredites, Höhe der Verzinsung und die Möglichkeit ihrer Änderung, Höhe sonstiger Kosten, darunter Provisionen, Vertragsparteien die zur Kostenübernahme der Immobilienbewertung verpflichtet ist, Methode zur Kontrolle des Immobilienwertes, Form der Absicherung des Kreditgebers, Rechte und Pflichten des Kreditnehmers, Methode zur Abrechnung des Kredites, Vermerk darüber, dass das Merkblatt kein Angebot darstellt sowie auch andere Informationen, die einen potenziellen Kunden zum Abschluss eines Vertrages zur Umkehrhypothek bewegen (Art. 8 Abs. 2 u.ö.k.h.).

Diese Informationsform ist meiner Meinung nach nicht ausreichend, um die Kunden anzuziehen, ihr Interesse zu wecken und vor allem das Vertrauen in die Institution der Umkehrhypothek älterer Menschen zu gewinnen. Es sollten Berater berufen werden, so wie das in vielen Ländern, die dieses Kreditierungsmodell anbieten, getan wird, die auf eine klare Art und Weise das Angebot der Inanspruchnahme dieses rechtlichen Mechanismus durch Beantwortung von Fragen der Kreditnehmer und Erläuterung unverständlicher Aspekte dargestellt hätten 20.

Es sollte wahrscheinlich auch eine allgemein zugängliche Tabelle oder ein Rechner, wie etwa die Kreditrechner, mit einer hypothetischen Ermittlung der Höhe der Umkehrhypothek erstellt werden. Die dort enthaltenen Informationen sollten die ungefähre Höhe des Kredits je nach dem Immobilienwert und der Altersgruppe des Kreditnehmers übermitteln. Natürlich wären dies nur

20 Ebenso Fundacja na Rzecz Kredytu Hipotecznego (poln. Stiftung für Hypothekenkredit), Stanowisko Fundacji na Rzecz Kredytu Hipotecznego do założeń projektu ustawy o odwróconym kredycie hipotecznym (Stellungnahme der Stiftung für Hypothekenkredit zu Annahmen des Gesetzentwurfs über die Umkehrhypothek), Nieruchomości 2011, Nr. 9, S. 40.
Schätzwerte, die in dem oben erwähnten Merkblatt eines konkreten Kreditgebers für einen konkreten Kreditnehmer näher bestimmt wären.

Der Vertrag zur Umkehrhypothek ist schriftlich zu halten und hat folgende Informationen zu enthalten:

- Angaben zu Vertragsparteien,
- Kredithöhe, Auszahlungsverfahren und Zahlungstermin,
- Marktwert der Immobilie,
- Vergleich des Kreditbetrags mit dem Marktwert der Immobilie,
- Form der Absicherung des Gläubigers,
- Angabe der Partei, die zur Übernahme von Kosten der Immobilienbewertung und Kontrolle ihres Wertes verpflichtet ist,
- Pflichten des Kreditnehmers: Versicherung der Immobilie, Instandhaltung der Immobilie, Bezahlung von Gebühren und Abgaben im Zusammenhang mit der Nutzung der Immobilie,
- Höhe der Verzinsung und die Möglichkeit ihrer Änderung,
- Höhe der Kosten im Zusammenhang mit der Kontrolle des Immobilienwertes und die Bedingungen für ihre Änderungen, sowie auch die Häufigkeit der Durchführung einer solchen Kontrolle,
- Rechte des Kreditnehmers: Rücktritt vom Vertrag samt Angabe der Zinshöhe, vorzeitige Kreditabzahlung, Vertragskündigung,
- Kündigungsbedingungen,
- Regeln für Abrechnung des Kredits,

Angaben zu Personen, die nach dem Tod des Kreditnehmers über den Vertrag zur Umkehrhypothek informiert werden sollen (Art. 10 Abs. 1 und 2 u.o.k.h.).

Es ist wichtig, dass in seinem Inhalt der Kreditnehmer sich zusätzlich zur Nicht-Veräußerung des Immobilieneigentums, das Gegenstand der Sicherheit ist, ohne vorherige Zustimmung der Bank verpflichten kann (Art. 11 u.o.k.h.).

Für Zwecke eines stärkeren Sicherheitsgefühls unter den Bankinstituten sollte vielleicht im Inhalt des Vertrages zusätzlich die Mindesthöhe der Versicherung der Immobilie, die Gegenstand der Absicherung des Gläubigers ist, bestimmt werden.

Bemerkenswert ist die Tatsache, dass der Kreditnehmer ohne die Angabe von Gründen von dem Vertrag innerhalb von 30 Tagen ab Vertragsabschluss zurücktreten kann ohne dabei Kosten, die aus dem Rücktritt vom Vertrag resultieren, bis auf die von der Bank an die Organe der Regierungsverwaltung und Gerichte bezahlten Gebühren, zu tragen (Art. 12 Abs. 1 und 2 u.o.k.h.). Darüber hinaus ist er jederzeit berechtigt den gesamten Betrag, zu dessen Rückzahlung er verpflichtet ist, zurück zu zahlen (Art. 13 Abs. 1 u.o.k.h.). Tut er das nicht und stirbt, so dürfen seine Erben den gesamten geschuldeten Betrag zurückzahlen und haben dafür eine Zeit von 12 Monaten ab Todestag des Kreditnehmers (Art. 21 u.o.k.h.). Die Bank ist
verpflichtet die Information über den Tod des Kreditnehmers auf ihrer Homepage zu veröffentlichen. In einer solchen Anzeige sind Vor- und Nachname des Kreditnehmers, Information über den Abschluss eines Vertrages zur Umkehrhypothek sowie auch über die Möglichkeit und Frist für die Abrechnung des Kreditvertrages durch die Erben, anzugeben (Art. 25 Abs. 1 u. o. K. h.).

Als begründet erscheint meiner Ansicht nach ein Postulat auf die Veröffentlichung dieser Information in einer landesweiten Tageszeitung und nicht auf der Homepage der Bank, so dass die Erben, die daran interessiert sind, die Immobilie in ihren Händen zu halten, eine reale Chance bekommen, entsprechende Abrechnungen aus der Umkehrhypothek mit der Bank durchzuführen. Der Gesetzgeber schreibt allerdings vor, dass der Kreditnehmer die Absicht der Veröffentlichung einer solchen Information in einer landesweiten Tageszeitung ausdrücken kann. Die Frage ist aber, ob der Kreditnehmer über diese Möglichkeit bei der Lektüre des Gesetzes erfahren oder im Merkblatt darüber informiert wird. Denn die Nichtrückzahlung des gesamten durch den Kreditnehmer oder ihre Erben geschuldeten Betrages folgt mit weitreichenden Konsequenzen. Die Bank wird ihr zustehendes Recht auf die Übertragung des Eigentums an der Immobilie, die Gegenstand der Sicherheit ihrer Forderungen ist, geltend machen können (Art. 22 u. o. K. h.).

Im polnischem Rechtssystem sollte die gegenständliche Institution ein Heilmittel für die Bevölkerung mit niedrigen Renten sein. Die Praxis zeigt jedoch, dass sie eine stillgelegte Institution ist. Bald vergehen drei Jahre seit der Inkrafttreten des des die Umkehrhypothek regulierenden Gesetzes und die Banken fürchten sich immer noch vor der Einführung dieses Kreditmodells in ihr Angebot.


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21 Fundacja na Rzecz Kredytu Hipotecznego (poln. Stiftung für Hypothekenkredit), Stanowisko Fundacji... (Stellungnahme der Stiftung...), Nieruchomości 2011, Nr. 9, S. 42.
22 ebd.
23 Związek Banków Polskich (Verband polnischer Banken), Raport: Symulacja możliwości zwiększenia budżetów domowych seniorów przy wykorzystaniu raty kapitałowej odwróconego kredytu hipotecznego dla różnych rodzajów nieruchomości (Bericht: Simulation der Möglichkeit der Erhöhung des Haushaltsgeldes von Senioren durch Inanspruchnahme der Kapitalrate bei der Umkehrhypothek für verschiedene Arten von Immobilien),
versprechender Kreditkalkulationen scheint es, dass ein Teil der Bevölkerung, vor allem die einsamen und bedürftigsten Rentner, diese Kreditform in Anspruch genommen hätte, insofern selbstverständlich eine solche Möglichkeit für sie gegeben wäre.


Wenn die vom Gesetzgeber berechtigten Rechtsträger an der Einführung der Dienstleistung Umkehrhypothek in ihr Angebot nicht interessiert sind, dann scheint es die Erweiterung des Kreises von berechtigten Rechtsträgern, die diese Form der Kreditierung anbieten dürfen, in Erwägung zu ziehen als begründet. Die Voraussetzung hierfür wäre aber die Unterwerfung dieser Rechtsträger im Bereich der betroffenen Dienstleistungen einer entsprechenden Aufsicht der zuständigen öffentlichen Behörde. Darüber hinaus ist davon auszugehen, dass die Verstärkung des Wettbewerbs in der Zukunft zu besseren Kreditbedingungen führen könnte.


Abschließend bleibt es zu hoffen, dass die von mir aufgestellten Postulate dazu beitragen werden, dass die Umkehrhypothek sich zu einem zugänglichen Produkt für die polnischen

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24 P. Pietkun, Kup pan cegłę (Kaufen Sie den Ziegel), Gazeta Bankowa 2010, Nr. 12, S. 25.
Rentner entwickeln wird und sie in einer vergleichbaren Größenordnung genutzt wird, wie dies in vielen anderen Ländern der Fall ist.
**Wojciech Kosior, Jakub M. Łukasiewicz, An Agreement as the Source of Parental Responsibility Over a Stepchild – A Model Approach on the Example of British Legislation**

**Abstract:** The purpose of this article is to show parental responsibility as a legal relationship, the source of which may be a contract. Because such a case occurs i.e. in the regulations of British law, hence the authors’ attention is focused on the analysis of these regulations. The main motive of the work is to say that we are now witnessing the contractualisation of family law.

**Keywords:** Family law, United Kingdom, parental responsibility, adoption.

According to a fixed view in the doctrine, the fundamental family law is a foundation of three basic family-legal relationships\(^1\). It is about the relationship of marriage, kinship and adoption, which are the source of other family-legal relationships\(^2\). That means that both the parental power, the relationship between the spouse's property\(^3\) and the relationship of affinity, and finally maintenance can be defined as so-called dependent relationships. Their essence lies in the fact that these relations are not self-contained, but are, in principle, rooted in one of the fundamental family-legal relationships\(^4\). Historically, this dependence could be so strong that former Roman lawyers did not see the need for constructing special dependent relationships. In the agnostic relationship of kinship (the period of the kingdom and of the early republic), there were elements of today’s relation to parental authority (cognitive), cognition and alimony\(^5\). Over time, legal thinking began to take account of certain relationships in terms of dependent relations\(^6\). At the same time, in modern normative solutions, it is possible to perceive the formulation of new (apart from dependent relationships) varieties of family-legal relations.

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Settled in the Art. 144 k.r.o. (Polish Family and Guardianship Code), the maintenance relationship between the stepfather (or stepmother) and the stepchild is an example of so-called indirect relationship. This relationship results from the affinity (between the stepfather and the stepmother), which in turn results from the marriage relationship (between the stepfather or stepmother and the stepchild parent). In addition, Polish law recognizes autonomous family-law relationships, i.e. those which occur despite the lack of a family-legal basic relationship. This refers to the maintenance relationship between divorced spouses (Art. 60 k.r.o.), the maintenance relationship after termination of adoption (Art. 125 k.r.o.), the relationship of affinity after the cessation of marriage (Art. 61 k.r.o.) and the maintenance relationship of a man against a pregnant mother (Art. 141 k.r.o.). These examples clearly show that the autonomous and indirect relationship is the maintenance relationship. In the context of parental control there are no such unusual relationships. The relationship of parental responsibility is always the result of the basic relationship of kinship or adoption. On the grounds of foreign legal solutions, however, one can observe such models that parental responsibility "detaches" from the fundamental relationships of the affiliate and creates such a relationship to guarantee the actual needs of those involved in the current custody of a minor child. Among systems very strongly oriented on actual social needs, common law systems should be identified, including family law in the British legal system.

The essence of the so-called parental responsibility

In the British legal system, parental authority grows in principle from the relationship of kinship. Legal literature also points to parenting based on intent. There are, for example regulations referring to the situation of sperm donation, where the genetic father does not want to become a parent to the payer - the mother. Although such cases may be approximating the pre-legal status of a child who inherits property from hand to hand, it is the situational context of the pregnant mother that allows for certain exceptions. At the same time it should be noted that such situations are not in the scope of interest of the authors of this publication. This problem is due to the divergence between genetic and biological kinship and refers to the question of which normative character should be attributed. In the meantime, the purpose of the article is to be the case when the legal relationship has already been established, and yet the family-legal relationship of parental control is "detached" from the relationship of kinship, thus obtaining the characteristics of the autonomous relationship. This is the case when the relationship of parental responsibility is established between persons who do not have a relationship of kinship. A model of even such a situation is the relationship between a stepfather (stepmother) and a stepson (or stepdaughter) on the basis of the British regulation.

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From the perspective of Polish family law, the only way to establish parental authority between a stepfather (or stepmother) and a stepchild is to adopt the child\textsuperscript{13}. In the meantime, under the regulations of the British family law, a stepfather (or stepmother) can acquire parental responsibility over a stepchild by signing a parental responsibility agreement. This article deals with exactly this issue where, under the constitutive agreement for the acquisition of parental responsibility, the legal status of a stepfather or stepmother is equated with the parental responsibility of biological parents.

Addressing a research problem requires prior discussion of the fundamental issues of parental responsibility in the British family law, and more precisely the laws of England and Wales. The Children Act of 1989 is the basic act in this area. The provisions of Art. 3 of the above-mentioned act defines parental responsibility as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

Parental responsibility is also related to the responsibilities of raising and caring for a child, and for making all kinds of decisions\textsuperscript{14}. The scope of those decisions is extraordinarily wide. As an example, the parent decides about the religious affiliation of the child and the direction of his or her education, indicates the child's future name and also selects the guardian in case of his/her death. He or she also authorizes various types of medical treatment or medical records, and also represents the child in all administrative and court proceedings\textsuperscript{15}. Interestingly, a parent under British family law has the right to receive child benefits owed on his own behalf\textsuperscript{16}.

Considering the ways of acquiring parental responsibility, it can be said that the standard situation is the case when a child marries his biological parents - then both the mother and the father of the child have the full power of parental responsibility\textsuperscript{17}. In the case of a child born out of wedlock, the full power of the child is legally valid only by the mother of the child, and the father can only be obtained by virtue of art. 4 of the Children Act\textsuperscript{18}. These are the following situations\textsuperscript{19}:

\textsuperscript{13} However, in Polish law the specific examples can be found where the relationship between the parent’s spouse and the child is legally significant, for example the stepdaughter and stepfather are the persons who belong to the immediate family, releasing wholly from the tax the acquisition of property or property rights as inheritance and donation between To those persons or persons irrespective of their value (Art. 4a section 1 of the Law of 28 July 1983 on inheritance and gift tax, Journal of Laws of 2009, No. 93, item 768 as amended). In addition, there is a mutual maintenance obligation between the stepson and the stepfather (stepmother) in Art. 144 k.r.o.


\textsuperscript{16} Regardless of the relationship between parental responsibility and, therefore, parental responsibility, the parent is obliged to keep the child (depending on the maintenance relationship) and also interacts with the child in the relationship of succession.

\textsuperscript{17} Article 2 section 1: Where a child’s father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

\textsuperscript{18} Article 2, section 2: Where a child’s father and mother were not married to each other at the time of his birth— (a) the mother shall have parental responsibility for the child; (b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) [in accordance with the provisions of this Act.]?

(1) If the father was entered in the birth record of the child with the consent of the mother, then the parental authority is created for such father automatically, without any additional credentials or declarations. However, the father cannot demand that he has to be included in the birth certificate on his own, so without the mother’s prior consent. Similarly, a mother cannot register a child’s paternity without the prior consent of the child’s father. It is worth noting here that the case of automatic acquisition of parental authority by a father registered in the birth certificate refers only to children born after 2003, because prior to that date, paternity registration did not automatically give father a parental authority. In such a situation, it was necessary for the father to conclude a parental responsibility agreement or to apply to the court establishing biological paternity.

According to Art. 55 of the Family Law Act 1986, a father may apply to the court for confirmation of biological fatherhood. In the case of a father-in-law resolution of paternity, the father may apply for the so-called re-registration of the birth certificate of the child, which however does not give the father parental responsibility. This one the father can get in two ways.

(2) First of all, the father of the child may conclude a parental responsibility agreement with the mother of the child.

(3) Parental authority may also be entrusted to a father by a court decision after having considered his or her application (the so-called "parental responsibility order").

In addition, the father of a child who, at the time of the child’s birth, is not married to the mother of the child, may acquire parental authority by marrying her if she is to be appointed guardian of the child or if the child is adopted. Importantly, a father of an unmarried child of his mother, even without parental authority, may exercise a number of rights with regard to the child he implements by making the appropriate application to the court. In addition, the father is obliged to pay the so-called child support.
An agreement as a source of parental responsibility for a stepparent

The spouse of the child's parent in English is referred to as stepparent. Depending on gender, the parent may be a stepmother or a stepfather. As in Poland, a stepparent is a spouse of the biological parent after previous divorce of biological parents or after the death of one of them.29 The mere fact of living together with the parent and child does not yet result in the person becoming a stepparent. It is necessary to conclude a marriage. Moreover, in the context of parental responsibility, the mere conclusion of marriage does not yet prevail. It is necessary to make an adoption, which creates a relationship imitating kinship. In addition, under the British regulations, there are additional ways to obtain parental or step-parental control without the need to adopt a stepchild. These are:

A) obtaining a child arrangement order attesting to the fact that the child lives with and adheres to the stepparent and therefore enjoys parental rights,

B) obtaining a parental responsibility order at the request of the stepparent30.

C) the conclusion of a constitutive parental responsibility agreement, i.e. the so-called parental responsibility agreement.

Previous considerations indicate that a biological father unmarried with the mother of a child (at the time of his / her birth) may also acquire parental responsibility under a parental responsibility agreement. In this case, however, we are dealing with a contractual "combination" of kinship relationship with parental authority. In the meantime, in the situation of the parent of the adopted child the situation is quite different. The point is that the contractual acquisition of parental responsibility occurs by a person not related to the child by any relationship of kinship.

The above-mentioned possibility created an amendment implemented in 2005 to the Adoption and Children Act of 2002, by which art. 4A to the Children Act of 1989 was added. Art. 4 A in paragraph 1, points out as follows:

Where a child’s parent (“parent A”) who has parental responsibility for the child is married to [ or a civil partner of,] a person who is not the child’s parent (“the stepparent”)— (a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the stepparent provide for the stepparent to have parental responsibility for the child; or (b) the court may, on the application of the stepparent, order that the stepparent shall have parental responsibility for the child.

The abovementioned agreement is thus concluded between the parent or biological parents having parental authority and the stepparent. Prior to the conclusion of such a contract, it is necessary to meet two conditions:

A) firstly, the stepparent must remain married (or remain in partnership under the Civil Partnership Act of 2004) with the biological parent of a child with parental authority;

B) secondly, the stepparent must obtain the consent of all persons, i.e. the parents, if they have such power. It is therefore not sufficient for consent only to the parent with whom the stepparent remains married. The need for consent from both biological parents emphasizes the special nature of the agreement for which the parents are required to cooperate (in unison). Consequently, under British law, there is the possibility of parental involvement by more than

two parents. It is worth noting here that in the absence of agreement between biological parents with parental responsibility, the institution provided for in Art. 4a. 1 b, i.e. the judicial assignment of parental authority at the request of the stepparent.

The conclusion of an agreement on parental responsibility results in granting the stepparent the same rights and responsibilities towards the child as the eligible biological parents. This agreement in no way affects, however, the existing scope of parental responsibility of biological parents. Hence, the agreement in conjunction with the fact that the stepparent who is married to the biological parent resides with a child, does not grant the stepparent greater rights to the child than the other parent who does not live with the child has. Such an agreement only equates those persons from the legal point of view, although the stepfather or stepmother does not become obliged to pay for maintenance. It is also worth mentioning that the analyzed agreement cannot be denounced. The only way to terminate a contractual relationship of parental authority is to intervene in the court at the request of anyone who has parental authority and at the request of the court (with prior consent of the court) by the child. Naturally, parental control ceases when the child is eighteen years old.

The conclusion of the agreement on parental responsibility must take place in the prescribed form. The requirements for this are specified by the statutory instrument 2009 No. 2026 Children and Young Persons, England and Wales The Parental Responsibility Agreement (Amendment) Regulations 2009. This act introduces a uniform model of parental responsibility that must be respected. Obviously the contract should be made in a written form. The contract in its content should include the statements of authorized biological parents about the consent to grant parental authority to the stepparent. Then all these people (including the stepparent) should sign. Of course, this fact alone is not enough, as the signatures should be submitted to the court and certified in a special form by the Justice of the Peace, Justice’s Clerk, Assistant to the Justice’s Clerk or Officer of the Court authorized by the Judge to administer oaths or by any other person authorized to accept the statements of a court employee authorized by the judge. The signature cannot be attested by a solicitor. The appropriate court is the local family court, county court or the Principal Registry of the Family Division in London. In this court should be additionally submitted relevant documents certifying the parental authority of the biological parents, i.e. the birth certificate and the marriage certificate (or affirmation of the partnership) of biological parents, to show the date that the parents remained in the relationship when the child was born. Possibly they should submit a document confirming possessing parental responsibility by the biological father if this is the case. The stepparent should additionally submit a document certifying marriage to the parent of the child. Each of the above mentioned should also have a valid identity card. The signed contract should be drawn up in triplicate (or three copies), one for each interested person, i.e. eligible biological parents and a stepparent. Such a set of documents should then be sent to the above-mentioned Family Registry in London. Upon acceptance of the contract, each parent receives one copy with the stamp of the court and the appropriate court note. The agreement has legal effects when it is registered in the registry. What is important, in the case of the transfer of parental responsibility over more than one child, a separate agreement should be drawn up for each of them.

Conclusions

In light of the abovementioned considerations, one can risk the thesis that the evolution of family relations has taken place in three characteristic stages. (1) It seems that former Roman lawyers did not initially see the need for constructing special legal relationships such as maintenance, education or anything else. All relations between specific members of the family were taken into account in a single cognitive attitude in which elements similar to modern parental authority, alimony and cognition were incorporated. (2) In time, however, the basic relations (marriage, kinship and adoption) and dependent relationships (relationship of maintenance, parental relationship, spousal relationship, and affinity ratio) began to be distinguished. (3) Finally, apart from primary and dependent relations, independent ones started to appear. This includes support after marriage termination (Art. 60 k.r.o.), post-adoption support (Art. 125 k.r.o.), affinity after marriage termination (Art. 61\(^8\) k.r.o.), and support for pregnant mother (Art. 141 k.r.o). Examples of these last relationships may also be foreign solutions. A representative model is the relationship between the parental authority of a stepfather or stepmother towards a stepchild on the basis of a parental responsibility agreement. It is an interesting relationship as its source is a contract that is an example of an enriched axiology of family law. The axiology according to which, apart from persons formally belonging to the family, persons who are effectively included in the family community are also considered, based on close links which are not significant from the legal point of view. An open question remains whether the Polish legislator should also go in this direction. One may wonder whether a constitutive parental contract should be allowed in the Polish legal system. The case requires in-depth studies beyond the scope of this publication, as it is necessary to carry out a systematic analysis, examine the morality of Poland, social expectations, as well as cross-border issues of psychology in the context of the fundamental principle of child welfare, to determine whether such a solution could be introduced on the grounds of Polish law.

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33 A stepfather or stepmother is associated with the stepchild by the bond of affinity. In light of Polish family law, however, this bond is not so significant, because in addition to the prohibition of marriage (Art. 14 k.r.o.) and the allowance in some cases (Art. 144 § 1 k.r.o.) and the possibility of inheritance, this bond can not be comprehended as a base to perform the parental responsibility (Art. 95 k.r.o. and other) and formal family inclusion (Art. 27 k.r.o.).
Nadezda Ljubojev*, Legal Protection of the Computer Program in the Republic of Serbia

Abstract: Digital technology has become an integral part of everyday life, both on the global level and in Serbia. This fact suggests the great significance of the computer program and how important is the issue of determination of adequate forms of its legal protection. This paper aims to show the system of computer program protection in the Republic of Serbia. In Serbian legal system, the basic form of protection for computer programs is copyright. Therefore, in author’s work with the analysis of relevant sources of Serbian law but also in the laws of European Union, within the process of integration and harmonization of Serbian legislation with the legislation of the European Union, the author pointed to the existing situation regarding the legal protection of computer program by copyright, meaning by patent. Taking into account that in practice coexists copyright and patent protection of computer program, the author has elaborated their relationship also.

Keywords: protection of the computer program, copyright law, patent right, Republic of Serbia.

Introduction

The appearance of computers and computer programs represents a turning point, not only in economic, but also in social life of all countries. Otherwise, the expansion of computer programs is related to the second half of the last century, when they appeared on the market as an independent good, separated from computer devices for which they were designed. Today, everyone is addressed on the economic significance of computer programs and, without them, computers as electronic devices, barely have any use value.

The need for implementing legal protection for computer programs became current in the moment when the first computers appeared and it was justified by many facts. The first one is of economic nature and it is a result of wider and wider use of hardware and software in the world. Appropriate regulations need to protect large investments in the production of hardware and creating programs, as well as to encourage new investments. The second argument is related to the fact that computer programs are a result of human creativity, which is, as intellectual creation, suitable for legal protection. However, apart from providing legal protection to the creators of computer programs and protecting them from unauthorized use of their programs, it is often necessary to regulate the relationship between the author of the program as the owner of program and interested users by appropriate regulations. The third reason for implementing legal protection of computer programs would be a need for regulating transfer of computer programs. According to that, the software industry needs exclusive legal protection to develop itself appropriately.

However, as the issue of legal protection of computer programs in international and comparative law is not disputed, as it is undeniably a spiritual creation and the result of spiritual creativity, there is commitment for obtaining legal protection of computer programs which should be within a specific branch of law – intellectual property. The question which is disputable is in what field of law on intellectual property legal protection should be provided – whether on the basis of patent rights regulations or on the ground of provisions of the copyright

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law, in order to establish a legal framework for exploitation of computer programs which possess high value on the market.

Copyright protection of computer programs can be suitable for software developers, because it does not require revealing of the program in the source code is for obtaining legal protection. That way, unlike the program in object code which is placed on the market, the source code remains a business secret of its creator.1 Besides, copyright protection lasts for the life of the author and fifty (Bern Convention, 1971)2 or seventy years after his death (Agreement on Trade-Related Aspects of Intellectual Property -TRIPS).3

However, once made available to the public, the source code (when it is expressed in some of the programing languages) can be used in a simple way for creating another computer program, without direct copying, which leads to the violation of copyright. It should be kept in mind that in this field there is restriction in intellectual creativity by technical factors, because there is no infinite series of possible ways to express the same idea, as it is the case with other forms of creative work. Thus, it is very hard to delimit in particular case if the computer program is a plagiarism of another program or an original creation of its author. Also, thanks to the current developed computer technologies, the computer program became easily available product for copying and this can be achieved with minimal costs.

On the other hand, afore mentioned complex nature of the computer program opens the question of protection by the patent. The source and object code, as forms of expression, are the objects of copyright protection. However, activation of the computer program produces a technical result that often has an industrial application. Considering this fact, copyright concept of protection is being questioned not only by the American, but also by the European legal theory and practice.

This issue became particularly important during the 1970s and 80s. In that period, numerous contradictory discussions appeared about regulations to protect the creators of computer programs.4 The attitude that computer programs represent author’s work protected by copyright provisions overpowered after a comprehensive discussion.5 This standpoint is expressed in the Provision of the Article 10 (1) of TRIPS, according to which “computer programs, whether in source or object code, shall be protected as literary works under the Bern Convention (1971)”.6 But, that does not mean that legal protection of computer programs is uniformed in the comparative law.

I. Protection of computer programs in the law of the European Union

and the Republic of Serbia

By adopting the Directive on the legal protection of computer programs (Directive 91/250/EEZ) in 1991, it was confirmed that computer programs were considered as author’s literary works.

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4 Marković, S, Zaštita kompjuterskog programa patentom, autorskim pravom i pravom sui generis, Ljubljana, p. 12, 1989.
6 Agreement on Trade-Related Aspects of Intellectual Property Rights -TRIPS.
This view was later also confirmed in the TRIPS\textsuperscript{7}, as well as in the Patent Law Treaty\textsuperscript{8}, which recognized the protection of computer programs as they were literary works. According to that, computer programs are classified as literary works and they enjoy copyright protection, providing that they fulfill the conditions prescribed for the protection of the author’s work.\textsuperscript{9} Regarding the importance of the electronic trade and development of technological society based on the Internet, the real expansion of the production and use of computer programs is still expected, so the issue of their adequate legal protection on the European continent is up-to-date. Due to the economic impact of the software industry of the United States (USA), and the expressed efforts to recognize the computer program and protect the patent, some of the doubts about justification of copyright protection of the computer program have been introduced on the European continent, which we will discuss, but firstly, let us explain the concept of copyright protection of the computer program.

First, there is a need for a precise determining the term of computer program, as an object of legal protection. The computer program is defined as “a series of instructions that are, upon their fixing on the machine-readable material carrier, capable of affecting the machine for information processing so it can express, perform or achieve a specified function, task or result”.\textsuperscript{10}

The term software needs to be differed from the similar concept of the computer program, because the latter is a narrower term.\textsuperscript{11} In theory, the term software is used often and it includes “the computer program and procedures, possible supporting documentation and data referring to the functioning of the computer system”.\textsuperscript{12}

The Directive 91/250/EEZ was issued by the Council of the European Committees with the obligation of its applying in all of the member states of the European Economic Community starting from 1\textsuperscript{st} January 1993.\textsuperscript{13} It was composed in Brussels in May 1991. According to the Directive 91/250/EEZ, the computer program is considered as a program regardless of its form. This term also includes all the preparatory works of conception which finally lead to development of some program, provided that they are of nature that allows production of the program in the later stadium.

The copyright protection of computer programs in the Serbian law is in accordance with the regulations of the Directive 91/250, which represents a primary act regulating the issue of the computer program’s protection in the European Union (EU) and it is used by the member states to protect computer programs with copyright, same as literary works, in terms of the Bern Convention (1971).\textsuperscript{14}

\begin{thebibliography}{99}
\item Article 1 (1) Directive 91/250.
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The software expressed in any form is protected by copyright. The software form includes: source code (when it is expressed in some of the programming languages), object code (in form of binary numbers, i.e. in the machine language) and executable code (electronic digital inscription on the body carrier: magnetic tape, chip, CD). The ideas and principles existing in the basis of any software element, including ideas and principles located in the basis of its interface, are not covered by copyright protection. “The parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces’”.

The computer program will enjoy copyright protection if it fulfills the conditions prescribed for the protection of the author’s work. In order to be legally protected, the author’s work needs to be the result of original human creativity expressed in the form suitable for such work. No other criteria is applied for determining whether the work should fall under this kind of protection, because it is considered that the criteria used in order to determine whether a computer program is or is not a genuine work should not contain any estimation of quality or aesthetic value of the program. According to the Directive 91/250, all computer programs are protected, regardless of their concrete form and the fact they are “stored” in computer or in some other place (floppy disc, paper, disc).

In accordance with the Directive 91/250, author of the computer program can be an individual or a group of individuals (co-authors). Signed authorship is assumed and general regulations on authorship are applied for collective works. The right of protection belongs to the author or to co-authors, if more individuals participated in making of the computer program. If the computer program is created while the author is employed, employer is the holder of all exclusive authorizations on using the program, unless it is contracted differently between the employer and employee.

The rightholder has exclusive authorizations to allow or forbid permanent or temporary use of the program, in general or partly, in every way and by use of any technical means. It is defined, by the Directive 91/250, that use of the program means copying, storing in a computer or some other body carrier, preparing the program for work, adapting, adjusting or doing any other program change, as well as every other form of placing computer program on the market, including renting of the program.

Significant limits of the computer program’s author are provided by the Directive 91/250, in favor of the program’s lawful owner. So that lawful owner of the computer program has the right to adapt the computer program to his needs, translates it to another program language and creates the only security copy of it. By national legislation, the member states are obliged to provide efficient means, in case of violation of rights of the author of the computer program.

In Serbian regulations on copyright, computer program as an author’s work is regulated for the first time by the Law on the Amendments of the Law on Copyright from 1990. The Law on Copyright and Related Rights from 1998 which followed accepted the same concept by explicitly providing that computer program is on the list of author’s works. In that way, copyright protects the titular from direct copying of the source or object code, but that protection does not apply on those cases representing different ways of expressing the same idea or principle.

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15 In that way, copyright protects the titular from direct copying of the source or object code, but that protection does not apply on those cases representing different ways of expressing the same idea or principle.
17 Article 1 (2) Directive 91/250.
18 Ibid., Directive 91/250.
19 Ibid., Art. 1 (2) and (3).
Copyright and Related Rights from 2004\(^{22}\) also did not bring essential changes, as according to international regulations it subsumes computer programs under written works,\(^{23}\) which is also provided by the Law on Copyright and Related Rights from 2009\(^ {24}\) (hereinafter: LCRR) LCRR anticipates computer programs as one of the author’s works that are listed exemplary in the category of written works.

Considering the specifics of the computer program as an intellectual property, consistent application of provisions on author’s literary works is not justified. Due to specificity of this type of author’s work, the rights of the author of the computer program are limited, in comparison with authors of other works, which will be discussed in the part about the limitations of copyright, so, in order to understand the issue of the computer program as an author’s work, it is necessary to highlight these issues.

While protecting computer programs, there are situations that are different from those related to other author’s works: program copying, program changing and translating from one program to another. The Law also introduces a right to lend a sample of the computer program, in accordance with the Directive of the EU on Rental and Lending Rights.\(^ {25}\)

LCRR provides limitations which completely abolish exclusive property rights of the author. These limitations, in prescribed cases allow the third person to use the work without permission of the author or his/her legal successor without paying a fee. According to this type of limitation, every transgression in use of the certain work represents violation of the copyright. In the domain of suspension of exclusive rights and right to compensation, crucial specifics of copyright protection for computer programs are included.

Suspension of copyright is especially regulated, when it comes to the computer program. If the author’s work is a computer program, a person who lawfully obtained a sample of computer program (person who has the permission of the copyright holder to use the program) is allowed, for his/her own customary use of the program, \emph{without author’s permission and without paying an author’s fee}, to take the following activities:

\begin{itemize}
  \item store the program in the computer memory and activate the program to work. Starting from general postulates of the copyright, the author has an exclusive right to allow or forbid copying of his work in every physical or non-physical, permanent or temporary, indirect or direct manner. In that way, author is protected from any copying of his work for which he has not given his consent. If the author’s work is a computer program, copying is considered and storing the whole program or its part in the computer memory, i.e. activating the program in the work on the computer. Essentially, this activity represents copying of the computer program on some of the body carriers, which is the author’s authority computer program. However, in this case, this action does not represent the violation of copyright, because the copying is carried while the computer is working.\(^ {26}\) Nowadays, copying programs is the most frequent case of violating the computer program.
  \item remove program errors and make other necessary changes, according to the purpose of the program, if it is not stipulated otherwise in the agreement. In legal sense, these activities represent the adaptation of the author’s work, which are under personal
\end{itemize}

\(^{22}\) Law on Copyright and Related Rights ("Official Gazette", 61/2004).
\(^{23}\) \textit{Ibid.}, Art. 2 (2) (1).
\(^{24}\) Article 2 (2) (1) Law on Copyright and Related Rights ("Official Gazette", 104/09 and 99/11).
\(^{26}\) Marković, S. supra note 5, p. 12.
authority of the author. In this regard, if this limitation does not exist, it would be a violation of copyright by disrupting the work’s integrity.

- make a backup copy of the computer program on a permanent body carrier. From the standpoint of the copyright, this activity represents copying of the author’s work, which is the exclusive authority of the author. However, this authority was recognized to the legal owner of the computer program, in order for the program to continue working smoothly, in case of damaging the original copy of the computer program.
- perform the so-called decompilation of the computer program, exclusively for acquiring necessary information for achieving interoperability of that program with another, independently created program, or with relevant computer equipment, provided that this information was not available in other way and that decompilation is limited only to the program which is necessary for achieving interoperability. These activities of the computer program are allowed in order to enable using computer program on the computer equipment on which this program would not work at all, or not work optimally. The legal owner of the computer program can use this authority under the additional condition, which assumes that the program’s owner did not receive data from its author, which will enable working of the program on a new computer equipment. Besides, the data thus obtained (decompilation) cannot be used by the third parties or for any other purposes, especially not for creating or placement of another computer program, which would violate the copyright of the first (source) computer program. As a rule, the legal owner most often does not perform certain operations on the computer but a certain professional person does it on his account and according to his order (operator or other person). The regulations stipulate that this limitation acts not only in favor of the legal owner of the computer program but also in favor of the person who uses it according to the owner’s authority.

II. Relation between copyright and patent protection of the computer program

By accelerated development of computer science and by taking into account the economic value of computer programs, both in terms of investing in programming and possibilities for economic exploitation, there has been created such legal-political climate which, in some countries, made acceptable that certain types of intellectual creativity related to the software are protected by patents, instead of copyright. Thus, for example, United States Trademark and Patent Office approved the so-called patents for software back in the 1970s. Neither the judicial and administrative practice of the member states of the EU, nor the practice of the European Patent Office (EPO), do not ignore current trends of the American precedents in their own decisions, which is also evidenced by the data showing that several thousands of patents are assigned to the computer-applicable inventions in the national authorities and in the EPO.

27 Article 47, Paragraph 1, LCRR.
28 Idris, Kamil, p. 92.
29 Serbia is the member of the EPO https://www.epo.org/index.html, from 1st October 2010. In order to join EPC, Serbia was called upon the decision of the Administrative Council of EPO from 19th June 2008. The Law on Ratification of the European Patent Convention was published in the “Official Gazette SRJ” 3/96, Annex-International Agreements.
In theory, it is stated that the Freeman-Walter-Abele test for rating of patentability of mathematical algorithms which the software is based on, has been adopted in the USA in the 1980s. According to this test, it was researched previously if the patent request included formulas and equations directly or indirectly. If the answer was positive, it was researched if the patent request was focused on the mathematical algorithm as such, or on the process, machine, product or composition, as types of inventions in the American Patent law.\(^{32}\) The Examination Guidelines for Computer-Implemented Inventions has been applied since 1996.\(^{33}\)

By analyzing the judicial practice, it comes to the fact that the computer program, under conditions, can be a subject of patent protection. Namely, by interpreting the relevant provisions of the European Patent Convention (EPC),\(^ {34}\) the EPO has come to the point of view where the computer program, when it is starting or storing in the computer, produces or has the possibility to produce further technical effect which overcomes normal physical interaction between the software and the computer (hardware) which starts the program, it can be patentable. The main requirement regarding the patentability of the computer program is that an invention has technical contribution.

Similar determination of patentability also exists in the legal system of the USA, because the patent can be assigned to the procedure, device or product which is new and useful. Patent protection can also be recognized for the improvement of the procedure, device or product, under the condition that the improvement fulfills the predicted requirements.\(^ {35}\) In that way, judicial practice in the USA deletes the difference between computer programs, as author’s works and patentable inventions even more.\(^ {36}\)


33 Šarboh, S, supra note 2, p. 847.

34 The KEP came into force on 19 October 1977. The first application for recognition of a European patent was filed on June 1, 1978, and the first European patent was granted in January 1980. There are currently 38 countries with the full membership of KEP.

35 [www.uspto.gov/web/offices/dcom/olia/aipa/PatLaws121](http://www.uspto.gov/web/offices/dcom/olia/aipa/PatLaws121).


37 In the court decisions in the USA, during 1960s and ’70s, it was distinguished that the source code represents a form of expressing an idea and because of that, the computer program is considered an author’s work. This attitude of the American judicial practice was first regulated by the amendments on the U. S. Copyright Act. Yang, B. G. C., The Continuing Debate of Software Patents and the Open Source Movement, Texas Intellectual Property Law Journal Vol. 13, p. 175, 2004−2005; Moy, R., A Case Against Software Patents, Santa Clara Computer and High Technology Law Journal 17, p. 77−78, 2000/2001. This attitude of the American law praxis was firstly regulated by the amendments to the U. S. Copyright Act, An Act for the General Revision of the Copyright Law, Title 17 of the United States Code, and for other purposes, 94th Congress, January 1, 1978. Pub. L. 94−553 (Oct. 19, 1976), and later also to Computer Software Copyright Act of 1980, Pub. L. No. 96−517, 94 Stat. 3015, 3028 (1980).
However, it is necessary to notice an uneven volume of computer program’s protection, in those situations when the program can be considered as an invention in terms of the patent law, leads to different understanding of patentability. Regarding the aforementioned fact that patent protection is recognized to the inventions in the USA, under different conditions than it is the case with the law of the EU, it may occur that certain computer programs can be protected by patent in the USA, i.e. by copyright in the European continent. It is inevitable that differences regarding the protection of computer programs are derived from it.

On this basis, it can be concluded that the EPO virtually accepted the practice of the United States Trademark and Patent Office, although there are still differences between them. One of them is the treatment of patent applications for software intended for work performance. Namely, the methods for work performance are excluded from the patent protection in almost all countries. However, after changing regulations, the USA is issuing patents for these inventions, too. On the other hand, the attitude of the EU has not changed and these patent applications reported to the EPO are being declined. At the moment, it is not clear which concept will overpower the other and it will depend significantly on the further development on the market.38

EPC and the EPO practice are especially important for every Serbian law in this field. Regarding the EPC, computer programs are not considered inventions, unless they have a technical character. Actually, assumption is that computer program a priori does not possess a technical character, but if a concrete program has a technical character, if it fulfills other conditions as well, then it can be considered an invention. This means that a computer program with technical character can be protected by patent. It can be said that a computer program has technical character in two cases. The first one is when the algorithm of the computer program is used for solving technical problems in functioning of the computer itself. It is an operative software without which the computer cannot work. This would, argumentum a contrario, mean that applicative software does not have a technical character. However, once it is started on the computer, every computer program interacts with it – it is a regular technical effect. Observed in this way, every program has a technical character. But when it comes to patentability, occurrence of the additional technical effect is demanded, which surpasses the regular interaction between the computer program and the computer itself in qualitative terms, like for example, shortening of time needed for data processing and so on. According to this, the patent, apart from indisputable operative software, can also protect the applicative software which, in the interaction with the computer, produces the so-called additional technical effect. The second case refers to the software for automatic control of production or some other process. The system for automatic control consists of: a sensor which follows the process and registers the information concerning the functioning of the system whose work is being followed, a computer which processes that information and a control mechanism which maintains the functioning of the system whose work is being followed within the limits of prescribed values.39 As it can be concluded from its name, the control mechanism performs the described technical function automatically, therefore, without direct human intervention and his intellectual abilities. In this case it means that the direct causal link between the technical mean and effect, which as a solution to the technical problem represents a consequence with technical character in the system for automatic control and regulation, is not being interrupted.40 This is the field where

40 Marković S, supra note 11, p. 72.
the European and the American patent laws are getting closer. In the Republic of Serbia, several software patents are approved yearly, mostly to domestic inventors. 41

Considering that in practice parallel copyright and patent protection of the computer program exist, their relation is also important. We can conclude that these two forms of protection can complement each other so that the copyright is protected by the form in which the computer program is expressed, and the patent ideas on which it is based, if they meet the requirements of patentability.

Conclusion

In the Serbian legal system, a computer program was allowed copyright protection for the first time in the Law on Changes and Amendments to the Copyright in 1990. The Law on Copyright and Related Rights of 1998, which followed, accepted the same concept by expressly compiling a computer program on a list of copyrighted works. The 2004 Law did not bring about essential changes, but striving to comply with international regulations, the computer program was underlined as written work. This is envisaged by the 2009 Law on Copyright and Related Right. However, given the specific nature of the computer program as an intellectual property, the consistent application of the provisions on copyright works is not justified. Therefore, this law, as well as in international regulations, provides for a number of provisions that respect the need for a special regulation of a computer program.

However, the field of application of computer software, in the information era that is expanding, includes also those areas traditionally protected by industrial property rights by patent. From this fact appear the differences in terms of protection. By analyzing the current global case law, it can be concluded that the computer program, under certain conditions, can be subject to patent protection. The basic requirement that is raised, in terms of its patentability, is that the invention has a technical contribution. In this way, however, the primacy of a copyright concept that is universally accepted is not called into question.

KEP and the practice of the EPO are of special importance in this area for the Serbian law. As for KEP, computer programs are not considered to be an invention unless they have a technical character. In fact, the assumption is that computer programs a priori have no technical character, but if a specific computer program is of a technical nature, then the fulfillment of other conditions can be considered an invention. Computer programs can be said to be of a technical nature in two cases. The first case is when the computer program algorithm solves a technical problem in the functioning of the computer itself. It’s about an operational computer program without which the computer can not function. The second case refers to a computer program for automatic management of a production or other process.

Considering that in practice parallel copyright and patent protection of the computer program exist, their relation is also important. We can conclude that these two forms of protection can complement each other so that the copyright is protected by the form in which the computer program is expressed, and the patent ideas on which it is based, if they meet the requirements of patentability.

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41 Šarboh, S, supra note 2, p. 82-85.
Piotr Zamelski*, The Common Good as a Tool Allowing the Adjustment of the Awareness of Human Rights. The Need for Development

Abstract: The article „The common good as a tool allowing the adjustment of the awareness of human rights. The need for development” concerns the methods of preventing the relativisation of human rights, which appears to be more and more frequent in philosophical reflection and legal protection. This phenomenon is manifested by the abandonment of the ideals of natural law and personalism, which stress the need for protecting human dignity, in favour of putting forward claims based on subjective beliefs which leads to uncertainty regarding the actual content and the effect of the law. Shaping legal awareness by postmodern paradigms can be cited as one of the root causes of that state of affairs. Reference to the common good as a value and an argument in the law interpretation process and in human rights education should be a tool for adjusting the awareness of human rights. Then human rights awareness will not be limited by individualistic concepts, and their legal protection will be characterised by a more objective approach, typical for human nature.

Keywords: axiology of law, common good, legal awareness, human rights, pedagogy of law

Introduction

Evolution of the content of the law forms a natural phenomenon, as it stems from the variable circumstances of the social life, in particular such as the developments in science and technology coupled with economic and cultural transformations. Much more meaningful effects are brought about by the changes in the law axiology, which determines both the content of the legal norms as well as the attitudes and convictions of its addressees. The protection of the human rights seems to be a relatively young area among the existing sub-disciplines of the law, as it if founded on the universal and natural values and personalist philosophy. We are able to state that the emergence of the institutions of human right protection forms evidence in favor of the evolution of the law under way in Europe dating back from the Middle Ages and having its roots in the ancient ideas1. Whereas the idea of the human dignity (regardless of the applied terminology) was relatively constant throughout time due to the common consideration of it as a consequence of the invariable content of the natural law, the positivist approach to human rights adopted after World War II initiated a number of innovations and rapid transformations involving both the expression of legal safeguards as well as the attitudes of the communities to this issue.

The perspective of the obscuration of the invariable content of the human rights poses a hazard that law can be applied as a measure aimed at the fulfillment of arbitrary political and economic goals. For this reason, the protection of the human rights needs to apply a systematic correction aimed at restoring its appropriate dignitatis protector function (guard of the human dignity) in the place of the positivistic dignitatem creator paradigm (creator of the object of dignity). The spread of the latter model is attributable to the relativistic themes present in the philosophy of law and subsequently in the judiciary. These themes have justified the gradual change from the

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primacy of the mind and truth to the primacy of the feelings and the will over the course of the last centuries. The philosophical and legal value of common good has an adequate axiological potential so as to become a tool for the postulated correction, which should primarily involve the interpretation of the law as well as legal and law education.

The human consciousness forms a component of a wider legal consciousness, which includes the knowledge, assessment and postulates regarding law and its application as well as convictions in the matters regarding the behaviors which are not directly regulated. The legal consciousness of the society practically decides on the way in which law is established, understood, applied and the effects that it brings. This study addresses the following problems:

- directions in the development of the protection of the human rights,
- potential for improvement of common good resulting from its content,
- challenges to law pedagogy in the context of the postulated correction of the awareness of the society in the subject of the human rights.

I. Directions in the development of protection of human rights

"In the twentieth century, after a wave of modernism, post-modernism emerged as a cultural and philosophical program in which a definitely smaller confidence was expressed in the cognitive capabilities of humans. Postmodernism itself forms the other side of the dominant positivism, which dominates in the contemporary philosophy of law. The postmodernism circles stated a view that the strive to seek the truth opens a way to adopt an approach of intolerance by humans since the truth that is revealed and recognized by an individual has to become a threat (oppression) to other humans. In this vein, it was considered that the truths recorded in the basic laws and pacts on human rights are subject to further discussion and they are open to new interpretations. As a matter of fact, since December 10, 1948, when the United Nations adopted the Universal Declaration of Human Rights, the idea and practical approach to human protection are constantly subject to transformations. Whereas the initial judicature that was formulated on the ground of the universal and European law recognized the traditional moral values as a rule, the current judiciary seems to adopt a distinct axiology close to the post-modernist foundations. The institutional protection of human rights takes on a contradictory character by focusing on the evaluation of the claims being raised at the expense of the holistic view of the human as an autotelic value and concurrently the co-responsible member of a wider community. A particularly important role in this process is taken on by the attorneys at litem, who often do not limit their role to demonstrate the fact of breaching human rights before a national or international authority. Instead, they apply a broader interpretation and demand the development of new human rights which fulfill the claims of their clients. Whereas the dignity of the humans remains to be a recognized origin of human rights, a constantly positivistic and subjective approach is taken to it in the public social consciousness. Therefore, we should study interpretation of the law as the principal tool applied for the perception and application of human rights. The post-modernism mentality seeks a justification for the subjective and relative world view and applies a conviction regarding a relation between the meaning of linguistic expressions and external circumstances derived from the structural linguistics developed by Ferdinand de Saussure, although the traditions of this theory date back to the fourteen-century nominalism by William Ockham. When it is combined with the modern

relativism in the ethics expressed by Immanuel Kant, language is no longer considered to be an invariable reference in the process of interpretation of the law. Instead, it has become a plastic matter applied in implementation of the individual perceptions of the world. Under current legislation, postmodernism seems to adapt the concept of the derivative interpretation for its purposes coupled with other similar methods used to interpret the law.

The very adoption of the derivative interpretation should not be the subject of moral or axiological evaluation. The derivative interpretation only forms a tool, whose results are dependent on the adopted interpretation model. We can expect that such a model can demonstrate its coherence and applicability for the purposes of justifying specific decisions regarding interpretation. In the reverse case, the legal norms would only be of façade character, while the actual social relations would merely operate in a space with a complete discretion. In addition, there are such clear conditions in which interpretations seem unnecessary and even harmful and the only logical solution should involve their literal subsumption to the legal norm.

Postmodernism resulted in the adoption of interpretation models, which contributed to the far-reaching changes in the protection of the human rights. As a result, a relatively simple structure of legal norms tended to give rise to surprising claims and judgments. Undoubtedly the protection of the human rights requires a creative interpretation which is not limited to the literal statements since the complexity of the humankind and the diversity of the potential circumstances in which humans can find themselves requires the application of general and clear principles (a key role in this respect is played by the Decalogue). If the process of the historical re-possession of natural law resulted in the development of the models of behavior needed to maintain dignity of each of the humans, that were recognized as freedoms and human rights at a certain moment in time, it was also necessary to develop principles of a priori and inductive categories of evaluating situations in terms of the respect and breach of these rights.

The derivative interpretation seems to play the role of an optimum tool of this evaluation on the ground of the legal protection of the human rights; however, the direction of the developing legal norms is not decided by the interpretation method but by the axiological interpretation model. The individual and subjective principles of the interpreter generally provide a manner in which mechanisms of the legal protection are implemented along with their outcomes.

II. Corrective potential of common good

„Human forms the principal subject of law and morality. Humans also form the object of the society, whereas the community and also the state form the means and the tool to achieve the pursued objective. The reason for the existence of a community is associated with common good, which is represented by the personal development of humans. This objective needs to be served by all communities”

The common good and human dignity are the values recognized by the natural law, hence, the integral development that is completely in conformity with the demands of the human nature forms both the component of the common good and the objective of all freedoms, laws and human duties. As a consequence, there is no possibility of separating

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8 Stanisław L. Stadniczeńko, *Urzeczywistnianie prawa w zatrudnianiu młodocianych w okresie transformacji*, Opole 2000, p. 81.

the consciousness regarding human rights and common good without impoverishment to this consciousness.

The weight of common good in the process of forming social consciousness is decided by its very subject. The philosophical tradition uses the term common good to define the means and tools applied to maintain the complete development of the members of a community, whose attainment is fulfilled by the diversity of the spiritual, material and social needs. It would be naïve to believe that the positive law is capable of providing diagnosis to all and at least to the majority of the human needs, and guarantee that they are fulfilled, as it is promised in a number of materialist, statist and collective-oriented theories. By its very nature, law can assist in the realization of common good, as only law can protect it from abuse, waste and appropriation, yet, regulations cannot create it. The very fact of the existence of the law does not mean that the material effects are achieved, as it is often assumed in the classic legal positivism. The ability to create common good, including the development of culture, endorsing values, organizing social and economic processes and managing resources remains to be determined by the wise and free choice made by individuals and communities. What is more, the law created by the state cannot limit the development of common good as a result of the excessive formalization of the procedures, inadequate accumulation of resources and giving arbitrary preference to specific enterprises.

"The common good as an objective of the personal activity of humans, including personal, intellectual, moral and creative development forms a personal domain in which the state cannot intervene. The state has a sovereign power with regard to the measures which enable the realization of the personal objectives." Common good and the enacted legislation apply immanently in all political communities and both are necessary for their existence. Both categories operate in a correlation to one another, and depending on the content of the law they can promote or hinder the development of common good. A greater consciousness with regard to common good means a stronger and more effective social pressure put on the subordination of the legal regulations to the objectives associated with their implementation. The organized efforts of society in this direction demonstrate that the society is capable of a mature social participation, which departs from simple individualistic, conformist and withdrawn reactions in favor of the accepting real co-responsibility for public matters. The involvement in the realization of common good can contribute to the changes of the content of the law and the manner in which is comprehended by applying the potential that is offered by the law-making procedures, court proceedings, public debate and various forms of protest.

We can say that the corrective potential of common good is expressed by the social consciousness with regard to its subject and importance. This consciousness is reflected by the holistic and rational approaches that are open to learning about humans and their personal and social nature coupled with maintaining an adequate care in dealing with ideas. The human development, by the very fact of inalterability of their nature demands that the same needs are fulfilled, although in various circumstances different measures can prove to be accessible and effective. A hazard to the common good is not associated with the diversity of the measures serving for the development but in the denial of the invariable record of the human needs. This means nothing else but undermining the invariable human nature, as well as the classical concept of the natural law. We can note at this point that history has faced a number of various movements, in which the attempt to solve the existing problems developed even greater errors

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10 Comp.: Jan Krucina, Dobro wspólne. Teoria i jej zastosowanie, Wrocław 1972, p. 70.
12 Piotr Zamelski, Partycypacja społeczna i ekonomiczna. Zagadnienia podstawowe, w: Piotr Zamelski (ed.), Partycypacja społeczna i ekonomiczna w administracji, Opole 2015, p. 11.
only due to the fact that the natural law was neglected. However, common good, which is rooted in the natural law, excludes the possibility that it is rejected or depreciated.

In the consideration of the above discussion, we can conclude about the role of the derivative interpretation in the understanding and applying contemporary law, whose form often was determined rather on the basis of a political compromise than on a genuine attempt to achieve an optimum solution. Regardless of the demonstrated problems, derivative interpretation is needed for the purpose of protecting human rights, as it provides means to gain insight into the objectives and the functions of the legal norm, as it is perceived as a complex and dynamic reality, which is not always equivalent with the literally understood text. The subordination of the principles of the interpretation to the principal value, which could in particular be represented by common good, offers an opportunity to derived substantial and useful rules of procedure even from defective laws. The general principles stated in the constitution are extremely helpful in this respect. The use of the corrective potential of common good constitutes a historic challenge to the bodies responsible for establishing and administering the law, non-governmental organizations and persons whose role is to interpret it (scientists, educators and publicists)\textsuperscript{14}. In this manner, valuable general and individual decisions can be implemented and – more importantly, legal consciousness of the society can be developed, which in turn can affect the form and the operation of the legal system.

III. Challenges to law pedagogy

The presented evaluation, though simplified and fragmented, demonstrates the urging need to achieve a correction of the legal consciousness with regard to human rights in the objectivist direction and the key to this process seems to be related with the notion of common good. As it forms an axiological and normative correlate with legal and natural characteristics formulated as far back as the Ancient times and the Middle Ages, the category of common good is not very common in the individualist theories dominant in the contemporary philosophy. Nevertheless, common good tends to provide justification for the recognition of the human duties as equivalent to their rights, while securing the realization of both normative spheres as a result of maintaining a balance between them\textsuperscript{15}. If common good were to act for the benefit of the needed correction of the comprehension of human rights, it is necessary that it is promoted and disseminated in such a manner that the social consciousness in this respect increases. Whereas the realization of common good needs to be coupled with the implementation of human rights in the real (and not only the declared) activity of the state’s organs, these two notions should never be put in opposition to each other\textsuperscript{16}.

The consistent education of the society forms the subject of the interests and efforts of the law pedagogy, which perceives it as a remedy to the axiological crisis of the current law. This is subdiscipline of the theory and philosophy of law declaring a proposition of development of a model of law interpretation which is open to the educational outcome of the law, and one that is embedded in the natural law and personalism. The directives favored by the law pedagogy focus on the teleological aspects in the process of law interpretation, in particular on the

\textsuperscript{14} Common good is present in Polish legislature, in particular in tuling of the Constitutional Court, nevertheless, it is referred to incidentally and aspect-oriented manner depending on the content of the filed application. Thus, it is difficult to consider the judiciary to be completely able to apply the potential of common good in the area of the protection of human rights (Piotr Zamelski, \textit{Równowaga praw i obowiązków implikacją zasady dobra wspólnego}, Lublin 2014, p. 269).

\textsuperscript{15} Ibidem, p. 328.

determination of evaluation of the educational objective of the legal norm. The phenomenon of
the progressive inflation of the law, which by its very nature leads to the deterioration of its
quality, affects the educational role of the law in relation to the society. Even setting aside from
the evaluation of the content of the particular norms, an excess of legal regulations results in
the feeling of a pressure, doubt and confusion on the part of many members of the community.
These feelings regard the rules of conduct in force, consequently undermining the public
confident in the rule of law. As it was noted by A. Stelmachowski, the problem associated with
the legal system is related to the disrespect of the moral standards by the legislature, which can
have a detrimental effect, as well as frequent changes in law (which in part is induced by its
very precision), which result in the breach of the continuous development17.

An assumption adopted in the law pedagogy is associated with the determining the
directions in the legal thought so that models of responsibility, independence (which also naturally leads
to the subsidiarity principle) and participation are implemented in the social life. Such
approaches can be applied as a result of the consciousness with regard to common good, which
faces a major deficit on one hand but whose role is reflected in various initiatives originating in
a bottom-up manner on the other hand. The development of the consciousness with regard to
common good, which emphasizes the role of mutual responsibility (and also for the fate of the
future generations), forms a prerequisite for the correction of the consciousness with regard to
the human rights. Such an approach needs to involve the development of broader perspective,
which must overcome the narrow circle of the subjective claims generated by the culture of the
atomized society. The knowledge regarding the integral human development, their
suprahistoric co-relation on the scale of the society (and even humanity) and the consequences
of the disintegration of the development directs the consciousness with regard to common good and
awareness of human rights towards the natural law, which form a source of both axiological
and normative categories. A challenge to the law pedagogy in the context of the correction of
the consciousness with regard to human rights has to be based on the education to the integral
thinking and action, which always demands certain sacrifices for the benefit of the values and
the overall society. However, in order to ensure that common good marks its presence in the
legislation and interpretation, it needs to occupy a due place in the awareness of the society.

Conclusions

In consequence of the considerations made here, we can emphasize the weight of the problems
and threats that touch upon the protection of human rights, which fit into a wider context of the
contemporary philosophy and culture. The principal axis of controversy concerns the approach
to the values, since the approaches involving search for truth and relativism, care for tradition
and nihilism, primacy of faith and materialism are incompatible. The idea of human rights, in
which objective truths recognized by the reason are ignored (i.e. natural law), can only be based
on the subjective perceptions of individuals. In such a case, the notions of the dignity and human
rights can be used as universal arguments for arbitrary, thus gradually depriving law of its
values of stability and predictability, so postulated in the contact of the principle of the rule of
law18.

18 cf.: „A citizen should have the feeling of a relative stability of the law so as to perform their activities in a
confidence that othey are not sensitive to the negative effects of the decisions and activities undertaken by them”
(decision by Constitutional Court from April 25, 2001, file no. K. 13/01, OTK ZU Nr 4/2001, poz. 81; ruling of
that law that is established should be clear and comprehensible, so as it can have a direct motivational effect,
meaning that not intermediate sides need to be involved in the process, such as the court, which takes its decision
“Indeed, contemporary law is considerably less sustainable and does not give the certainty that it was on the part of the times of our predecessor in the 19th century. In this place, the justice aspect of the law is emphasized to a much greater extent. In reality, this is a choice between specific values, with a note that we are more likely to prefer law as right, and hence, just, in the place of the law that is safe and secure. Concurrently, we are prone to pay attention to the fact that humans live in a community and should respect both the interests of their fellow citizens as well as the view on morality and customs that are prevalent in this community. The spirit of a community does not allow for the unlimited use of the opportunities that are created by the framework of the law in the formal sense; however, it imposes the obligation to respect the principles of social behavior. In this sense, we can find an analogy to the right to property. Similarly to the right to property, which ceased to be an absolute right in the hands of the holder, the application of other rights has also become limited. The moral imperative, though it is struggling, makes its way in the fight against the economic dominance as well as with the prevalence of the public authorities.”

Natural law directs our attention towards a community due to the reference to the common good in it. The community does not form the source of natural law, however, due to the consciousness with regard to the common good becomes its depositary and medium. In this manner, the reference to common good can gain the role of *ratio correctionis* (corrective argument) in the relative protection of the human rights both in terms of the interpretation and legal and law education. With the purpose of more extensive illustration of the problem, we can add that natural law forms the principal axiological system which determines the content of the laws and duties of humans, which is understood as the invariable axiological order recorded by the reason from the human and world nature. Common good forms a reason that is derived from natural law; still, it does not form the sole corrective factor affecting the consciousness of the human rights. The corrective function can be played in particular by the religious values, since the Christian thinking gave an impulse to the development of the idea of the dignity of the human being.

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Abstract: Adapting the government model to contemporary globalization trends, including the technological advances of recent years, is one of the challenges of the public administration of the 21st century. This also applies to the authorities of municipalities which are obliged to create an information and communication environment (e-administration) for the provision of public services by electronic means. Computerization of municipal administration services is a complex process and takes place "on an ongoing basis", taking into account the existing regulations. The modernization of the existing IT and telecommunication systems of the municipal offices occurs simultaneously with the changes in the existing regulations concerning the provision of public services by electronic means. The purpose of the deliberations included in the paper is to answer the question about the current state of the legislation in force constituting the basis for municipal e-Government. The divagations cover in particular the evolution of the legislation made in 2016. The changes introduced in the legislative acts and executive regulations will be analysed.

Keywords: e-administration, authorities of municipalities, municipal administration services.

Wprowadzenie

We współczesnej rzeczywistości funkcjonowania organów administracji publicznej, e-administracji przypisuje się coraz większe znaczenie. Dotyczy to wszystkich krajów Unii Europejskiej1. Europejskim aktem prawnym bezpośrednio oddziałującym na polski dorobek prawný w zakresie e-administracji, w tym e-administracji na szczeblu gminnym, jest rozporządzenie Parlamentu Europejskiego i Rady (EU) Nr 910/2014 z dnia 23 lipca 2014 r. w sprawie identyfikacji elektronicznej i usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym oraz uchylające dyrektywę 1999/93/WE, obowiązujące od dnia 1 lipca 2016 r.2 Ujednoliciło ono zasady dotyczące świadczenia usług zaufania niezbędnych do umożliwienia bezpiecznego załatwiania spraw drogą elektroniczną z wykorzystaniem dokumentów wytwarzanych i dostarczanych w wersji elektronicznej. Wskazując wpływ rozporządzenia na rozwój e-administracji w Polsce należy wskazać cel jego regulacji. Wynika on m. in. z pkt 2 preambuły, zgodnie z którym celem rozporządzenia jest zwiększenie zaufania do transakcji elektronicznych na rynku wewnętrznym poprzez

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2 Rozporządzenie Parlamentu Europejskiego i Rady (EU) Nr 910/2014 z dnia 23 lipca 2014 r. w sprawie identyfikacji elektronicznej i usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym oraz uchylające dyrektywę 1999/93/WE, OJ L Nr 257, s. 73, zwane w dalszej części rozważań rozporządzeniem eIDAS.
zapewnienie wspólnej podstawy bezpiecznej interakcji elektronicznej między obywatelami, przedsiębiorstwami i organami publicznymi co pozwoli podnieść efektywność publicznych
i prywatnych usług online, e-biznesu i e-handlu w Unii3. Zgodnie z art. 1 rozporządzenia,
wezwanie równego funkcjonowania rynku wewnętrznego i w dążeniu do osiągnięcia odpowiedniego poziomu bezpieczeństwa środków identyfikacji elektronicznej
i usług zaufania, rozporządzenie: a) określa warunki uznawania przez państwa członkowskie
środków identyfikacji elektronicznej osób fizycznych i prawnych, objętych notyfikowanym
systemem identyfikacji elektronicznej innego państwa członkowskiego, b) określa przepisy
dotyczące usług zaufania, w szczególności transakcji elektronicznych, c) ustanawia ramy
prawne dla podpisów elektronicznych, pieczęci elektronicznych, elektronicznych znaczników
czasu, dokumentów elektronicznych, usług rejestrowanego doręczenia elektronicznego i usług
certyfikacyjnych uwierzytelniających witryn internetowych4.

W pełni należy podzielić pogląd, zgodnie z którym, celem nowych przepisów jest umożliwienie
bezpiecznych i płynnych interakcji na poziomie europejskim pomiędzy przedsiębiorcami,
organami administracji publicznej oraz obywatelami, co wpłynie na zwiększenie skuteczności
publicznych i prywatnych usług online, e-biznesu i e-handlu w Unii Europejskiej5. Tak
sprzecywany przedmiot regulacji zobowiązał państwa członkowskie UE do podjęcia
niezbędnych działań dostosowawczych w zakresie wewnętrznych regulacji prawnych.

W polskim porządku prawnym konieczne stało się uchylenie lub zmiana wielu aktów
prawnych. Spowodowane to było przede wszystkim koniecznością dostosowania terminologii
obowiązujących uregulowań do nadrzędnych przepisów unijnego rozporządzenia oraz unijnych
aktów delegowanych i implementujących6. Chodzi o przepisy prawa powszechnie
obowiązującego, które gminy i ich organy zobowiązane są uwzględniać przy realizacji
gminnych procesów e-administracji.

Podstawą odpowiedniego funkcjonowania e-administracji gminnej jest system aktów
prawnych, stanowiący podstawy prawno-organizacyjne procesów tej administracji. Celem
rozważań zawartych w referacie będzie odpowiedź na pytanie o aktualny stan obowiązujących
przepisów prawnych stanowiących podstawy gminnej e-administracji. Rozważania obej
w szczególności ewolucję uregulowań dokonaną w 2016 r. W szczególności, wskazane zostan
zmiany wprowadzone w aktach prawnych rangi wykonawczej-rozporządzeniach.

Zakres i istota zmian w obowiązujących przepisach prawnych

Z punktu widzenia funkcjonowania gminnej e-administracji podstawowe znaczenie przypisać
należy ustawie z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących
zadania publiczne7 oraz wydanym na jej podstawie aktom wykonawczym. Przepisami ustawy
z dnia 5 września 2016 r. o usługach zaufania oraz identyfikacji elektronicznej8 znowelizowano
treść przepisów u.i.d.p. W szczególności wskazać należy, iż mocą art. 96 u.z.i.e. wprowadzono
zmiany w upoważnieniach ustawowych dla ministra skutkujące koniecznością zastąpienia
obowiązujących aktów wykonawczych nowymi aktami. Zmiany te dotyczyły trzech przepisów
upoważniających: art. 19a ust. 3 u.i.d.p. zobowiązującego ministra do określenia w drodze

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3 Punkt 2 preambuły do rozporządzenia eIDAS, eur-lex.europa.eu/legal-content/PL/TXT/?uri=URISERV%3A310603-1 [dostęp dnia: 2017-02-17].
4 Art. 1 rozporządzenia eIDAS.
5 M. Marucha-Jaworska, Rozporządzenie e-IDAS. Zagadnienia prawne i techniczne, Warszawa 2017, s. 19.
7 Tekst jedn.: Dz. U. z 2017 r. poz. 570 ze zm., zwana w dalszej części rozważań u.i.d.p.
8 Dz. U. z 2016 r. poz. 1579, zwana w dalszej części rozważań u.i.e.
rozporządzenia zakresu i warunków korzystania z ePUAP, z uwzględnieniem roli ePUAP w procesie realizacji zadań publicznych drogą elektroniczną oraz zasad przetwarzania i ochrony danych osobowych; art. 20a ust. 3 pkt 1 u.i.d.p. zobowiązującego ministra do określenia w drodze rozporządzenia szczegółowych warunków organizacyjnych i technicznych, które powinien spełniać system teleinformatyczny służący do wydania certyfikatu oraz stosowania innych technologii umożliwiających użytkownikom identyfikację w systemie teleinformatycznym oraz art. 20a ust. 3 pkt 2 u.i.d.p. zobowiązującego ministra do określenia w drodze rozporządzenia zasad potwierdzania, przedłużania ważności, wykorzystania oraz unieważniania profilu zaufanego ePUAP. W wyniku działania legislacyjnego ustawodawcy trzy wydane na podstawie dotychczasowych przepisów upoważniających rozporządzenia zostały zastąpione nowymi przepisami. Z dniem 7 października 2016 r. uchylone zostały: rozporządzenie Ministra Administracji i Cyfryzacji z dnia 6 maja 2014 r. w sprawie zakresu i warunków korzystania z elektronicznej platformy usług administracji publicznej, rozporządzenie Ministra Administracji i Cyfryzacji z dnia 5 czerwca 2014 r. w sprawie zasad potwierdzania, przedłużania ważności oraz wykorzystania profilu zaufanego elektronicznej platformy usług administracji publicznej oraz rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 21 kwietnia 2011 r. w sprawie szczegółowych warunków organizacyjnych i technicznych, które powinien spełniać system teleinformatyczny służący do identyfikacji użytkowników. W ich miejsce zaczęły obowiązywać następujące akty wykonawcze: rozporządzenie Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie zakresu i warunków korzystania z elektronicznej platformy usług administracji publicznej, rozporządzenie Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie profilu zaufanego elektronicznej platformy usług administracji publicznej oraz rozporządzenie Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie szczegółowych warunków organizacyjnych i technicznych, które powinien spełniać system teleinformatyczny służący do uwierzytelniania użytkowników. Wskazanie również należy, iż przepisami u.z.i.e. uchylono ustawę z dnia 18 września 2001 r. o podpisie elektronicznym. Do czasu uchwalenia nowej ustawy obowiązują w tym zakresie przepisy unijnego rozporządzenia dotyczące uznawania kwalifikowanego podpisu elektronicznego, kwalifikowanej pieczęci elektronicznej oraz kwalifikowanych znaczników czasu. Organy administracji publicznej zobowiązane są do wprowadzenia mechanizmów uznawania unijnych podpisów kwalifikowanych.

Mocą przepisów rozporządzenia Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie zakresu i warunków korzystania z elektronicznej platformy usług administracji publicznej, w stosunku do poprzednio obowiązującego rozporządzenia, poszerzony został jego zakres przedmiotowy. Dotychczasowy zakres rozporządzenia ograniczony był do zakresu i warunków korzystania z ePUAP, w tym zakładania konta na ePUAP oraz warunków wymiany informacji między ePUAP a innymi systemami teleinformatycznymi. Zgodnie z nowym stanem prawnym rozporządzenie, obok zakresu i warunków korzystania z ePUAP oraz sposobu ich potwierdzania określa również: sposób identyfikacji i uwierzytelniania w ePUAP, w tym przy wykorzystaniu środków identyfikacji elektronicznej stosowanych do uwierzytelniania w systemie teleinformatycznym banku krajowego lub innego przedsiębiorcy oraz warunki organizacyjne i techniczne nieodpłatnego wykorzystywania do identyfikacji i uwierzytelniania w ePUAP środków identyfikacji elektronicznej stosowanych do uwierzytelniania w systemie

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9 Dz. U. z 2014 r. poz. 584.
10 Dz. U. z 2014 r. poz. 778.
11 Dz. U. z 2011 nr 93, poz. 545.
12 Dz. U. z 2016 poz. 1626, zwane w dalszej części rozważań r.z.w.k.e.p.u.a.p.
13 Dz., U. z 2016 poz. 163, zwane w dalszej części rozważań r.p.z.e.p.u.a.p.
14 Dz. U. z 2016 poz. 1627, zwane w dalszej części rozważań r.s.w.o.t.
15 Tekst jedn.: Dz. U. z 2013 r. poz. 262 ze zm.
podmiotu niepublicznego. Dostęp do funkcjonalności ePUAP przyznawany jest na podstawie danych przekazywanych przez potencjalnego użytkownika w procesie rejestracji w systemie. W nowym rozporządzeniu rozszerzono zakres danych wymaganych do utworzenia konta dla użytkownika. Obecnie, obligatoryjnie należy podać, obok wymaganych do tej pory: imienia, nazwiska, adresu poczty elektronicznej oraz identyfikatora użytkownika, również numer PESEL (jeżeli użytkownik posiada) oraz numer telefonu komórkowego. Warto również wskazać iż przy utworzeniu konta możliwe jest obecnie podanie imion, jeżeli użytkownik posiada więcej niż jedno imię. Nowością jest wprowadzenie nowej zasady pozwalającej na szybkie informowanie użytkownika zarejestrowanego o sprawach związanych z funkcjonowaniem konta. Komunikaty w tym zakresie przesyłane są na podany przez użytkownika adres poczty elektronicznej. Obok przewidywanej dotychczas możliwości utraty przez użytkownika hasła, w treści nowego rozporządzenia przewidziano również możliwość utraty przez niego identyfikatora, przyznając mu w tym przypadku prawo wnioskowania, za pośrednictwem ePUAP, o przesłanie na adres poczty elektronicznej nowego identyfikatora użytkownika. Warto również zwrócić uwagę na poszerzenie w nowym rozporządzeniu zakresu funkcjonalności ePUAP. Funkcjonalność tę rozszerzono o dwie dodatkowe funkcje: weryfikację zgodności dokumentu elektronicznego z jego wzorem określonym w centralnym repozytorium wzorów dokumentów elektronicznych oraz wystawienie urzędowego potwierdzenia odbioru, elektronicznego poświadczenia opłaty oraz elektronicznego znacznika czasu z uwzględnieniem funkcjonalności ePUAP gwarantujących niezaprzeczalność tych poświadczeń.

Warto również zwrócić uwagę na poszerzenie w nowym rozporządzeniu zakresu funkcjonalności ePUAP. Funkcjonalność tę rozszerzono o dwie dodatkowe funkcje: weryfikację zgodności dokumentu elektronicznego z jego wzorem określonym w centralnym repozytorium wzorów dokumentów elektronicznych oraz wystawienie urzędowego potwierdzenia odbioru, elektronicznego poświadczenia opłaty oraz elektronicznego znacznika czasu z uwzględnieniem funkcjonalności ePUAP gwarantujących niezaprzeczalność tych poświadczeń.

Nowym elementem rozporządzenia są rozwiązania określające wymagania dla wykorzystania w ePUAP środków identyfikacji elektronicznej stosowanych do uwierzytelniania w systemie teleinformatycznym podmiotu niepublicznego. Obejmują one następujące obowiązki podmiotu: wdrożenie zabezpieczeń dotyczących co najmniej średniego poziomu zaufania wymaganych przepisami prawa Unii Europejskiej; opracowanie i ustanowienie, wdrażanie i ekspLOATowanie, monitorowanie i przeglądanie oraz utrzymanie i doskonalenie systemu zarządzania bezpieczeństwem informacji; poddawanie się niezależnemu audytowi sprawdzającemu spełnienie dwóch powołanych powyżej wymagań, nie rzadziej niż raz na dwa lata oraz potwierdzenie przez podmiot niepubliczny tożsamości osoby, której udostępniono środki identyfikacji elektronicznej stosowane do uwierzytelniania w systemie teleinformatycznym.

16 § 4 ust. 1 r.z.w.k.e.p.u.a.p.
17 § 4 ust. 4 r.z.w.k.e.p.u.a.p.
18 Bez zmian pozostała możliwość wnioskowania przez użytkownika o przyznanie mu hasła tymczasowego do uwierzytelniania.
19 § 5 ust. 1 r.z.w.k.e.p.u.a.p.
20 § 7 r.z.w.k.e.p.u.a.p.
21 § 10 ust. 1 pkt 9) i 10) r.z.w.k.e.p.u.a.p.
22 Chodzi o rozporządzenie wykonawcze Komisji (UE) z dnia 8 września 2015 r. w sprawie ustanowienia minimalnych specyfikacji technicznych i procedur dotyczących poziomów zaufania w zakresie środków identyfikacji elektronicznej na podstawie art. 8 ust. 3 rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 910/2014 w sprawie identyfikacji elektronicznej i usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym.
teleinformatycznym podmiotu niepublicznego na podstawie okazanego podczas fizycznej obecności dowodu osobistego albo paszportu który zawiera numer PESEL albo danych pochodzących z poprawnie przeprowadzonej weryfikacji kwalifikowanego podpisu elektronicznego, przy użyciu którego osoba ta podpisała dokument elektroniczny, w którym oświadczyła, iż świadoma jest warunków i zalecanych zasad korzystania z systemu identyfikacji elektronicznej oraz wyraziła zgodę na nadanie statusu użytkownika tego systemu oraz wykorzystywanie udostępnionych środków identyfikacji elektronicznej w systemie ePUAP oraz przeprowadzenie testów integracyjnych w zakresie możliwości wykorzystania do identyfikacji i uwierzytelniania w ePUAP środków identyfikacji elektronicznej stosowanych do uwierzytelniania w systemie teleinformatycznym podmiotu niepublicznego, zgodnie z procedurą udostępnioną w BIP na stronie podmiotowej ministra.23

Drugim nowym rozporządzeniem jest rozporządzenie Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie profilu zaufanego elektronicznej platformy usług administracji publicznej. W treści jego przepisów poszerzeniu uległ zakres przedmiotowy rozporządzenia, które obok zasad, określa również warunki potwierdzania, przedłużania ważności wykorzystania i unieważniania profilu zaufanego elektronicznej platformy usług administracji publicznej. Chodzi głównie o warunki organizacyjne i techniczne dla potwierdzania profilu zaufanego ePUAP oraz autoryzacji przy nieodpłatnym wykorzystaniu środka identyfikacji elektronicznej stosowanego do uwierzytelniania w systemie teleinformatycznym banku krajowego lub innego przedsiębiorcy oraz sposób potwierdzania spełnienia tych warunków. W zakresie wprowadzonych zmian wskazać również należy na fakt, iż zmiany objęły procedurę weryfikacji danych użytkownika wskazanych przez niego we wniosku. Wprowadzono weryfikację w sposób automatyczny z danymi zawartymi w rejestrze PESEL. Pod rządami poprzednio obowiązującego rozporządzenia punkt potwierdzający weryfikował dane zawarte we wniosku z danymi zawartymi w profilu użytkownika. Były one również weryfikowane z danymi zawartymi w zbiorze PESEL. Ograniczony został zakres danych weryfikowanych automatycznie z danymi zawartymi w rejestrze PESEL. Obowiązek weryfikacji nie obejmuje już identyfikatora użytkownika. Do czasu wprowadzenia przepisów nowego rozporządzenia sposób autoryzacji określiła osoba wnioskująca poprzez podanie we wniosku o potwierdzenie profilu zaufanego ePUAP środka komunikacji elektronicznej służącego do przekazywania przez ePUAP danych niezbędnych do autoryzacji. Rezygnować z wykorzystania do autoryzacji poczty elektronicznej postanowiono, że autoryzacja dokonywana będzie poprzez użycie haseł jednorazowych przesyłanych na wskazany przez użytkownika numer telefonu komórkowego albo środków identyfikacji elektronicznej stosowanych do uwierzytelniania w systemie teleinformatycznym podmiotu niepublicznego. Wprowadzono możliwość zmiany adresu poczty elektronicznej lub numeru telefonu komórkowego, środka identyfikacji elektronicznej stosowanego do uwierzytelniania w systemie teleinformatycznym podmiotu niepublicznego oraz sposobu autoryzacji. Zmodyfikowano zasady przedłużania profilu zaufanego ePUAP przyznając osobie posiadającej profil zauważony ePUAP możliwość skorzystania z jednej z dwóch form postępowania. Można tego dokonać samodzielnie w ePUAP, potwierdzając to podpisem potwierdzonym profilem zauważanym ePUAP albo w punkcie potwierdzającym profil zauważany ePUAP, składając wniosek o przedłużenie ważności profilu zauważanego ePUAP.

Trzecim z powołanych powyżej rozporządzeń jest rozporządzenie Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie szczegółowych warunków organizacyjnych i technicznych, które powinien spełniać system teleinformatyczny służący do uwierzytelniania użytkowników. W związku ze zmianą terminologii ustawowej i zastąpieniem ustawowego pojęcia identyfikacji

23 § 12 ust. 1 r.z.w.k.e.p.u.a.p.
pojęciem uwierzytelniania konieczne stały się zmiany w tytule przedmiotowego rozporządzenia, gdzie zwrot „identyfikacji użytkowników” zastąpiony został zwrotem „uwierzytelniania użytkowników”. W nowym rozporządzeniu doprecyzowany został zakres przedmiotowy regulacji. Postanowiono, iż tak jak w dotychczasowym stanie prawnym, rozporządzenie określa szczegółowe warunki organizacyjne i techniczne, które powinien spełniać system teleinformatyczny służący do wydania certyfikatu oraz stosowania technologii, o których mowa w art. 20a ust. 2 u.i.d.p. w tym nieregulowany dotychczas treścią poprzedniego aktu wykonawczego zakres i okres przechowywania danych w systemie oraz obowiązki informacyjne, do których zobowiązany jest administrator systemu. Uchylone przez art. 141 u.z.i.e. ustawy z dnia 18 września 2001 r. o podpisie elektronicznym spowodowało konieczność modyfikacji przepisów w nowym rozporządzeniu. Usunięto z jego treści pojęcia „usług certyfikacyjnych” oraz „kwalifikowanego certyfikatu”, w zakresie którego rozumienia odwoływano się w poprzednio obowiązującym rozporządzeniu do treści ustawy o podpisie elektronicznym. UstawaRM z 14 października 2016 r. zmieniającego rozporządzenie w sprawie Krajowych Ram Interoperacyjności, minimalnych wymagań dla rejestrów publicznych i wymiany informacji w postaci elektronicznej oraz minimalnych wymagań dla systemów teleinformatycznych dokonano zmian w obowiązującym w tym zakresie rozporządzeniu RM z dnia 12 kwietnia 2012 r. Po pierwsze, bezpośrednio w treści rozporządzenia precyzyjnie zdefiniowano dwa atrybuty bezpieczeństwa: „niezaprzeczalność” i „rozliczalność”. Do czasu uchwalenia rozporządzenia zmieniającego, definiując oba pojęcia ustawodawca odniósł się do odrębnych rozporządzeń. W odniesieniu do pojęcia „niezaprzeczalności” było to rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 27 kwietnia 2011 r. w sprawie zakresu i warunków korzystania z elektronicznej platformy usług administracji publicznej, które utraciło moc z dniem 11 maja 2014 r. na podstawie § 12 rozporządzenia Ministra Administracji i Cyfryzacji z dnia 6 maja 2014 r. w sprawie zakresu i warunków korzystania z elektronicznej platformy usług

24 Art. 20 a ust. 1 u.i.d.p. został zmieniony art. 96 pkt. 4a u.z.i.e.
25 § 2 ust. 3 pkt. 5) r.s.w.o.t.
26 Dz. U. z 2016 r. poz. 1744, zwane w dalszej części rozważań rozporządzeniem z dnia 14 października 2016 r.
administracji publicznej \(^{27}\), uchylonego następnie w dniu 7 października 2016 r. rozporządzeniem Ministra Cyfryzacji z dnia 5 października 2016 r. w sprawie zakresu i warunków korzystania z elektronicznej platformy usług administracji publicznej. Pojęcie „niezaprzeczalności” włączono do treści rozporządzenia w brzmieniu dotychczasowym \(^{28}\). W przypadku pojęcia „rozliczalności” ustawodawca odsyłał do uchylonego, z dniem 7 października 2016 r. przez ustawę z dnia 5 września 2016 r. o usługach zaufania oraz identyfikacji elektronicznej, rozporządzenia Ministra Spraw Wewnętrznych i Administracji z dnia 21 kwietnia 2011 r. w sprawie szczegółowych warunków organizacyjnych i technicznych, które powinien spełniać system teleinformatyczny służący do identyfikacji użytkowników \(^{29}\). Z浪潮o dotychczasowe brzmienie pojęcia „rozliczalność”, rozumianej jako właściwość systemu pozwalająca przypisać określone działanie w systemie do osoby fizycznej lub procesu oraz umiejscowić je w czasie. Pozostałe zmiany wprowadzone w rozporządzeniu dotyczyły dwóch jego załączników. W załączniku nr 1 nt. „Identyfikatory obiektów występujących w architekturze rejestrów publicznych” zaktualizowano dane o akcie prawnym stanowiącym podstawę funkcjonowania Powszechnego Elektronicznego Systemu Ewidencji Ludności wskazując na ustawę z dnia 24 września 2010 r. o ewidencji ludności. W załączniku nr 2 nt. „Formaty danych oraz standardy zapewniające dostęp do zasobów informacji udostępnianych za pomocą systemów teleinformatycznych używanych do realizacji zadań publicznych”, zmieniono oznaczenie normy standardu Portable Document format z ISO/IEC 32000-1 na ISO 32000-1. Zmiana ta dotyczyła formatu plików służącego do prezentacji, przenoszenia i drukowania części tekstowo-graficznych. Umożliwia on użytkownikom wymianę i przeglądanie dokumentów elektronicznych niezależnie od środowiska, w którym dokumenty te zostały utworzone. W związku z poszerzeniem zawartego w sekcji B zakresu wykazu specyfikacji technicznych do pieczęci elektronicznych, w części 3 tabeli B zmodyfikowano jej tytuł. Dotychczasowy tytuł: „Do elektronicznego podpisywania, weryfikacji podpisu i szyfrowania dokumentów elektronicznych stosuje się:” zastąpiono tytułem: „Do elektronicznego podpisywania, weryfikacji podpisu, opatrywania pieczęcią elektroniczną i szyfrowania dokumentów elektronicznych stosuje się:”. Zmieniono również oznaczenie standardu ETSI TS 102 231 dla listy TSL. Obecnie wykorzystywanie list TSL w systemach administracji publicznej następuje w oparciu o najnowszą wersję standardu ETSI TS 119 612. To nowa specyfikacja techniczna dla zaufanych list TSL. Dotyczy tworzenia publikacji, lokalizacji, uwierzytelniania i integralności list TSL oraz dostępu do nich. W odnośniku nr 2 dotyczącym wykorzystywania list TSL w systemach administracji publicznej oraz odnośniku nr 3 dotyczącym formatów danych ustawodawca odwołał się do aktów prawnych Unii Europejskiej obowiązujących w związku z wydawaniem aktów prawnych na podstawie rozporządzenia eIDAS: decyzji wykonawczej Komisji (UE) 2015/1505 z dnia 8 września 2015 r. ustanawiającej specyfikacje techniczne i formaty dotyczące zaufanych list zgodnie z art. 22 ust. 5 rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 910/2014 w sprawie identyfikacji elektronicznej i usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym oraz do decyzji wykonawczej Komisji (UE) 2015/1506 z dnia 8 września 2015 r. ustanawiającej specyfikacje dotyczące formatów zaawansowanych podpisów elektronicznych oraz zaawansowanych pieczęci elektronicznych, które mają być uznane przez podmioty sektora publicznego zgodnie z art. 27 ust. 5 i art. 37 ust. 5 rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 910/2014 w sprawie identyfikacji elektronicznej, w usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym oraz do decyzji wykonawczej Komisji (UE) 2015/1506 z dnia 8 września 2015 r. ustanawiającej specyfikacje dotyczące formatów zaawansowanych podpisów elektronicznych oraz zaawansowanych pieczęci elektronicznych, które mają być uznane przez podmioty sektora publicznego zgodnie z art. 27 ust. 5 i art. 37 ust. 5 rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 910/2014 w sprawie identyfikacji elektronicznej, w usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym oraz do decyzji wykonawczej Komisji (UE) 2015/1506 z dnia 8 września 2015 r. ustanawiającej specyfikacje dotyczące formatów zaawansowanych podpisów elektronicznych oraz zaawansowanych pieczęci elektronicznych, które mają być uznane przez podmioty sektora publicznego zgodnie z art. 27 ust. 5 i art. 37 ust. 5 rozporzą
elektronicznej i usług zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrzny.

Drugim znowelizowanym rozporządzeniem było rozporządzenie Prezesa Rady Ministrów z dnia 14 września 2011 r. w sprawie sporządzania pism w formie dokumentów elektronicznych, doręczania dokumentów elektronicznych oraz udostępniania formularzy, wzorów i kopii dokumentów elektronicznych. Zmienione ono zostało rozporządzeniem Prezesa Rady Ministrów z dnia 5 października 2016 r. zmieniającym rozporządzenie w sprawie sporządzania i doręczania dokumentów elektronicznych oraz udostępniania formularzy, wzorów i kopii dokumentów elektronicznych. Główną przesłanką nowelizacji było dostosowanie terminologii rozporządzenia do wymogów prawa Unii Europejskiej. Pojęcie „bezpiecznego podpisu elektronicznego weryfikowanego przy pomocy ważnego kwalifikowanego certyfikatu” zostało zastąpione pojęciem „kwalifikowanego podpisu elektronicznego”. Uregulowano również możliwość opatrzenia dokumentu elektronicznego kwalifikowaną pieczęcią elektroniczną. W przypadku potwierdzania poświadczeniem przedłożenia doręczenia dokumentu elektronicznego na informatycznym nośniku danych, dokument elektroniczny powinien być podpisany kwalifikowanym podpisem elektronicznym albo podpisem potwierdzonym profilem zaufanym ePUAP albo opatrzony kwalifikowaną pieczęcią elektroniczną, a nie tak jak do czasu zmiany podpisem elektronicznym osoby identyfikowanej w sposób określony w art. 20a ust. 1 u.i.d.p. Obecnie adresat dokumentu elektronicznego potwiera jego odebranie przez podpisanie poświadczenia doręczenia kwalifikowanym podpisem elektronicznym albo podpisem potwierdzonego profilem zaufanym ePUAP, albo przez zapewnienie możliwości potwierdzenia pochodzenia oraz integralności danych zawartych w tym poświadczeniu przy użyciu technologii, o których mowa w art. 20a ust. 2 ustawy. Do czasu zmiany adresat potwierdził jego odebranie przez potwierdzenie podpisem elektronicznym umożliwiającym identyfikację podpisującego w sposób określony w art. 20a ust. 1 lub 2 ustawy. Wniosek o umieszczenie w centralnym repozytorium wzoru dokumentu elektronicznego podpisuje się kwalifikowanym podpisem elektronicznym albo podpisem potwierdzonym profilem zaufanym ePUAP, a nie bezpiecznym podpisem elektronicznym weryfikowanym za pomocą ważnego kwalifikowanego certyfikatu. W obowiązującym stanie prawnym, jeżeli wniosek o umieszczenie wzoru dokumentu elektronicznego jest podpisany kwalifikowanym podpisem elektronicznym albo podpisem potwierdzonym profilem zaufanym ePUAP (do tej pory: podpisany bezpiecznym podpisem elektronicznym weryfikowanym za pomocą ważnego kwalifikowanego certyfikatu) wzór dokumentu elektronicznego umieszcza się w centralnym repozytorium, z zastrzeżeniem § 33.

Zakończenie

Nie budzi wątpliwości fakt, iż rozwój prawnych podstaw funkcjonowania gminnej e-administracji uwarunkowany jest przepisami prawa Unii Europejskiej. Wejście w życie nowego rozporządzenia unijnego spowodowało szereg zmian w obowiązującym ustawodawstwie krajowym, które powinny następnie zostać uwzględnione w działalności organów administracji publicznej, a więc również w procesie świadczenia e-usług na szczeblu gminnym. Zmiany te spowodowane były w szczególności modyfikacją treści przepisów, do których odsyłały

30 Tekst jedn.: Dz. U. z 2015 r. poz. 971., zwane w dalszej części rozważań rozporządzeniem z dnia 5 października 2016 r.
31 Dz. U. z 2016 r. poz. 1625.
32 § 1 pkt 1) rozporządzenia z dnia 5 października 2016 r.
33 § 1 pkt 2) rozporządzenia z dnia 5 października 2016 r.
34 § 1 pkt 3) rozporządzenia z dnia 5 października 2016 r.
upoważnienia ustawowe do ich wydania. W konsekwencji wejścia w życie rozporządzenia eIDAS polski ustawodawca zintensyfikował prace legislacyjne. Uchwalili nowe akty normatywne rangi ustawy oraz rozporządzenia jak również znowelizował treść przepisów już obowiązujących bez konieczności uchylania całego aktu normatywnego. Nowe rozporządzenia dotyczyły dwóch istotnych z punktu widzenia funkcjonowania gminnej e-administracji zagadnień: wykorzystywanej przez gminy do świadczenia e-usług elektronicznej platformy usług administracji publicznej oraz warunków organizacyjnych i technicznych dotyczących systemów teleinformatycznych wykorzystywanych do uwierzytelniania użytkowników. Obok uchwalenia nowych przepisów wykonawczych istotę zmian legislacyjnych stanowiła nowelizacja konkretnych przepisów rozporządzeń bez konieczności utraty mocy obowiązującej całego rozporządzenia. Zmiany w dwóch powołanych w rozważaniach rozporządzeniach dotyczyły przede wszystkim zmian w zakresie oznaczania standardów zapewniających dostęp do zasobów informacji udostępnianych za pomocą systemów teleinformatycznych używanych do realizacji zadań publicznych. W praktyce wiązało się to z koniecznością wprowadzenia zmian w sferze wewnętrznej urzędu obejmujących m. in. zmiany technologiczne w infrastrukturze urzędu.
Abstract: The article first indicates the entities which are required to use international accounting regulations. In the next part was presented impact of international regulations on liability under Polish law. The problem of naming criminal offenses has also been discussed. The relationships between international law and Polish legislation are presented, on example of court judgments.

Keywords: accounting regulation, criminal liability, international accounting standards.

Introduction

In the beginning, the article specifies a goal that will be achieved through development of the indicated problem. The sources of international law on the subject of widely understood accounting and determining the impact of the aforementioned acts on criminal liability that apply on the territory of the Republic of Poland will be presented in this article.

With the development of trade and commodity money economy, the need to register monetary and commodity transactions in the books has arisen. The first of this type of entries were made as early as in ancient Egypt and Babylonia. The next breakthrough took place in the 15th century, when the first scientific works in this area were written, but still understood only in a purely practical way. The first work on this topic was 'Summa di Arithmetica, Geometria, Proportioni et Proportionalitia', published in Venice in 1494 by Luci Paciolego. Without a doubt, these are the two crucial moments for the development of this discipline and the gradual formation of the rules that govern modern accounting.

The development of international regulations.

The evolution of development of global financial markets and the intensification of global integration have influenced in an equally powerful way the broadly understood balance sheet law. The necessity to standardize regulations on accounting was recognized in the 20th century. The first unified patterns were introduced in the United States, the so-called GAAP\(^1\), which was similar to IAS, which was invented later.\(^2\) The first official agreement was signed in 1973 between accounting organizations from Australia, Canada, Great Britain, Ireland and the United States, which resulted in creation of the International Accounting Standards Committee.\(^3\) The main purpose of establishing this organization was to standardize the accounting rules that bind companies and other organizations. Significant pressure was laid to ensure the comparability of financial data of the companies not only within a particular country or continent, but also of all globally relevant financial markets. This is crucial to ensure proper conditions for the further globalization.

International regulations combine a variety of different currents and ideas. A few stand out among them, namely the imperial strand (based on a principle of true and fair view, in

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\(^1\)GAAP of: General Accepted Accounting Principles- American Accounting Standards.

\(^2\)Maciej Skudlok, Międzynarodowe standardy rachunkowości–praktyczne zastosowanie w biznesie, Gliwice 2014, p. 17.

accordance with which accounting presents the true and fair view of the company), the model used by the Latin countries (the principle of true and fair view is applied in only a limited extent) and the German economic culture (emphasis put on the protection of the interests of creditors). The unification of the various systems requires diligence, especially if it will influence the responsibilities sustained by specific entities for abuse associated with the (broadly defined) balance sheet law. It seems that in matters that are not well governed by the European legislation, the country-specific laws and the General rules of accounting fulfill the roll adeptly.

Before proceeding to a detailed analysis of the problem, it is imperative to present what are the International Financial Reporting Standards, which are one of the major elements of international law that apply to accounting. The definition can be found in the international accounting standard-IAS 1 "presentation of financial statements". The IFRS standards and its interpretations should be understood as standards accepted by the international accounting standards Board, which, in accordance with § 11 of IAS 1, includes:

1) International Financial Reporting Standards,
2) International Accounting Standards,
3) Interpretations issued by the Committee. The interpretation of international financial reporting standards, or before the Standing Committee on Interpretation.

In order to harmonize and ensure comparability of financial statements, the within the European Union introduced the Regulation 1606/2002 of the European Parliament and of the Council of the European Union of 19 July 2002 on the application of international accounting standards. In accordance with the regulation, banks and issuers admitted to official listing in Poland are required to prepare consolidated financial statements in accordance with international accounting standards. Therefore, in practice, a very small group is subject to the international accounting regulation. However, it is important to remember that these are very important entities that are listed on the Warsaw Stock Exchange, such as: Jastrzębska Spółka Węglowa, KGHM, PKN Orlen, PGE, LPP. These are the leading companies of the key sectors for the country.

The role of international regulations in Polish legal system

The decision to transition to the IAS is taken by the management authority (A body that, in accordance with the applicable unit of law, statute, contract or under the law of property is entitled to approve the financial statements. In the case of a partnership, with the exception of shares-limited partnership, and partnership shareholders), applies to the issuers of securities admitted to trading on one of the regulated markets of the European economic area, applicant issuers to the market as well as units that are included in a group in which the parent company or group delivers a report in accordance with IAS. The impact of international regulations on accounting, varies according to the type of entity:

1) natural persons who operate under their own company respect the tax legislation and can employ simplified accounting (entry to revenue and expense Ledger),
2) limited companies are obliged to employ full accounting in accordance with the accounting Act - at the very least they are bound to draw up the profit and loss account and the balance sheet,

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5Ustawa z dnia 29 września 1994 r. o rachunkowości. (t.j. Dz. U. z 2016 r. poz. 1047 z późn. zm.). art. 45.
3) units mentioned in the second point after a particular threshold are obliged to have their financial statements examined by an auditor,

4) companies listed on the Warsaw Stock Exchange follow Polish legislation only in cases that are not regulated by the IAS.

5) subsidiaries of companies listed in the fourth point and subsidiaries may, but do not need to employ the accounting method of the parent company,

6) National Treasury, government entities and other budgetary entities must follow the principles of the Act on public finances, and only secondarily the Accounting Act. 6

Under Polish law, we find various legal acts which regulate the crime arising out of fraud related to accounting regulations. The creators of the legislature chose not to introduce in a single legal act, e.g. the Criminal Code, the offences related to the law of the balance sheet.

In connection with the required expertise to commit an accounting crime (such as fraud), the perpetrators are often of high social and professional status. The crime itself is characterized by a somewhat complex mechanism. They are included in a group of white collar crime.7 They may have different legal bases:

1) the Penal Code penalises inter alia, inflicting damage on economy, removing business documentation, loan extortion, fraud, money laundering8; 

2) fiscal Penal Code takes into account the failures in running books, violation of accounting procedures and the lack of accounting books9

3) the accounting Act also contains a narrow criminal directory that penalize a number of accounting offences, and among them there are: responsibility for the breaches in the field of conducting accounting and preparation of financial statements, the auditor's responsibility for the opinion and the responsibility for the violation of other articles of the Act.

One can say that the specified directory based exclusively on Polish legislation penalises precisely highly specific behaviors. The acts indicated by the legislature include well-described criteria, which the offender must first fulfill.

International accounting regulations in particular are used during the work of the Commission of financial supervision. It exercises oversees the capital market, pension insurance, banking and the entities that provide payment services, supplementary supervision of financial conglomerates,10 Units subject to the IAR units follow the international law of the balance sheet. The Commission regularly publishes an information bulletin that covers the list of penalties imposed. According to the analysis of the violations, they are imposed, inter alia, for abandonment or failure to follow the international regulations imposed by international entities such as IAS and IFRS.11 It should be noted that the recommendations issued by the Commission of financial supervision are today considered the so-called. soft law, therefore it is an institution that grows more powerful with time.

IAS and IFRS, which are the main subject of this article, do not contain similar regulations as the Act on accounting. These international regulations indicate the general rules of conduct that apply to accounting, but they also focus also on the individual elements of the financial

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6 Maciej Skoluk, Międzynarodowe Standardy Rachunkowości Gliwice 2014 p. 33.
8 Ustawa z dnia 6 czerwca 1997 r. Kodeks karny. (t.j. Dz. U. z 2016 r. poz. 1137 z późn. zm.).
9 Ustawa z dnia 10 września 1999 r. Kodeks karny skarbowy. (t.j. Dz. U. z 2016 r. poz. 2137 z późn. zm.).
statements and the content that should be found there. However, in contrast to the Polish legislation, it does not contain criminal law regulations. They do not show sanctions, but instead present course that should be taken when a mistake or a crime is found. They specify the actions to be taken in order to correct errors. For example, errors that relate to recognition, measurement, presentation or disclosure of information about each part of the financial statements are considered to be incompatible with the requirements of IFRS. They also include unintentional mistakes and also ones committed intentionally, in order to present a specific financial situation, profit or cash flow in a way that was intended in advance. The legislator imposes the obligation to correct the errors detected while writing the report, that is, prior to publication. However, errors detected later are corrected by creating another financial statement with comparative information. Arrangements for mistakes in financial statements, regardless of the order in which they were committed, do not contain sanctions.

IAS and IFRS gradually play an ever increasing role in relation to other sources of balance sheet law. Art. 2. 3 UoR is important in this case. According to the regulation, individuals who prepare financial statements in accordance with IAS, IFRS and related European Commission legislation shall follow the regulations of the accounting Act and the regulations issued on its basis only to the extent that is not regulated by them. The Polish legislature in the Act indicates the primacy of these adjustment over national legislation. It should be noted that this applies only to a narrow group of entities that are required to follow the international standards. However, the regulation directly specifies that in this case Polish law is only complementary. In addition, it should be noted that the Polish legislator introduces in this respect, the penal legislation. In terms of unregulated by the IAS and IFRS. This means that most of the laws that define the obligations of operators can be found in the regulations of IAS and IFRS, but responsibility for their violation will be charged on the basis of, inter alia: accounting act, the criminal code and the Criminal Code of tax in connection with the breach of the obligations laid down by international regulations.

Polish penal code not contain a comprehensive catalogue of crimes. Some of them also have been listed in other legal acts and it is the same in the case of the accounting Act. According to the view of Olaf Włodkowski's penal legislation left outside the Penal Code Act is characterized by lack of stability, which should be one of the key elements of the criminal code. There is concern that in the case of subsequent amendments regarding accounting the legislature will also be interfere with the criminal law regulations.

Using precise terminology

Certain difficulties can arise while selecting a single name for a group of offences and felonies related to accounting and broadly defined balance sheet law. A number of conditions required to convict a perpetrator are to be understood as crime. Please note that in accordance with one of the basic principles of criminal law, nullum crimen sine lege, the legislature is required to indicate which behaviors are prohibited by law, by indicating the specific behaviors that make

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up the criminal offence or a felony. The process of selecting a single name for the said crime groups raises disputes in the doctrine.

In the recommendations of the Council of Europe R/81/112, the term “falsification of balance sheet statements and accounting” is used. However, with the range of responsibilities defined under the term of balance sheets and accounting statements need to be considered, it seems that in the context of the liability in question the term is too narrow. Outside of this concept there is legislation recognized by the Polish Accounting Act, which deals with offenses such as failing to account, not preparing accounts and breach of obligation. National law provides for much broader directory than the European legislature.

Another reference to criminal liability in connection with accounting can be found in the Criminal Law Convention on Corruption, prepared in Strasbourg on the 27th of January, 1999. It was the first convention to categorize offenses and felonies. It requires the parties to adopt such legislature and other measures required by domestic law for offenses subject to criminal penalties or other sanctions that follow intentional acts or omissions in order to commit or conceal the offenses (for example, different categories of bribery or trading in influence), as far as the parties have not made any objections: creating or using an invoice or any other accounting document or record containing false or incomplete information and unlawful failure to post payments. It seems that once again the use of the term defining only accounting offenses and the definition that introduces directory of criminal acts are too narrow to implement them to Polish legislation. The General Regulation that obliges parties to penalize any certain behavior leaves a lot of room for interpretation for the signatories of the Convention. From the point of view of Polish law it seems most appropriate to use a concept of the greatest scope, that is balance sheet law offenses. It is concerned with business accounting, and its main task is to provide the real economic situation of the entity. Therefore it will deal with all the offenses and crimes that influence the economic image of the company.

The application of the international regulations

For Polish courts, certain international accounting regulations are only additional supplement of the obligations indicated in Uoride. They are mainly used to justify judgments and sentences of the administrative courts. Analyzed sentences and judgments show that the aforementioned administrative courts investigate complaints lodged against the decisions of the financial supervision Commission, which impose penalties for failure to comply with the obligations laid down by IAS and IFRS.

International regulations indicate certain rules of conduct and general rules that govern accounting. In order to support a certain thesis, the Constitutional Court too refers to these regulations as part of the legal justification. In the judgment of the Constitutional Court of 18th February, 2014, in U 2/12 on the “non-compliance of the laws of MF regulation on specific cooperative credit unions accounting rules with the Constitution of POLAND” is a description of one of the General principles that govern accounting.

"The principles of accounting policies provide a set of rules, procedures and standards that are applied to the information provided about the financial situation the company, its business and financial results achieved were complete, clear, reliable and useful. The principles govern the accounts and the preparation and presentation of financial statements. Some of these rules are

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16 Recommendations of the European Council R/81/112.
17(Dz. U. z 2005 r. Nr 29, poz. 249 z późn. zm.)
18Art 14 ibidem.
normative -Polish legislator has codified them in Chapter I of the Act on accounting. They are also derived from international accounting standards (...).” 19

The Court directly indicates that entities are required to apply the rules, which are derived from international accounting standards. However, they have no significant effect on criminal liability, they only determine the obligations of entrepreneurs and describe the various elements of the financial statements. In the Polish legal system, they do not constitute a precedent, as they do in anglo-Saxon countries. However, the role played by the Constitutional Court emphasises the importance of these regulations.

Ordinary courts also hear cases related to, inter alia, failure to prepare financial statements by companies, to what they are obliged according to UoRide. An excellent example would be the judgment of the District Court in Gliwice, which found the defendant J. D. guilty of crimes of article 77 paragraph 2 of Uoride. K. the Chairman of the Board of the limited liability company has avoided preparing financial statements for three years in a row. The Court found him guilty of failure to submit financial statements for the years 2010-2012 and sentenced him to a fine of 20 daily rates in the amount of 15 PLN each for each of the offences committed. By combining the penalties the court fined the offender the amount of 50 daily rates in the amount of 15 PLN each. 20

Apart from the economic situation of the various entities, the comparison of penalties imposed by the financial supervision Commission and the fines dealt by the district courts indicate large differences in their importance. It should be highlighted that the conclusions of the above comparison does not take into account the scale of operations and the economic situation of the companies. The impact of international regulations in the cases of the district courts is invisible. References to the General principles derived from IAS or IFRS and obligations defined there are not shown in these rulings.

Summary

Criminal liability associated with criminal offences under the law of the balance sheet is not subject to the regulation of international accounting standards. Leaving the regulations to Member States seems to be a controversial decision. No doubt each Member wishes to retain some autonomy in creating and enforcing compliance with law. However, the attention should be paid in particular to deterrence of penalties that might have been delivered in different legal systems. In an extreme case, the consequence can be also penalizing different behaviors between two legal systems. A situation in which certain behaviors in one of the countries will be prohibited on pain of severe punishment, while in another the same behaviour is allowed must be avoided. Only a part of the entrepreneurs in Poland are subject to international obligations. However, they are vital to the economy of the whole country. The companies listed on the stock exchange need to be compared with similar companies within the country, but also with companies from other European and international markets. The main objective of the introduction of the EU accounting standards was to harmonize financial reporting of companies listed on the stock exchange. A report, which was designed to evaluate the performance of the said legislation positively evaluates to the attempt to unify and improve the efficiency of the financial markets. The development of economic crime may pose new challenges for the European legislature, it may also involve creating new regulations concerning criminal liability.

19 Trybunału Konstytucyjnego z dnia 18 lutego 2014 r. U 2/12.
20 Sąd Rejonowy w Gliwicach wyrokiem z dnia 27 czerwca 2016 r. sygn. akt IX K 437/14.
Katarzyna Gutbier*, Ewolucja przepisów o odpowiedzialności za przestępstwo oszustwa kredytowego w polskim kodeksie karnym. Oszustwa gospodarcze w Brytyjskim systemie prawa karnego – Fraud Act 2006 (The evolution of the rules on liability for the crime of credit fraud in the Polish penal code. The attempt of comparison with the UK Fraud Act 2006 regulations. Economic Fraud in the UK - Fraud Act 2006)**

Abstract: The aim of this publication is to draw attention to the evolution of the responsibility for the crime of credit fraud in the Polish Penal Code and then the discussion of the current legislation with the provisions of the UK Fraud Act 2006. At first, the historical changes in the structure of regulations that punish fraud of credit contained in the Penal Code will be presented. The regulations of the year 1997 in the original wording will be shown, then the changes in 2003 due to the necessity of the implementation of the legal acts of the European Union and the Council of Europe, a change from 2004 and finally the change in 2013, having only a purely technical nature. Then the currently existing criteria of the crime of credit fraud which belong to the group of offenses of abstract threat will be presented. Later it will be shown what is the Fraud Act 2006 passed by the Parliament of the United Kingdom, which was given royal assent on 8 November 2006 and came into force on 15 January 2007. The criminal offence of fraud, as an interesting example of alternative specific criteria, will then be presented. Fraud accordance with the regulations contained in the Fraud Act 2006 are classified as formal crimes, so only the intention of the perpetrator is important, rather than actions made by him and then effects because they are irrelevant. The categories are a literature, legal acts, and jurisprudence review.

Keywords: credit fraud, Penal Code, Fraud Act 2006.

Wstęp


* SWPS Uniwersytet Humanistycznospołeczny.
** Niniejszy artykuł powstał w oparciu o materiały robocze służące do przygotowania rozprawy doktorskiej.

Ewolucja przepisów o odpowiedzialności za przestępstwo oszustwa kredytowego w polskim kodeksie karnym.

Sięgając do uzasadnienia rządowego projektu ustawy z dnia 6 czerwca 1997 roku Kodeks karny czytamy: „Zjawiskiem występującym we współczesnym świecie gospodarki wolnorynkowej, któremu nowy Kodeks wychodzi naprzeciw, jest przestępstwo oszustwa kapitałowego, wyłudzenia kredytu, pożyczki bankowej, gwarancji kredytowej, dotacji lub subwencji albo zamówienia publicznego od państwa, fundacji, banku itp. przez oszukańcze poczynania, jak: przedstawianie nieprawdziwych dokumentów lub oświadczeń oraz nieinformowanie kredytodawcy (dawcy dotacji) o okolicznościach mogących mieć wpływ na wstrzymanie lub ograniczenie wysokości kredytu, pożyczki bankowej, gwarancji kredytowej, dotacji lub subwencji albo zamówienia publicznego (art. 297)”

Tekst pierwotny przepisu art. 297 k.k. z roku 1997 zawierał trzy paragrafy, które brzmiały następująco:

§ 1. Kto, w celu uzyskania dla siebie lub innej osoby kredytu, pożyczki bankowej, gwarancji kredytowej, dotacji, subwencji lub zamówienia publicznego, przedkłada fałszywe lub stwierdzające nieprawdę dokumenty albo nierzetelne, pisemne oświadczenia dotyczące okoliczności mających istotne znaczenie dla uzyskania takiego kredytu, pożyczki bankowej, gwarancji kredytowej, dotacji, subwencji lub zamówienia publicznego, podlega karze pozbawienia wolności od 3 miesięcy do lat 5.

§ 2. Tej samej karze podlega, kto wbrew ciążącemu na nim obowiązkowi nie powiadamia właściwego organu lub instytucji o powstaniu okoliczności mogących mieć wpływ na wstrzymanie lub ograniczenie wysokości udzielonego kredytu, pożyczki bankowej, gwarancji kredytowej, dotacji, subwencji lub zamówienia publicznego.

§ 3. Nie podlega karze, kto dobrowolnie przed wszczęciem postępowania karnego zapobieżył wykorzystaniu kredytu, pożyczki bankowej, gwarancji kredytowej lub subwencji, zrezygnował z zamówienia publicznego lub dotacji uzyskanych w sposób określony w § 1 lub 2 albo zaspokoił roszczenia pokrzywdzonego.

Jurydyczny kształt wyżej zacytowanych przepisów nawiązywał do czynów karalnych penalizowanych w kodeksie karnym obowiązującym na terenie ówczesnej Republiki Federalnej Niemiec. Chodzi tu o § 264 tamtejszego kodeksu karnego opisującego oszustwo subwencyjne (Subventionsbetrug) a także do § 265b traktującego o oszustwie kredytowym (Kapitalanlagebetrug)633. Art. 297 k.k., w uchwalonym kształcie, przewidywał dwa typy oszustwa kredytowego, tj. w § 1 tego artykułu występę powszechny a w § 2 występę indywidualny. Natomiast § 3 zawierał klauzulę niekaralności sprawcy wskazanych występów634. Innymi słowy omawiany artykuł statuował dwa typy czynów zabronionych:

określone w art. 297 § 1 oszustwo kredytowe, dotacyjne, subwencyjne i oszustwo związane z zamówieniami publicznymi a także określone w art. 297 § 2 oszustwo z zaniechania 635.

Podkreślenia wymaga, że nieakceptowane społecznie zachowanie pisane w art. 297 k.k. polega także na dezinformacji instytucji finansowej aby ta udzieliła finansowania w postaci wymienionych w tym przepisie instrumentów finansowych 636.

W tym miejscu należy powiedzieć, że Polska jako członek Unii Europejskiej została zobowiązana do zapewnienia ochrony karnej interesów finansowych Unii i jej członków. Najważniejszym aktem prawnym na szczeblu Unii, służącym ochronie tych interesów jest Konwencja o ochronie interesów finansowych Wspólnot Europejskich, sporządzona w Brukseli dnia 26 lipca 1995 r. wraz z Protokołami:

- Protokół do Konwencji o ochronie interesów finansowych Wspólnot Europejskich z dnia 26 lipca 1995 r., sporządzony w Dublinie dnia 27 września 1996 r.,
- Protokół w sprawie interpretacji w trybie orzeczenia wstępnego przez Trybunał Sprawiedliwości Wspólnot Europejskich Konwencji o ochronie interesów finansowych Wspólnot Europejskich z dnia 26 lipca 1995 r., sporządzony w Brukseli dnia 29 listopada 1996 r.,
- Drugi Protokół do Konwencji o ochronie interesów finansowych Wspólnot Europejskich sporządzony w Brukseli dnia 19 czerwca 1997 r. 637

Konwencja weszła w życie 17 października 2002 roku wraz z pierwszym protokołem i protokołem w sprawie jej wykładni dokonywanej przez Trybunał Sprawiedliwości. Drugi protokół wszedł w życie 19 maja 2009 roku 638.

Konwencja wraz z przynależnymi do niej Protokołami wprowadziła jednolitą definicję nadużycia finansowego oraz nałożyła na sygnatariuszy obowiązek penaltacji nadużyć finansowych, które mają wpływ na interesy finansowe Unii Europejskiej. W treści omawianej Konwencji wskazano nadużycia finansowe dotyczące wydatków i osobno dotyczące dochodów 639. Wprowadzenie tych regulacji miało na celu, między innymi, prewencyjne przeciwdziałanie trafiańiu funduszy unijnych do podmiotów innych niż te, którym się to należy oraz przeznaczeniu na inny cel niż ten, na który zostały przyznane 640.

W owym czasie przestępstwa przeciwo interesom finansowym Unii Europejskiej nie były w Polsce znane, stanowiły zupełnie nowy rodzaj oszustw. Przyczyną był przedmiot zamachu sprawcy, czyli zamach przeciwko przychodom i wydatkom z budżetu Unii Europejskiej, chociaż mosus operendi sprawców pozostało podobne, a mianowicie charakterystyczne dla


przestępstw gospodarczych manipulowanie, między innymi, dokumentami oraz w celu realizacji oszukańczych planów.\textsuperscript{641}

W literaturze uważa się, że zwalczanie nieakceptowanych czynów przestępczych godzących w interesy finansowe Unii Europejskiej regulowane było i jest przez jedną organizację międzynarodową, żywo zainteresowaną ochroną swoich dóbr. Działania te godzą w interesy Unii oraz jej członków, a nie w szersze interesy całej społeczności międzynarodowej\textsuperscript{642}.

W dniu 29 września 2003 roku skierowano do pierwszego czytania na posiedzeniu Sejmu IV Kadencji rządowy projekt ustawy o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy - Kodeks wykroczeń. Projekt zawierał przepisy dostosowujące polskie prawodawstwo do prawa Unii Europejskiej. Chodziło głównie o implementację do porządku prawnego następujących aktów prawnych Unii Europejskiej i Rad Unii Europejskiej: Konwencji Rady Europy o cyberprzestępczości\textsuperscript{644}, podpisanej przez Polskę 28 listopada 2001 r.\textsuperscript{645}, Wspólnego działania 97/154/WSiSW z dnia 24 lutego 1997 r. przyjęte przez Radę na podstawie art. K.3 Traktatu o Unii Europejskiej, dotyczące działań mających na celu zwalczanie handlu ludźmi i seksualnego wykorzystywania dzieci\textsuperscript{646}, Konwencji o ochronie interesów finansowych Wspólnot Europejskich\textsuperscript{647}, Decyzji ramowej Rady z 13 czerwca 2002 r. w sprawie europejskiego nakazu aresztowania i procedurach dostarczania między państwami członkowskimi\textsuperscript{648}.

W opisie projektu wskazano, że celem zmian jest między innymi wprowadzenie nowego opisu typu czynu zabronionego w postaci oszustwa kapitałowego. Wynikało to z art. 1 Konwencji o ochronie interesów finansowych Wspólnot Europejskich, która została do prawa polskiego Zob. A. Adamski, \textit{Karalność oszustw na szkodę interesów finansowych Unii Europejskiej na podstawie prawa polskiego}, Monitor Prawniczy nr 24 z 2004 r., C. H. Beck, Warszawa 2004, Legalis.\textsuperscript{641}

Wspólne działania 97/154/WSiSW z dnia 24 lutego 1997 r. przyjęte przez Radę na podstawie art. K.3 Traktatu o Unii Europejskiej, dotyczące działań mających na celu zwalczanie handlu ludźmi i seksualnego wykorzystywania dzieci, (L 063, 04/03/1997 P. 0002–0006).\textsuperscript{646}

Konwencji Rady Europy o cyberprzestępczości, sporządzonej w Budapeszcie dnia 23 listopada 2001 r. (Dz. U. z 2015 poz. 728).\textsuperscript{645}

Konwencja ta została ratyfikowana ustawą z dnia 12 września 2004 r., C. H. Beck, Warszawa 2004, Legalis.\textsuperscript{642}


W opisie projektu wskazano, że celem zmian jest między innymi wprowadzenie nowego opisu typu czynu zabronionego w postaci oszustwa kapitałowego\textsuperscript{649}. Wynikało to z art. 1 Konwencji o ochronie interesów finansowych Wspólnot Europejskich, która została do prawa polskiego Zob. Opinia prawna o zgodności przedstawionego przez Radę Ministrów projektu ustawy o zmianie ustawy - Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń z prawem europejskim z dnia 12 stycznia 2004 r., dostępne na:\textsuperscript{644} http://orka.sejm.gov.pl (2.8.2013), archiwum prac sejmu IV Kadencji, druk 2031.

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\textsuperscript{644} Zob. Konwencja Rady Europy o cyberprzestępczości, sporządzonej w Budapeszcie dnia 23 listopada 2001 r. (Dz. U. z 2015 poz. 728).


\textsuperscript{646} Zob. Opinia prawna o zgodności przedstawionego przez Radę Ministrów projektu ustawy o zmianie ustawy- Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń z prawem europejskim z dnia 12 stycznia 2004 r., dostępne na:\textsuperscript{644} http://orka.sejm.gov.pl (2.8.2013), archiwum prac sejmu IV Kadencji, druk 2031.

W dniu 7 kwietnia 2004 roku Prezydent podpisał ustawę z dnia 18 marca 2004 r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy - Kodeks wykroczeń (Dz. U. z 2004 Nr 69 poz. 626). Tym samym z dniem 1 maja 2004 roku art. 297 k.k. uzyskał nowe brzmienie:

§ 1. Kto, w celu uzyskania dla siebie lub kogo innego, od banku lub jednostki organizacyjnej prowadzącej podobną działalność gospodarczą na podstawie ustawy albo od organu lub instytucji dysonujących środkami publicznymi - kredytu, pożyczki pieniężnej, poręczenia, gwarancji, akredytywy, dotacji, subwencji, potwierdzenia przez bank zobowiązania wynikającego z poręczenia lub z gwarancji lub podobnego świadczenia pieniężnego na określony cel gospodarczy, elektronicznego instrumentu płatniczego lub zamówienia publicznego, przedkłada podrobiony, przerobiony, poświadczający nieprawdę albo nierzetelny dokument albo nierzetelne, pisemne oświadczenie dotyczące okoliczności o istotnym znaczeniu dla uzyskania wymienionego wsparcia finansowego, instrumentu płatniczego lub zamówienia, podlega karze pozbawienia wolności od 3 miesięcy do lat 5.

§ 2. Tej samej karze podlega, kto wbrew ciążącemu obowiązkowi, nie powiadamia właściwego podmiotu o powstaniu sytuacji mogącej mieć wpływ na wstrzymanie albo ograniczenie wysokości udzielonego wsparcia finansowego, określonego w § 1, lub zamówienia publicznego albo na możliwość dalszego korzystania z elektronicznego instrumentu płatniczego.

§ 3. Nie podlega karze, kto przed wszczęciem postępowania karnego dobrowolnie zapobiegł wykorzystaniu wsparcia finansowego lub instrumentu płatniczego, określonych


Artykuł 297 § 1 w swym pierwotnym ujęciu chronił instytucje "pożyczki bankowej", "kredytu", "gwarancji kredytowej", "dotacji", "subwencji" oraz "zamówień publicznych". Nowelizacja Kodeksu karnego, wprowadzona ustawą z dnia 18 marca 2004 r. (Dz. U. 2004 Nr 69 poz. 626), uzupełniła ten przepis uwzględniając w jego treści "akredytywę", "pośredzenie bankowe" oraz "elektroniczne instrumenty płatnicze".

Zaznaczyć należy, że przed omawianą nowelizacją spotykało się w doktrynie różnicę poglądów co do tego czy przepisy art. 297 k.k. chronią jedynie kredyty udzielane przez banki czy też udzielane przez inne instytucje czy podmioty. Chodziło tu np. o kredyt kupiecki czy towarowy. Po nowelizacji stało się jasne, że ochroną objęty jest kredyt, pożyczka pieniężna i inne świadczenia uzyskane od banku lub podmiotów prowadzących podobną działalność na podstawie ustawy653. Z cała pewnością miano tu na myśli banki hipoteczne654, spółdzielcze kasy oszczędnościowo-kredytowe 655 a także instytucje elektronicznych instrumentów płatniczych656.

Nadto nowelizacja wprowadziła pojęcie pożyczki pieniężnej, które zastąpiło wcześniejsze określenie „pożyczka bankowa” oraz drugie pojęcie „gwarancja” w miejsce „gwarancji kredytowej”. Dzięki tym ruchom ochrona objęta większa wachlarz instrumentów finansowych, jako że po nowelizacji przepis mówił o każdej pożyczce pieniężnej oraz każdej gwarancji udzielonej przez podmiot wskazany w przepisie. Zmiany dotyczyły także charakterystyki czynności sprawczej. A mianowicie doprecyzowano definicję fałszywego dokumentu jako dokumentu podrobionego lub przerobionego. Pojawiło się nowe pojęcie „dokument nierzetelny”. Kolejna zmiana dotyczyła okoliczności, które to w poprzednim brzmieniu art. 297 k.k. „miały istotne znaczenie”, po nowelizacji były „o istotnym znaczeniu”. Dodatkowa zmiana dotyczyła samego dokumentu i oświadczenia, tj. liczbę mnogą zastąpiono liczbą pojedynczą. Nie można zapomnieć o zmianie dotyczącej podmiotów, które w wyniku działania sprawcy mają odniesć określone korzyści. W wersji art. 297 § 1 k.k. przed nowelizacją był to „lub innej osoby”. Oznaczało zarówno osobę fizyczną jak i prawne. Nowelizacja wprowadziła pojęcie „które inny” i tym samym zawęziła zakres podmiotów do osób fizycznych. Istotną zmianą było także w art. 297 § 2 k.k. określenie podmiotu sprawczego jako każdej osoby. W poprzedniej wersji były to osoby identyfikowane przez określony obowiązek, który naruszały przez zaniechanie jego wypełnienia657.

Ostatnia trzecia modyfikacja omawianego art. 297 k.k. została wprowadzona przez ustawę z dnia 12 lipca 2013 r. o zmianie ustawy o usługach płatniczych oraz niektórych innych ustaw (Dz. U. z 2013 poz. 1036). Zmiana dotyczyła § 1 i 2 omawianego przepisu i miała charakter techniczny. Wynikała z zastąpienia pojęcia "elektroniczny instrument płatniczy" występującego w uchylanej ustawie o elektronicznych instrumentach płatniczych658 pojęciem

654 Chodzi tu o banki hipoteczne w rozumieniu ustawy z dnia 29 sierpnia 1997 r. o listach zastawnych i bankach hipotecznych (Dz. U. z 2003 Nr 99 poz. 919 ze zm.-t.j.).
655 Zob. ustawę z dnia 14 grudnia 1995 r. o spółdzielczych kasach oszczędnościowo-kredytowych (Dz. U. z 1996 Nr 1 poz. 2 ze zm.).
656 Zob. ustawę z dnia 12 września 2002 r. o elektronicznych instrumentach płatniczych (Dz. U. z 2002 Nr 169 poz. 1385 ze zm.).
657 Zob. J. Skorupka, Przestępstwo oszustwa finansowego z art. 297 k.k. po noweli z marca 2004 r., Prokuratura i Prawo nr 7-8 z 2005 r., Wydawnictwo IES, Kraków 2005, s. 135-150.
658 Zob. ustawę z dnia 12 września 2002 r. o elektronicznych instrumentach płatniczych (Dz. U. z 2002 Nr 169 poz. 1385 ze zm.).
"instrument płatniczy", które jednak nie stanowi zmiany merytorycznej, gdyż zmodyfikowany zwrot zachował ten sam zakres pojęciowy. Modyfikacja ta weszła w życie w dniu 7 października 2013 roku. Od tego czasu treść art. 297 k.k. w niezmienionym kształcie obowiązuje do chwili obecnej:

§ 1. Kto, w celu uzyskania dla siebie lub kogo innego, od banku lub jednostki organizacyjnej prowadzącej podobną działalność gospodarczą na podstawie ustawy albo od organu lub instytucji dysponujących środkami publicznymi - kredytu, pożyczkach pieniężnych, gwarancji, akredytywach, dotacjach, subwencji, potwierdzenia przez bank zobowiązania wynikającego z poręczenia lub z gwarancji lub podobnego świadczenia pieniężnego na określony cel gospodarczy, instrumentu płatniczego lub zamówienia publicznego, przedkłada podrobiony, przerobiony, potwierdzający nieprawdę albo nierzetelny dokument albo nierzetelne, pisemne oświadczenia dotyczące okoliczności o istotnym znaczeniu dla uzyskania wymienionego wsparcia finansowego, instrumentu płatniczego lub zamówienia, podlega karze pozbawienia wolności od 3 miesięcy do lat 5.

§ 2. Tej samej karze podlega, kto wbrew ciężącemu obowiązkowi, nie powiadamia właściwemu podmiotowi o powstaniu sytuacji mogącej mieć wpływ na wstrzymanie albo ograniczenie wysokości udzielonego wsparcia finansowego, określonego w § 1, lub zamówienia publicznego albo na możliwość dalszego korzystania z instrumentu płatniczego.

§ 3. Nie podlega karze, kto przed wszczęciem postępowania karnego dobrowolnie zapobiega wykorzystaniu wsparcia finansowego lub instrumentu płatniczego, określonych w § 1, zrezygnował z dotacji lub zamówienia publicznego albo zaspokoił roszczenia pokrzywdzonego.

Przedmiotem ochrony omawianego przepisu jest zabezpieczenie prawidłowości i rzetelności przyznawania i wykorzystywania kredytów, pożyczek pieniężnych, poręczeń, gwarancji, akredytyw, dotacji, subwencji, potwierdzeń przez bank zobowiązania wynikających z poręczenia lub z gwarancji lub z podobnego świadczenia pieniężnego na określony cel gospodarczy, elektronicznych instrumentów płatniczych czy zamówień publicznych.

Podmiotem przestępstwa z § 1 może być każdy, zatem jest to przestępstwo powszechne. Natomiast przestępstwo z § 2 jest przestępstwem indywidualnym, ponieważ może popełnić je tylko osoba zobowiązana do powiadomienia właściwego organu czy instytucji o faktach, o których mowa w tym przepisie.

Zachowanie się sprawcy przestępstwa określonego w § 1 polega na przedkładaniu podrobionego, przerobionego, poświadczającego nieprawdę albo nierzetelnego dokumentu lub nierzetelnego, pisemnego oświadczenia dotyczącego okoliczności o istotnym znaczeniu dla uzyskania wsparcia finansowego, instrumentu płatniczego lub zamówienia. Jeśli zachowanie się sprawcy nie dotyczy wspomnianych okoliczności, sprawca nie podlega odpowiedzialności karnej z art. 297 § 1, ale może odpowiadać np. za oszustwo z art. 286.

Zachowanie się sprawcy przestępstwa opisanego w § 2 polega na zaniechaniu powiadomienia właściwego organu lub instytucji o powstaniu okoliczności mogących mieć wpływ na wstrzymanie lub ograniczenie wysokości udzielonego wsparcia finansowego, instrumentu płatniczego lub zamówienia. Obowiązek powiadomienia instytucji lub właściwego organu dotyczy tych instytucji czy organów, które podjęły decyzję o przyznaniu wsparcia finansowego, instrumentu płatniczego lub zamówienia publicznego. Treścią natomiast takiego

659 Zob. komentarz do zmiany art. 297 § 1 i 2 k.k., LEX GAMMA.
powiadomienia winny być okoliczności, których uwzględnienie doprowadzi do wstrzymania lub ograniczenia wysokości udzielonych uprawnień.

Przestępstwa z art. 297 k.k. mogą być popełnione wyłącznie z winy umyślnej, a przestępstwo z art. 297 § 1 k.k. tylko w postaci zamiaru bezpośredniego. Jest to przestępstwo kierunkowe. Sprawca działa w celu uzyskania np. kredytu.

Przestępstwo z art. 297 k.k. jest przestępstwem formalnym. Jego istota nie jest uzależniona od nastąpienia jakiegokolwiek skutku. Na przykład, samo przedłożenie podrobionego, przerobionego, poświadczającego nieprawdę albo nierzetelnego dokumentu jest wystarczające do stwierdzenia przestępstwa. Nie jest tu wymagany skutek w postaci udzielenia sprawcy np. pożyczki pieniężnej.

Art. 297 § 3 k.k. przewiduje możliwość wyłączenia odpowiedzialności karnej, jeśli spełnione zostaną warunki przewidziane w tym przepisie. Instytucja ta, zwana „czynnym żalem”, pozwala uniknąć karalności w przypadku, gdy sprawca zapobiegnie wykorzystaniu wsparcia finansowego lub instrumentu płatniczego. Znamię „zapobieżenie” interpretować należy jako zachowanie się, którego skutkiem jest uniemożliwienie wykorzystania wsparcia finansowego lub instrumentu płatniczego. Z kolei przez rezygnację należy rozumieć tylko dobrowolne zachowanie, których skutkiem jest odstąpienie od możliwości otrzymania zamówienia czy dotacji. Przez zaspokojenie roszczeń pokrzywdzonego należy rozumieć spełnienie wszystkich należnych mu świadczeń.

Omówienie penalizacji oszustw gospodarczych w brytyjskim systemie prawa karnego – Fraud Act 2006

W tym miejscu warto przedstawić rozwiązania w zakresie ścigania patologii gospodarczych jakie przyjęto w Wielkiej Brytanii. Istnieje ku temu kilka przesłanek. Po pierwsze podejście ustawodawcy brytyjskiego do oszustw gospodarczych różni się znacząco od podejścia polskiego ustawodawcy. Dzieje się tak, ponieważ brytyjski ustawodawca nie dokonał rozróżnienia co do rodzaju oszustwa, o którym mówi ustawa, czyli przykładowo nie wyróżnia oszustw gospodarczych. Po drugie nie podjął próby uszczegółowienia i opisania poszczególnych zachowań przestępczych w obszarze oszustw gospodarczych a skupił się na ogólnym przestawieniu przesłanek nie akceptowanych działań charakteryzujących wszelkie oszustwo. Po trzecie konstrukcja przepisów jest warta uwagi w związku z alternatywnym określeniem znaczeń przestępstwa oszustwa.


1) oszustwo przez fałszywe oświadczenie (art. 1 ust. 2 lit. a – section 2 of Fraud Act 2006),
2) oszustwo przez nieujawnienie informacji, jeśli sprawca miał prawny obowiązek ich ujawnienia (art. 1 ust. 2 lit. b – section 3 of Fraud Act 2006),
3) oszustwo przez nadużycie pozycji, z której sprawowaniem wiąże się obowiązek ochrony lub niedziałania przeciwko interesom finansowym innej osoby (art. 1 ust. 2 lit. c – section 4 of Fraud Act 2006).

Podkreślić należy, że każdy ze sposobów popełnienia oszustwa charakteryzuje działanie nieuczciwe oraz drugi element w postaci zamiaru sprawcy. Sprawca działa z zamiarem doprowadzenia do uzyskania określonej korzyści przez niego samego lub inną osobę albo działa...
w celu doprowadzenia do straty na czyjąś niekorzyść lub narażenia na ryzyko poniesienia straty.\footnote{673}{Zob. N. Monaghan, Criminal Law, 4\textsuperscript{th} edition, Oxford University Press, Oxford 2016, s. 302-312.}

Ustawodawca nie zawarł we Fraud Act 2006 definicji legalnej co należy rozumieć przez uczciwość, na potrzeby wykonywania i egzekwowania omawianych rozwiązań prawnych. W literaturze zaleca się stosowanie tzw. Ghosh testu\footnote{674}{Zob. S. Farrell, G. Ladenburg, N. Yeo, Blackstone’s Guide to the Fraud Act, Oxford University Press, Oxford 2007, s.14-16.}, który funkcjonował wcześniej jako narzędzie oceny czy sprawca popełniając przestępstwo działał nieuczciwie. Oceny dokonuje sąd i ława przysięgłych. Polega on na tym, że najpierw sąd musi ocenić czy działanie oskarżonego było nieuczciwe biorąc pod uwagę przeciętne, zwykle standardy akceptowane przez przeciętnie rozsądnych i uczciwych ludzi. Jest to obiektywna przesłanka. Jeśli tak to sąd przechodzi do drugiego etapu, czyli przesłanka subiektywnej. A mianowicie sąd ma za zadanie zanalizować czy oskarżony w chwili popełniania czynu był świadom, że jest to zachowanie nieuczciwe\footnote{675}{Zob. N. Monaghan, Criminal Law, 4\textsuperscript{th} edition, Oxford University Press, Oxford 2016, s. 304.}. Gdyby się okazało, że oskarżony nie był świadom, że jego zachowanie, w myśl obowiązujących przepisów prawa, jest nieuczciwe, wtedy nie można mówić o spełnieniu wszystkich znamion nieuczciwości. Test ten był wielokrotnie krytykowany przez doktrynę akademicką jako nie dający pewności prawnej, ponieważ sądowi pozostawiono decyzję czy zachowanie pozwanego było nieuczciwe\footnote{676}{Zob. B. Summers, The Fraud Act: Has it had any impact?, Amicus Curiae Nr 75 (2008), London, dostępne na: \url{http://journals.sas.ac.uk/amicus/article/view/1180} (26.5.2017), s. 13.}. Był także krytykowany przez praktyków, między innymi, za to, że oskarżenia zbyt często decydują się na proces, ponieważ mają niewiele do stracenia i liczą na wprowadzenie w błąd sądu co do zaistnienia nieuczciwości w działaniu\footnote{677}{Zob. N. Monaghan, Criminal Law, 4\textsuperscript{th} edition, Oxford University Press, Oxford 2016, s. 304.}.

Jeśli chodzi o zamiar sprawcy czynu to podkreślić należy, że przestępstwo oszustwa penalizowane w Fraud Act 2006 ma charakter formalny. Nie ma znaczenia rezultat działań podjętych przez sprawcę. Przestępstwo zostaje dokonane jeśli sprawca działał z zamiarem.

Co należy rozumieć pod pojęciami: korzyść i strata zostało określone we Fraud Act 2006. Zgodnie z art. 5 ust. 2 Fraud Act 2006 korzyść lub strata użyte w art. 2–4 Fraud Act 2006 dotyczą jedynie korzyści lub straty w pieniądzu lub innym majątku. Przy czym nie ma znaczenia czy korzyści lub straty są tymczasowe czy trwałe. Majątek oznacza każdy majątek zarówno nieruchomości, ruchomości, dobra niematerialne, jak i majątek osobisty. Definicja legalna określenia „korzyść” zawarta została w art. 5 ust. 3 Fraud Act 2006 i oznacza uzyskanie korzyści w wyniku zatrzymania czegoś co było już w posiadaniu oraz pozyskanie czegoś czego ktoś nie uzyskał. A zgodnie z art. 5 ust. 4 Fraud Act 2006 „strata” ma miejsce w sytuacji gdy ktoś nie otrzymuje tego co mógłby otrzymać lub traci coś co posiadał.

Jednym ze sposobów popełnienia oszustwa zgodnie z regulacjami zawartymi w art. 1 ust. 2 lit. a Fraud Act 2006 jest oszustwo przez fałszywe oświadczenie. W myśl art. 2 ust. 1 Fraud Act 2006 popełnia je ta osoba, która składa fałszywe oświadczenie w sposób nieuczciwy z zamiarem uzyskania korzyści dla siebie lub kogo innego czy spowodowania straty kogoś innego lub narażenia kogoś innego na ryzyko straty. Kiedy natomiast oświadczenie jest fałszywe tłumaczy przepis art. 2 ust. 2 Fraud Act 2006, czyli jeśli jest nieprawdziwe lub wprowadza w błąd oraz jeśli składająca je osoba wie o fakcie nieprawdziwości oświadczenia lub wprowadzania przez nie w błąd lub wie, że może ono być nieprawdziwe lub wprowadzać
w błąd. Podkreślić należy, że potrzebna jest rzeczywista wiedza, że oświadczenie może być fałszywe. Nie wystarczy sama świadomość ryzyka, że oświadczenie może być fałszywe.679

Oświadczenie natomiast to jakiekolwiek oświadczenie traktujące o faktach lub prawie oraz stanie umysłu osoby składającej lub innej osoby.680 Oświadczenie może być wyrażone wprost ale może także być domniemane.681 W omawianej ustawie nie wskazano katalogu sposobów składania przedmiotowych oświadczeń, a zatem można je złożyć w każdy możliwy sposób: ustnie, pisemnie, przez zamieszczenie postu na stronie internetowej,682 przez gest czy zachowanie, a także w każdym możliwy inny sposób. Na potrzeby powyżej opisanych uregulowań oświadczenie uznaje się za wykonane lub jakkolwiek zasugerowane, jeśli zostało złożone w jakiejkolwiek formie do dowolnego systemu lub urządzenia przeznaczonego do odbioru, przekazywania lub reagowania na komunikację z udziałem ludzkiej interwencji lub bez niej.683 Nie ma potrzeby udowadniania, że złożone oświadczenie zadziałało, tzn. że pokrzywdzony uwierzył w prawdziwość złożonego oświadczenia.684 W literaturze typ ten nazywa się tzw. „pozytywnym” oszustwem, czyli gdy pozwany złożył oświadczenie mające na celu osiągnięcie zarobku lub spowodowanie straty.685

Oszustwo przez fałszywe oświadczenie różni się znacząco od przepisów, które zostały nim efektywnie zastąpione, przede wszystkim tym, że oskarżony może ponieść odpowiedzialność bez uzyskania jakiekolwiek zysku w postaci dóbr materialnych czy niematerialnych. Wystarczającym jest aby przestępstwo to zostało popełnione w zamianie.686

Oszustwo przez złożenie fałszywego oświadczenia najczęściej kojarzy się z użyciem mowy lub z pisemnym oświadczeniem. Ale może być popełniane także w sposób dorozumiany. Przykładowo oszustwo przez oświadczenia popełniane jest w sposób dorozumiany gdy osoba używa nieuczciwie karty kredytowej. Przedkładając kartę składa fałszywe oświadczenie, że posiada autoryzację do przeprowadzenia określonej transakcji przy użyciu karty. Może to być przebywanie w zastrzeżonej przestrzeni i sugerowanie, że się ma prawo tam przebywać, np. nielegalne logowanie się na strony internetowe, czy podłączanie się do zastrzeżonej sieci komputerowej.687

W myśl art. 3 Fraud Act 2006 oszustwo przez nieujawnienie informacji polega na tym, że kto nieuczciwie nie ujawnia innej osobie informacji, jeśli istniał prawny obowiązek ich ujawnienia z zamątem, by przez to zachowanie uzyskać korzyść dla siebie lub kogoś innego czy spowodować straty kogoś innego lub narazić kogoś na ryzyko straty. Przestępstwo to może zostać popełnione jedynie jeśli istnieje prawny obowiązek ujawnienia informacji. Sposób ten nazywa się tzw. „negatywnym” oszustwem, czyli celowym pominięciem informacji mającym

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685 Zob. S. Ramage, Fraud Investigation: Criminal Procedure and Investigation, iUniverse Inc, New York 2009, s. 35.
skutkować zabezpieczeniem osiągnięcia lub utrzymania zysku lub doprowadzenia do straty. Jest to oszustwo ujęte bardzo szeroko. Obowiązki, o których mowa w przepisie, mogą pochodzić z bardzo różnorodnych źródeł. Mogą to być: akty prawne, umowy, porozumienia i wszelkie inne. Co ciekawe przepis ten nie jest ograniczony przez zobowiązania do nieujawniania informacji, wynikające ze statutów i regulaminów.

Kolejnym sposobem popełnienia przestępstwa oszustwa jest nadużycie stanowiska określone w art. 4 Fraud Act 2006. Osoba, która zajmuje stanowisko (pozycję), które zobowiązuje do chronienia lub niedziałania przeciwko interesom finansowym innej osoby, nadużywa go w zamierze doprowadzenia do uzyskania korzyści dla siebie lub kogoś innego lub spowodować straty kogoś innego lub narazić kogoś innego na ryzyko straty. Dotyczy to także osoby, której zachowanie polegało bardziej na zaniechaniu niż na działaniu. W przepisie tym chodzi o stanowiska, czy pozycje charakteryzujące się zaufaniem lub powiernictwem (position of trust, position of trustee). Osobom na takich stanowiskach znacznie łatwiej jest popełnić przestępstwo oszustwa, ponieważ niejednokrotnie dysponują oni odpowiednimi informacjami, narzędziami i środkami. Przykładowo kiedy dana osoba zajmuje stanowisko opierające się na zaufaniu i jest pracownikiem, może ona dokonać oszustwa przeciwko swojemu pracodawcy bez potrzeby użycia fałszywego oświadczenia, ponieważ w ramach wykonywanej pracy dysponuje powierzonymi mu dobrami należącymi do pracodawcy takimi jak pomieszczenia czy pieniądze, a zatem posiada niezbędne narzędzia aby móc dokonać oszustwa.

Kolejne przestępstwo, o którym traktuje Fraud Act 2006 to nieuczciwe uzyskanie usług. Przepis ten zastąpił uchylony art. 1 Theft Act 1978. W myśl art. 11 Fraud Act 2006 przestępstwo to popełnia osoba, która uzyskuje dla siebie lub kogo innego usługi przez nieuczciwe działanie, przy spełnieniu następujących warunków:

- usługi są dostępne na podstawie tego, że zapłata za nie została, jest lub będzie wykonana,
- sprawca uzyskuje usługi bez jakiejkolwiek płatności za nie lub płacąc w niepełnej wysokości,
- sprawca uzyskuje usługi wiedząc, że są one lub mogą być świadczone na podstawie tego, iż płatność za nie została, jest lub będzie dokonana, a jego zamiarem jest nieuściskzenie za nie płatności lub uiszczenie jedynie w części.

Przestępstwo to dotyczy uzyskania wszelkich możliwych usług. Elementy tego przestępstwa takie jak: nieuczciwość i zamiar, muszą wystąpić przed lub w tym samym czasie co uzyskanie usługi. Fakt, że omawiane przestępstwo nie wymaga dowodu popełnienia czynu

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689 Zob. S. Ramage, Fraud Investigation: Criminal Procedure and Investigation, iUniverse Inc, New York 2009, s. 35.
691 Zob. S. Ramage, Fraud Investigation: Criminal Procedure and Investigation, iUniverse Inc, New York 2009, s. 72.
693 Zob. S. Ramage, Fraud Investigation: Criminal Procedure and Investigation, iUniverse Inc, New York 2009, s. 72.
bezpośrednio polegającego na oszustwie, daje możliwość ścigania go w sytuacjach, w których w poprzednim stanie prawnym nie byłoby to możliwe. A zatem przestępstwo to może zaistnieć w sytuacjach, w których nie miało miejsca jako takie oszustwo. Tytułem przykładu: gdy ktoś wchodzi do kina, niezauważony, przez otwarte drzwi przeciwpожarowe i w ten sposób może oglądać film bez placenia za bilet wstępu.

Zachowanie opisane powyżej w ramach czynu zabronionego stypizowanego w art. 11 ust. 3 lit. a Fraud Act 2006 zagrożone jest karą pozbawienia wolności nieprzekraczającą 12 miesięcy lub karą grzywny albo obiema tymi karami łącznie jeśli skazanie następuje w trybie uproszczonym. Natomiast jeśli do skazania dochodzi w trybie zwyczajnym tj. na podstawie aktu oskarżenia przestępstwo to zagrożone jest karą pozbawienia wolności nieprzekraczającą 5 lat lub karą grzywny albo obiema tymi karami łącznie.

W tym miejscu warto wskazać, że w art. 6 i 7 Fraud Act 2006 określono nieakceptowane zachowania w postaci posiadania przedmiotów przeznaczonych do popełniania oszustw oraz wytwarzania i dostarczania takich przedmiotów. Art. 6 Fraud Act 2006 mówi, że osoba winna jest popełnienia tego przestępstwa jeśli ma w posiadaniu lub pod swoją kontrolą jakikolwiek przedmiot używany w trakcie lub w związku z jakimikolwiek oszustwami. W myśl art. 7 Fraud Act 2006 osoba jest winna popełnienia przestępstwa, jeśli wytwarza, dostosowuje, dostarcza lub oferuje dostawy każdego przedmiotu wiedząc, że jest zaprojektowany lub przystosowany do użytku w trybie dokonywania oszustwa lub w związku z oszustwem lub zamierza go wykorzystać do popełnienia lub pomagania w popełnianiu oszustw. Zagrożenie karą w przypadku obu przestępstw jest takie samo. W postępowaniu uproszczonym jest to kara pozbawienia wolności nieprzekraczającą 12 miesięcy lub karą grzywny albo obie te kary łącznie. Natomiast jeśli do skazania dochodzi w trybie zwyczajnym tj. na podstawie aktu oskarżenia przestępstwo to zagrożone jest karą pozbawienia wolności nieprzekraczającą 5 lat lub karą grzywny albo obiema tymi karami łącznie.

W obu przypadkach nie ma potrzeby wykazywania specyficznego zamiaru, wystarczy zamiar ogólny. Sprawca nie musi mieć psychicznego stosunku do tego przedmiotu, wystarczy, że ma go w posiadaniu lub go kontroluje. W rozumieniu omawianych przepisów przedmiotem będzie także program komputerowy oraz dane przechowywane w formie elektronicznej.

Reasumując należy powiedzieć, że Fraud Act 2006 został stworzony przez legislatorów w celu uproszczenia i zmodernizowania istniejącego prawa tak aby stało się bardziej dopasowane do wymogów XXI wieku i także aby aby pomóc w kontrolocie długości i złożoności postępowań i procesów w przedmiocie oszustwa. Przez wielu jest on postrzegany jako akt prawnym, który poprawił konstrukcje czynów zabronionych wprowadzonych Theft Acts (1968 – 1996), skryminalizował odmienne typy oszukańczych zachowań i zapewnił oskarżycielom nową siłę do zwalczania oszustw. Regulacje zawarte we Fraud Act 2006 wydają się spełniać swoje zadania. Chociaż niedługo po wejściu w życie tego aktu prawnego brytyjscy oskarżyciele mieli wątpliwości co do skuteczności takich rozwiązań w praktyce. Chodziło głównie o obawę, że

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regulacje za bardzo teoretyczne. Konstrukcja oszustwa bez ofiar i pokrzywdzonych oczywiście ułatwiała pracę oskarżycielom bo nie wymagała dowodów takich jak w poprzednim porządku prawnym i tym samym skraca czas trwania procesu. Jednocześnie jednak sąd przyzwyczajony był do zeznań pokrzywdzonych co mogło powodować trudności w przekonaniu sądu. Obawiano się także, że jeśli pokrzywdzony nie będzie wskazany w sprawie sąd nie zasądzi mu odszkodowania 702.


Zakończenie

Reasumując należy powiedzieć, że art. 297 typizuje w § 1 oszustwo kredytowe z działania i w § 2 oszustwo kredytowe z zaniechania, natomiast § 3 traktuje o sytuacji, w której sprawca nie będzie podlegal karze 705. Przestępstwo z art. 297 § 1 k.k. jest przestępstwem formalnym, czyli do znamion jego popełnienia nie należy skutek. Samo przedłożenie określonego w przepisach dokumentu czy oświadczenia stanowi czynność sprawcą. W tym zakresie polski ustawodawca obrał kierunek zbliżony do ustawodawcy brytyjskiego. Jednak przepisy Fraud Act 2006 wydają się być zdecydowanie bardziej uniwersalne. Fraud Act 2006 został stworzony przez legislatorów w celu uproszczenia i zmodernizowania istniejącego prawa tak aby stało się bardziej dopasowane do wymogów XXI wieku i także aby móc w kontrolowaniu długości i złożoności postępowań i procesów w przedmiocie oszustwa 706. Przez wielu jest on postrzegany jako akt prawny, który poprawił konstrukcje czynów zabronionych wprowadzonych Theft Acts (1968 – 1996), skryminalizował odmienne typy oszukańczych zachowań i zapewnił oskarżycielom nową siłę do zwalczania oszustw 707. Regulacje zawarte we Fraud Act 2006 wydają się spełniać swoje zadania. Chociaż niedługo po wejściu w życie tego aktu prawnego brytyjski oskarżyciele mieli wątpliwości co do skuteczności takich rozwiązań w praktyce. Chodziło głównie o obawę, że regulacje za bardzo teoretyczne. Konstrukcja oszustwa bez ofiar i pokrzywdzonych oczywiście ułatwiała pracę oskarżycielom bo nie wymagała dowodów takich jak w poprzednim porządku prawnym i tym samym skraca czas...
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Abstract: European financial regulation tries to regularize Islamic capitals without resolving the legal deadlock. The evidence shown the lack of a responsible political will considering Sharia finance specificities and its social characteristics as a financial alternative; a regulation that consists on forcing Islamic financial norms exploitation Islamic capitals to cover the crisis of liquidity in conventional market. In this paper there is an attempt to focalize this question analyzing different aspects of financial organization between the conventional system and Sharia one.

Keywords: Finance, Sharia, guaranties, legislation, tax, practices, legitimacy, rules, growth, acceptance.

Introduction

Global economic organization reactivated, in some way, a certain new “Mammonism”, the greedy pursuit of riches and hoarding money, anywhere and no matter how. To achieve this goal, several demagogies are invested, among them slogans and principles sustained by a deregulation increasing wealth for a minority and generating outrageous inequalities. On its part, conventional global finance industry based on usury, unfairness and speculative practices, imposes a review of the regulation governing the financial activities. Less barriers, more deregulation and an utilitarian logic are the arguments used to improve this evolution.

In this postulation, Islamic finance is introduced to the global market. Apparently, the prohibition of usury, exclusion of aleatory contracts, the share of profits and losses no longer contradicts the interests of the “civilized world”. Only that facts and statistics shown that majority of individuals in Europe do not profit on guarantees, possibilities and facilities offered by Sharia finance. They are still deprived from the services that could save them from the extreme exploitation and from the high rate of interests dictated by the banks.

European financial regulation, in an ill-considered and cursory attempt, tries to assimilate Islamic capitals, but had never considered the legal specificities of Sharia finance nor had instituted a consistent policy to regularize it. It is an integration process consisting on forcing Sharia norms and exploitation Islamic capitals to cover the insufficient liquidity in a risky unstable market.

This paper is an endeavor to understand and lighten the official status of Islamic finance in some Europeans regulation models. Firstly, the paper highlights the political ambiguous attitude facing Sharia finance in Europe, secondly the analysis focuses on the legal status and provisions organizing this activity comparing the conditions requested to undertake it, with a specific interest to the tax policy.

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Paths of Islamic finance in Europe

In Europe, Islamic finance experience is generally considered recent, but thriving thanks to its characteristics more useful for individuals and society. The hope of a financial system free from usury would be no reprehensible in the popular conscience, the crossbreed between the secular and the religious seems to convince European modernized thought. However facts show an increasing violence and discrimination against Islam and Muslims. In public medias, politicians and others express officially the rejection of Islam as religion and as a social model denying to Muslims, (minority in Europe), the basilar rights recognized in the international conventions and treaties. The popular consciousness is hammered by ineradicable images of terrorism and inconsolable cultural differences. The impact of this “status quo” is rooting the separation between Muslims and the rest of the communities in the same State and deepening the isolation of Muslims around the World.

To understand the evolution of Islamic finance in Europe we should consider different models according to each European country covering the practical, legislative, scientific and political paths. Before starting, it is useful to point out the general factors that deeply signed the evolving of Islamic finance in Europe, most important among them are:

- Ignorance of the principles of Islamic finance and the lack of unified marketing policy,
- disintegration of Muslims resulting from a weak cooperation and coordination,
- weak competencies and professional training,
- lack of Sharia supervisory and jurisprudence experiences,
- the attitude of Other religions and politicians against Sharia finance and Islam,
- taxation policy and accounting technical barriers,
- Linkage between Islamic finance and terrorism.

A report published, on 2014, by “Baytuka lil abhath”, affiliated to Kuwait Financial House confirmed that Islamic finance is making a continuous progress in Europe since its inception in the early 1980s. That Islamic funds based in Europe hold $ 14.6 billion in managed assets, accounting for 19.8% of the assets managed by Islamic funds worldwide. But unfortunately Europe's share of the global “sukuk” market is unrepresentative. In the first quarter of 2014, the total asset of “sukuk” did not exceed $ 345.2 million, representing only 0.13% from the global asset. In the recent years, United Kingdom and Luxembourg announced the issuance of “sukuk” by sovereign bodies outside the Islamic countries. In a prediction of Thompson Reuters’ report in 2016, the asset of Islamic finance may outweigh $3.5 trillion by 2021 considering the global scale, 35 countries are approaching Islamic finance regulation in 2015. Around the world, Islamic financial industry disposes on 622 institutions offering Islamic finance qualified formation, among them 201 provide Islamic finance degrees. Europe for its part has 109 institutions proposing qualified Islamic finance education, 63 percent of these institutions are concentrated in UK.

Despite positive developments, challenges facing the Islamic finance industry are more widely spread in European capital markets. The main obstacles result from its specific regulatory. The legal dispositions of this system established a different social and economical role from those known in the conventional system (prohibition of usury, speculation, uncertainty). The concept

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2 Interview with k. M. Al-Aboodi, Chief Executive Officer, Islamic Corporation for the Development of the Private Sector (ICD), published on ICD-Thomson Reuters Islamic finance development report 2016.
of economic redistribution and scarcity of resources are based on completely different vision. Consequently it’s not prudent to speak about harmonization or unification. Security and supervisory regulations covering all services and products on the global financial market cannot be applied drastically to Sharia finance. The controlling and monitoring processes remain difficult to verify because of the differences in standards used. Consequently, Islamic banks are not allowed to participate in any stock exchange so they are not obliged to publish their financial statements. Another divergence comes from the tax standards applied to financial activities, in Sharia Taxes have a different social connotation and function different from the practiced one in the conventional finance.

Financial activities and institutions on the light of EU legislation

EU legislation on financial activities and institutions offer a pluralism of texts that makes the follow-up of the evolution a hard mission for non specialists. But it shows a concrete harmonization process implemented for years. The success of this process was culminated by the establishment of the Euro as a European common currency. In 2015 this currency includes 19 countries, the hope now is focused on a single financial market, depending on a radical political pragmatism doped by competitive pressure resulting from the U.S. financial system domination. According to European legislations we distinguish three financial institutions allowed to exercise them activities on the EU space, and they are: Credit institutions (banks); Investment firms; Payment institutions.

In the European Directive 2006/48/EC, relating to the taking up and pursuit of the business of credit institutions, article 4 established a large definition for the institutions providing financial services and activity.

(a) Credit institution

“for the purposes of this Directive, the following definitions shall apply:

(1) ‘credit institution’ means: (a) an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account; or (b) an electronic money institution within the meaning of Directive 2000/46/EC”.

The credit institution is defined here by it function consisting firstly in collecting funds or capital refundable if required by the customer, secondly in according credits when all the requested guaranties are fulfilled. In Sharia system this function (assigning credits) was accomplished by individuals under the form of “Qard Hassan”, and the institutional form was limited in sovereign credits and keeping the public budget in positive. Modernized credit institutions, offering credits to public appeared very late around the seventies from the twentieth century. The following paragraph of the cited article (Directive 2000/46/EC) states the main
condition requested to undertake the business of the credit institution that is an authorization. The intended authorization can take any form, and must be delivered by the competent authority to supervise the activity on the territory where the credit institution carries out its activity, as established in the third and fourth paragraphs. Article 12 of the Directive 2006/46/EC provides for situations where authorization can be denied settling a certain limitation as in the case of:

- lack of information about the identities of the shareholders or members; or in case when the sound and prudent management conditions are not satisfied;
- when the close links between credit institution and other natural legal person avoid an effective exercise of their supervisory by those authorities;
- when the legal provisions of a third country governing one or more natural or legal persons with which the credit institutions have close links, or difficulties involved in the enforcement of this legal provisions, prevent the effective exercise of their supervisory functions.

For Islamic financial institutions desiring to undertake them activities in Europe, more conditions are requested. From one side these institutions must fulfill all guarantees requested in the secular legislation organizing financial activities as for all banks, simultaneously must be in total conformity with the standards settled by Sharia rules and Supervisory Board\(^9\).

For providing services in a member country from the EU, article 28 (1) settles the following: “Any credit institution wishing to exercise the freedom to provide services by carrying on its activities within the territory of another Member State for the first time shall notify the competent authorities of the home Member State, of the activities on the list in Annex I which it intends to carry on”. For an Islamic credit institution that wants to exercise its activity in Europe, if it comes from outside Europe, it must fulfill specific conditions added to those mentioned before (Foreign company, or capital).

(b) Investment firm

Directive 2004/39/EC, defines investment firm in the article 4 (1) as following: “Investment firm’ means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis”. Up to this statement investment firms must dispose on a legal person and exercise them activities in providing investment services in a regular way. For a first sight it seems excluding firms without legal personality, but this article comes up against recognizing the investment firms without legal personality provided to fulfill the following conditions:

(a) their legal status ensures a level of protection for third parties’ interests equivalent to that afforded by legal persons, and

(b) they are subject to equivalent prudential supervision appropriate to their legal form.

However, where a natural person provides services involving the holding of third parties' funds or transferable securities, he may be considered as an investment firm for the purposes of this Directive only if, without prejudice to the other requirements imposed in this Directive and in Directive 93/6/EEC, he complies with the following conditions:

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In 2002, the Malaysia-based Islamic Financial Services Board (IFSB) was established as an international standard-setting body for Islamic financial institutions. In 2004, the Islamic Bank of Britain became the first Islamic commercial bank established outside the Muslim world.

(a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors.

As for the credit institution, investment firms must be authorized according to the statement of the fifth article of the Directive 2004/39/EC, “Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis be subject to prior authorization in accordance with the provisions of this Chapter. Such authorization shall be granted by the home Member State competent authority designated in accordance with Article 48”. And up the seventh article the competent authority delivers the authorization only if all requirements under the provisions adopted pursuant to this Directive are meet.

(c) Payment institutions

Directive 2007/64/EC, in Article 4 (4) defined the payment institution as following: “payment institution, means a legal person that has been granted authorization in accordance with Article 10 to provide and execute payment services throughout the Community”.

The role of the payment services institutions is limited on intermediary activities transferring funds registered on a payment account or of cash for the account of a third party. Generally the payment services is divided in two categories: payment realized with a payment account and those realized without account. The “Directive on Payment Services in the Internal Market” (PSD2) of 2015 gave a similar definition but introducing some change. In the article 4 (4), it establishes that “payment institution means a legal person that has been granted authorization in accordance with Article 11 to provide and execute payment services throughout the Union”. It is clear that in this definition the Directive provide a European payment area with all the necessary guaranties but simultaneously it extends the payment to all currencies and to the situation where only one payment institution is exercising its activities in EU. Also it implements the security dispositions for electronic payment and allowed the “third party providers”, to realize specific services related to payments.10

Financial activities and institutions on the light of Sharia

Islamic financial institutions are divided in three main sections: Al-Masraf, mistakenly defined as banks in the financial literature, are institutions receiving deposits from individuals and companies for the purpose to invest this capital and create wealth. This institution acts in accordance with technical and legal systems settled by Sharia. Among the rules governing this financial process we find the norm of Al-Kharaj bi-daman that means: what results from the exploitation of invested good (capital) is a guarantee for this good, in case when some defect affects the good. Then the rule of Al-Ghunnu bil-Ghormi that means: one who gets the benefit of something must bear the damage. Such institution carries out a mission unifying banking and financial brokerage using legal forms and instruments in which this institution can fulfill the role of a salesman, a purchaser, partner and financier.11 In the conventional system, the bank is only a mediator between savers, depositors and investors.

Comparing between the two financial models of Islamic financial institutions and practices constitute a real challenge for the European financial regulatory and supervisory bodies. This challenge begins with the technics mobilizing and deploying funds to make profits. In some

specific situations mobilizing funds demands asset management, and the implying commercial banks in asset management is a practice unknown in the tradition of the conventional commercial banking; the same observation can be sustained regarding the use of funds, Islamic institutions will use contracts in which clients seem less protected and share the risk at the same level as for the bank, these contracts and practices never existed in the conventional banking12. Investing according to Sharia rules, investor do not receive any return for the deposit but a share of the profits13.

For what regard Islamic investments firms desiring to undertake business in Europe, a general consideration of European financial legislation suggests that discrimination that could reach foreign companies is formally prohibited. Only that the last decades European financial authority fulfilling its mission of granting stability and security in the market, clearly verify the capital of Islamic origin considering the terrorist incidents that reached Europe in particular14.

Investment companies (Sharikat Al-Istithmar): are institutions that provide them business (investment) according to the principles of Sharia, and are considered companies and not banks15. Instruments, methods and the field of investment must meet the purposes of Sharia “maqasid al-Sharia”.

Islamic economy is based on the rule of “Al-Istikhlaf”16 that presents humankind only as a vice-regent and manager of the wealth and richness (capitals, goods) that belong to God 17. Consequently, hoarding money is a sin that deprives individuals and the community exploiting it and producing a new wealth18. Consideration is given to equity, risk and profit sharing, fair redistribution of resources and incomes. Speculation and hazard are excluded from the investment technics, money can never be a source of wealth if not invested in a real economic process19.

“Takaful” companies (social solidarity and assistance): Islam has adopted an integrated system of social solidarity, whether in terms of principles or executive instruments. It is a concept that refers to the interdependence in all its material and moral aspects. Islam has considered social solidarity as a duty for every Muslim within the limits of his capacity.

To sustain this construction of social solidarity, Islam introduced the institutions of “Zakat”, “Waqf” and “Sadaqa”20, but in finance the role of “Takaful” companies is a money asset management, not giving guaranties in compensation of an amount paid, as in the case of commercial insurance companies. Takaful insurance is defined as the cooperation of a group of individuals that decided to assume the potential risk (because of the job or other reason), opening an account in which the subscriber's premiums are collected on a donation basis, and the charges and other fees are paid out, this account is managed in accordance with Sharia rules21. The process consists in the fact that the company designs “takaful” portfolio for specific

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16 Quran 2 : 30, (suratu Al-Baqara verse 30).
18 Quran 9 – 34-35, (suratu Al-Tawba verses 34-35), and Quran 59-7, (suratu al-Hashr, verse 7)
situation (accident), and determines the nature of the risk and makes appropriate calculations for the compensation program. Then this company proposes the product to the interested people, the amount of the premium is received as a donation to help the workers or employees in the same category or institution.

In United Kingdom

In 1978 British financial instances authorized the first Sharia compliant bank (Islamic Banking International Holding). Another positive experience was repeated with “Al Baraka” International Group, (1987-1993), which deposits grew from 28 million pounds in 1983 to 154 pounds in 1991. Because of the potential of the market, British authorities gave licenses to conventional banks to open windows for Islamic products (Murabaha, Mudaraba, Musharaka, Istisna’a, al’Ijar)22. But this opening was halted by the crisis that quaked the London market between the eighties and nineties when financial authority emanated a law (the Banking Act of 1987), increasing taxes and control on foreign financial institutions.


In France

The case of France is the proof that the volume of the community has less effect on the political decision. France with the most important Muslim community is among the latest European countries introducing, in a limited way, Islamic finance in the French market.

Most formal implication for French public authority in accommodating Islamic finance was in 2007, when the Economy Minister “Christine Lagarde” engaged in a public policy to remove barriers facing the potential market of Islamic finance in France. on 2011, France issued the first “sukuk” Sharia compliant. The “Chaabi” Bank Group and the “Banque de France” opened the windows of Islamic products (Murabaha and Ijara), which meet the requirements of the French real estate market25.

It is important to point out that the French Financial Markets Authority (AMF) note of 17 July 2007 is the first French law to accommodate Islamic finance. It authorized banks desiring to undertake Islamic financial activities to use extra-financial selection criteria (developing index-based management considering Sharia compliant index: Dow Jones Islamic Index, FTSE Islamic Global Index, S & P Sharia Index, etc.); to resort to the services of a Sharia board, provided that this do not contravene the management company's autonomy; and to purify the

22 Great Britain disposes on 22 banks offering products that comply with the Sharia, including 5 Islamic banks and 17 conventional banks with windows offering Sharia complying products.


unclean portion of their dividends by making donations to organizations recognized as being of public utility (such as the “Institut du Monde Arabe”), in a limit of 10%26. According to realized steps in France there is a guaranteed parity of tax treatment: compensation paid by “sukuk” is deductible from taxable income; Non-resident “sukuk” investors are exempt from withholding tax in France; no double stamp duties on “sukuk” issuances27.

Islamic financial specificities challenging European legislator28

<table>
<thead>
<tr>
<th>Islamic financial specificities</th>
<th>Specificities of conventional financial system</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibition to apply interest rates both on borrowing and lending operations, prohibition of speculation</td>
<td>Use of interest rates both on borrowing and lending operations, use of speculation</td>
</tr>
<tr>
<td>Profit and loss sharing</td>
<td>No profit and loss sharing</td>
</tr>
<tr>
<td>Bank as partner of depositors and borrowers</td>
<td>Bank as principal and agent of its customers</td>
</tr>
<tr>
<td>No profit if the financed counterpart has a loss</td>
<td>Interest has to be paid even if the financed counterpart has a loss</td>
</tr>
<tr>
<td>Investment must be only in activities compliant with the Sharia</td>
<td>No limit to investments</td>
</tr>
<tr>
<td>Prohibition of speculative practices</td>
<td>Speculative practices are allowed</td>
</tr>
<tr>
<td>It is necessary to create a special reserve in which put the Islamic tax (zakat) to be used for charity</td>
<td>Charity is discreional</td>
</tr>
</tbody>
</table>

In Sharia teachings, taxation system is a part of the public finance organization, and are defined as contributions imposed by the public power on individuals and other entities (e.g. corporations) to bear the cost of public services. They can be paid in cash or in kind and can be subject to certain conditions based on Sharia logic:

- Tax is a duty predetermined either by the Quran or by Sunna;
- Tax is imposed by a Muslim legislator on individual and companies, even if living abroad;
- Tax is levied in cash (Naqd) or in kind (‘Ayn);

Considering the legitimacy of taxes in Sharia, and except for these cases above, the State may not impose taxes, only in case of necessity, the process and under the following conditions:

• taxes must be fair, and justly distributed between people, everyone according to his
wealth, and may not be charged on the poor neither on the rich just because they are
rich. Taxes can be imposed when available conditions allow that:
• when the state treasury is in crisis and there is an evident lack of resources;
• imposition cannot be perpetual and is authorized just to resolve the crisis and satisfy
public needs;
• spending these resources rationally considering the interests of the nation.

Conclusion

Islamic finance in Europe is being blocked, from its beginning, between political ambiguity and
legal uncertainty, so what could be the proposal to overtake and resolve these ambiguity and
uncertainty?

For politicians, traditional answer to this problem begin with the necessity of a deep work on
the mentality of people, manipulating their reasoning and thinking. It should be a sort of
compromise gathering different authorities: political, financial, social and cultural to create a
space for the newcomer ovoiding it exclusion. For experts and specialists, it is noted that Islamic
banking services provided by European banks are old and have not received enough attention
to be actualized and expanded.

In financial practices “in senso stretto”, many technical solutions are being proposed to promote
Islamic finance in Europe focusing on new instruments compatible with the purposes of Sharia
on the one hand and with the need of people on the other.

The logical reasoning shows that non-Muslims consumer idea about Islamic finance is not clear
and should be defined, not only for corporations and business managing huge capital but also
considering individuals and foyers. The direct contact and the communication with masses can
inform the customer and offer him a second choice, but in the same time can anger the rival.

The growth of the Islamic financial industry in Europe is addicted to the political and social
will and acceptance. When such conditions could be meet, this financing system can express its
real potential as a model with a distinguished legal guaranties accorded to the client and with a
range of ethical and organizational rules providing innovative and competitive services and
products.

29 M. Qahf, “Public revenues of the Islamic State and its contemporary applications”, IRTI, II ed., Jeddah, 2000,
p. 50.