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00-876 Warszawa ul. Ogrodowa 58, budynek B, 2. piętro / 00-876 Warsaw 58 Ogrodowa St., Building B, 2nd floor, PL
tel. +48 22 18 24 942
eppism.ewspa.edu.pl

From the Editor

The first issue of the quarterly in 2026 is not themed. In it, we publish articles from quite diverse fields, but concerning – as always in our pages – important issues in the field of jurisprudence, particularly from a comparative perspective, and international relations.

In this vein, the article by the journal's editor-in-chief, Professor Jerzy J. Wiatr, analysing the threats to democracy in the 21st century, deserves particular attention. Meanwhile, Jan Gajewski, a graduate of our university, offers an analytical examination of the dangerous phenomenon of state collapse.

An important warning sign regarding the emerging ideas in Poland of leaving the European Union is the article by Monika Bator-Bryła, which outlines the practical consequences of Brexit for EU citizens in the context of the free movement of persons.

In the section on foreign legal systems, attention should be drawn to the article by Felipe de la Mata Pizaña, discussing certain aspects of electoral system oversight in Mexico, as well as that by Nato Gugava and Nino Vasadze – dealing with qualification procedures for teachers in Georgia. Giacomo Oberto, meanwhile, describes strategies for dealing with backlogs and delays in the courts – a problem that is, unfortunately, ever-present in the Polish justice system.

The other articles are also well worth a careful read. They address a wide range of issues, such as railway safety, the sources of international commercial law, competition law and the right to housing.

Tit. Prof. Roman Wieruszewski, DSc,
Rector of EULA

Od Redakcji

Pierwszy w 2026 roku numer kwartalnika nie ma charakteru tematycznego. Publikujemy w nim artykuły z dość odległych dziedzin, ale dotyczące – jak zawsze na naszych łamach – ważnych problemów z zakresu prawoznawstwa, w tym zwłaszcza z perspektywy porównawczej, oraz stosunków międzynarodowych.

W tym nurcie na szczególną uwagę zasługuje tekst autorstwa naczelnego redaktora pisma profesora Jerzego J. Wiatra, analizujący zagrożenia dla demokracji w XXI wieku. Z kolei Jan Gajewski, absolwent naszej uczelni, porusza w sposób analityczny niebezpieczne zjawisko, jakim jest upadek państwa.

Ważnym ostrzegawczym sygnałem dla pojawiających się w Polsce pomysłów wyjścia z Unii Europejskiej jest artykuł Moniki Bator-Bryły przedstawiający praktyczne konsekwencje brexitu dla obywateli UE w kontekście swobodnego przepływu osób.

W ramach prezentacji zagranicznych systemów prawnych należy zwrócić uwagę na artykuł Felipego de la Mata Pizaña, omawiający pewne aspekty kontroli systemu wyborczego w Meksyku, a także Nato Gugavy i Nino Vasadze – traktujący o procedurach kwalifikacyjnych dla nauczycieli w Gruzji. Z kolei Giacomo Oberto opisuje strategie radzenia sobie z zaległościami i opóźnieniami sądowymi – problem niestety stale obecny w polskim wymiarze sprawiedliwości.

Pozostałe teksty również zasługują na uważną lekturę. Poruszają zróżnicowane problemy, takie jak: bezpieczeństwo obszarów kolejowych, źródła międzynarodowego prawa handlowego, prawo antymonopolowe czy prawo do mieszkania.

Prof. zw. dr hab. Roman Wieruszewski,
rektor EWSPA

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Felipe de la Mata Pizaña*

The Role of the Electoral Court of the Federal Judiciary of Mexico in the Construction of an Inclusive and Parity Democracy

[Rola Trybunału Wyborczego w ramach Federalnego Sądownictwa Meksyku w budowaniu demokracji opartej na integracji i parytetach]

Abstract

In the last twenty-five years, electoral justice in Mexico has contributed to the protection and effective exercise of women's right to vote. From the judicial function, the right to be nominated by political parties and effective access to elected office has been strengthened.

The Mexican Electoral Court has generated a relevant line of case-law on the right of women to vote, which has also been extended to the parity integration of political parties' governing bodies. This text consists of two chapters. The first chapter describes the path of this protection, from the establishment of gender quotas in the electoral law to the constitutional reform on total gender parity. The second chapter develops the electoral case-law based on emblematic cases on this issue.

Keywords: electoral justice in Mexico, gender parity in politics, gender quotas, electoral law and women's rights, party nominations and gender equality, Electoral Court of Mexico case law.

* **Felipe de la Mata Pizaña** – Full Professor, PhD in Law, National Autonomous University of Mexico (UNAM, affiliation); Justice of the Superior Chamber of the Electoral Court of the Federal Judiciary (Mexico); https://orcid.org/0009-0005-8416-9659; fdelamata.pizana@te.gob.mx / profesor prawa, PhD, Narodowy Uniwersytet Autonomiczny Meksyku (UNAM, afiliacja); sędzia Izby Wyższej Trybunału Wyborczego w ramach Federalnego Sądownictwa Meksyku.

I. INTRODUCTION

Mexico is a benchmark in the integration of parity in popularly elected bodies. Currently, several city councils, several local congresses and the Chamber of Deputies are made up of a majority of women, or women make up half of their members or are very close to half of the genders that comprise them.

In the last twenty-five years, electoral justice in Mexico has contributed to the protection and effective exercise of women's right to vote, the right to be nominated by political parties and effective access to elected office. This path has gone through several legal and constitutional electoral reforms, which started from the formula: the parties "may nominate" to another formula: the parties "shall nominate". This led to the installation of gender quotas and, subsequently, to total parity in elective public office. As a result, the Mexican Electoral Court has generated a vast jurisprudential line on the right of women to vote, which, in addition, has been extended to the parity integration of political parties' governing bodies.

This text is composed of two chapters. The first deals with the path of this protection, from the establishment of gender quotas in the electoral law to the 2020 reform regarding total gender parity. The second chapter describes, in general, the corresponding case-law line, based on emblematic cases on this issue.

II. CONSTITUTIONAL RECOGNITION OF WOMEN'S RIGHT TO VOTE

In France[1], women pioneers of women's rights demanded that anti-discrimination laws should cease to be partial in their recognition of women's rights, and that the principle of a fundamental right to equality should be proclaimed. At first, electoral gender quotas were the legal mechanisms that, based on percentages or reserved seats, increased women's political participation. However, in 1982, the French Constitutional Council invalidated the bill that established that there could be no more than 80% of the same sex on the list for the municipal council (Scott, 2012: 83); quotas were criticized[2] and it

[1] The movement for parity in France began in the 1980s and was subsequently intensified at the Athens conference in 1992. See Scott 2012, 83.

[2] The various obstacles that in different political contexts affected the effectiveness of quota laws opened the debate on political gender parity. They demanded the design of lists of candidates with 50% of each sex sequentially and alternately (Archeti, 2011: 10).

was pointed out that they limited the fundamental rights of voters (universal suffrage), that they divided the citizenry into sex categories and introduced a new form of discrimination.

Hence, beyond quotas, a point of arrival was considered: parity, with the different view that representative democracy would solve the absence of women in politics. In 1992, in the search for a law to regulate gender parity, it was argued that in order to democratize politics, the gap between representatives and represented should be closed, universal citizenship should be admitted to include the excluded, and the recognition of the equality of women and men should be rethought.

1. Electoral gender quotas

The electoral gender quota is an affirmative action that seeks to place the right to political participation of women and men on an equal footing. Quotas are the reservation normally made by the electoral law or the Constitution so that no gender can have more than a certain percentage of representatives in legislative bodies (Rey Martínez, 1995: 84, 85, quoted by Carbonell, 2002: 305). In view of the fact that the number of women in popularly elected positions is still limited. Therefore, "[…] electoral gender quotas arise from the observation of the low rate of women accessing representative public office" (Carbonell, 2002: 306).

Electoral gender quotas in Mexico were first established in 1996, in the Federal Code of Electoral Institutions and Procedures (COFIPE), in a 70–30 percentage. Subsequently, in 2002, sanctions were included for non-compliance by the parties. In 2008, the COFIPE was modified to a 60–40 percentage in the registration of candidates of each gender.

The response to these quotas was a socialization of gender that was reluctant to mainstream. Although they had an impact on increasing women's political participation, they were insufficient or were evaded by political actors. This was reflected in actions such as frauds against the law, in cases such as the one known in Mexico as the "Juanitas",[3] the nomination of women in districts or municipalities that were not very competitive; the distribution of lesser amounts of funding to their campaigns, among other fraudulent situations.

Electoral gender quotas were replaced, when elevated to constitutional rank, with the principle of parity, in addition to being regulated in the General Law of Electoral Institutions and Procedures (LEGIPE) and in the General Law of Political Parties (LGPP).

[3] This was the name given to this case and to the phenomenon in which the women owners of the formulas, once they took possession of the elected positions, resigned the position so that the men could occupy it.

2. Electoral gender parity

At the European Summit on Women and Decision-making (1992), European women ministers and former ministers proclaimed the need to achieve a balanced distribution of public and political power between women and men. The Declaration presented "parity democracy", a concept which, although it does not appear literally, states: "Equality requires parity in the representation and administration of nations, women represent half of the intelligence and qualifications of humanity and their under-representation in decision-making positions constitutes a loss for society as a whole [...]. A balanced participation of women and men in decision-making is likely to engender different ideas, values and behaviors, which go in the direction of a fairer and more balanced world, both for women and men."

Subsequent European movements influenced the Latin American continent around 2007, at the X Regional Conference on Women in Latin America and the Caribbean, in the Quito consensus. At this conference, parity was recognized as a mechanism for promoting democracy and a goal for eradicating the structural exclusion of women. Thus, each of the countries represented was entrusted with the adoption of measures necessary for its effective implementation to be manifested in the representation of women in popularly elected positions.[4]

In 2010, the XI Regional Conference on Women in Latin America and the Caribbean was held and the Brasilia consensus was signed. Emphasis was placed on the implementation of parity in the composition of electoral lists, strategies for the equal access of women to decision-making spaces in political parties, campaign financing and electoral propaganda.[5]

Different meetings of women leaders were crucial to promote the inclusion of parity in regulatory frameworks. As a constitutional principle, it became mandatory for their societies and for the subjects involved in their electoral processes. According to studies by Nélida Archeti (2011) Beatriz Llanos (2013), Line Bareiro and Lilian Soto (2015), Latin America is the geographical area in which more countries have adopted gender parity in their legislations.[6]

From 1992 to the present, the concept of parity has acquired a more substantive development, to the point of gaining a "[...] predominant place in the debates on the enrichment of democracy. Unlike the quota, which is a temporary adjustment measure aimed at reducing the underrepresentation of women in politics, parity constitutes an accelerator of *de facto* equality and is

[4] See agreement 2 of the Quito consensus.
[5] See agreement 3 of the Brasilia consensus.
[6] The first countries to include gender parity were: Bolivia, Ecuador, Costa Rica, Nicaragua, Honduras and Mexico.

a definitive measure that seeks to ensure that political power is shared by men and women" (INSTRAW/UNIFEM, 2010, in Archeti, 2011: 22).

Thus, parity is a definitive measure that reformulates the conception of political power, redefining it as a space that must be shared equally between men and women (Llanos, 2013). And the fact is that: "parity implies a strictly balanced distribution of 50% for each sex, while quotas range between 30% and 40% of female representation" (Zúñiga, 2013: 89). In order to fulfill its objective, parity uses the resignification of the principle of representation based on a rewriting of the social pact, in which the other half of humanity is included. In this way, parity has the aptitude to be permanent, which is different from the temporary configuration of quotas (Zúñiga, 2013: 90).

Parity, according to its application, stands out for its three essential characteristics, which are:

1. It is used in collegiate and unipersonal bodies. It is applicable to representative positions in collegiate bodies, such as the legislature, as well as in those positions in which only one person represents the public office, such as municipal presidencies or governorships.
2. It is horizontal and vertical. Collegiate bodies are composed of 50–50 of each gender. In the case of unipersonal positions, of the total number for the same elected position, 50–50 must be distributed by each gender. In the case of odd-numbered bodies, they must conform to a difference between the two genders that is not greater than one. Parity must be considered integral.

In short, gender parity is a principle of balanced distribution of power that goes beyond equality. It is a proposal for the transformation of all areas of social life. Parity constitutes a strictly balanced 50–50 distribution for each sex, and aims to permeate transversally in all social and cultural spaces, through a rewriting of the social pact, suppressing the symbolism of sexuality in political representation.

3. Constitutional reform on electoral gender parity

The experience of quotas in different electoral processes was part of the reasons why, in the 2014 electoral reform, gender parity was included in the Mexican Constitution in Article 41, Base I, second paragraph. It was established as a mandatory principle for political parties in the nomination of candidates for the Congress of the Union and local legislatures.

In this context, electoral gender parity becomes a fundamental and transcendental issue to contribute to women's political participation, which involves the principle of substantive equality and non-discrimination. LEGIPE incorporates the principle of gender parity and adds that, in the candidate

formulas, the owner and the substitute must be of the same gender. It also provides that the lists of plurinominal candidacies must be made up alternately by the different sexes, so that both have the possibility of having access to representation.

Parity is established in Article 3 of the General Law of Political Parties. It is stated that each political party shall determine and make public the criteria to guarantee gender parity in the candidacies for federal and local legislators, which must be objective, ensuring conditions of equality between genders. It also establishes that no criteria will be accepted that would lead to any of the genders being assigned districts in which the party has obtained the lowest percentages of votes in the previous electoral process.

At that time, the Electoral Court of the Judiciary of the Federation (TEPJF, acronym in Spanish) established the parameter of validity of parity for the three levels of government. Thus, it established that parity for nomination in municipalities is not understood in the same way as for federal and local congresses ('Jurisprudences' 2015/6 and 2015/7). This is because it must be applied in an integral or dual manner (both vertically and horizontally), in such a way as to maximize the substantial equality of women's political rights at said level of government.

4. Constitutional reform on "full parity"

This reform fully protects women's equal access to public office: all authorities in the country must be composed on an equal basis. The second article, paragraph A, section VII, was amended, in the sense that in municipalities with indigenous population, representatives must be elected before the municipal councils observing the principle of gender parity in accordance with the applicable norms. Article 35, section II, establishes that it is the right of citizens to vote in conditions of parity for all popularly elected positions. Article 41 of the Constitution added that the law shall determine the forms and modalities for observing the principle of gender parity in appointments to the secretariats of the Federal Executive Branch and their equivalents in the states. The same principle will be observed in the integration of the autonomous agencies.

The principle of gender parity shall be observed for political parties in the nomination of their candidates. The exercise of public power must be made possible considering the rules to guarantee gender parity in the candidacies to the different positions of popular election. In Article 115, Section I, it was established that the municipal councils must also be integrated in accordance with the principle of gender parity.

5. Legal reform on gender parity and affirmative action

Legal regulations were amended to guarantee women's political rights. Although they stand out because they regulate gender-based political violence, they also include legal modifications of rules to make parity effective. Thus, the General Law of Electoral Institutions and Procedures now provides as follows:

- Political equality between women and men is guaranteed with the allocation of 50% of women and 50% of men in candidacies for elected office and in appointments to positions by designation.
- It establishes that the National Electoral Institute (INE), local electoral bodies (OPLES) and political parties must guarantee gender parity and respect for women's human rights (art. 3).
- Parties must draw up lists of candidates with gender alternation for each elective period (art. 14).
- The registration of candidates for municipal offices must guarantee the principle of parity and that alternates must be of the same gender (art. 26).
- The integration of INE's General Council, its commissions and the OPLES' management bodies must be parity (art. 36, 42 and 99).
- The integration of local electoral jurisdictional bodies must be gender parity and with alternation in the majority gender (art. 106).
- There must be horizontal and vertical parity in the election of municipal councils (art. 207).
- The obligation to observe gender parity at the local level and the power of the OPLES to sanction non-compliance is established (art. 233 and 235).
- For proportional representation (PR) deputies, of the 5 lists, at least 2 must be headed by formulas of the same gender, alternating each period; and the same applies for the national list of senatorial seats (art. 234).
- Parties must promote substantive equality and guarantee equal participation in the integration of their bodies and in the nomination of their candidates, as well as at the municipal level.
- The guarantee of equal participation of women and men in its internal processes for the selection of candidates is established (art. 23).

For the most part, all these new electoral norms took into account precedents and criteria established in sentences and the case law line generated by the Electoral Court (TEPJF). Therefore, the following section describes the jurisprudential line created in more than twenty-five years by the electoral justice regarding the protection of women's right to vote, as well as their inclusion in electoral and partisan bodies.

III. ELECTORAL CASE LAW: FROM GENDER QUOTAS TO GENDER PARITY

Through its chambers, the TEPJF has analyzed a variety of issues related to gender quotas and parity. The rulings of the TEPJF have been milestones and mechanisms for the constant promotion and expansion of women's rights.

This section describes some emblematic cases in which concrete actions have been taken to strengthen women's political participation. It is divided into the following subsections:

(i) foundations and origin of parity;
(ii) insufficiency in its regulation;
(iii) parity within political parties;
(iv) parity in governorships, and
(v) parity "in everything".

1. The origin of parity

Alternation in the proportional representation lists

In the 2009 federal congressional elections, a political party proposed that one of its proportional representation lists be headed by a woman. The second and third places were occupied by men. Finally, the fourth place was obtained by a woman, who claimed that the principle of alternation was violated and that she deserved the third place on the list.[7]

The Superior Chamber of the TEPJF, based on a grammatical and systematic interpretation of Article 220.1[8] of the Electoral Code (COFIPE), considered that the rule of alternation consists of placing in succession a woman followed by a man, or vice versa, in such a way that the same gender is not in two consecutive places.

The order of the candidacies must be repeated and successive, through the interspersed placement of candidacies of different genders, individually considered. This allows both genders to reach a seat more or less similarly. The current legislation only provided that the candidacies should be integrated with at least 40% of owners of the same gender, with the duty to ensure parity. This parity could not be achieved if the political parties decided to place the candidacies of a certain gender at the end of the list. What is relevant about

[7] SUP-JDC-461/2009.

[8] "Article 220. 1. The lists of proportional representation shall be composed of segments of five candidates. In each of the segments of each list there shall be two candidacies of different gender, alternately."

gender alternation is that it allows balancing the possibilities between men and women, and achieving substantive equality.

"Anti Juanitas" case[9]

In the 2011–2012 electoral process, the National Electoral Institute issued an agreement on the rules for the nomination of candidates and established that political parties would seek to integrate formulas with people of the same gender. Several women challenged this recommendation, because: a) if fully complied with, it prevented women from being alternates in formulas headed by men, and b) therefore, this recommendation should be exclusively for formulas headed by women and prevent men from being alternates in these formulas. It was considered that the candidacies should be composed of at least 40% of the same gender, i.e., the formulas should be made up of an owner and a substitute of the same gender. This criterion could be applied to both relative majority and proportional representation formulas.

Regarding the relative majority formulas, the internal democratic procedures cannot be an exception to comply with the 60–40% rule in the nomination of candidates. Although the selection of candidacies originated in an internal democratic procedure, political parties were required to present at least 120 formulas of deputies of the same gender. For senatorial seats, at least 26 formulas had to be presented.

Parity in the integration of city councils[10]

In 2015, it was determined that parity is applicable in the integration of municipal councils. In a relevant case, it had to be determined whether the parity, in its vertical criterion, should include the presidency and municipal syndicate, or only the *regidurías*. Likewise, it had to be resolved whether the parity could be applied in a horizontal criterion for all municipal councils.

In the ruling, it was considered that vertical parity should include the positions elected by the principle of relative majority, that is, the municipal presidency and syndicate. This was the only way to guarantee a parity integration, as far as possible, of men and women, so that both genders could occupy an equal number of positions within the city council. This is so because if parity is a measure to favor equal opportunities for men and women, it should have a useful effect on the registration of candidacies.

The principle of parity should also be applied with a horizontal criterion, with equal numbers of men and women running for the office of municipal president, which would allow both genders to occupy an equal number of

[9] SUP-JDC-12624/20211 and accumulated.
[10] SUP-REC-46/2015.

municipal presidencies. The principle of progressivity must be understood not only in a formal but also in a material sense. It makes viable the effective access to public office under equal conditions.

Parity must be complied with in coalitions

The TEPJF determined that the principle of parity must be upheld by all political parties, whether they are competing individually or through coalitions.[11] The duty imposed on coalitions to guarantee the parity nomination of candidates could not be conceived as independent or different from the duty imposed on political parties. Thus, it is neither valid nor constitutional to try to evade parity under the pretext that certain political parties formed a coalition. Therefore, it would not be admissible for a political party that participates in a flexible or partial coalition with candidates of the same sex to do so without a sufficient number of persons of the other sex for the nomination to be parity.

2. Inadequate parity regulation

At this stage, since 2016, other precedents were generated judging with a gender perspective, which look at a principle of insufficient parity. Those cases are the ones explained below.

Allocation of vertical parity candidacies in municipalities composed of odd-numbered councilors[12]

In 2017, the Superior Chamber of the TEPJF validated the non-application of an article of the Electoral Law of the State of Tabasco that established that, when the number of candidacies to be elected was odd, each coalition, party or slate of independent candidates, if applicable, would freely determine the gender of the last formula that exceeded the parity criterion.[13] The TEPJF considered that the allocation of more women candidates should be favored in order to achieve vertical parity in city councils composed of odd numbered councilors.

[11] SUP-REC-115/2015.
[12] SUP-REC-1183/2017.
[13] Article 185, paragraph 6 of the local electoral law.

Women can head the lists registered by political parties in proportional representation[14]

The TEPJF confirmed the implementation of the affirmative action related to women being able to head the lists of proportional representation, considering that it was adequate and necessary. This, because placing women at the top of such lists substantially increased their chances of accessing the state legislature, thus satisfying the constitutional principle of gender parity.

Women may be alternates for formulas headed by male proprietors[15]

In 2017, the Electoral Institute of the State of Jalisco established that in the nomination of deputies the formula headed by the male sex could have as alternate a person of the female sex.[16] The TEPJF considered that it was admissible for parties to nominate candidate formulas in which women were substitutes for men. This translated into greater possibilities for women to have access to positions of popular representation. This provision was a measure that derived from a valid interpretation because it coexisted harmoniously with other constitutional rights, values and principles.

Register more women, according to horizontal parity, in an odd number of city councils[17]

In 2017, the Electoral Institute of the State of Baja California (IEEBC) established that the lists of deputies by the principle of proportional representation and the majority of municipal presidencies would be headed by women. The TEPJF considered the measure as reasonable, necessary, suitable and proportional, since it generated an important effective access: it put more women in hierarchical political positions, such as municipal presidencies or mayoral offices. Positions that symbolize the exercise of power. The Court considered that the measure was justified because the fact of nominating three women and two men for the position of municipal president changed the ideology and made women visible in important positions. With this, the principle of reelection in representative public positions, which is also provided for in the Constitution, was minimally affected.

[14] SUP-REC-83/2018.
[15] SUP-REC-7/2018.
[16] Article 8, paragraph 2, of the Guidelines.
[17] SUP-JRC-4/2018.

3. Parity within political parties

Political parties faced a dilemma in complying with parity within their own bodies, since it was clear that there could be no parity in popularly elected bodies if the parties themselves did not comply with it when integrating their internal leaderships. In this problem, the Superior Chamber played an important role because it established criteria for all political parties to comply with parity within their leadership, as described in the following cases.

Full parity in the internal bodies of political parties[18]

In 2017, the Superior Chamber of the TEPJF established a criterion according to which parity is enforceable in the integration of the leadership bodies of political parties. Although the Federal Constitution imposes a duty on political institutions to guarantee gender equality in the nomination of candidates for elected office, parity does not end there, but rather seeks to guarantee the active participation of both genders. With this criterion, the Electoral Tribunal eliminated the *de facto* or *de jure* obstacles that prevented the equal participation of women and men in the internal life of the political parties and, therefore, guaranteed the parity conformation in the party leadership bodies.

Parity in the chairmanship and general secretariat of a national steering committee[19]

A woman challenged the election of the president and general secretary of the National Executive Committee of a political party for failing to comply with parity rules. The Superior Chamber of the TEPJF considered that the principle of gender parity was not guaranteed in the integration and election of the formula for the Presidency and General Secretary of the National Executive Committee of the political institute, and that it should have been integrated by persons of different genders, as established by the party's regulations.

However, in order to guarantee legal certainty, due to the proximity of the electoral process at the time of the resolution, it was ordered that the principle of parity must be complied with in the subsequent procedure for the renewal of the presidency and general secretariat of the National Executive Committee.

[18] SUP-JDC-369/2017 and accumulated.
[19] SUP-JDC-20/2018.

Horizontal and vertical gender parity in partisan bodies[20]

The Superior Chamber of the TEPJF established the criterion that the principle of vertical and horizontal parity must be observed by political parties in the internal procedures for the election of leaders of all their bodies. This was intended to ensure that women would have access to all party leadership positions, including those of the highest hierarchy, political importance or public significance. Thus:

(a) The aim was to make women visible in the highest decision making positions, thus contributing to their political scaling up.
(b) It contributes to the dilution of prejudices and negative stereotypes in society against women and their capacity to lead or preside over political institutions or bodies, and
(c) It contributes to the fact that the gender of the person, at some point, is indifferent and irrelevant to determine who should lead an organ, or occupy a public office.

Political parties must observe the principle of parity, which must be observed and applied in a total and integral manner, not in a biased or isolated manner. Therefore, in the respective electoral process they must apply the principle of parity, both vertically and horizontally.

Horizontal gender parity must be applied in decentralized party bodies[21]

The Superior Chamber of the TEPJF resolved a case in which the internal regulations of a political party established that its governing bodies should promote the principle of parity and encourage the economic and political empowerment of women. However, the political party considered that the general delegations were part of the deconcentrated structure of the National Executive Committee and did not constitute leadership bodies.

In this case, the Superior Chamber considered that although the general delegations are decentralized bodies, they do not cease to be part of the National Executive Committee. In effect, the general delegations execute policies and strategies determined by the presidency of the National Executive Committee, and are representatives and spokespersons of that executive body in the corresponding federal entity. Therefore, it determined that, by being part of that Committee, the delegations are subject to the gender parity mandate.

[20] SUP-REC-578/2019.
[21] SUP-JDC-1862/2019.

4. Parity in governorships[22]

In 2020, an aspiring candidate for the governorship of a State of the Republic (Michoacán), and several civil associations, requested the National Electoral Institute to issue criteria to guarantee the principle of gender parity in the nomination of candidates for the fifteen governorships to be elected the following year.[23] INE issued the requested guidelines on parity in the nomination of gubernatorial candidates, which was challenged by several political parties and citizens.[24] In the first case, they considered that the national electoral authority lacked the power to set such measures, and in the second case they argued that the measures were insufficient.

The Superior Chamber of the TEPJF warned that the legislative bodies had not complied with the constitutional mandate to establish the rules for the parity nomination of political party candidates for single-member positions. It considered that it, as the highest judicial authority in electoral matters, should directly apply the Constitution to give effect to the constitutional principle of parity. Therefore, it determined:

(i) to revoke the INE's agreement,
(ii) to order the Congress of the Union and the local congresses to regulate this issue before the subsequent election,
(iii) it obliged the national political parties to nominate at least seven women candidates,
(iv) in case of non-compliance, the registration of male candidates would be denied.

This is a matter of great relevance for the national legal order, because for the first time concrete duties were established for political parties in the sense of applying the principle of parity in the nomination of candidates for the highest political office in the federal entities. The case was a watershed for the implementation of parity in the nomination of gubernatorial candidates. It was taken up in other cases resolved in 2022 and 2023 in which political parties were also ordered to guarantee parity in several governorships.[25]

In 2023, an electoral reform was approved in which the regulation of parity in the governorships of the states was taken up again based on the rulings of the TEPJF. In this way, the relevance of this criterion was evident and clear.

[22] SUP-RAP-116/2020.

[23] Mexico is a federation made up of 32 states that historically have been governed by men. These are important positions because they exercise the executive power in each of the States of the Republic.

[24] In the following terms: (a) National and local parties were to publish the criteria on parity for the 15 governorships, (b) Local electoral authorities (OPLES) were to inform INE of the criteria for parity in the selection of gubernatorial candidates, (c) Parties were to nominate at least 7 women as gubernatorial candidates, (d) Local parties were to nominate preferably one person of a different gender than the one registered in the previous election, (e) New local parties would preferably nominate women.

[25] SUP-JDC-91/2022, SUP-JDC-434/2022 and SUP-RAP-220/2022.

5. Parity "in everything"

This last section presents recent criteria that have established parity duties not only in popularly elected bodies, but also in electoral authorities, in the integration of commissions of the Congress of the Union and, recently, in the election of members of the Judiciary, both federal and local.

Parity in all legislatures[26]

In 2021, the Superior Chamber determined that in odd-numbered legislatures, the legislative majority should alternate gender in a progressive manner. For parity, when it comes to even-numbered congresses, the rule is 50/50 of both genders, at least. However, in this context, what should be done in the case of an odd-numbered congress? It was determined that:

(1) in odd numbered legislatures of deputies, where one gender has one more member than the other, alternation in the following integration must be taken into account and the other gender must have a majority representation, and

(2) implementing the rule of alternation does not affect the principle of freedom of legislative configuration because it is based on the non-existence of a measure that guarantees parity to integrate the local congress.

These types of decisions radiate to all congresses in the country that do not have specific rules in this regard and that have an odd number of deputies.

Parity in the federal chamber of deputies[27]

In 2021, for the first time in the history of Mexico, the federal chamber of deputies will be made up of 250 women and 250 men out of a total of 500 members. This integration was achieved thanks to the intervention of the Electoral Court: in resolving various challenges, it was favored that the integration be parity. After resolving challenges on the allocation of deputies by the principle of proportional representation, the chamber was made up of 251 men and 249 women. In order to achieve exact parity, it was ordered to modify an allocation by applying the criterion of adjustment to the political party in which women were least represented. Thus, for the first time, parity was achieved in the Chamber of Deputies at the federal level.

[26] SUP-REC-1524/2021 and accumulated.
[27] SUP-REC-1414/2021 and accumulated.

Parity in the permanent commission of the chamber of deputies[28]

In 2022, a female deputy challenged the composition of the Permanent Commission of the Chamber of Deputies of the Congress of the Union, considering that it was not in accordance with the principle of parity because it was composed of fifteen men and only four women. The Superior Chamber determined that the Permanent Commission should be parity, since it is a substantive body with constitutional attributions, which is not limited to procedural or internal work aspects, but assumes decisions during the recesses of the Congress of the Union. Thus, if the Chamber of Deputies is made up of 250 male and 250 female deputies, this parity should not end there, but should be extended and projected in the composition of the Permanent Commission.

Women in the presidency of the National Electoral Institute

Since the creation of the National Electoral Institute more than three decades ago, it had never been presided over by a woman (except on temporary occasions). In fact, since 1990, men have occupied the presidency of the highest administrative authority on elections. In 2023, the Superior Chamber of the TEPJF issued a ruling, in which it established that it was time for the presidency of INE to be occupied by a woman.[29]

The Political Coordination Board of the Chamber of Deputies (JUCOPO) issued the call for the renewal of four INE board memberships, including the presidency. The Superior Chamber modified the call so that the election of the presidency would be exclusively for women. As of April 4th, 2023, the presidency of INE was occupied, for the first time in history, by a woman. In the context of the lack of female presence in the presidency of the General Council of INE, the decision taken by the Superior Chamber of the TEPJF directly promoted women's access to the highest management positions within the public service.

The precedents outlined above show that the resolutions of the Superior Chamber of the TEPJF have broadened the spectrum of protection of parity. It is not limited to the bodies elected by popular vote, but goes beyond, by establishing criteria for the integration of electoral authorities.

Parity in the election of the Presidency of the Republic

In Mexico, 200 years of independent life have passed without having been a single woman President of the Republic. Therefore, it was reasonable from the outset that women should be guaranteed the right of access,

[28] SUP-JE-93/2022.
[29] SUP-JDC-74/2023 and accumulated.

under conditions of equality and parity, to the highest political office in the country.

In this context, the Superior Chamber of the TEPJF analyzed a case in which it had to decide whether the principle of parity is applicable to the election of the Presidency of the Republic and, consequently, whether there was an omission of the Congress of the Union and the General Council of INE to legislate or regulate, respectively, on this aspect.[30]

The Superior Chamber considered that the principle of gender parity does apply to the election of the Presidency of the Republic. From the point of view of international human rights law and the Constitution, the principle of gender parity applies to all popularly elected positions.

International treaties to which the Mexican State is a party establish the right of women to hold public office and to exercise all public functions established by national legislation, on equal terms with men, without any distinction or discrimination.

As seen above, the principle of gender parity was established in the Mexican Constitution in 2014. With the constitutional reform of 2019, known as the "in all" parity reform, its applicability was established for all popularly elected positions (art. 35, section II). It was stipulated that the Congress of the Union should, within a non-extendable term of one year from the entry into force of the decree, make the corresponding regulatory adjustments, in order to observe said principle.

As we saw, in 2020, in resolving appeal 116/2020, the Superior Chamber established that parity is a principle applicable in elections of unipersonal positions, such as the governorships of the federal entities. Likewise, it reiterated INE's obligation to verify gender parity, in case there are omissions in its regulation. Thus, it was clear that the principle of gender parity is applicable to the election of the Presidency of the Republic. And that to consider otherwise would imply going against international and constitutional provisions, as well as the TEPJF's own criteria.

Once the Superior Chamber established that the principle of gender parity applies in the election of the Presidency of the Republic, it determined the existence of the omission of the Congress of the Union to issue concrete and specific legislative measures to give content to that principle. This is because, despite the existence of a constitutional mandate to apply the principle of parity for all popularly elected positions and the existence of a term determined by the Permanent Constituent itself to issue the relevant regulation, the Congress of the Union has not done so.

On the other hand, the Superior Chamber considered that, in view of the omission of the federal legislative branch, it was necessary for the General

[30] SUP-JDC-574/2023.

Council of INE to regulate the way in which the principle of parity should operate with respect to the election of the Presidency of Mexico. In this sense, the Superior Chamber determined that:

(a) the Congress of the Union must regulate parity with respect to the election of the presidency of the Republic; and

(b) if at the end of the legislature the omission of the Congress persists, the General Council of INE must issue the pertinent rules to be applied in the next federal electoral process.

The constitutional principle of gender parity is aimed at reversing structural inequality so that women have full access to all popularly elected positions. It is not enough to leave the inclusion of women in electoral contests as a mere possibility; it is necessary to ensure compliance with the constitutional principles and norms regarding parity and equality. Therefore, the Congress of the Union, or failing that, the General Council of INE must establish legislative and regulatory mechanisms, within the scope of its competencies and powers, to allow women equal access to the most important political office in the country.

Gender parity in judicial elections

A constitutional reform of September 15, 2024 established the popular election of all judges and magistrates of the Federal Judicial Branch, including the Justices of the Supreme Court, as well as of the judicial branches of the States of the Republic.

As has been reiterated in this article, the Mexican Constitution establishes the right of a citizen to be voted in conditions of parity for all popularly elected positions (art. 35, section II). Thus, the principle of parity is one of the constitutional principles whose fulfillment is also determinant for the popular election of female Justices, magistrates and judges in the framework of the historic election day of June 1, 2025.

Within this framework, on February 12, 2025, the General Council of the National Electoral Institute approved the parity criteria to be applied after the vote count in the extraordinary election of judges. In said agreement, it established an alternation scheme and the rules to guarantee gender parity in the jurisdictional positions of the federal Judicial Branch. Several candidates disagreed with these criteria and filed citizen lawsuits for alleged violations of their rights to vote, to remain in office (in the case of judges currently in office), as well as, among others, for the alleged disproportionality of the affirmative action established and the alleged violation of the principle of the reservation of the law.

The Superior Chamber of the TEPJF confirmed the criteria approved by INE.[31] INE did not exceed its regulatory power because it acted in exercise of

[31] SUP-JDC-1284/2025 and accumulated.

a constitutional mandate and in compliance with its obligation to guarantee gender parity in the integration of federal judicial bodies. Even the judicial reform decree is explicit in the sense that INE may issue the general agreements it deems necessary for the extraordinary electoral process, observing, among several principles, precisely that of gender parity (second transitory article).[32]

The Constitution also mandates INE to carry out the computations of the judicial election, publish the results and deliver the majority certificates to the candidates who obtain the highest number of votes. In addition, it provides that it must allocate judicial offices alternately between women and men (Art. 96, Section IV).

INE also did not violate the right to vote under equal conditions, nor the authenticity or effectiveness of the vote. In particular, some judges currently in office considered that, given the numerical composition of candidates in their respective circuits, with a predominance of male candidates, the application of the parity criteria would inevitably lead to the fact that, even if they obtained a majority of the votes, they would not be assigned the office to which they aspired.

However, INE fulfilled its responsibility by applying Articles 94 and 96 of the Constitution and, in that sense, harmonized the right to vote with the principle of parity, derived from two constitutional mandates that do not cancel each other out, but must coexist. It was considered that INE approved proportional and reasonable criteria because the measures consisting of assigning the winners of the election starting with women and allowing more women to be elected constitute affirmative actions justified by the need to reverse the historical disparity in the integration of the jurisdictional bodies. INE also did not violate the principle of certainty because the criteria it approved establish clear and precise rules on how the principle of parity will be applied once the judicial election is held.

As can be seen, this case is also emblematic: the first election of judges in the history of Mexico will be held with full respect for the parity allocation of elected judicial positions, which is in keeping with an inclusive, fair and egalitarian judicial democracy.

IV. CONCLUSIONS

Based on the rulings issued by the Electoral Court of the Federal Judiciary, discussed in this article, it can be seen that an extensive line of case law has been built with the aim of achieving gender equality in state decision-making

[32] The decree reforming the judiciary in the Mexican Constitution can be consulted in the 'Official Gazette of the Federation' 2024, Sept. 15, available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5738985&fecha=15/09/2024#gsc.tab=0 (in Spanish).

positions in Mexico. In this review of the electoral jurisprudence on women's political participation rights, it is evident that there has been progress towards total parity, and that the TEPJF has participated in and influenced, through its rulings, the constitutional and legal reforms on women's political rights.

It is also noted that electoral justice and gender perspective are closely linked to the principle of equality, women's right to political participation and total parity. Electoral justice and gender perspective show a justice system that has broken away from the structurally ingrained division of gender roles. For this reason, the active participation of justice operators is needed: to break down gaps, eradicate the patriarchal vision of law, and ensure that gender equality is observed in their resolutions. Electoral jurisprudence shows a constant progressive vision to reach a more effective equality for all Mexican women. In fact, the absence of rules has not been an impediment for the authorities to make the necessary changes to achieve parity as a constitutional principle.

The day when women hold all the seats that make up a legislature, or seats in a city council, or party positions, will be the day when equality will be real and effective. It will be a historical vindication, for the centuries that they have been denied their participation in public office. This was echoed by Justice Ruth Bader Ginsburg, who, when asked the question, "When will there be enough women on the Supreme Court?" – she answered: "When there are nine. People were shocked. But there were nine men, and nobody's ever raised a question about that."

Abstrakt

W ciągu ostatnich dwudziestu pięciu lat wymiar sprawiedliwości w sprawach wyborczych w Meksyku przyczynił się do ochrony i skutecznego wykonywania prawa kobiet do głosowania. Dzięki władzy sądowniczej wzmocniono prawo kobiet do kandydowania z ramienia partii politycznych oraz rzeczywisty dostęp do sprawowanych funkcji publicznych.

Meksykański Trybunał Wyborczy stworzył istotną linię orzecznictwa dotyczącą prawa kobiet do głosowania, które zostało również rozszerzone na parytetową integrację organów zarządzających partii politycznych.

Niniejszy tekst składa się z dwóch rozdziałów. W pierwszym opisano drogę do osiągnięcia tej ochrony: od ustanowienia kwot płci w prawie wyborczym po reformę konstytucyjną dotyczącą całkowitej parytetu płci. W drugim rozdziale omówiono orzecznictwo wyborcze oparte na emblematycznych sprawach dotyczących tej kwestii.

Słowa kluczowe: sprawiedliwość wyborcza w Meksyku, parytet płci w polityce, kwoty płci, prawo wyborcze a prawa kobiet, nominacje partyjne i równość płci, orzecznictwo Trybunału Wyborczego Meksyku.

BIBLIOGRAPHY

Aguilar, José Antonio. Igualdad democrática y medidas afirmativas. ¿Equidad y cuotas?, Mexico: TEPJF 2011.

Amorós, Celia, Tiempo de feminismo. Sobre feminismo, proyecto ilustrado y postmodernidad, Madrid: Cátedra feminismos 1997.

Añazco, Yanira (ed.), Democracia y participación política de las mujeres. Visiones desde Europa y América Latina, Valencia: Tirant lo Blanch 2013.

Aparicio, Javier, Cuotas de género en México: candidaturas y resultados electorales para diputados federales 2009, Mexico: TEPJF 2011.

Archeti, Nélida, La paridad política en América Latina y el Caribe. Percepciones y opiniones de los líderes de la región. Serie mujer y desarrollo, No. 108. Chile: ONU-CEPAL 2011.

Bustillo, Roselia y Gilas, Karolina (eds.), Líneas Jurisprudenciales en materia electoral, México: Tirant lo Blanch 2014.

Declaración de Atenas. Cumbre Europea sobre las Mujeres y la Toma de Decisiones. Atenas, 1992.

Hacia una Democracia paritaria: Análisis y revisión de las leyes electorales vigentes. Toledo: CELEM, 2022; http://www.celem.org/prog_europeos/mujeres_ciudadanas2000/libro_demo/capitulo%20i.pdf.

IDEA-Internacional, OEA y CIM. La apuesta por la paridad: democratizando el sistema político de América Latina. Los casos de Ecuador, Bolivia y Perú, Perú 2013; http://www.oas.org/es/CIM/docs/ApuestaPorLaParidad-Final.

IDEA-Internacional, PNUD y ONU-Mujeres. Participación política de las mujeres en México. A 60 años del reconocimiento del derecho al voto femenino, México 2013.

La apuesta por la paridad: democratizando el sistema político en América Latina. Los casos de Ecuador, Bolivia y Costa Rica, IDEA-OEA 2013; http://www.oas.org/es/CIM/docs/ApuestaPorLaParidad-Final.

Mestre i Mestre, Ruth M. y Zúñiga Añazco, Yanira (eds.), Democracia y participación política de las mujeres. Visiones desde Europa y América Latina, Valencia: Tirant lo Blanch 2013.

Mujeres en el parlamento. Más allá de los números. Serie Manuales. Estocolmo: IDEA, 2002.

Rey, Fernando. Cuotas 2.0. Un nuevo enfoque de las cuotas electorales de género. Serie: Cuadernos de Divulgación, No. 22, México: TEPJF 2013.

Roza, Vivian, Llanos, Beatriz y Garzón, Gisela (eds.), Partidos políticos y paridad: La ecuación pendiente, Lima: IDEA Internacional 2010.

Scott, Joan, Parité. Equidad de género y la crisis del universalismo francés, México: FCE 2012.

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Jerzy J. Wiatr*

Uncertain Future of Democracy in the 21st Century

[Niepewna przyszłość demokracji w XXI wieku]

Abstract
The history of democratic regimes in our time shows that there exists a sharp difference between America and Western Europe on one hand and the rest f the world on the other. Democracy survives best in conditions of economic affluency and when ethnic diversity does not generate sharp conflicts. Authoritarian regimes of the present century differ from the older ones in the sense that they are mostly based on popular will expressed in competitive elections. The survival of democracy depends on the ability to avoid deep polarization based on conflicts of identities rather than of interests.

Keywords: conflicts, democracy, polarization, transformation.

At the end of the twentieth century the dominant perception of the future of democracy was optimistic. There was a strong, almost universal belief that democratic transformation will continue in the new century and that – at least in the long term – democracy constitutes the most likely future of mankind. Francis Fukuyama's book on the "end of history" (1992) became symbolic for this kind of optimistic forecasting.

Compared to the recent history of totalitarian and authoritarian regimes (Friedrich and Brzezinski, 1956), the world of the end of the twentieth century looked safe for democracy. The dominant mood of the time was that the dark years of dictatorship were gone and that future bellowed to democracy.

There were reasons for such optimism. The last quarter of the twentieth century was marked by the unprecedented growth of the number of democrat-

* **Jerzy J. Wiatr** – Full Professor of Humanities, DSc, sociologist and political scientist, former Minister of National Education (1996–1997), honorary rector of EULA (affiliation); https://orcid.org/0000-0001-8632-7669; jwiatr@ewspa.edu.pl / prof. dr hab. nauk humanistycznych, socjolog i politolog, b. minister edukacji narodowej (1996–1997), rektor honorowy EWSPA (afiliacja).

ic regimes in the world. In the nineteen-seventies three remaining nondemocratic regimes in Western Europe (Greece, Portugal and Spain) underwent peaceful transitions form authoritarian to democratic systems. In the nineteen-eighties the wave of democratization changed the political landscape of Latin America and in the first years of the next decade a similar process took place in East-Central Europe. The collapse of the rule of communist parties in Europe (peaceful everywhere except Romania and, partly, Yugoslavia) had a profound impact on the structure of international relations. The bipolar division of the world was gone, substituted for a short time by the hegemony of the United States.

The declared policy of the American presidents of the post-cold war era was the promotion of democracy worldwide. The political and ethnic conflicts in former Yugoslavia were met with the direct American military involvement – first such action on the other side of what only a few years earlier was the Iron Curtain. The terrorist attacks on New York and Washington in September 2001 were used by president George W. Bush as a pretext to justify aggressive policy toward states unwilling to accept American dictate. This led to the American invasion of Iraq in 2003 and armed intervention in Afghanistan. The result was detrimental to the American strategic interests. It provoked a strong anti-American reaction in the Middle East and intensified political divisions at home. The policy of promoting democracy by the use of military strength was short-sighed. It resulted in the crisis of American leadership at home and the growth of anti-American sentiment in many parts of the world. One of the consequences of this trend was the growing attraction of non-democratic politics in those regions of the world where the opposition to American hegemony was the strongest, particularly in the Middle East and Southern Asia (Applebaum, 2020).

It does not mean, however, that the present crisis of democracy is caused exclusively by the American policy of intervention and by the reaction which such policy causes. The roots of the crisis of democracy are deeper and called for a complex analysis.

The Stagnation of Democratization

When Samuel P. Huntington published his study of democratic transformation (Huntington, 1991) there were reasons to believe that the impressive growth of the number of democratic states would continue in the next century. The number of democratic states grew from 30 in the year 1973 to 58 in 1990. Democratic state constituted 45 percent of the world total. The "third wave" of democratization produced more massive change than the

two previous ones (of early nineteen-twenties and of early nineteen-sixties). The number of nondemocratic states went down from 92 (in 1973) to 71 (in 1990). There were reasons to believe that this process would continue (Huntington, 1991: 29).

Soon, however, it became clear that the process of democratization had its limits. The "third wave" of democratization lasted only for three more years after the publication of Huntington's book. In 1994 first fully democratic elections (both parliamentary and presidential) took place in the Republic of South Africa elevating the African National Congress and its leader Nelson Mandela to power. It was the last such turning point in the long contest between democracy and authoritarianism, not to be replicated in the next century.

Thirty years later the world is still dominated by nondemocratic regimes. According to the calculation of the Freedom House (Democratic Index 2021––2024) only 20% of world population live in fully democratic (free) states, 42% in states defined as "partly free" and 37% in "not free" states. Moreover, only in Europe and America the majority of people live under democratic regimes (82% in Europe and 70% in two Americas). In the Middle East 93% of people live under nondemocratic regimes, in Africa 50% and in Eurasia (former USSR) 84%. Africa (south of the Arab belt) has 50% of its population living under nondemocratic regimes, 43% in partially democratic states and only 7% in democracies. No meaningful change took place in the respect during last two decades.

One of the most important aspects of the stagnation of the democratic transformation is the way in which the "Arab Spring" of 2011 affected the Middle east and North Africa. The collapse of the authoritarian Arab regimes rarely produced a democratic transformation (Tunisia, Egypt) and where it happened the democratic change turned out to be unstable, like in Egypt where the armed forces removed from power democratically elected (but governing in nondemocratic way) Muslim Brotherhood. There are reasons to believe that the Islamic heritage constitutes a barrier to successful democratization. What happened in the Arab world resembles the experience of the Iranian revolution of 1979. In Iran the revolt which terminated the rule of emperor Mohammad Reza Pahlavi resulted in the establishment of the theocratic regime of Islamic fundamentalists who use the quasi-democratic practices (like elections) to legitimize their almost absolute power.

The cross-national studies of the processes of democratization (Linz and Stepan, 1996) suggest strong correlation between democracy and cultural heritage of the West. Democratic systems survive and emerge mostly in the Western hemisphere, in the cultural climate created centuries ago by the Reformation and the Enlightenment. This cultural-historical conditioning

is particularly obvious when one compares Russia with the rest of Europe, including its Eastern regions. Barriers to successful democratization have been created by centuries of specific histories and are not easy to overcome in a short time. Consequently, one has to accept the pessimistic scenario according to which the present division between democracies and authoritarian regimes will continue for many generations.

Stagnation of the democratic transformation worldwide has its consequences for the architecture of international relations. The hegemony of the United States was replaced by the renewed system of competition between great powers, with China replacing the USSR as the main rival of the United States in the struggle for the future of the world. The impressive economic growth achieved by China has been conditioned by the pragmatic economic reforms initiated by Deng Xiaoping in late nineteen-seventies.

The unquestionable success of China in the economic and political fields takes place without any signs of democratization. At the maximum one may say that the main change in Chinese politics consists of ending the extravagances of the Cultural Revolution of the 1960s and 1970s, replaced by the rational (but authoritarian) policy at home and moderate policy abroad. China remains a "communist state" in name only. In reality, it has abandoned the ideological dogmas of communism, replacing them by nationalist values. Among the consequences of such change one of the most important is the attractiveness of the Chinese model of development for less developed countries of Asia and Africa. China builds its position as the second strongest world power on the promise of economic development and independence from the hegemony of the West. Its political and economic development results in the creation of the "Asian model" of development without democratization (deLisle, 2008: 197–232).

Russia is a more complex case. The collapse of the USSR left the biggest part of it – the Russian Federation – in deep crisis, which lasted until the turn of centuries. Russia of the nineteen-nineties was no longer a totalitarian party state but it has not become a stable democracy either. The dominant mood of the Russian population at that time was disappointment with both the totalitarian past and the post-totalitarian present. For many Russians the lose of the empire was a tragedy and they look forward to a leader who would offer them the chance to become a world power again. Vladimir Putin's success as political leader can be understood only when one takes into account such mood of his nation (Shestopal, 2016). The most rational explanation of the Russian decision to restart the war with Ukraine in 2022 is that Putin and his entourage looked for an easy way to consolidate their rule and to create a new source of legitimacy based on a military success. As long as the Russian regime is able to build its strong international position, it can more or less successful-

ly avoid democratization. The outcome of the present Russian–Ukrainian war have consequences for the future of the authoritarian Russian regime. If the war ends in a way which Putin will be able to sell as his success, it will make the present regime stronger.

For comparative political science the crucial question is what explains success or failure of democratization. Part of the answer refers to the capacity of leadership (Wiatr, 2022). History is not deterministic in a way which would make human decision irrelevant. The history of democratization points to several instances in which the role played by politicians had the potential to change the course of events. Leaders of mass movements – Nelson Mandela, Lech Wałęsa – mobilized the masses of followers and, in doing so, changed the course of history. But it was also some of the leaders of the regimes – Mikhail Gorbachev, Deng Xiaoping, Wojciech Jaruzelski – who by their decisions made the change possible.

Important as the leaders are, the successes or failures of democratization cannot be explained in terms of their decisions only. There are three sociological factors of particularly great importance which affect the outcome of democratization: economic conditions, ethnicity and cultural tradition.

Democracy and Free Market: A Dilemma of Development

One of the most interesting explanations of the problems of democratic development has been offered by Adam Przeworski. His analysis of the origins of modern democracy points to the linkage between it and the functioning of free market (Przeworski, 1991). A few years later, in a book which reflects results of the debates conducted by the working group of the International Political Science Association, Przeworski argued that the very survival of democracy depended on the choice of economic strategy and that rapid, full-scale privatization puts democracy in danger because it deepens already existing conflicts of economic interests (Przeworski, 1995: 111). Conflicts, argues Przeworski, are inevitable but their intensity differs. Democracy is about the institutional regulation of conflicts but democracy works well only when conflicts are not too sharp and can be regulated by political institutions (Przeworski, 2019: 4).

The relation between democracy and economic affluency is complex. It is true that all states which are listed high on the scale of democracy are economically well developed and that their population enjoins high standard of living. Of the twenty one states listed by the Freedom House as "full democracies" none can be defined as economically poor. Democracy does not work well in economically backward countries.

It does not mean, however, that all economically affluent countries are democratic. Among fifty-nine states listed as authoritarian four belong to the richest states of the world. They are Arab monarchies (Kuwait, Qatar, the United Arab Emirates, Saudi Arabia) which – largely because of natural resources – combine authoritarian political regimes with highly developed economies.

The vast majority of authoritarian states belong, however, to the category of economically underdeveloped. It can, therefore, be argued that democracy is more likely to survive in economically well-off countries, in which socio-economic conflicts are not too sharp. It is not the level of affluency itself but the intensity of economically generated conflicts which explains this phenomenon. Economic backwardness generate hardships which led to intense social conflicts over the distribution of scare resources. Democracy fares well when conflicts are not too sharp. Therefore, one may argue that democratic stability is more likely to take place in more affluent countries in which the intensity of economically motivate conflicts is not too great.

Political and economic transformations which took place in Poland in the last decade of the last century illustrate this tendency. The radical economic reform introduced in 1990 by Tadeusz Mazowiecki's cabinet ("Balcerowicz's Plan") included massive privatization of state-owned economy and produced sharp economic polarization. Writing in the first years Polish democratic transformation I have identified economic conflicts as the most important challenge to successful democratization (Wiatr, 1992: 81–83). Commenting on this stage of Polish transformation I have argued that the radical economic strategy would result in social conflicts too sharp to be safely handled by democratic institutions. The survival of Polish democracy was due to the fact that after the parliamentary election of 1993 (won by the social-democratic Left) the economic strategy has been modified in the direction of greater and more effective state intervention blueprinted by Grzegorz Kołodko – deputy prime minister and minister of finances in four Center-Left cabinets. This observation has been confirmed by political events in those post-communist states where radical liberalization of the economy was not combined with the active role of the state in moderating socio-economic conflicts. Russia of the nineteen-nineties is one of the best examples.

Ethnic Division and Democracy

Socio-economic conflicts are not the only factors explaining crises of democracy. In ethnically plural societies conflicts based on ethnic identities can become as destructive as the economic ones, or even more.

One of the fundamental principles of democracy is the rule of the majority, expressed in free, fair and competitive election. The underlying provision of such election is that the voters constitute a cohesive unit, divided by political orientations but considering themselves members of the same community. Ethnic homogeneity is not a necessary condition for such self-identification providing that the vast majority of citizens consider themselves primarily as members of the common state.

While ethnic homogeneity is not a necessary condition of successful democracy, it is by far more likely that democracy would survive in ethnically homogenous societies. Of the twenty one states listed as full democracy by the Freedom House only four (Australia, Canada, Switzerland and the United Kingdom) can be defined as ethnically plural societies. On the other side the opposite is true. States listed as authoritarian are mostly heterogenous in the ethnic composition of their population.

In ethnically divided states the majoritarian democracy does not work as smoothly as it is usually the case in the homogenous ones. The majoritarian system of government has to be replaced by so-called consensual democracy, in which complicated mechanism of election and of decision-making results in the necessity to find compromise solutions (Lijphart, 1984).

History and Cultural Heritage

Democracy is most stable when it exists for a longer period of time. Of the twenty one full democracies -according to the Freedom House ratings – only five (Taiwan, Germany, Japan, Mauritius and South Korea) were not democracies before 1945. In the majority of cases democracy is more stable when it functions without interruption for at least two generations.

To understand this phenomenon one has to consider the role of cultural patterns. Sociological analyses of such phenomena have demonstrated the importance of long-term historical heritage (Almond and Verba, 1963). Cultural pattern are formed by generations and reflect the specific characteristics of national history. Consequently, the longer is the history of democratic government, the most likely is the survival of democracy. This makes “old democracies” of America and Western Europe more consolidated and safer than the new democracies of East-Central Europe, Asia and (particularly) Africa.

Dangers From Within: Is Democracy Safe in the West?

The preceding analysis points to the factors which make democracy by far more secure in the highly developed countries of the West than in the other regions. Does it mean that democracy is safe in its traditional environment of North America and Western Europe?

Empirical evidence tends to confirm the optimistic scenario according to which democracy is – and will remain – the only "game in town" within the Western hemisphere. Except for the abortive coup d'etat in France in 1958, there have been no serious challenges to the democratic governments in Western Europe and North America. These two regions differ radically in this respect from the rest of the world, where democratic governments are regularly challenged by authoritarian forces. The East-Central region of Europe – composed of formerly communist states – is an interesting case of weak democracy which, however, have been able to survive the attempts of nondemocratic reaction.

The survival of democracy depends, however, on the ability of the democratic governments to deal with the process of polarization (von Beyme, 2019). Polarization is a process of political change in which conflicts become so strong that the adversary is seen as an enemy rather than a rival, and political conflicts becomes a zero-sum game with zero chance for a compromise solutions.

Such polarization takes place when conflicts of interests are substituted for by conflicts of identities – religious, national or other. In the United States, such polarization deeply affected relations between two main political parties, destroyed the political consensus of the past and caused the intensification of political conflict. Donald Trump's election in 2016 was to large extent caused by the reaction to the fact that his predecessor was the first American president with partly African background (Klein, 2020: 66). Trump's return to power in the election of 2024 (the second such event in American presidential elections) points to the stability of his Right-wing political support.

Parallel political change takes place in several European democracy. Radical right-wing populism replaced communism as the main challenge to the democratic order of Western societies. Political parties such as Alternative for Germany or the National Front in France, while not strong enough to win power, are powerful enough to cause concern about the future of democracy. So-called "illiberal democracies" become a realistic alternative at least for some traditionally democratic countries of the West (Zakaria, 2007). In new democracies they have become more than a distant possibility.

The emerging authoritarianism differs from the old one in several respects. Not only does it differ from the totalitarian model (Linz, 2000), but also it is different from "old authoritarianism" the essence of which was the use of armed forces both to capture and to consolidate power. Most important

is the fact that it is based not naked power but on the consent of the people expressed in basically fair election. In this sense I have suggested a new term ("new authoritarianism") to distinguish between it and the traditional (old) authoritarianism (Wiatr, 1996b: 201–214).

Young democracies, like Poland, are particularly endangered. Populist Right-wing parties (like Law and Justice in Poland or Fidesz in Hungary) can appeal to the egalitarian tendencies of the poorer strata of the population and to the traditional conservative values, stronger among less educated and less well-off members of the lower class than among the affluent and better educated middle-class. The peculiarity of this constellation is that it is the populist Right – rather than the reformist Left – which can count on the support of the poorer strata of the society.

Political polarization intensifies with the growing role of conflicts of identity as compared with conflicts of interests. The later can be handled by compromises, while the former are by definition immune from compromises. If one considers abortion "killing of an unborn child", one is not likely to accept any solution which would permit abortion under some circumstances. The final decision is to be made by democratically elected state authorities but this would not make them legitimate in the eyes of those who perceive such decisions as violation of fundamental (natural) law. Democracy has no easy answer to such beliefs.

Can democracy defend itself nonetheless? Poland offers an optimistic alternative. In 2023 parliamentary election the coalition of Left-of-Center parties defeated the ruling Law and Justice party and stopped the process of transforming Poland into an authoritarian regime of the Right. This was the first case of the electoral defeat suffered by the ruling populist Right. Once more Poland showed the way to defend democracy against its enemies. Only future will show how lasting this trend has become.

Abstrakt

Historia systemów demokratycznych współczesnego świata wskazuje na wyraźną różnicę między Ameryką i Zachodnią Europą z jednej strony a resztą świata. Demokracja funkcjonuje najlepiej w warunkach dobrobytu ekonomicznego i przy nieznacznym zróżnicowaniu etnicznym. Współczesne reżymy autorytarne różnią się od dawniejszych tym, że są głównie oparte na woli obywateli wyrażonej w opartych na rywalizacji wyborach. Przetrwanie demokracji wymaga unikania głębokiej polaryzacji opartej raczej na konflikcie tożsamości niż konflikcie interesów.

Słowa kluczowe: konflikty, demokracja, polaryzacja, transformacja.

REFERENCES

Almond Gabriel A. and Verba Sidney (1963), Civic Cuture: Political Attitudes and Democracy in Five Nations, Princeton: Princeton University Press.

Applebaum Anne (2020), Twilight of Democracy: The Seductive Lust of Authoritarianism, New York: Doubleday.

Beyme Klaus von (2019), From Post-Democracy to Neo-Democracy, Cham: Springer Publishing.

DeLisle Jacques (2008), *Development without Democratization? China, Law, and the East Asian Model* [in:] Jose V. Ciprut (ed.), Democratizations: Comparisons, Confrontations, and Contrasts, Cambridge, Mass.–London: The MIT Press.

Fridrich Carl J. and Brzezinski Zbigniew K. (1956), Totalitarian Dictatorship and Autocracy, Cambridge Mass.: Harvard University Press.

Fukuyama Francis (1992), The End of History and the Last Man, New York: Free Press.

Huntington Samuel P. (1991), The Third Wave: Democratization in the Late Twentieth Century, Norman–London: University of Oklahoma Press.

Klein Ezra (2020), Why We're Polarized, New York–London–Toronto–Sidney–New Delhi: Avid Reader Press.

Linz Juan J. (2000), *Totalitarian and Authoritarian Regimes*, Boulder: Lynne Riener Publishers

Linz Juan and Stepan Alfred (1996), Problems of Democratic Transition and Consolidation: Southern Europe, Southern America and Post-Communist Europe, Baltimore-London: The Johns Hopkins University Press.

Liphart Arend (1977), Democracy in Plural Societies: A Comparative Explanation, New Haven–London: Yale University Press.

Lijphart Arend (1984), Democratic Patterns in Majoritarian and Consensus Government in Twenty-one Countries, New Haven-London: Yale University Press.

Przeworski Adam (1991), Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America, Cambridge: Cambridge University Press.

Przeworski Adam, ed. (1995), Sustainable Democracy, Cambridge: Cambridge University Press.

Przeworski Adam (2019), Crises of Democracy, Cambridge: Cambridge University Press.

Shestopal Elena, ed. (2016), New Trends in Russian Political Mentality: Putin 3.0, Lanham–Boulder–New York–London: Lexington Books.

Wiatr Jerzy J. (1992), Four Essays on East European Democratic Transformation, Warszawa: Scholar Agency.

Wiatr Jerzy J. ed. (1996a), Political Sociology and Democratic Transformation in Poland, Warszawa: Scholar Agency.

Wiatr Jerzy J. (1996b), *Democracy Versus a New Authoritarianism in Eastern Europe* [in:] Richard Kilminster and Ian Varcoe (eds.), Culture, Modernity and Revolution: Essays in Honour of Zygmunt Bauman, London–New York: Routledge.

Wiatr Jerzy J. (2022), Political Leadership Between Democracy and Authoritarianism: Comparative and Historical Perspectives, Opladen–Berlin–Toronto: Verlag Barbara Budrich.

Zakaria Farred (2007), The Future of Freedom: Illiberal Democracies at Home and Abroad, New York: W. W. Norman.

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Jan Gajewski*

Beyond Capacity: A Resilience Framework for Understanding State Failure

[Od zdolności do odporności: rekonceptualizacja upadku państwa]

Abstract
Traditional approaches to state failure focus primarily on state capacity–the ability of governments to perform key functions and deliver public goods. This article advances a fundamental reconceptualization, arguing that state failure should be understood through resilience theory and complexity science rather than solely in terms of capacity deficits. Drawing on network science, systems theory, and ecological resilience research, this framework conceptualizes states as complex adaptive systems whose survival depends on dynamic responses to perturbations and shocks. The analysis introduces equilibrium transitions, tipping points, and transformative adaptation to explain state trajectories from stability through instability to potential collapse. By analyzing states through stability dynamics borrowed from physical and natural sciences, this approach reveals striking parallels between sociopolitical decomposition and system failures in other complex domains. The framework integrates State Failure Task Force findings on regime types, material well-being, and structural risk factors with insights from complexity theory on adaptation and metastability. This demonstrates that state failure represents a distinct phenomenon related to systemic resilience rather than merely institutional capacity deficits. The reconceptualization offers new pathways for early warning indicators, prevention strategies, and policy interventions accounting for non-linear system dynamics rather than prescribing universal institutional templates.

Keywords: state failure, resilience theory, complexity theory, political instability, equilibrium framework, systems theory, state capacity, transformative adaptation.

* **Jan Gajewski** – PhD in Social Sciences; graduate and currently assistant professor at EULA (affiliation); https://orcid.org/0009-0007-8996-3354; jan.m.gajewski@gmail.com / dr nauk społecznych; absolwent, a obecnie adiunkt EWSPA (afiliacja).

Introduction to the Conceptual Framework

Our understanding of the state and its role in international politics has remained essentially unchanged since the 19th century. Globalization, internationalization, and the multicentricity of international law[1] have yet to change how we perceive the state through the global changes that have occurred. Unlike the convergence theory predicted, the civilizational, economic, and social gap between different states is not narrowing but widening, and the general state of world affairs is increasingly unstable. We still tend to recognize the state as a fully autonomous and sovereign entity within an anarchic, volatile, unpredictable international system. Therefore, we lack adequate resources to 'restabilize' states on the verge of state collapse.

A general shift of our perception is needed, as all states in the post-Westphalian international system must be perceived as unobvious, blurred, ubiquitous, and obscured entities,[2] slipping away from the *cuius regio, eius religio* principle. Today, they should merely portray various codependent institutions, escaping any formal or substantive definition. Much like snowflakes, today's states are both similar and different from one another.

Although we would like to characterize them through some ordinary, uniform, and Western standard, i.e., based on definitions of a modern (nation) state or good governance, it is simply impossible,[3] unless, following Max Weber, we consider them merely entities with some familiar empirical characteristics, purely as beings that exist to function purposefully.[4]

We need a new 'ideology-free' conceptual framework (consisting of new, purely abstract concepts) grounded in multiple fields of study, that is more than a mere 'metaphor' for the world we try to analyze and describe. For this, a state (in its idealistic form) must be recognized as a political-legal abstraction representing the governing elite (within an accepted political system) that can effectively regulate society and the population within a given territory. The governing elite, through its government (and its bureaucracy), constitutes a state's main external and internal characteristics.

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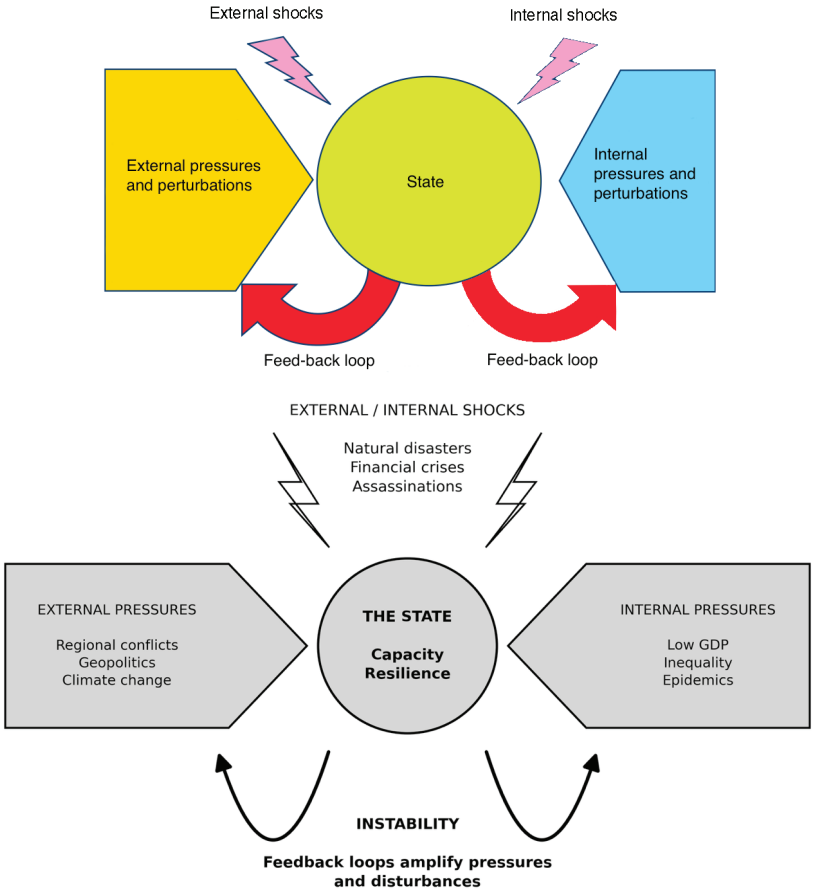
1 J. Raciborski, *Klasyczne teorie państwa a doświadczenia czasów najnowszych* [in:] O mocy i niemocy współczesnego państwa polskiego, J. Raciborski, P. Sadura (eds.) Warszawa 2024, p. 43.
2 J. Raciborski, P. Sadura, *Wstęp* [in:] O mocy..., p. 7.
3 Possible dimensions: rule of law, effectiveness, political accountability, corruption, social inclusion, etc.
4 J. Raciborski, *Klasyczne*..., p. 28.

The State as System: Interrelationships and Responses to Stimuli

The state, in its very essence, can be understood only through the interrelationships among the system's various components (elemental parts) in response to internal or external stimuli, i.e., external/internal pressures and perturbations and external/internal shocks.

Graph 1. Framework for Understanding Instability



The state *symbolizes a country's capacity and resilience, i.e., the extent to which a country can successfully manage risk factors, potential external/internal pressures and perturbations, and external/internal shocks, as well as leverage external and internal stabilizers. Country capacity depends on both state and non-state institutions and should be assessed at an aggregate level and in relation to the capacity to manage specific risk factors.*

- ***External and internal pressures and perturbations*** *reflect the internal processes and factors within the country or result from the actions or inactions of other countries or the international community. They are typically structural and must be addressed through long-term measures and investment.*
- ***External/internal shocks*** *are more proximate and unpredictable risk factors that can trigger instability at any moment by imposing enormous pressures on a country's capacity and resilience. They necessitate contingency planning.*
- ***The feedback loop of instability*** *into external and internal pressures and disturbances can, once a crisis or conflict arises, create a vicious cycle of instability by further undermining the state's capacity and resilience.*

Source: Further developed from UK Prime Minister's Strategy Unit, Investing in Prevention: An International Strategy to Manage Risks of Instability and Improve Crisis Response, Cabinet Office, London 2005, England [stable link: https://gsdrc.org/document-library/investing-in-prevention-an-international-strategy-to-manage-risks-of-instability-and-improve-crisis-response/], p. 6.

Where,

- External pressures and perturbations include (but are not limited to) destabilizing regional environments, geopolitical competition, organized crime and terrorist networks, conflict financing systems, climate change, etc.
- Internal pressures and perturbations include (but are not limited to): low GDP per capita, economic decline, history of conflict, natural resource dependency, horizontal inequality, unfavorable demographic patterns, AIDS/HIV/COVID-19/Ebola and other epidemics, etc.
- External/internal shocks include (but are not limited to) natural disasters (global/regional), internal/external financial crises, hyperinflation, commodity price shocks, political assassinations, etc.

The State as Conglomerate: Government, Society, and Feedback Loops

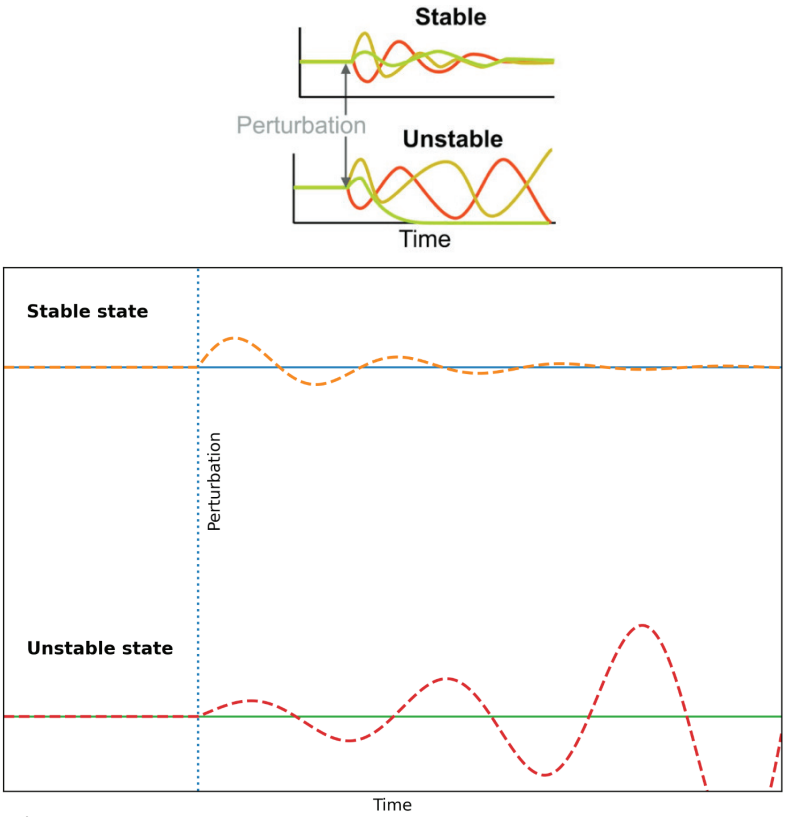
A state, therefore, is a conglomerate of society (the governed) and the governing elite within an internationally recognized territory, where the governed are subservient to the ruling elite whose will can be enforced upon them with force. This is the central empirical aspect of every state. However, a state is not reducible to its individual components. It can function only as a set of its elements (as recognized by Dahl, who identified a state as a combination of inhabitants of a given territory and a functioning government[5]). Through this prism, the government shapes social action and expectations among different social groups within a given territory and political system, and communicates

[5] R. A. Dahl, Modern Political Analysis (5th ed.), Englewood Cliffs (NY) 1991, p. 31.

with them through feedback loops. Thus, the state functions within the political system it creates and maintains, as well as its external environment.

Effective governments have order-producing[6] capabilities to mitigate the natural and ever-present societal tendency for disorder. By implementing legitimate and awaited laws and regulations, a state of stability can be reached within a state. The longitudinal stability of each state is reflected in its ability to constantly adjust to internal and external perturbations by readjusting and rebalancing the normative sphere or state's actions (reinforced by the use of legitimate force) to create an accepted by the society state of balance. If the state's response is mismatched or absent, instability can arise and, in extreme cases, lead to state collapse.

Graph 2. Linear Stability/Instability after perturbation



Communities/States that return to their previous functionality after a perturbation are classified as stable, and those that return to their equilibrium faster are categorized as more stable. Those that continue to diverge from the equilibrium are considered unstable.

Source: X. Liu, L. Daqing (et al.), Network Resilience, Physics Reports 971 (7034), p. 85.

[6] Or order-suppressing.

Government Capacity and Regime Types

Governments possess varying capacities, enabling them to generate different degrees of order within sociopolitical systems. In the absence of effective governing institutions, states risk descending into disorder. Governments thus function to produce organizational stability by generating countervailing forces that mitigate internal and external destabilizing pressures. Levitsky and Way[7] observe that long-consolidated democracies and strong totalitarian regimes tend to exhibit the highest levels of long-term stability. Yet much of the world is governed by unconsolidated democracies or weak authoritarian regimes (such as military juntas or personalistic strongman systems), which are more accurately characterized as semi-stable or unstable. Moreover, even highly consolidated regimes may transition into semi-stable or unstable configurations when confronted with severe crises—such as economic collapse, war, prolonged trade isolation, or uncontrolled migration—often more rapidly than fragile regimes can achieve restabilization.

Johnson[8] and Eckstein[9] argued that state stability depends on sociopolitical congruence, with incongruence identifying a state in disequilibrium. An incongruent state is a necessary precondition for spiraling into chaos (marking state failure and state collapse), which requires merely a spark to ignite. In such cases, governmental capacity and effectiveness need to focus on aligning the objectives of authority figures with those of the rest of society. Stability ensues if the elite's authority is recognized as rational, legal, and based on consent (i.e., legitimacy). In such cases, a state becomes a framework for constructively manifesting grievances and negotiating policies between elites and the masses (*ergo*, self-regulating and limiting the necessity for brute force). However, at times, the governing elites (which consist of fluid social groups) are partisan, biased, and/or inept; therefore, by inefficaciously regulating grievances, they breed conflict, and chaos ensues.

[7] S. Levitsky, L. Way, Revolution and Dictatorship: The Violent Origins of Durable Authoritarianism, Princeton (NY) 2021.
[8] C. Johnson, Revolutionary Change, Boston (MA) 1966.
[9] H. Eckstein, Division and Cohesion in Democracy: A Study of Norway, Princeton (NY) 1966.

Building a Conceptual Framework

The Power of Analogical Reasoning

Analogies and parallels are commonly recognized as aids to discovery. They generate valuable insights and formulate possible solutions to problems. Many investigations are motivated by analogical reasoning, which already has yielded great new insight:

- Simon[10] pioneered the study of complexity in biological and social organization.
- Padgett and Powell[11] published seminal work on the emergence of organizations and markets based on analogies with chemical processes of biological change.
- Daems[12] has applied complexity theory in an effort to understand the emergence and evolution of civilizations.

These examples illustrate that analogical transfers across disciplines have historically generated major theoretical breakthroughs. By extension, applying concepts of stability and transformation from the natural sciences to the study of state failure is not a metaphorical exercise but a structurally grounded analytical strategy.

This research therefore analyzes parallels between the social and natural worlds through the prism of stability, focusing on mechanisms that drive systems from stability to instability and, in extreme cases, to disintegration. It demonstrates that characterizations of equilibrium, transformation, and regime shifts in the physical sciences exhibit structural similarities to the sociopolitical dynamics of state failure.

Theoretical Foundations: Political Science Meets Physical Science

This research is influenced by:

- A recent article by George W. Breslauer and Kenneth J. Breslauer, titled "Political Science Meets Physical Science: The Shared Concept of Stability," highlights structural and functional parallels between the biophysi-

[10] H. A. Simon, *The Architecture of Complexity*, „Proceedings of the American Philosophical Society" 1962, vol. 106, 6, pp. 467–482.

[11] J. F. Padgett, W. W. Powell, *The Emergence of Organizations and Markets*, Princeton (NY) 2012.

[12] D. Daems, Reimagining the Rise and Fall of Civilizations, https://longnow.org/ideas/reimagining-the-rise-and-fall-of-civilizations/ [retrieved: 22.01.2024].

cal world and self-organizing sociopolitical systems such as sovereign states.[13] The authors argue that "the structure, function, and organizational similarities of such parallelism are particularly noteworthy, given that human agency introduces greater contingency in the sociopolitical world than do the 'laws of Nature' in the natural-scientific world."[14] This parallelism legitimizes the analytical transfer of stability concepts from physical systems to sociopolitical entities and provides the epistemological foundation for reconceptualizing state failure in systemic rather than purely institutional terms.

- By Xueming Liu *et al.* study "Network Resilience."[15] In this study, the authors focus on the real-world complex networked multidimensional systems (in domains such as ecology, biology, society, and infrastructure) and their resilience functions and early warning indicators.

From Capacity to Resilience: Reconceptualizing State Failure

From a political perspective, there are many acknowledged and conceptual examples of stabilizing features one expects to find within a stable state: unity of elites, meritocratic recruitment, shared norms, robust civil society, authentic political participation of the population, independent legislature, homogeneity or well-integrated heterogeneity, low corruption, and high transparency, to name a few. However, no such consensus can be reached regarding state failure.

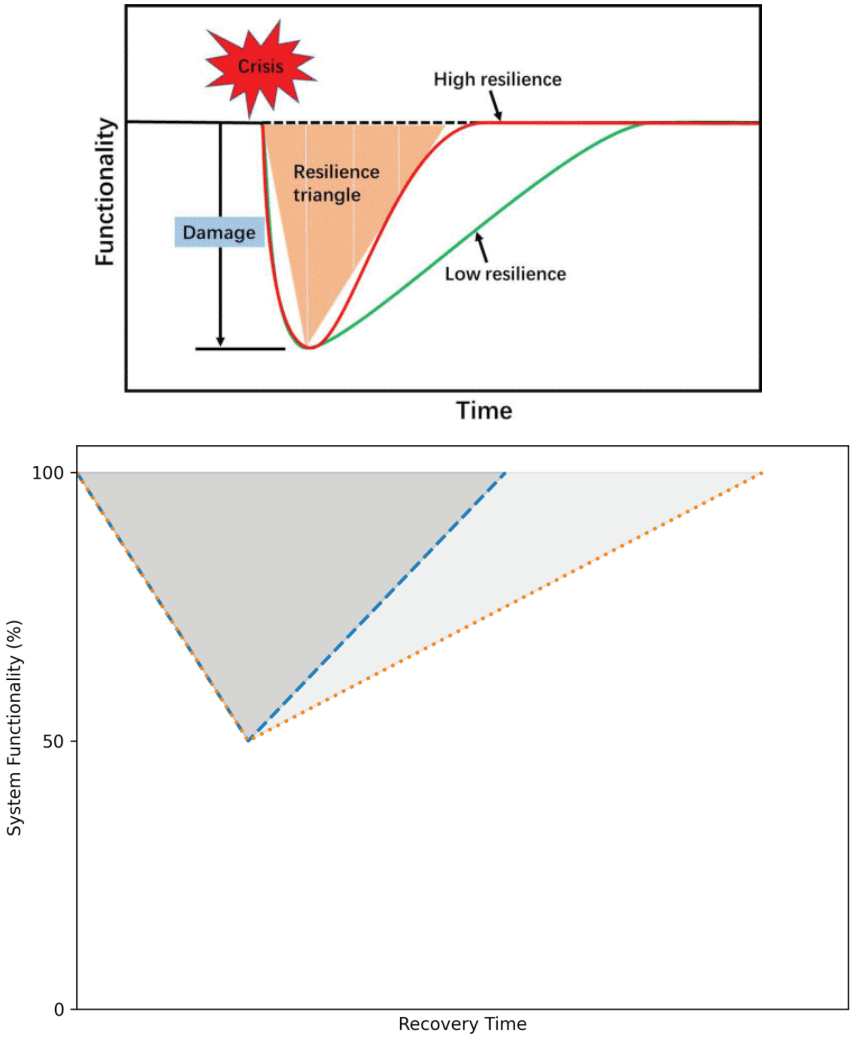
State failure was at first perceived as directly related to the state's lack of resilience. The more resilient the state, the more stable it was thought to be, defining resilience as the ability to bounce back after a perturbation. This also assumed that a failed state was in equilibrium in its pre-perturbation state, with resilience characterizing the degree to which a system can endure perturbations without collapsing.

[13] G. W. Breslauer, K. J., Breslauer, *Political Science Meets Physical Science: The Shared Concept of Stability*, „PNAS Nexus" 2023, vol. 2, DOI: 10.1093/pnasnexus/pgad401, p. 1.

[14] *Ibid.*

[15] X. Liu, L. Daqing (*et al.*), *Network Resilience*, Physics Reports 971(7034) pp. 1–108, https://www.researchgate.net/publication/360717846_Network_resilience [retrieved: 02.02.2024].

Graph 3. Schematic diagram of a resilience triangle



The system's performance decreases after a crisis, but it gradually recovers to its pre-crisis level in the long run. The recovery will be rapid for a system with high resilience, but slow for a system with low resilience. A resilience 'triangle' is the area of degradation in the quality of recovery.

Source: X Liu, L. Daqing, M. Ma, B. Szymanski, J. Gao, (2020). Network resilience, DOI: 10.48550/arXiv.2007.14464, p. 12.

Multiple Equilibria and Tipping Points

Contemporary insights from the natural sciences suggest that some (if not all) states can be associated with more than one steady state. Large-scale perturbations and shocks might cause a system to adapt and persist, or to transform while maintaining its basic functionality. If the perturbation is small, the system may adapt and return to its pre-perturbation state. If, on the other hand, the perturbation proves more significant in magnitude, the state could cross a tipping point, change its structure, identity, and some of its functions, and shift to another regime (an alternative stable state or a new equilibrium) while maintaining its minimal core functionality. This new equilibrium is reached when old social structures render the old system untenable within 'new realities.'

Shifts from one stable state to another may result from either a 'threshold' (set of small and incremental changes that accumulate over time) or a 'sledgehammer' (significant and dramatic perturbation) effect. When a system is close to a tipping point, even small, incremental changes can trigger a tremendous, disproportionate qualitative change within the system without any early warning signals, making it difficult to both foresee and reverse.

Applied to state trajectories, this implies that collapse should not be interpreted as a linear erosion of institutional capacity but as a nonlinear transition between alternative equilibria. State failure thus appears as a regime shift within a complex adaptive system rather than the gradual exhaustion of administrative resources.

Early Warning Indicators: State Failure Task Force Findings

Predicting tipping points (where a critical transformation occurs) can be extremely difficult. Fortunately, when discussing state failure, specific yet generic symptoms emerge that mark a broad class of states as they approach a critical point of state collapse, a phenomenon the state failure Task Force[16] has identified based on its research on 114 distinct events of state failure that have occurred between 1955 and 1998. By better tracking these symptoms, we can better assist states with these characteristics in counteracting state failure.

Conditions associated with several types of state failure:

- Bad quality of life (meager material well-being of a country's citizens).
- Unfavorable regime type (unfavorable institutional configurations).

[16] J. Goldstone, T. Gurr (*et al.*), State Failure Task Force Report: Phase III Findings, January 1999, https://www.researchgate.net/publication/247639865_State_Failure_Task_Force_Report_Phase_III_Findings [retrieved: 14.03.2023].

- Limited international integration (low openness to trade, no membership in regional organizations, and violent conflict in neighboring countries).
- Problematic ethnic or religious composition of a country's population or leadership.

Factors directly associated with the risk of state failure in all countries (INFLUENCE):

1. Regime type (all other things being equal, the State Failure Task Force "found the odds of failure to be seven times as high for partial democracies[17] as they were for full democracies and autocracies,"[18] with autocracies being slightly more stable than full democracies[19]).
2. Low levels of material well-being (measured by infant mortality rates).
3. Low trade openness (measured by imports plus exports as a percent of GDP).
4. The presence of major civil conflicts in two or more bordering states.
5. Total population and population density, i.e., states with larger populations and higher population density, are more prone to episodes of serious political instability (moderate relationship to state failure).

Factors indirectly affecting episodes of state failure:

1. Unfavorable environmental factors (droughts, heavy rainfall, forest fires).
2. High ethnic and/or religious discrimination.
3. Spikes in price inflation.
4. Big government debt.
5. High military spending.

Complexity Theory and States as Adaptive Systems

Multi-Causality and Interdisciplinary Integration

State failure is a multi-causal phenomenon, and there are critical differences between individual states that have experienced state collapse (with relatively little overlap between identified causes). Scholars have provided some causal insights that can serve as steppingstones toward a more extensive comparison; however, to fully grasp the process of state failure, it must be understood through the lens of interdisciplinary research and complex theory. Parallelism and analogy to other fields of study are also encouraged, given the

[17] Especially the ones with a powerful chief executive and a fractious and/or ineffective legislature.
[18] J. Goldstone, T. Gurr (*et al.*), State..., p. VI.
[19] J. Goldstone, T. Gurr (*et al.*), State..., p. 14.

overarching concept of decomposition, which is complex and elaborate and spans many scientific fields.

Complexity theory, "through the exploration of general patterns, dynamics, and interactions,"[20] aspires to deepen our comprehension of common properties and behaviors of complex systems such as states. It presupposes that a state (in any of its many forms) is a product of social evolution (through the process of fitness adaptation) to change (i.e., internal or external circumstances). The inherent complexity of every state increases over time as internal and external expectations rise, placing greater pressure and burdens on the state, which must adapt and evolve to fulfill social and political expectations for the universal delivery of political goods. Through the lens of complexity theory, we can gain a deeper understanding of how states truly function, grow, evolve, and, especially, fail and collapse. Complexity theorists have sought to identify the state's organizing internal logic to understand the onset of instability and decomposition in social organizations.

States as Self-Regulating Systems

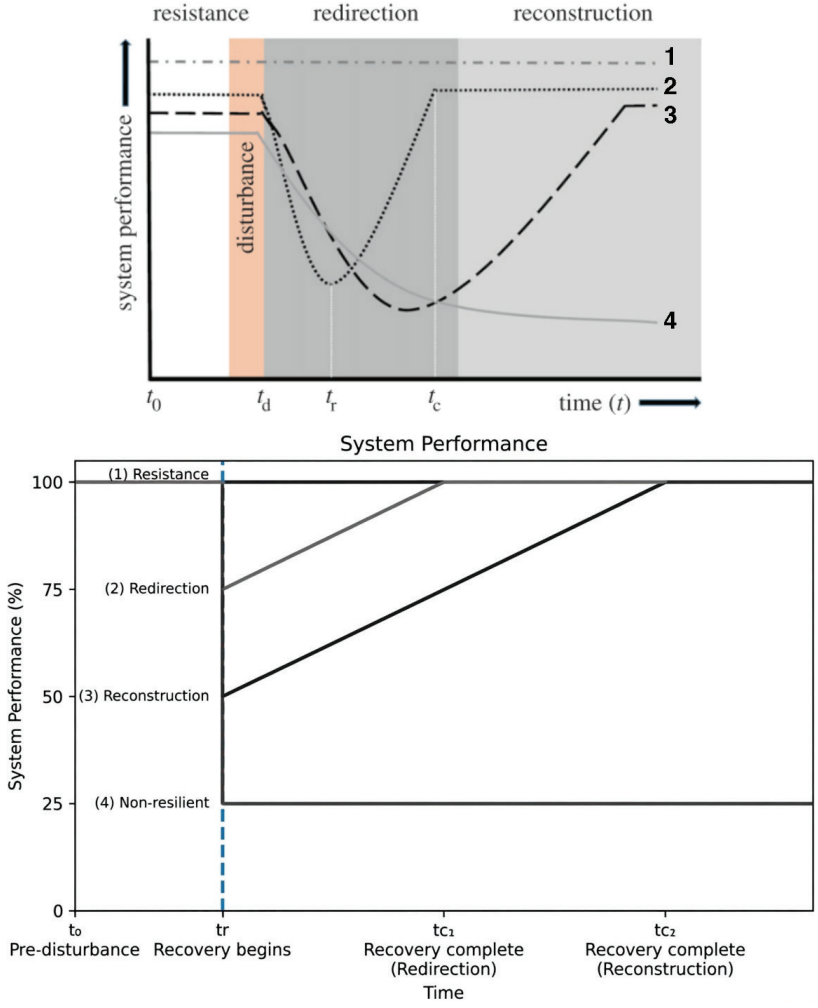
All states can be perceived as self-regulating,[21] dynamic, adaptive, and complex social systems formed to support, maintain, and perpetuate the conditions necessary for their survival (with the ability to renew themselves endlessly through adaptation and transformability). Due to their extensive exposure to internal and external disturbances and perturbations (of varying intensity), states remain in constant flux. Instability, from this perspective, is seen as an imbalance between the necessary functions the state must perform on behalf of its citizens and external actors, and its existing structures for performing them. When states fulfill their duties, they possess at least three stabilizing characteristics: internal social cohesion, consensus, and order (attesting to the state of equilibrium, i.e., stability).

Whenever a state is exposed to an internal/external disturbance or perturbation, it reacts in one of the following ways:

1. The social system maintains its original state without any adverse effects.
2. The social system may lose some of its functions but recover to the previous state after some time.
3. The social system may lose most of its functions and not recover to its original state.
4. The social system may collapse.

[20] D. Daems, Reimagining..., *ibid.*
[21] Via self-editing and self-shaping.

Graph 4. Potential responses of a system to a disturbance



System performance is a case-specific measure of a system's functionality. Time t_0 *is the start of the examination, pre-disturbance; td indicates the start of the disturbance, and tr indicates the beginning of the recovery phase for a system, while tc indicates the point at which recovery is complete since system performance has returned to pre-disturbance levels. (1) Shows a system that has invested in resistance and, as a result, does not experience a decrease in functionality after the disturbance. (2) Shows a system that is using redirection. Although there is an initial decrease in performance, it is rapidly mitigated by rerouting flows using existing infrastructure. (3) Shows a system that uses primarily reconstruction-based resilience strategies. Since reconstruction requires the construction of new infrastructure, it takes longer to recover pre-disturbance performance. (4) Shows a non-resilient system, which does not recover pre-disturbance performance.*

Source: Liu, Xuemiung and Daqing Li (***et al.***), Network Resilience, p. 62.

Parsons's Essential Function for System Survival

The equilibrium perspective gains additional analytical depth when complemented by classical sociological systems theory. Talcott Parsons's general theory states that for a social system to survive disturbance or systemic stress, it must perform at least one of its four essential functions—mechanisms that, in resilience terms, may operate through resistance, redirection, or reconstruction. These functions are: **Adaptation**, whereby the system adjusts to changes in its internal and external environment; **Goal attainment**, through which it defines and achieves its primary objectives; **Integration**, which coordinates and regulates relationships among its components to maintain cohesion; and **Latency**, which sustains and renews the cultural and motivational patterns necessary for role performance. From a resilience perspective, these functions can be interpreted as structural mechanisms that enable sociopolitical systems to preserve or reconstitute equilibrium under conditions of stress.

The Equilibrium Framework: Stability as Dynamic Balance

Additionally, each state (as a complex sociopolitical system) can be characterized and viewed within the equilibrium framework in terms of degrees of instability. By framing state failure as an issue of instability (i.e., as a decomposition, an ultimate manifestation of instability), a different analytical perspective emerges. State failure is not merely a lack of sufficient capacity of state institutions but a new and separate phenomenon vis-à-vis the state's survivability.

As stability is not equivalent to "stasis," the equilibrium framework conceptualizes the state as a non-static entity constantly reacting to ever-present change. As one scholar notes, "social structures do not spring forth fully-fledged from one day to the next but are the result of incremental expansion, addition, and recombination of the outcomes of day-to-day decision-making processes."[22] This observation reinforces the argument that stability is not a static condition but an emergent property of continuous structural adaptation. Over time, such adaptive processes generate denser institutional arrangements capable of addressing increasingly complex challenges. However, two structural risks emerge:

1. When institutions grow rigid, they reduce their capacity to respond adequately to events.
2. Institutions tend to specialize in addressing naturally occurring challenges, increasing the risk of incorrectly addressing unknown or unforeseen risks.

[22] D. Daems, Reimagining..., *ibid.*

Therefore, a state should be regarded as an entity with homeostatic capabilities, i.e., the tendency of a self-regulating system to establish a relatively stable equilibrium between its interdependent elements. The state, as a social system, maintains stability through internal processes while adjusting to internal and external conditions to guarantee its survival.

Equilibrium, in this framework, denotes a dynamic state of balance rather than mere resistance to change. Whenever internal or external disturbance or shock affects a social system, the system needs to make incremental changes (compensatory adjustments within a specific range) without substantially altering its internal organization and overall stability (its resilience) conducive to survival. Therefore, resilience is the sociopolitical system's ability to return to a stable state after perturbation or shock.

Metastability: The Intermediate State Between Stability and Instability

Contemplating state failure through an equilibrium framework is also justified, as it also relates to metastability, i.e., a relatively long-lived intermediate state between stability and instability that can be easily destabilized or restabilized by internal or external perturbations (as foregrounded by G. W. Breslauer and K. J. Breslauer[23]). Metastability is a persistent non-equilibrium state of "apparent stability" if the system remains insulated or isolated from severe internal or external perturbations (outside forces).[24] However, once the system tries to adapt to the external environment, instability often ensues (with possible state collapse induced by changes within the social system itself).

When any social system is severely disturbed, it usually reacts with a transformation (rather than mere adaptation), i.e., by reshaping the status quo. Transformation recaptures the original framework's (previous status quo) lost stability by dramatically changing key elements/functions of the social system. Transformations, therefore, increase the system's susceptibility[25] (understood as a shift from one equilibrium to another), providing the system with an extra degree of freedom beyond decomposition.

[23] G. W. Breslauer, K. J. Breslauer, *Political Science Meets Physical Science: The Shared Concept of Stability*, „PNAS Nexus" 2023, vol. 2, p. 3, DOI: 10.1093/pnasnexus/pgad401.

[24] For example: North Korea, Cuba.

[25] Susceptibility helps distinguish between long-lived stable states, relatively long-lived quasi-stable states, also known as metastable states, and unstable states i.e., non-equilibrium states.

The Limits of Prediction: Quantification and the Anna Karenina Principle

Unlike the strict laws of natural sciences, social sciences are characterized by 'mere principles' that are hard to quantify. Any search for a strict relationship between cause and effect is difficult to substantiate, given the diverse and limitless possibilities of causal impacts in the sociopolitical landscape (especially when human agency is considered). Given the current state of knowledge, leaders, governments, and NGOs must rely on context-sensitive judgment rather than deterministic prediction.

As each individual and integral part of a social system can individually react to any and all perturbations in an individualized or orchestrated manner (sometimes causing a chain reaction within the system), foreseeing destabilization, fragmentation, rebellion, or decomposition is often impossible. Each perturbation or shock must be understood in accordance with the Anna Karenina principle. which states that a deficiency in any one of several stabilizing factors might doom the whole endeavor to failure. Many reactions, adaptations, or transformations that uphold, reshape, or destabilize a state's original *status quo* would need to be quantified to foresee state failure. As states become increasingly complex, a virtually unlimited 'dendritic' branching of potential outcomes would need to be calculated and considered on a case-by-case basis for each state, with each shock or perturbation.

Conclusions

There is no universally applicable formula for restoring a failed or collapsed state. Acemoglu and Robinson[26] argue that inclusive and egalitarian political institutions are a direct source of economic development. Additionally, a delay in adopting inclusive and egalitarian political institutions delays economic development.[27] However, as presented above, these policies, when implemented too quickly and at too large a scale, can breed massive discontent and instability when states lack sufficient implementation capacity. Additionally, inclusive and egalitarian political institutions at this developmental stage often lead to clientelism, unqualified agents, and unhealthy political norms, resulting in low state capacity and a dissatisfied, corrupt bureaucracy. As a correlation can be found between the quality of political leaders and

[26] D. Acemoglu, J. Robinson, Why Nations Fail: The Origins of Power, Prosperity, and Poverty, New York 2012.
[27] K. L. Sokollof, S. L. Engerman, *History Lessons: Institutions, Factors Endowments, and Paths of Development in the New World*, "Journal of Economic Perspectives" 2000, vol. 14, 3, pp. 217–232.

bureaucratic productivity (such as health services),[28] bureaucracies closely related to incompetent or corrupt political leaders are more likely to be absent from their jobs[29] and to breed corruption.

Providing external financing for capacity building has also met mixed results. As studies show, foreign aid can:

1. Undermine political accountability by allowing (rent-seeking) incumbent leaders to remain in office despite poor performance;[30]
2. Hinder the development of state capacity (which would otherwise have to evolve without foreign aid);
3. Result in sub-optimal or ineffective reforms (due to poor quality of technical advisors and bureaucrats).[31]

One potential pathway of state restabilization involves leadership capable of restructuring institutional equilibria under conditions of systemic disequilibrium. The case of Charles de Gaulle provides a historical illustration of such a transformative intervention.

He "became a charismatic leader but not a dictator. His political beliefs combined the attachment to republican values and to the French national interest, which required the democratically elected government to be strong enough to be able to lead France to her destiny. When appointed prime minister of the provisional government of newly liberated France, he tried to reform French political institutions in a way consistent with these ideas. When, in 1946, the parliament adopted a constitution that continued the tradition of a weak executive, he stepped down from his position as head of government and temporarily withdrew from politics. He was called back in 1958 to save French democracy from the revolt of the military. After his return to power, he used his prestige as the wartime leader to end the rebellion not by force but by persuasion. He then used his charisma to obtain public support for the constitutional reform and for the end of the Algerian war – in both cases acting against what used to be the dominant sentiment of his nation. He ruled France as Prime Minister and President from 1958 to 1969 and used his power not only to reform the Republic and to end the war in Algeria but also to strengthen France's position as a great power within the Western alliance. 'In this context – writes his biographer – de Gaulle appears as an exemplar of the transformative leader."[32]

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[28] J. Habyarimana, S. Khemani, T. Scot, Political Selection and Bureaucratic Productivity, Policy Research Working Paper No. 8673, World Bank 2018, https://hdl.handle.net/10986/31074 [retrieved: 21.06.2023].

[29] M. Callen (*et al.*), The Political Economy of Public Sector Absence: Experimental Evidence from Pakistan, National Bureau of Economic Research 2016, No. 22340, https://www.nber.org/system/files/working_papers/w22340/w22340.pdf [retrieved: 02.02.2024].

[30] A. Deaton, The Great Escape: Health, Wealth, and the Origins of Inequality, Princeton (NY) 2013, DOI: 10.2307/j.ctt3fgxbm.

[31] S. Devarajan, S. Khemani, *If Politics Is the Problem, How Can External Actors Be Part of the Solution?* [in:] Institutions, Governance and the Control of Corruption, K. Basu, T. Cordella, Cham 2018, pp. 209–251, ISBN: 978-3-319-73822-2 (e-book).

[32] J. J. Wiatr, Political Leadership Between Democracy and Authoritarianism, Opladen 2022, p. 39. DOI: 10.3224/84742538.

In equilibrium terms, this episode can be interpreted as a transition from systemic disequilibrium toward a reconstituted executive-centered equilibrium. Rather than representing a purely personalistic phenomenon, transformative leadership here functions as a resilience mechanism enabling regime-level realignment without systemic collapse. Leadership thus emerges as a contingent but potentially decisive resilience variable within complex sociopolitical systems.

Ultimately, the resilience framework proposed here reframes state failure not as administrative weakness but as a qualitative transformation in the stability dynamics of complex sociopolitical systems.

Abstrakt

Tradycyjne podejścia do upadku państwa koncentrują się przede wszystkim na zdolności państwa (*state capacity*) – rozumianej jako umiejętność rządów do wykonywania kluczowych funkcji oraz dostarczania podstawowych dóbr publicznych. Niniejszy artykuł proponuje jednak fundamentalną rekonceptualizację tego zjawiska, argumentując, że upadek państwa należy rozumieć przez pryzmat teorii odporności oraz nauk o złożoności, a nie wyłącznie jako rezultat deficytów zdolności instytucjonalnej. Wykorzystując dorobek teorii sieci, teorii systemów oraz badań nad odpornością ekologiczną, zaproponowane ramy pojęciowe ujmują państwa jako złożone systemy adaptacyjne, których przetrwanie zależy od dynamicznych reakcji na zakłócenia i wstrząsy. Artykuł wprowadza pojęcia przejść równowagowych, punktów krytycznych oraz adaptacji transformacyjnej w celu wyjaśnienia trajektorii państw – od stabilności przez niestabilność aż po potencjalny upadek. Analiza państw w kategoriach dynamiki stabilności, zapożyczonej z nauk fizycznych i przyrodniczych, ujawnia uderzające analogie między dekompozycją społeczno-polityczną a awariami systemów w innych złożonych domenach. Ramy te integrują ustalenia State Failure Task Force dotyczące typów reżimów, dobrobytu materialnego oraz strukturalnych czynników ryzyka z wnioskami teorii złożoności odnoszącymi się do adaptacji i metastabilności. Pokazuje to, że upadek państwa stanowi odrębne zjawisko związane z odpornością systemową, a nie jedynie z deficytami zdolności instytucjonalnej. Zaproponowana rekonceptualizacja otwiera nowe możliwości w zakresie wskaźników wczesnego ostrzegania, strategii prewencyjnych oraz interwencji politycznych uwzględniających nieliniową dynamikę systemów – zamiast narzucania uniwersalnych szablonów instytucjonalnych.

Słowa kluczowe: upadek państwa, teoria odporności, teoria złożoności, niestabilność polityczna, ramy równowagowe, teoria systemów, zdolności państwa, adaptacja transformacyjna.

BIBLIOGRAPHY

Acemoglu D., Robinson J., Why Nations Fail: The Origins of Power, Prosperity, and Poverty, New York 2012.

Basu K., Cordella T. (ed.), Institutions, Governance and the Control of Corruption, Cham 2018.

Breslauer G. W., Breslauer K. J., *Political Science Meets Physical Science: The Shared Concept of Stability*, "PNAS Nexus" 2023, 2, DOI: 10.1093/pnasnexus/pgad401.

Callen M. *et al.*, The Political Economy of Public Sector Absence: Experimental Evidence from Pakistan, National Bureau of Economic Research 2016, No. 22340, https://www.nber.org/system/files/working_papers/w22340/w22340.pdf.

Daems D., Reimagining the Rise and Fall of Civilizations, https://longnow.org/ideas/reimagining-the-rise-and-fall-of-civilizations/.

Dahl R. A., *Modern Political Analysis*, 5th ed., Englewood Cliffs 1991.

Deaton A., The Great Escape: Health, Wealth, and the Origins of Inequality, Princeton 2013, DOI: 10.2307/j.ctt3fgxbm.

Eckstein H., Division and Cohesion in Democracy: A Study of Norway, Princeton 1966.

Goldstone J., Gurr T. *et al.*, State Failure Task Force Report: Phase III Findings, January 1999, https://www.researchgate.net/publication/247639865_State_Failure_Task_Force_Report_Phase_III_Findings.

Habyarimana J., Khemani S., Scott T., Political Selection and Bureaucratic Productivity, Policy Research Working Paper No. 8673, World Bank 2018, https://hdl.handle.net/10986/31074.

Johnson C., Revolutionary Change, Boston 1966.

Levitsky S., Way L., Revolution and Dictatorship: The Violent Origins of Durable Authoritarianism, Princeton 2021.

Liu X., Daqing L. *et al.*, *Network Resilience*, "Physics Reports" 2022, vol. 971 (7034), https://www.researchgate.net/publication/360717846_Network_resilience.

Padgett J. F., Powell W. W., The Emergence of Organizations and Markets, Princeton 2012.

Parsons T., The Social System, London 1970.

Raciborski J., Sadura P. (eds.), O mocy i niemocy współczesnego państwa polskiego, Warszawa 2024.

Simon H. A., *The Architecture of Complexity*, "Proceedings of the American Philosophical Society" 1962, vol. 106, 6.

Sokoloff K. L., Engerman S. L., *History Lessons: Institutions, Factors Endowments, and Paths of Development in the New World*, "Journal of Economic Perspectives" 2000, vol. 14, 3.

UK Prime Minister's Strategy Unit, *Investing in Prevention: An International Strategy to Manage Risks of Instability and Improve Crisis Response*, Cabinet Office, London 2005, https://gsdrc.org/document-library/investing-in-prevention-an-international-strategy-to-manage-risks-of-instability-and-improve-crisis-response.

Wiatr J. J., Political Leadership Between Democracy and Authoritarianism, Opladen––Berlin–Toronto 2022, DOI: 10.3224/84742538.

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Monika Bator-Bryła*

Practical Consequences of Brexit for EU Citizens in the Context of Free Movement

[Praktyczne konsekwencje brexitu dla obywateli UE w kontekście swobodnego przepływu osób]

Abstract
Brexit, understood as the United Kingdom's decision to leave the European Union, formally implemented on 31 January 2020, is one of the most important events in contemporary European politics. One of the key aspects of this decision was the changes in freedom of movement, which had a direct impact on the citizens of the European Union Member States. Freedom of movement was one of the fundamental rights guaranteed to European Union citizens by the treaty principle of free movement of persons. In the period leading up to Brexit, EU citizens enjoyed the rights arising from the principle of free movement of persons, which allowed them to travel, take up employment, settle and study in the United Kingdom without having to complete additional visa or immigration formalities.

Following the United Kingdom's withdrawal from the European Union, legal regulations came into force which significantly restricted EU citizens' access to some of their previous rights. In particular, persons who did not complete the required formalities before the end of the transition period were subject to the national immigration regime established by the United Kingdom. This regime includes, among other things, a points-based system that makes the right to reside and work in the United Kingdom conditional on meeting certain criteria relating to education, professional qualifications and income.

The article analyses the practical consequences of Brexit for European Union citizens, with particular focus on changes in freedom of movement. The aim of the study is to examine the impact of new legal regulations on the daily lives of EU citizens in terms of exercising their rights to travel, settle, take up and pursue employment, and use public services in the United Kingdom. The article also highlights the challenges faced by EU citizens due to these changes and explore potential future directions for the United Kingdom's migration policy.

The author formulates the following research thesis: the provisions contained in the Brexit Withdrawal Agreement, in particular those relating to the right of EU citizens to

* **Monika Bator-Bryła** – PhD in Law, Assistant Professor at the Faculty of Law and Social Sciences, Jan Kochanowski University of Kielce (affiliation); https://orcid.org/0000-0003-1703-8040; mbryla@ujk.edu.pl / dr nauk prawnych, adiunkt na Wydziale Prawa i Nauk Społecznych, Uniwersytet Jana Kochanowskiego w Kielcach (afiliacja).

free movement, were aimed at ensuring continuity and protection of their rights after the end of the transition period. However, in practice, the implementation of new immigration rules by the United Kingdom has led to the creation of significant formal and legal barriers that have significantly hampered the effective exercise of this right.

The various research methods used included, in particular, comparative analysis and analysis of normative acts affecting the legal status of European Union citizens after the United Kingdom's withdrawal from the EU. The research included an analysis of the content of the Agreement on the Withdrawal of the United Kingdom from the European Union, with particular emphasis on the provisions relating to the free movement of persons, as well as national legislation implementing the provisions of that agreement, including the European Union (Withdrawal Agreement) Act 2020 and the Immigration and Social Security Coordination (EU Withdrawal) Act 2020. The method of analysis and interpretation of legal documents was also used, focusing on regulations defining the status of EU citizens, in particular with regard to immigration requirements and application procedures, such as the EU Settlement Scheme. Furthermore, an empirical analysis was conducted based on a review of academic literature, including studies on the impact of the new regulations on the daily lives of EU citizens in the United Kingdom, which provided an in-depth and multifaceted picture of the practical consequences of Brexit.

Keywords: freedom of movement, right to settle, EU citizen, Withdrawal Agreement, Brexit.

The Essence of Free Movement

The freedom of movement for citizens of Member States and their family members within the EU entails the ability to move freely across this area, which is intrinsically linked to European Union citizenship.[1] It appears that holding the citizenship of one of the Member States is a key condition for enjoying the rights conferred by the treaty. However, the purpose of EU citizenship is not to extend the substantive scope of the treaty to purely domestic matters unrelated to EU law.[2] Thus, the acquisition or loss of citizenship of

[1] See G. Druesne, Prawo materialne i polityki Wspólnot i Unii Europejskiej [Substantive Law and Policies of the Communities and the European Union], Warszawa 1996, p. 93; see also A. Triandafyllidou, *Irregular Migration in Europe in the Early 21st Century* [in:] Irregular Migration in Europe: Myths and Realities, A. Triandafyllidou (ed.), Ashgate Publishing, Burlington 2012, p. 3.

[2] See joined cases C-64/96 and C-65/96, Becker and Jacquet, judgment of 5 Jun. 1997, ECLI:EU:C:1997:285, para. 23; C-148/02, Carlos Garcia Apello v Belgian State, judgment of 2 Oct. 2003, ECLI:EU:C:2003:539, para. 26.

a Member State is equivalent to the acquisition or loss of European Union citizenship.[3]

The principle of free movement primarily derives from Article 21 of the Treaty on the Functioning of the European Union (TFEU), which guarantees EU citizens the right to move and reside freely within the territory of the Member States, as well as from Article 45 TFEU, concerning the free movement of workers, prohibiting discrimination based on nationality in matters of employment, remuneration, and other working conditions. The fundamental secondary EU law act in the field of free movement of EU citizens is Directive 2004/38/EC of April 29, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[4] The main premise of its provisions is to ensure the possibility of moving between Member States under terms identical to national regulations regarding the relocation within one's home country. The legislator's intention is to apply all possible facilitations and simplifications in the exercise of migration rights. In defining the beneficiaries of Directive 2004/38/EC, the EU legislator extended its scope to include all Union citizens and their family members who move to or reside in another Member State, as well as specific family members.

An indispensable condition for exercising the rights arising from the provisions of the aforementioned directive is actual migration and residence in another Member State. Theoretically, all EU citizens are the addressees of EU regulations on the free movement of persons. In practice, however, only those who move to another Member State benefit from these provisions, although the case law of the Court of Justice of the European Union (CJEU) does not always appear to confirm this principle.[5] Nevertheless, the right to free movement within the Member States includes the right of entry and residence, the right to employment, the right to settle, the right to education and training, access to healthcare, the right to equal treatment, and the right to social benefits on an equal basis with the citizens of the host state. An inherent element of exercising freedom of movement within the European Union is the right of residence in the host Member State. According to Article 21(1) TFEU, every EU citizen has the right to reside in the territory of the Member States, subject to the restrictions and conditions provided for in the treaty and the measures adopted to implement it.[6] The right of residence is categorized into three types:

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[3] See A. Gubrynowicz, *Obywatelstwo Unii Europejskiej – stan obecny i perspektywy* [in:] Obywatelstwo Unii Europejskiej [Citizenship of the European Union], Zeszyty Ośrodka Informacji i Dokumentacji Europejskiej, 9, Wydawnictwo Sejmowe, Warszawa 2008, p. 8.

[4] Official Journal of the European Union L 158, p. 77, 30 April 2004.

[5] See the case C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department, judgment of 19 Oct. 2004, ECLI:EU:C:2004:639, para. 18 and 19.

[6] Cases C-456/02, Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS), judgment of 7 Sept. 2004, ECLI:EU:C:2004:488, para. 31 and 32; C-291/05, Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind, judgment of 11 Dec. 2007, ECLI:EU:C:2007:771, para. 28.

- residence for up to three months,
- residence for more than three months, and
- permanent residence.[7]

EU citizens can reside in another Member State for up to three months without any formalities or conditions, except for the requirement to hold a valid identity card or passport. Residence for more than three months is granted to EU citizens under the following circumstances: if they have the status of a worker or are self-employed, if they possess sufficient financial resources, or if they have comprehensive sickness insurance.[8] This right of residence also extends to EU citizens enrolled in a private or public institution recognized or funded by the host state for the purpose of studies or vocational training. These individuals must also have sufficient resources to avoid becoming a burden on the host state's social assistance system and must possess comprehensive health insurance. The right of permanent residence is granted to EU citizens and their family members who are not nationals of a Member State, provided they have continuously and lawfully resided in the host state for five years.[9] The loss of permanent residence rights can only occur due to an absence exceeding two years, while temporary absences do not disrupt its continuity.

An essential element of the freedom of movement is the principle of equal treatment.[10] This principle ensures that EU citizens exercising their right to free movement cannot be treated less favorably than the citizens of the country in which they reside. It applies to access to the labor market as well as to social and educational benefits. Additionally, this freedom also extends to the right of family members of EU citizens to move and settle on equal terms, even if they are not EU citizens. A particular expression of adherence to the principle of equal treatment can be found in Article 45(2) TFEU, which mandates the application of this rule in the areas of employment, remuneration, and other working conditions for workers from Member States.[11]

In the social sphere, the prohibition of discrimination is enshrined in Article 7(2) of Regulation 492/2011.[12] This provision prohibits discrimination

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[7] P. Minderhoud, *Free Movement, Directive 2004/38/WE and Access to Social Benefits* [in:] Rethinking the Free Movement of Workers: The European Challenges Ahead, P. Minderhoud, N. Trimikliniotis (eds.), Wolf Legal Publ., Nijmegen 2009, p. 69; see F. Rossi dal Pozzo, Citizenship Rights and Freedom of Movement in the European Union, European Monographs, Kluwer Law International 2013, p. 61.

[8] See more W. Kałamarz, *Swobodny przepływ osób i polityka wizowa* [in:] Obszar wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Geneza, stan i perspektywy [The European Union's Area of Freedom, Security and Justice: Origins, Current Situation and Prospects], F. Jasiński, K. Smoter (eds.), Komitet Integracji Europejskiej, Warszawa 2005, p. 110.

[9] Directive 2004/38/EC, Chapter 4.

[10] The principle of equal treatment is expressed in Article 18 TFEU, Article 45 TFEU, Article 24 of Directive 2004/38/EC, and Article 7 of Regulation 492/2011.

[11] See also the case C-332/91, Beatrice Sellinger, Rosalba Del Maestro, Gillian Mansfield v Università degli Studi di Parma, judgment of 5 Jun. 2008, ECLI:EU:C:1993:333.

[12] Official Journal of the European Union L 141, p. 1, 27 May 2011.

in the social and tax domains.[13] According to the established case law of the Court of Justice of the European Union (CJEU), social benefits should not be interpreted narrowly, as they encompass all advantages granted to national workers either because of their status as workers or due to their residence within a given state. Extending these benefits to workers who hold the nationality of other Member States aims to support their mobility within the territory of the European Union.[14]

The freedom of movement of EU citizens and their family members is not an unconditional right. Article 21 of the Treaty on the Functioning of the European Union (TFEU) grants the right to freedom of movement and residence, subject to the restrictions and conditions laid down in the Treaties and measures adopted for their implementation. Article 27 of Directive 2004/38/EC, while regulating the migration of EU citizens, also sets out limitations on this freedom. As a general rule, EU citizens have the right to move between Member States under conditions almost identical to those governing movement within their country of origin. This principle was the main intention of the EU legislator when creating the freedom of migration. However, this freedom is not absolute. Member States may restrict it when necessary to protect their national interests. Justifications for such restrictions include considerations of public policy, public security, and public health. The measures available to Member States primarily include denying entry, prohibiting residence in the host state, or expulsion. A key factor qualifying behavior as contrary to public policy or public security is the existence of a sufficiently serious threat affecting a fundamental societal interest. The EU legislator has granted Member States the power to restrict freedom of movement only in cases where their vital national interests are at risk while simultaneously providing EU citizens with procedural safeguards to defend against the improper application of such restrictions.

A key element in the implementation of the freedom of movement of persons and services within the single market is the recognition of professional qualifications within the European Union.[15] Regulations in this area allow EU citizens to take up employment in other Member States based on qualifications obtained in their country of origin, contributing to professional

[13] See also J. R. Carby-Hall, The Treatment of Polish and Other A8 Economic Migrants in the European Union Member States: A Research Programme Prepared for Commisioner for Civil Right Protection of the Republic of Poland, Bureau of the Commissioner for Civil Right Protection, Warszawa 2008, p. 41.

[14] See cases C-65/81, Francesco Rein, Letizia Rein v Landeskreditbank Baden-Württemberg, ff of 14 Jan. 1982, ECLI:EU:C:1982:6, para. 12; C-85/96, Martinez Sala v Freistaat Bayern, ff of 12 May 1998, ECLI:EU:C:1998:217, para. 25; C-213/05, Wendy Geven v Land Nordhein-Westfalen, judgment of 18 Jul. 2007, ECLI:EU:C:2007:438, para. 12.

[15] The primary legal act regulating the recognition of professional qualifications within the EU is Directive 2005/36/EC of 7 Sept. 2005 (OJ L 255, p. 22, 30 Sept. 2005), as amended by Directive 2013/55/EU. This Directive establishes common legal frameworks and procedures that facilitate the mutual recognition of professional qualifications between Member States.

mobility and labor market integration. The form of education is irrelevant, as long as it is recognized in the home country.[16] To simplify procedures, a common system for the recognition of education and vocational training between Member States has been introduced across the EU. In the case of regulated professions, qualifications are automatically recognized based on the harmonization of minimum educational and training standards. In the case of non-regulated professions, the general system is applied. The host state compares the candidate's qualifications with the national requirements and may require supplementary training, such as completing an adaptation period or passing a skills test.

The freedom of movement within the European Union also includes the right to access healthcare in other Member States. Thanks to the European Health Insurance Card (EHIC), EU citizens can receive necessary medical services during a temporary stay in another country under the same conditions as residents of that country. Furthermore, according to Directive 2011/24/EU of March 9, 2011, on the application of patients' rights in cross-border healthcare,[17] patients can plan treatment abroad and are entitled to partial or full reimbursement of costs, depending on the rules in their home country's health insurance system. Regulations on the coordination of social security systems protect patients' rights, enabling them to access healthcare regardless of where they work, reside, or retire.

Freedom of Movement After Brexit

Brexit, officially implemented on January 31, 2020, had a significant impact on the freedom of movement between the United Kingdom and the EU Member States. With the end of the transition period, which lasted until December 31, 2020, the United Kingdom ceased to be part of the single market and customs union, introducing new rules regarding the mobility of persons.[18]

The main legal regulations in the United Kingdom governing the legal status of EU citizens after Brexit are:

(1) the European Union (Withdrawal Agreement) Act 2020.[19] This Act aims to align the UK legal system with the new post-Brexit conditions and implement specific provisions arising from the agreement, including those regarding the status of EU citizens, as well as the adoption of the EU Settlement Scheme,

[16] See M. Kożuch, Uznawanie kwalifikacji w Unii Europejskiej [Recognition of Qualifications in the European Union], EuroPrawo, XIX, Warszawa 2014, p. 10.
[17] Official Journal of the European Union, L 88, 4 April 2011, pp. 45–65.
[18] See N. Nic Shuibhne, EU Citizenship and Free Movement Rights, Oxford University Press 2020, p. 301.
[19] European Union (Withdrawal Agreement) Act 2020, C 37, on Jan. 9.

which enables EU citizens to obtain settled status or pre-settled status in the United Kingdom. These provisions implement the EU regulations contained in the agreement, but with specific details regarding the application procedures and documentation. The Withdrawal Agreement focuses on the general principles of protecting the rights of EU citizens, ensuring the continuation of these rights after Brexit, provided they complete the necessary procedures. The European Union (Withdrawal Agreement) Act 2020, on the other hand, implements the details of this agreement in UK domestic law, providing specific procedural and administrative regulations, such as the EU Settlement Scheme. Both documents are closely linked, with the Withdrawal Agreement setting the legal framework and the Act implementing these frameworks in practice, specifying the concrete steps EU citizens must take to retain their rights in the United Kingdom after Brexit.

(2) Immigration and Social Security Coordination (EU Withdrawal) Act 2020.[20] This Act regulates matters related to the immigration system after the end of the transition period, as well as the coordination of social security systems between the United Kingdom and the EU countries. The Act also modifies the rules concerning social benefits for EU citizens, including access to healthcare and other public services. It introduces a points-based immigration system for EU citizens and also introduces changes in the coordination of social security systems that were previously governed by EU regulations. EU citizens may be subject to different rules regarding access to social benefits such as unemployment benefits or pensions, depending on their status and length of stay in the UK. The Immigration and Social Security Coordination (EU Withdrawal) Act 2020 primarily focuses on new immigration and integration rules for EU citizens after the end of the transition period, including the introduction of a points-based system, which requires EU citizens to meet new criteria such as having a job offer, appropriate salary, education, and language proficiency to obtain residence rights. It also introduces changes to the social security system, lowering the level of access to benefits, including for EU citizens who do not meet the new requirements. In contrast, the Withdrawal Agreement focuses on protecting the rights of EU citizens who were residing in the UK before the end of the transition period and also addresses issues related to the coordination of social security systems, ensuring continuity of access for EU citizens to social security benefits under similar conditions to those before Brexit. In summary, the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 implements the provisions resulting from the Withdrawal Agreement by introducing new immigration rules, while the Withdrawal Agreement itself safeguards the rights of EU citizens who were residing in the UK before the end of the transition period, ensuring continuity of those rights.

[20] Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, C 20, of Nov. 11.

In the context of the right to free movement, the most important provisions of the Withdrawal Agreement[21] are those related to the status of EU citizens in the United Kingdom and UK citizens in EU Member States.[22] These rules are primarily outlined in the Protocol on Citizens' Rights and in articles regarding transitional provisions.

A fundamental element of the Withdrawal Agreement is ensuring the protection of the rights of EU citizens who lived in the United Kingdom or the European Union before the end of the transition period, including the right to residence, work, healthcare, education, social benefits, and pensions. Article 10 of the agreement, which regulates matters concerning individuals covered by the rights arising from the agreement, including the free movement and residence of EU citizens and their families after the end of the transition period, also defines the scope of beneficiaries. These include EU citizens who were exercising their right to reside in the United Kingdom under EU law before the end of the transition period and continue to reside there; EU citizens as frontier workers, who were benefiting from frontier worker rights in the United Kingdom before the end of the transition period and continue to do so; UK citizens exercising their right to reside in an EU Member State before the end of the transition period and continue to reside there; UK citizens as frontier workers, benefiting from frontier worker rights in an EU Member State before the end of the transition period and continue to do so; family members of EU or UK citizens, including children, direct relatives, or children born after the end of the transition period, provided certain conditions are met, such as residing in the host state in accordance with EU law before the end of the transition period.[23]

The agreement further addresses the issue of residence, stating in Article 11 that the right of residence for individuals who were entitled to reside in the territory of the United Kingdom (or an EU Member State) under EU law before the end of the transition period is not automatically revoked after Brexit. According to the provisions of Article 11, these individuals can continue residing under the same conditions that applied before the end of the transition period, provided they meet the required criteria. Therefore, the rights of citizens are protected as long as they are covered by the provisions of the Withdrawal Agreement and meet the requirements for legal residence.

According to the provisions of the agreement, particularly Article 18, the rules regarding access to social security systems, including healthcare, pensions, sick leave, maternity benefits, and other social services, have been

[21] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Official Journal of the European Union CI 384/1, 2019, Nov. 12.

[22] See C. Barnard, The Substantive Law of the EU: The Four Freedoms, Oxford University Press 2022, p. 459 ff.

[23] See S. Peers, EU Justice and Home Affairs Law, Oxford University Press 2023, p. 157 ff.

established.[24] Article 18 of the Withdrawal Agreement, concerning access to social security systems, aims to protect citizens who, as a result of Brexit, should not lose access to social benefits they were entitled to before December 31, 2020.[25] This primarily applies to individuals who were living and working in the United Kingdom at the time of Brexit, but also to British citizens who, as a result of the new legal status after Brexit, have settled in EU member states.[26] Regarding healthcare, individuals who were covered by the UK's healthcare system before Brexit retain their rights to healthcare services based on the Withdrawal Agreement. This agreement stipulates that EU citizens living in the UK will still be able to access healthcare under the National Health Service (NHS) in the UK, provided they meet specific conditions.[27] According to the new regulations, EU citizens who have settled or pre-settled status can continue to use NHS services on the same basis as UK citizens. Those who do not obtain this status may face additional requirements, such as charges for medical services or limited access to certain types of care. Under the Withdrawal Agreement, EU citizens who legally reside in the UK still have access to NHS healthcare services, but certain conditions must be met, such as the length of stay in the country and having the appropriate immigration status. Additionally, individuals applying for a work visa must pay the Immigration Health Surcharge (IHS), which grants them access to public healthcare services, but only if their visas entitle them to use the NHS. For those who do not meet these requirements, access to healthcare may be restricted, and some services may incur additional charges.[28] For example, access to dental or specialist services may require a fee that was not previously applicable to EU citizens.

Under the provisions concerning pensions and benefits, individuals who had already earned entitlement to benefits in the country where they lived or worked do not lose them as a result of Brexit. This means they can still rely on pensions or other benefits to which they had acquired the right before the end of the transition period. Similarly, with regard to sickness or maternity benefits, individuals who meet certain conditions can still apply for benefits in accordance with the rules that were in place before Brexit. Article 18 ensures that there is no change in access to these benefits, as long as the person was already entitled to receive them before the end of the transition period.[29] In practice, the Withdrawal Agreement aimed to ensure that EU citizens (and UK citizens as well) would not have to face sudden and unexpected losses of rights they had relied on due to their previous years of work and life in anoth-

[24] C. Barnard, The Substantive..., p. 439 ff.
[25] S. Peers, Brexit: The Legal Framework for Withdrawal from the EU, Oxford University Press 2020, p. 213 ff.
[26] K. Armstrong, *Brexit Time: Leaving the EU – Why, How and When?*, Cambridge University Press 2017, p. 172 ff.
[27] M. Dougan, The UK after Brexit: Legal and Policy Challenges, Intersentia, Cambridge–Antwerp 2021, p. 97 ff.
[28] N. Nic Shuibhne, EU Citizenship..., p. 329 ff.
[29] See P. Craig, Gráinne de Búrca, EU Law: Text, Cases, and Materials, Oxford University Press 2018, p. 1050 ff.

er member state. In this way, Article 18 played an important role in protecting citizens' rights, providing them with certainty that the social benefits they had been receiving would not be canceled due to Brexit, and their status would be recognized under the previous rules.

Article 20 of the Withdrawal Agreement, concerning the recognition of previous residence periods, is particularly important for EU citizens who lived in the United Kingdom before Brexit. The rules were established to allow them to apply for the so-called "settled status" or "pre-settled status." EU citizens who had lived in the UK for at least 5 years before the end of the transition period (Dec. 31, 2020) could apply for settled status, which allowed them to remain in the UK and enjoy full rights, such as the right to work, access to healthcare, social benefits, and pensions. On the other hand, EU citizens who had lived in the UK for less than 5 years could apply for pre-settled status.[30] This status was granted for a period of up to 5 years, with the possibility of extension if certain conditions were met, aimed at ensuring that the individual had actually resided in the United Kingdom for the required period.

The application procedure was relatively simple, but it required the applicant to provide documentation of their residence in the United Kingdom. Applications for settled[31] or pre-settled status were submitted online using the government's application portal. To complete the process, the applicant had to create an account, provide personal information, and then submit the required documents proving their residence in the United Kingdom. For settled status, it was necessary to provide evidence of a 5-year period of residence in the UK. Documents could include, for example, a residence card, utility bills, rental agreements, tax system records, and other documents showing presence in the country for the required period. For pre-settled status, it was sufficient to document a shorter period of stay (at least 1 day in 2020). Applications for settled or pre-settled status had to be submitted by the end of June 2021 (after this date, individuals who did not submit applications could lose their right to remain). It is worth noting that individuals applying for settled status could do so until June 30, 2021, while those who were granted pre-settled status had time to convert it to settled status by the end of their fifth year of residence in the UK. After submitting the application, the applicant would receive a decision within a few weeks, and if the application was accepted, they would receive either pre-settled[32] or settled status. It is important to

[30] See more S. Fella, M. Gower, C. J. McKinney, UK–EU Withdrawal Agreement: Implementation of Citizens' Rights, House of Commons Library 2023, Nov. 28, No 9657, p. 12.

[31] See also M. Suska, Dyskusja na temat praw obywateli Unii Europejskiej po brexicie [Debate on Issues Concerning the EU Citizen's Rights After Brexit], 'Roczniki Administracji i Prawa' 2017, 17, 2 ["Annuals of the Administration and Law"], p. 127

[32] See more M. Fernández-Reino, M. Sumption, Report. How Secure is Pre-Settled Status, Centre on Migration, Policy and Society (COMPAS), University of Oxford 2022, Mar. 29, p. 4.

emphasize that the application process was less complicated than traditional immigration visas, as it did not require going through complex procedures.

The issue of the rights of family members of EU citizens[33] who arrived in the United Kingdom after the end of the transition period was regulated by Article 22 of the Withdrawal Agreement. Although they could be admitted to the territory of the UK, their rights to settle were dependent on meeting certain conditions. According to this article, family members of an EU citizen who did not meet the requirements for obtaining settled status had to go through the application procedure, where they had to prove that their relationship with the EU citizen was genuine and also meet other requirements, such as having sufficient means of support and access to appropriate health insurance. Although Article 22 of the Agreement allowed family members of EU citizens to remain in the United Kingdom,[34] these conditions were significantly more restrictive than those that applied to individuals arriving before the end of the transition period.

One of the key elements of the United Kingdom's migration policy change after leaving the European Union was the introduction of a new immigration system.[35] The decision to leave the EU altered the way EU citizens were treated, as they had previously been able to freely settle and work in the UK.[36] The new system, which came into effect on January 1, 2021, represented a significant shift in the existing regulations, introducing rules that were more similar to those applied to citizens of non-EU countries. Before Brexit, EU citizens enjoyed the principle of free movement, meaning they could work, settle, study, access healthcare, and travel to the UK without needing visas or permits, on equal terms with British citizens. However, after Brexit, the UK decided to end the free movement and implement a new immigration system that restricted access to the labor market and settlement for EU and European Economic Area (EEA) citizens. This system is based on a "points-based" system, which means that individuals applying for a visa or residence permit must meet specific requirements that are assigned points. The system considers various factors, such as having a job offer in the UK, salary level, education, English language proficiency, and professional experience. A candidate applying for a work visa must accumulate a specified number of points based on these cri-

[33] See more N. Cambien, *Residence Rights for EU Citizens and Their Family Members: Navigating the New Norma*, "European Papers" 2018, 3, 3, pp. 1333 ff.

[34] See more G. More, *From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union. Social Justice, Brexit and Other Challenges* [in:] European Citizenship under Stress, Nijhoff Studies in European Union Law 2020 Aug., 16, p. 469.

[35] C. J. McKinney, M. Gower, G. Sturge, The UK's New Points-Based Immigration System, House of Commons Library 2022, Sept. 27, No CBP-8911, p. 6.

[36] See more G. Sturge, How Has Immigration Changed Under the UK's New 'Points Based' System?, House of Commons Library 2022, Sept. 27 [accessed: 27.01.2025] https://commonslibrary.parliament.uk/how-has-immigration-changed-under-the-uks-new-points-based-system/?utm_source=chatgpt.com.

teria. To apply for a visa, the candidate must achieve at least 70 points.[37] Points are awarded based on various factors, such as the offered salary (higher wages grant additional points), holding the required professional qualifications, and other aspects, such as the level of English proficiency, which also affects the points awarded.[38]

The new post-Brexit regulations significantly limited the employment opportunities for low-skilled workers in the United Kingdom.[39] While previously, EU citizens could freely work in various industries, including sectors requiring minimal skills, after the end of the transition period, the UK introduced a system in which most job applicants must meet specific qualification requirements.[40] Under the new immigration system, individuals who do not possess high qualifications or do not perform work considered skilled have much more difficult access to the job market. Despite the restrictive requirements introduced after Brexit, the United Kingdom still offers numerous employment opportunities for specialists and highly qualified workers. Sectors such as technology, healthcare, engineering, finance, and science continue to be key areas where skilled workers are sought. In particular, the UK focuses on attracting experts in fields like IT, artificial intelligence, biotechnology, and finance, where advanced knowledge and skills are required. EU citizens who hold the necessary qualifications can apply for visas under the skilled worker system. These individuals can also benefit from preferences in the points-based system, which makes it easier for them to obtain a work permit in the UK. It is also worth noting that the UK offers special migration programs for individuals with skills in specific professions. For example, in the healthcare sector, individuals applying for jobs in medical professions can benefit from facilitation in obtaining a visa, especially if they have a job offer within the NHS (National Health Service). Similar exemptions are available for scientists, engineers, IT specialists, and those working in environmental protection sectors.

The points-based system aims to attract highly skilled workers, which aligns with the UK government's policy to focus on immigrants who can contribute more to the economy. Under this system, there are no longer any

[37] See P. W. Walsh, Policy Primer: The UK's 2021 Points-Based Immigration System, the Migration of Observatory, the University of Oxford 2021, May 17, [accessed: 28.01.2025] https://migrationobservatory.ox.ac.uk/resources/primers/policy-primer-the-uks-2021-points-based-immigration-system/.

[38] See A. Radziwinowiczówna, O. Lewis, The Post-Brexit Legal Framework for International Migration in the UK: Differentiated Deportability of Poor Europeans?, Centre of Migration Research Working Papers, No. 126/184, University of Warsaw, Warszawa 2021, p. 14.

[39] See J. Summers, R. Hesketh, M. Kleinman, Implications of the Post-Brexit Immigration System for Temporary Migration Router, King's College London, the Policy Institute, p. 4 [accessed: 28.01.2025] https://www.kcl.ac.uk/policy-institute/assets/implications-of-the-post-brexit-immigration-system-for-temporary-migration-routes.pdf.

[40] See more M. Dias-Abey, K. Bales, Migration and Work in the Post-Brexit UK, Law Working Papers Series, University of Bristol 2024, Paper No 003, p. 18.

preferences for EU citizens, meaning that citizens of EU Member States must meet the same requirements as citizens of other non-EU countries. In practice, this means that all candidates must apply for a visa, and the decision to grant it is based on meeting certain conditions.[41] The system also introduced new rules for students.[42] EU students must now apply for a student visa, which is granted based on the requirements for admission to a university and having sufficient funds to support themselves in the UK. EU citizens wishing to study in the UK must now meet specific tuition fee requirements. Before Brexit, EU citizens were treated on an equal footing with UK citizens, and tuition fees for EU students were the same as for domestic students. After the end of the transition period, EU students wishing to study at a higher education level in the UK are treated the same as non-EU students and may be required to pay higher tuition fees. Additionally, EU citizens who did not obtain settled status may not have access to certain forms of financial support, such as student loans. As a result, many EU students may be forced to pay higher tuition fees or seek alternative sources of funding. It is also important to note that after the end of the transition period, EU citizens lost access to some privileges, such as the right to work after graduation without needing to apply for additional permission.

The introduction of the new immigration system was also aimed at controlling the number of people coming to the United Kingdom, especially in light of concerns about excessive immigration. One of the main goals of the government was to focus on highly skilled immigrants, which was intended to enable better integration of these individuals into the labor market and British society. The new immigration system not only affected EU citizens but also citizens of other countries who wanted to settle or work in the United Kingdom. On the one hand, the new rules offer greater employment opportunities for people with qualified skills, but on the other hand, they may pose a barrier for less qualified individuals who previously benefited from simplified immigration procedures. The criteria for obtaining a visa have become more demanding, and a lack of sufficient points may result in a visa refusal.

The United Kingdom introduced a series of changes regarding the free movement of EU citizens, which had a significant impact on travel to the country for both tourism and business purposes. EU citizens, who previously benefited from the free movement of people, had to adapt to the new immigration regulations after the transitional period ended, including visa requirements, border controls, and travel documents. Since January 1, 2021, EU

[41] See more M. Pazzona, F. Fil, UK Immigration After Brexit, Centre for Law, Economics and Finance, Brunel University London 2023, Aug., p. 15.

[42] See D. A. Vahtera, The Impact of Brexit on Students, Tallinn University School of Governance, Law and Society [accessed: 07.01.2025] https://www.researchgate.net/publication/365853664_THE_IMPACT_OF_BREXIT_ON_STUDENTS], p. 5 ff.

citizens must apply for a visa if they plan to stay in the United Kingdom for more than six months. This requirement does not apply to tourists or people traveling for short-term business visits. For such trips, EU citizens can enter the United Kingdom without needing a visa, provided their stay does not exceed six months. However, they must meet the new passport and document requirements, including having a valid passport or ID card, depending on the UK's border requirements. An important point is that since Brexit, EU citizens can no longer enter the United Kingdom solely with an ID card if their stay is to last longer than six months. For long-term stays, they must obtain the appropriate visa, depending on the purpose of their trip, such as a student, work, or family visa.

As part of the new regulations, the United Kingdom also introduced an Electronic Travel Authorisation (ETA) system,[43] which applies to certain EU Member States. Before traveling, individuals from these countries must apply for approval to enter, verifying information such as the purpose of their trip, health status, and sufficient financial means. For EU citizens planning long-term stays, these requirements are part of a larger immigration process that requires meeting specific criteria, such as proof of sufficient funds for living and health insurance.

EU citizens must also undergo passport control upon entering the United Kingdom. In practice, this means that every individual, regardless of the purpose of their trip, is required to present a valid travel document and may be asked for additional documents, such as a return ticket, hotel reservation confirmation, proof of sufficient financial means, or health insurance. In addition, as part of security procedures, travelers to the United Kingdom may be asked to undergo biometric tests, such as facial scans, fingerprints, or photographs.

The changes following Brexit also have implications for individuals traveling to the United Kingdom for business purposes. For short-term visits, such as business meetings or conferences, EU citizens can still travel to the United Kingdom without a visa, provided their stay does not exceed 6 months. However, business trips related to long-term projects or work now require applying for the appropriate visa. Just like with tourism, these individuals must comply with the new immigration requirements, such as presenting a passport, proof of the purpose of the trip, or additional documents confirming the appropriateness of their visit.

[43] See more C. J. McKinney, Electronic Travel Authorisations: What's the ETA?, House of Commons Library, 24 April, 2023 [accessed: 28.01.2025], https://commonslibrary.parliament.uk/electronic-travel-authorisations-whats-the-eta/.

The Future of the Freedom of Movement of EU Citizens to the United Kingdom

After Brexit, the future of the freedom of movement of EU citizens to the United Kingdom is marked by certain uncertainties, which will depend on the development of the UK's immigration policy and its ongoing relationship with the European Union. While restrictions currently apply regarding entry, residence, and employment for EU citizens, future changes in immigration legislation and the long-term effects of Brexit could significantly impact the shape of these relations, as well as the lives of EU citizens who plan to settle in the UK or take advantage of the opportunities to move to the country.

After leaving the European Union, the United Kingdom introduced an immigration system aimed at controlling the influx of citizens from outside the UK, including EU citizens. However, this system is still under analysis and potential modifications may occur in the future. The UK government has already announced that the points-based system currently in place for EU citizens may be adjusted depending on the needs of the economy, as well as based on the experiences from the first years after leaving the European Union. In the future, changes may be implemented to allow for greater flexibility in accepting immigrants, particularly in specialized sectors of the economy facing labor shortages. On one hand, the UK may seek to facilitate procedures for highly skilled workers to meet the demands of the labor market in sectors such as IT, healthcare, and science. On the other hand, it may introduce more restrictive rules for individuals with lower qualifications, which could mean that EU citizens seeking work in these areas will have to meet higher requirements. This could also apply to individuals looking for employment in sectors requiring lower qualifications, such as agricultural work or services.

In the context of future changes, an important aspect is the potential introduction of more varied visa applications, which would take into account the specific needs of the UK's economy. Potential policy changes may also include new rules for EU citizens who wish to stay in the UK for educational, tourist, or business purposes. It is also worth noting that the UK may seek to renegotiate agreements with the EU, including those regarding the freedom of movement, which could affect immigration conditions.

The long-term effects of Brexit on EU citizens in terms of freedom of movement have a significant impact on their daily lives, professional situations, and social circumstances. First and foremost, the end of the transition period means that EU citizens, who previously enjoyed the right to freely move and work in the United Kingdom, must adapt to new regulations. A predicted long-term consequence is the necessity to meet formal requirements, such

as obtaining settled or pre-settled status, in order to legally reside and work in the UK. These changes may result in reduced mobility for EU citizens, especially for those who fail to meet immigration status requirements. This means that many EU citizens, who were previously able to move freely and settle in the UK, may face difficulties related to legal residency and access to employment or public services. The reduction in the number of EU citizens in the labor market could affect the functioning of certain industries, particularly those relying on the employment of low-skilled workers, such as the agricultural sector, services, and social care.

In the long-term perspective, Brexit also impacts the reduced flow of students, interns, and volunteers, as EU citizens must obtain the appropriate student or work visa, which is hindered by point-based requirements and high fees related to education and visas. The decrease in the number of students from the EU may affect the academic culture of the United Kingdom and access to skilled personnel in many fields. Additionally, Brexit may lead to the gradual phasing out of cooperation between the United Kingdom and the European Union in the areas of exchange programs, scientific research, and professional collaboration. This could limit the mobility of individuals who previously participated in programs such as Erasmus+ or Horizon Europe. As a result, EU citizens wishing to participate in such programs will need to meet additional requirements to engage in these initiatives in the UK.

In summary, the future of the free movement of EU citizens to the United Kingdom is full of challenges that will shape depending on the UK's immigration policy and its future relationship with the EU. Potential changes in immigration legislation and the long-term effects of Brexit may reduce the mobility of EU citizens, as well as impact their professional, educational situations and access to public services.

Changes, Practical Implications, and Challenges

One of the main changes that occurred after Brexit was the loss of the right to freedom of movement for EU citizens to the United Kingdom. Before Brexit, EU citizens could freely travel, work, study, and settle in the United Kingdom, benefiting from the rights granted under the EU principle of free movement of persons. After leaving the EU, these rules were replaced by a more restrictive immigration system that requires EU citizens to meet specific criteria in order to gain entry, work, or settle. A points-based system[44] was introduced, linking

[44] See more C. C. Cîrlig, EU and UK Citizens' Rights After Brexit. An Overview, European Parliamentary Research Service, PE 651.975 – 2020, Jun., p. 14.

access to the labor market and other rights to meeting specific requirements, such as having the appropriate professional qualifications, salary levels, or English language proficiency. Additionally, these changes also included new rules regarding entry for tourism, educational, or business purposes, where EU citizens now need to apply for the appropriate visa or approval for entry. Travel requirements were also introduced, including the need to have sufficient financial means and a health check.

From the perspective of EU citizens, these changes carry a number of practical implications. For many individuals who previously benefited from the right to freedom of movement, the new regulations mean the need to adapt to more formal and complex application procedures. Currently, EU citizens who wish to settle in the United Kingdom must obtain settled or pre-settled status, which requires meeting criteria such as a specified period of residence in the country and proving sufficient financial means. Additionally, these individuals must be aware of deadlines for submitting their applications to avoid losing their right to stay legally. Changes in immigration policy also affect the professional mobility of EU citizens. The introduction of a points-based system means that EU citizens seeking employment in the United Kingdom must meet specific requirements related to qualifications, salary, and skills. For many, this could be a barrier, especially for those who wish to work in sectors requiring lower qualifications, such as agricultural work or services. In practice, these changes could also impact the education and tourism sectors. EU citizens who previously traveled to the United Kingdom for educational or tourism purposes must now apply for a student or tourist visa, which involves additional costs and formalities. For students, the change in regulations may also affect tuition fees, which have been increased for EU citizens, making the United Kingdom less accessible as an educational destination.

The challenges faced by EU citizens in connection with Brexit extend beyond changes in the regulations regarding freedom of movement. In the longer term, there are many issues that could influence the further development of the United Kingdom's immigration policy and its relations with the European Union. Firstly, the United Kingdom will need to adapt its immigration system to the changing labor market and economic situation. There is a possibility that some sectors, especially those dealing with a shortage of skilled labor, will need to introduce additional exemptions in the points-based system or open new immigration pathways to attract workers from the EU. Another challenge will be maintaining relations with EU countries in the context of citizen mobility, which may include renegotiating agreements on professional cooperation, academic exchange, or participation in programs such as Erasmus. From the perspective of EU citizens, the long-term effects of Brexit may involve the loss of benefits previously resulting from full integration within the European Union, potentially leading to reduced mobility and

career development opportunities. Additionally, the United Kingdom may face challenges in integrating new immigrants and ensuring they have equal access to public services such as healthcare and education. The adaptation process could be time-consuming and costly for both immigrants and the UK's administrative systems, potentially leading to social tensions or challenges related to managing diversity.

Reference to the Thesis

The regulations contained in the Withdrawal Agreement between the United Kingdom and the European Union were indeed intended to ensure the continuity of EU citizens' rights, particularly in terms of free movement, after the transition period. Article 13 of the Agreement guaranteed EU citizens and their family members the right to reside in the United Kingdom under previous rules, while Article 22 addressed the rights of family members of EU citizens arriving after the transition period. However, in practice, the new immigration rules introduced by the United Kingdom have significantly restricted the actual ability to exercise these rights. Firstly, the application process proved to be complicated for many individuals, especially for groups vulnerable to exclusion, such as the elderly, people with disabilities, or those without access to modern technology. Despite efforts by the UK government to inform EU citizens about the need for registration, not all eligible individuals managed to submit their applications before the final deadline. As a result, many people found themselves in an irregular status, affecting their rights to employment, healthcare, and social benefits. Secondly, the end of free movement and the introduction of a new points-based immigration system created significant barriers for EU citizens who wished to work in the United Kingdom after the transition period. The new regulations require meeting specific criteria, such as salary levels or professional qualifications, which have significantly limited employment opportunities for EU citizens in lower-skilled sectors such as hospitality, social care, and agriculture. Furthermore, the introduction of visas and administrative obligations for EU citizens traveling to the United Kingdom for professional or educational purposes has resulted in additional mobility challenges. This particularly affects posted workers, students, and entrepreneurs conducting cross-border business activities.

In conclusion, although the Withdrawal Agreement aimed to ensure the continuity of EU citizens' rights, the practical implementation of new immigration regulations by the United Kingdom has significantly restricted the exercise of the right to free movement. Consequently, many EU citizens face

difficulties in accessing the labor market, public services, and settlement opportunities, posing challenges both for individuals and for relations between the EU and the United Kingdom.

Conclusions

From the perspective of legal regulations, Brexit led to the termination of the previous rules on the free movement of EU citizens within the United Kingdom, and the introduction of new immigration laws had a significant impact on the ability to stay legally, work, and access the social security system. Regulations such as the Withdrawal Agreement, along with implementing acts such as the European Union (Withdrawal Agreement) Act 2020 and the Immigration and Social Security Coordination (EU Withdrawal) Act 2020, introduced complex application procedures that could make life difficult for EU citizens who do not meet the new requirements in the UK. Although the Withdrawal Agreement guarantees the protection of EU citizens' rights, including the right to reside and work in the United Kingdom, in practice, the application process, such as within the framework of the EU Settlement Scheme[45], involves considerable bureaucracy and the risk of not obtaining settled status for those who fail to complete the formalities. At the same time, the introduction of a points-based system, based on requirements related to employment, education, and language skills, changes the way EU citizens are perceived, treating them on equal terms with citizens of non-EU countries, which affects mobility and the integration of these individuals into British society.

The data indicates that although the new immigration regulations ensure the continuity of some rights for EU citizens, they nevertheless represent a significant barrier to their daily lives. EU citizens now face greater difficulties with administrative procedures, which can lead to feelings of uncertainty and limited integration within UK society. In practical terms, Brexit has therefore resulted in a substantial restriction on the free movement of EU citizens, which goes beyond the mere change of regulations and has real consequences for the quality of their lives in the new, post-Brexit environment.

[45] See more S. Fella, M. Gower, C. J. McKinney, UK–EU Withdrawal..., p. 9.

Abstrakt

Brexit, rozumiany jako decyzja Zjednoczonego Królestwa o wystąpieniu z Unii Europejskiej, formalnie zrealizowana 31 stycznia 2020 roku, stanowi jedno z najważniejszych wydarzeń współczesnej polityki europejskiej. Jednym z kluczowych aspektów tej decyzji były zmiany w zakresie swobody przemieszczania się, które miały bezpośredni wpływ na obywateli państw członkowskich Unii Europejskiej. Swoboda przemieszczania się była jednym z fundamentalnych praw, które gwarantowała obywatelom Unii Europejskiej traktatowa zasada swobody przepływu osób. W okresie poprzedzającym brexit obywatele UE korzystali z uprawnień wynikających z zasady swobodnego przepływu osób, umożliwiającej im: podróżowanie, podejmowanie zatrudnienia, osiedlanie się oraz kształcenie na terytorium Zjednoczonego Królestwa bez konieczności dopełniania dodatkowych formalności wizowych lub imigracyjnych.

Po wystąpieniu Zjednoczonego Królestwa z Unii Europejskiej weszły w życie regulacje prawne, które w istotnym zakresie ograniczyły dostęp obywateli UE do części dotychczas przysługujących im uprawnień. W szczególności osoby, które nie dopełniły wymaganych formalności przed zakończeniem okresu przejściowego, zostały objęte krajowym reżimem imigracyjnym ustanowionym przez Zjednoczone Królestwo. Reżim ten obejmuje między innymi system punktowy, uzależniający możliwość uzyskania prawa pobytu i pracy od spełnienia określonych kryteriów dotyczących poziomu wykształcenia, kwalifikacji zawodowych oraz wysokości osiąganych dochodów.

W artykule podjęto analizę praktycznych konsekwencji brexitu dla obywateli Unii Europejskiej, ze szczególnym uwzględnieniem zmian w zakresie swobody przemieszczania się. Celem opracowania jest zbadanie wpływu nowych regulacji prawnych na codzienne funkcjonowanie obywateli UE – w kontekście realizacji ich prawa do: podróżowania, osiedlania się, podejmowania i wykonywania pracy, a także korzystania z usług publicznych na terytorium Zjednoczonego Królestwa. W artykule omówiono również główne wyzwania, przed którymi stają obywatele UE w związku z wprowadzonymi zmianami legislacyjnymi, jak również przedstawiono potencjalne kierunki ewolucji polityki migracyjnej Zjednoczonego Królestwa w przyszłości.

Autorka formułuje następującą tezę badawczą: regulacje zawarte w umowie o wystąpieniu z Unii Europejskiej, w szczególności postanowienia odnoszące się do prawa obywateli UE do swobodnego przemieszczania się, były ukierunkowane na zapewnienie ciągłości oraz ochrony ich praw po zakończeniu okresu przejściowego. Jednak w praktyce implementacja nowych przepisów imigracyjnych przez Zjednoczone Królestwo doprowadziła do powstania istotnych barier o charakterze formalnoprawnym, które znacząco utrudniły efektywną realizację tego prawa.

Zastosowane zróżnicowane zestawy metod badawczych objęły w szczególności analizę porównawczą oraz analizę aktów normatywnych, mających wpływ na status prawny obywateli Unii Europejskiej po wystąpieniu Zjednoczonego Królestwa z UE. W ramach badań przeprowadzono analizę treści umowy o wystąpieniu Zjednoczonego Królestwa z Unii Europejskiej, ze szczególnym uwzględnieniem przepisów odnoszących się do swobody przemieszczania się osób, a także ustawodawstwa krajowego implementującego postanowienia tej umowy, w tym European Union (Withdrawal Agreement) Act 2020

oraz Immigration and Social Security Coordination (EU Withdrawal) Act 2020. Zastosowano również metodę analizy i wykładni dokumentów prawnych, koncentrując się na regulacjach określających status obywateli UE, w szczególności w zakresie wymogów imigracyjnych oraz procedur aplikacyjnych, takich jak EU Settlement Scheme. Ponadto przeprowadzono analizę empiryczną opartą na przeglądzie literatury naukowej, w tym badań dotyczących wpływu nowych regulacji na codzienne funkcjonowanie obywateli UE w Zjednoczonym Królestwie, co umożliwiło uzyskanie pogłębionego i wieloaspektowego obrazu praktycznych konsekwencji brexitu.

Słowa kluczowe: swoboda przemieszczania się, prawo do osiedlania się, obywatel UE, umowa o wystąpieniu, brexit.

BIBLIOGRAPHY

Armstrong K., Brexit Time: Leaving the EU – Why, How and When?, Cambridge University Press 2017.

Barnard C., The Substantive Law of the EU: The Four Freedoms, Oxford University Press 2022.

Cambien N., *Residence Rights for EU Citizens and Their Family Members: Navigating the New Norma*, "European Papers" 2018, 3.

Carby-Hall J. R., The Treatment of Polish and Other A8 Economic Migrants in the European Union Member States: A Research Programme Prepared for Commisioner for Civil Right Protection of the Republic of Poland, Bureau of the Commissioner for Civil Right Protection, Warszawa 2008.

Cîrlig C. C., EU and UK Citizens' Rights After Brexit. An Overview, European Parliamentary Research Service, PE 651.975 – 2020, Jun.

Craig P., de Búrca G., EU Law: Text, Cases, and Materials, Oxford University Press 2018.

Dias-Abey M., Bales K., Migration and Work in the Post-Brexit UK, Law Working Papers Series, University of Bristol 2024, Paper No 003.

Dougan M., The UK After Brexit: Legal and Policy Challenges, Intersentia, Cambridge–Antwerp 2021.

Druesne G., Prawo materialne i polityki Wspólnot i Unii Europejskiej [Substantive Law and Policies of the Communities and the European Union], Warszawa 1996.

European Citizenship Under Stress**,** Nijhoff Studies in European Union Law 2020, 16, Aug.

Fella S., Gower M., McKinney C. J., UK–EU Withdrawal Agreement: Implementation of Citizens' Rights, House of Commons Library 2023, 28 Nov., No 9657.

Fernández-Reino M., Sumption M., Report. How Secure Is Pre-Settled Status, Centre on Migration, Policy and Society (COMPAS), University of Oxford 2022, 29 Mar.

Irregular Migration in Europe: Myths and Realities, A. Triandafyllidou (ed.), Ashgate Publishing, Burlington 2012.

Kożuch M., Uznawanie kwalifikacji w Unii Europejskiej [Recognition of Qualifications in the European Union], EuroPrawo, Warszawa 2014.

McKinney C. J., Gower M., Sturge G. , The UK's New Points-Based Immigration System, House of Commons Library 2022, Sept. 27, No CBP-8911.

Nic Shuibhne N., EU Citizenship and Free Movement Rights, Oxford University Press 2020.

Obszar wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Geneza, stan i perspektywy [The European Union's Area of Freedom, Security and Justice: Origins, Current Situation and Prospects] F. Jasiński, K. Smoter (eds.), Komitet Integracji Europejskiej, Warszawa 2005.

Obywatelstwo Unii Europejskiej [Citizenship of the European Union], Zeszyty Ośrodka Informacji i Dokumentacji Europejskiej, 9, Wydawnictwo Sejmowe, Warszawa 2008.

Peers S., Brexit: The Legal Framework for Withdrawal from the EU, Oxford University Press 2020.

Peers S., EU Justice and Home Affairs Law, Oxford University Press 2023.

Radziwinowiczówna A., Lewis O., The Post-Brexit Legal Framework for International Migration in the UK: Differentiated Deportability of Poor Europeans?, Centre of Migration Research, University of Warsaw, Warszawa 2021.

Rethinking the Free Movement of Workers: The European Challenges Ahead, P. Minderhoud, N. Trimikliniotis (eds.), Wolf Legal Publ., Nijmegen 2009.

Rossi dal Pozzo F., Citizenship Rights and Freedom of Movement in the European Union, European Monographs, Kluwer Law International 2013.

Suska M., Dyskusja na temat praw obywateli Unii Europejskiej po brexicie [Debate on Issues Concerning the EU Citizen's Rights After Brexit], 'Roczniki Administracji i Prawa' ["Annuals of the Administration and Law"] 2017, 17, 2.

Web References

McKinney C. J., Electronic Travel Authorisations: What's the ETA?, House of Commons Library, 24 April, 2023 [accessed: 28.01.2025], https://commonslibrary.parliament.uk/electronic-travel-authorisations-whats-the-eta/.

Pazzona M, Fil F., UK Immigration After Brexit, Centre for Law, Economics and Finance, Brunel University London, August 2023 [accessed: 07.01.2025], https://www.researchgate.net/publication/365853664_THE_IMPACT_OF_BREXIT_ON_STUDENTS.

Sturge G., How has immigration changed under the UK's new 'points based' system?, House of Commons Library, 27 September, 2022 [accessed: 27.01.2025, https://commonslibrary.parliament.uk/how-has-immigration-changed-under-the-uks-new-points-based-system/?utm_source=chatgpt.com].

Summers J., Hesketh R., Kleinman M., Implications of the Post-Brexit Immigration System for Temporary Migration Router, King's College London, the Policy Institute [accessed: 28.01.2025, https://www.kcl.ac.uk/policy-institute/assets/implications-of-the-post-brexit-immigration-system-for-temporary-migration-routes.pdf].

Vahtera D. A., The Impact of Brexit on Students, Tallinn University School of Governance, Law and Society [accessed: 07.01.2025], https://www.researchgate.net/publication/365853664_THE_IMPACT_OF_BREXIT_ON_STUDENTS].

Walsh P. W., Policy Primer: The UK's 2021 points-based immigration system, the Migration of Observatory, the University of Oxford, 17 May 2021, [accessed: 28.01.2025, https://migrationobservatory.ox.ac.uk/resources/primers/policy-primer-the-uks-2021-points-based-immigration-system/].

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Nato Gugava*
Nino Vasadze**

The Effectiveness of Mandatory Qualification and Certification Procedures for Teacher Candidates in Georgia

[Skuteczność obowiązkowych procedur kwalifikacyjnych i certyfikacyjnych dla kandydatów na nauczycieli w Gruzji]

Abstract

Education is a top priority for any state, and teachers play a crucial role in enhancing its quality. Their professional knowledge, skills, and teaching approaches directly impact the effectiveness of the learning process and students' academic success. In response to the evolving challenges of the 21st century, the education system must remain flexible, adapting to contemporary requirements while ensuring that teachers are equipped with the expertise needed to manage instruction effectively and help students reach their full potential and achieve the best possible results.

It is worth noting that, according to national legislation, teachers in general education institutions must follow professional teaching standards, the code of professional ethics, and the responsibilities outlined by their Sector Benchmark. They are also required to acknowledge each student's individuality and to implement differentiated teaching strategies that support students' personal, social-emotional, and cognitive development. In addition, teachers should enhance student achievement by reflecting on their own work and analyzing student assessments. They should embrace innovation in their teaching practices, effectively integrate information and communication technologies into the learning process, and remain committed to ongoing professional development. Accordingly, teachers' high qualifications and professionalism are essential for enhancing the quality of school education. For this very purpose, Georgia has imposed new requirements on teachers since 2010 and introduced teacher certification exams. Although Georgia has established qualification requirements for aspiring teachers and introduced teacher training programs, there are still educators in the system who do

* **Nato Gugava** – PhD in Public Administration, Associate Professor (in Law) at Sulkhan-Saba Orbeliani University, Tbilisi, Georgia (affiliation); https://orcid.org/0009-0001-8191-6170; nato.gugava@sabauni.edu.ge / dr nauk o administracji publicznej, profesor uczelni (prawo), Uniwersytet Sulchana Saby Orbelianiego, Tbilisi, Gruzja (afiliacja).

** **Nino Vasadze** – PhD candidate in Public Administration of Sulkhan-Saba Orbeliani University (Sabauni), Tbilisi, Georgia (affiliation); https://orcid.org/0009-0002-7729-4863; n.vasadze24@sabauni.edu.ge / doktorantka nauk o administracji publicznej na Uniwersytecie Sulchana Saby Orbelianiego, Tbilisi, Gruzja (afiliacja).

not meet the state's minimum competency standards. It is therefore worth examining how teachers are hired in schools, as, despite regulations and competency requirements in the education system, there are still cases where teachers lack the fundamental skills needed to facilitate a successful, results-oriented learning process.

With this in mind, this paper will examine the effectiveness of teacher selection and qualification requirements in Georgian general education institutions, their alignment with national regulations and international standards, and the key reforms Georgia should consider to modernize its education system. In this process, assessing the effectiveness of qualification requirements for teacher recruitment is particularly crucial, as it serves as the foundation for attracting and retaining highly qualified, professional educators. Ultimately, this has a direct and measurable impact on the quality of education and students' academic success.

Keywords: teacher selection, qualification requirements, general education institutions, competitions, teacher competence, certification exam.

Introduction

In response to the growing challenges of the 21st century, teachers must be equipped with the knowledge and skills necessary to facilitate a successful, results-driven learning process. However, many students in Georgia face difficulties in developing the competencies needed to succeed in higher education and the labor market.[1] One contributing factor is that not all teachers possess the fundamental skills needed to effectively support student learning.[2] The relevance of the issue of selecting competent teachers in general education institutions is also confirmed by the Development Strategy of Georgia – Vision 2030, which emphasizes that modernizing the teacher training system and attracting and retaining qualified staff are key to establishing a student-centered learning environment in general education schools.[3] However, the strategic document does not specify the concrete steps planned to achieve this goal.

[1] Center For Civil Integration And Inter-Ethnic Relations, Teacher Certification, Professional Development, and Career Advancement from 2005 to 2023, p. 10.

[2] R. Li, H. Kitchen, B. George, M. Richardson, E. Fordham, OECD Reviews of Evaluation and Assessment in Education: Georgia, OECD Reviews of Evaluation and Assessment in Education, OECD Publishing, Paris 2019, p. 12.

[3] Ordinance of the Government of Georgia #517 on the Adoption of the Development Strategy of Georgia – Vision 2030.

It is worth noting that since 2010, the Georgian government has introduced new teacher qualification requirements, including certification exams.[4] Yet, a study by the Center For Civil Integration And Inter-Ethnic Relations found that between 2010 and 2014, only 41.6% of applicants who took the professional skills test met the minimum competency threshold. Between 2010 and 2015, results varied by subject: foreign language teachers had a higher success rate, while elementary school, physics, and mathematics teachers had a low rate.[5] Until 2016, a significant number of teachers failed to meet state competency standards. In response, exam questions were simplified, and the minimum competency threshold was lowered.[6] Despite these adjustments, by 2023, approximately 5,000 non-status teachers remained in the system without having met the state's minimum competency requirements.[7]

At the same time, a study by the National Center for Educational Research (NCER) revealed a sharp imbalance between supply and demand in the teacher labor market: while the number of individuals seeking to enter the profession has increased, demand for new teachers remains low.[8] Nevertheless, schools continue to employ teachers who have not attained full professional status.

University educational programs play a crucial role in shaping teacher qualifications. However, in some cases, these programs fail to produce highly competent graduates, as indicated by both labor market analyses[9] and research on university curricula.[10] These studies confirm that university programs in Georgia are not aligned with labor market demands,[11] including teacher training programs, which often fall short in preparing qualified professionals.[12]

In addition to the above, it should also be noted that in order to attract skilled educators to the profession, changes were made to the sectoral characteristics of the teaching profession and a teacher training educational program was introduced.[13] Admission to these programs requires candidates

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4 Order No. 1101 of the Minister of Education and Science of Georgia, dated December 4, 2009 On the Regulation of Teacher Certification and the Approval of a Sample Teacher Certificate

5 Center For Civil Integration And Inter-Ethnic Relations, Teacher Certification, Professional Development, and Career Advancement from 2005 to 2023, p. 3.

6 *Ibid.*, p. 7, 10.

7 National Center for Educational Research (NCER), Assessment of Teacher Professional Development and Career Advancement Scheme, 2023, p. 92.

8 *Ibid.*, p. 8.

9 M. Amashukeli, D. Lezhava, N. Gugushvili, Educational Outcomes, Employment Market and Job Satisfaction in Georgia, Tbilisi 2017, p. 7.

10 L. Ingvarson, J. Schwille, M. T. Tatto, G. Rowley, R. Peck, S. Senk, An Analysis of Teacher Education Context, Structure, and Quality-Assurance Arrangements in TEDS-M Countries, Michigan, Amsterdam 2013, p. 48.

11 M. Amashukeli, D. Lezhava, N. Gugushvili, Educational..., *ibid.*

12 L. Ingvarson, J. Schwille, M. T. Tatto, G. Rowley, R. Peck, S. Senk, An Analysis..., *ibid.*

13 Order No. 69 of the Director of the National Center for Educational Quality Enhancement (NCEQE), dated February 11, 2016 On the Approval of the Sectoral Characteristics of the Teacher Training Educational Program.

to score at least 60% on the relevant subject competency test.[14] However, the effectiveness of training and retraining processes—particularly for individuals transitioning from other fields who have demonstrated subject competence but lack formal teaching experience—has not been thoroughly studied.

Given these challenges, it is evident that teacher competence in general education institutions remains a critical issue. As such, the teacher selection process plays a fundamental role in ensuring educational quality. In Georgia, state regulations define qualification requirements for aspiring teachers, outline procedures for entering the profession, and establish rules for competitive hiring processes.[15]

Thus, the aim of this paper is to evaluate the effectiveness of teacher qualification requirements in public general education institutions and to develop recommendations for improving state policies in this area. To achieve this goal, the study primarily employs a documentary research methodology, analyzing legal frameworks governing teacher recruitment and professional entry requirements. This analysis also examines the experiences of Poland and Estonia. These countries were selected based on key criteria that influence the effectiveness of their education systems.[16] First and foremost, special attention was given to the high efficiency of the education systems in both countries, as evidenced by students' academic achievements,[17] and the degree of educational equity.[18] Furthermore, it is essential to consider the historical and contextual factors that have shaped the development of each country's education system. These factors were the primary reasons for selecting Poland and Estonia for analysis. By employing both inductive and deductive methods, this study examines their experiences, ultimately contributing to the development of well-founded recommendations for the Georgian education system.

[14] Teacher training educational program; https://bte.iliauni.edu.ge/ganatlebis-skola [accessed: 30.10.2024].
[15] Order No. 174/N of the Minister of Education, Science, Culture, and Sport of Georgia, dated August 20, 2019 On the Approval of the Procedure for the Start and Termination of Teacher's Activity.
[16] OECD, PISA 2012 Results: Excellence through Equity (vol. II): Giving Every Student the Chance to Succeed, PISA, OECD Publishing, Paris 2013.
[17] P. Santiago, OECD Reviews of School Resources: Estonia 2016, Paris 2016.
[18] OECD, Synergies for Better Learning: An International Perspective on Evaluation and Assessment, OECD Reviews of Evaluation and Assessment in Education, OECD Publishing, Paris 2013.

Requirements for Candidates Applying for Public School Teaching Positions Through Open Competition

In many countries of the world, the selection of highly qualified teachers is a key focus in efforts to improve the quality of education.[19] Like in many other nations,[20] in Georgia, the teaching profession is regulated,[21] requiring candidates to meet specific qualification standards. One of the most important steps in this process is the state certification exam, which serves not only to assess a candidate's professional knowledge but also to evaluate the relevance of their pedagogical skills.[22] In the selection process for teachers, public general education institutions adhere to state-established standards, which ensure existence of unified qualification requirements.[23] Drawing on international experience, key determinants of a teacher's professionalism[24] include the level of education achieved, teaching experience[25] ability to collaborate with colleagues,[26] teacher's university ranking, subject matter expertise, and pedagogical knowledge[27] —assessed through certification exams—as well as the content of their completed academic programs.[28] According to established regulations, candidates seeking employment as teachers in general education institutions in Georgia through an open competition[29] must meet one of the following criteria: they must have obtained certification before 2015 or, in all other cases, must hold the relevant higher education qualifications.[30]

[19] OECD, Teachers Matter – Attracting, Developing and Retaining Effective Teachers, OECD Publishing, Paris 2005, p. 38.
[20] J. Tummons, *Professional Standards in Teacher Education: Tracing Discourses of Professionalism Through the Analysis of Textbooks*, 'Research in Post-Compulsory Education' 2014, 19, 4, pp. 417–432.
[21] Law of Georgia on Higher Education, Article 76.
[22] *Ibid.*, Article 2, Paragraph z13.
[23] Order No. 174/N..., *ibid.*
[24] N. Andguladze, Professional Capital and Teacher Appraisal in Georgia, Ilia State University, Tbilisi 2016, *passim*.
[25] R. J. Marzano, D. J. Pickering, J. E. Pollock, Classroom Instruction That Works: Research-Based Strategies for Increasing Student Achievement, Alexandria, VA: ASCD 2001.
[26] R. J. Marzano, A Theory-Based Meta-Analysis of Research on Instruction, Mid-Continent Regional Educational Laboratory, Aurora, CO 1998.
[27] A. Hargreaves, Changing Teachers, Changing Times, Cassell, London 1994.
[28] A. Hargreaves, M. Fullan, Professional Capital: Transforming Teaching in Every School, Teachers College Press, New York 2012, p. 94.
[29] *Ibid.*, Article 7.
[30] Order No. 174/N..., *ibid.*, Article 2.

Teacher education in general education institutions

Education of subject teachers

Teacher qualifications are a crucial factor in the overall success of an education system. Well-qualified educators play a key role in delivering high-quality instruction, directly influencing students' academic achievements.[31] Individuals entering the teaching profession without prior teaching experience before 2015 and without certification granted before this period must meet the educational requirements established by the state. There are three pathways to meeting these requirements: completing an integrated bachelor's and master's degree program, enrolling in a teacher training educational program, or Teacher Seeker Program.[32] Individuals who obtain a Master of Education degree through an integrated bachelor's and master's program in teacher training are granted the status of a senior teacher upon entry into the profession[33] and are exempt from the teacher certification exam. Similarly, individuals holding a doctorate or an equivalent academic degree in a subject or field of education included in the national curriculum are also exempt from the exam.[34] In all other cases, candidates must demonstrate their competence by successfully passing the teacher certification exam. It is important to note that, at present, the integrated bachelor's and master's degree program is available only in the fields of primary education and history-geography-citizenship.[35] Thus, this system enables individuals to directly enter the education system, positively impacting teachers' career advancement. However, this approach is currently limited to specific subjects, including primary education, history, geography, and citizenship. Such a selective approach creates disparities in the career advancement opportunities for teachers of other subjects, while also posing challenges for schools in attracting qualified personnel for critical disciplines such as mathematics, physics, biology, and others. Therefore, it is essential to expand the integrated bachelor's and master's program to include additional subjects, allowing a broader range of teachers to pursue higher education and facilitating an evaluation of the effectiveness of direct entry into schools for these individuals.

In addition to the aforementioned pathways, there is another route to entering the teaching profession. A candidate may be employed as a teacher-in-training, provided they participate in a Teacher Seeker Program,[36]

[31] J. H. Stronge, J. L. Hindman, *Hiring the Best Teachers*, 'Educational Leadership' 2003, 60, 8, p. 49.
[32] Ordinance No. 241 of the Government of Georgia, dated May 23, 2019 On the Approval of the Scheme for Teacher Professional Development and Career Advancement, Article 7.
[33] *Ibid*.
[34] *Ibid*.
[35] National Assessment and Examinations Center, Guide for Applicants 2024, pp. 465, 751.
[36] Order No. 169/N of the Minister of Education, Science, Culture, and Sport of Georgia, dated August 16, 2019 On the Approval of the Procedure for the Registration of Teacher Candidates and the Completion of the Te-

which must be successfully evaluated. Teachers who participate in such programs tend to remain in the profession nearly twice as often as those who do not.[37] To be eligible for the Teacher Seeker Program, candidates must hold a bachelor's or master's degree in a subject or subject group specified by the national curriculum. The candidate is given a two-year period to complete the program, during which they must complete both academic and practical pedagogical courses. Additionally, they must demonstrate subject competence by passing a teacher certification exam organized by the National Assessment and Examinations Center, in accordance with established regulations.[38] It is important to note that the internship program in Poland closely resembles the Teacher Seeker Program in Georgia.[39] The qualification process for intern teachers is governed by the National Induction Scheme, established in 2000 and maintained under the post-2022 regulations. This scheme provides structured support to early-career teachers, ensuring they receive guidance during their initial years in the profession. The induction phase is a comprehensive program in which novice teachers engage in the same responsibilities as experienced educators while receiving a salary for their work.[40] The school-based induction program highlights the importance of professional development and support for new teachers. Unlike teacher-in-training program, it does not require individuals to pass a subject-specific examination. Instead, it focuses on providing additional training, personalized support, and school-based guidance to help early-career teachers navigate their professional journey effectively.[41] The commission is notified of the assessment of the teacher's professional achievements and the report on the implementation of their professional development plan. As part of the evaluation process, the teacher participates in an interview, during which they present their professional accomplishments, knowledge, and skills. They also respond to questions from the commission members regarding the required competencies. Following this assessment, the teacher may be granted the opportunity to become a contract teacher.[42] Estonia adopts a similar approach to that of Poland. Through a structured one-year program, novice teachers receive support in adapting to the

acher Candidate Period, as well as the Sample and Issuance Procedure for the Document Confirming the Completion of the Teacher Candidate Period.

37 S. M. Johnson, The Workplace Matters Teacher Quality, Retention, and Effectiveness, National Education Association, Washington 2006, p. 8.

38 Order No. 169/N..., Article 8, Paragraph 1.

39 J. Kordziński, K. Krakowiak, The Support System of Novice Teachers, Country Report, Poland, Cooperation Partnerships in School Education Project, ZNP [Warszawa] 2022, p. 5.

40 J. Madalińska-Michalak, *Teacher Education in Poland (1970–2024): Policy Development, Legislation, and Period -Specific Challenges*, 'Journal of Education for Teaching International Research and Pedagogy' 2024, 50, 5, p. 15.

41 *Ibid.*

42 J. Kordziński, K. Krakowiak, The Support..., p. 8.

school environment while enhancing their professional competencies.[43] Thus, teacher development systems in all three countries share a common goal: to support novice teachers and foster their professional growth. These programs facilitate professional development and career progression by incorporating practical activities essential for integrating new teachers into real classroom environments. Each system includes professional training and mentoring components; however, key differences exist among them. In Georgia, the program emphasizes formal assessment and competency verification, whereas Poland's system is more practice-oriented, offering greater personal support to novice teachers. While Georgia prioritizes exams, the induction schemes in Poland and Estonia focus on strengthening teachers' professional stability. Overall, the Polish and Estonian models appear more supportive and flexible, whereas the Georgian system adopts a more academic and formal approach.

In addition to Teacher Seeker Program, another pathway into the teaching profession is completing a teacher training educational program. Individuals who hold a bachelor's degree in any subject and have completed a teacher training educational program as part of their undergraduate studies, along with demonstrating subject competency, are eligible for employment in schools.[44]

The legislation provides exceptions for teachers of sports and arts subjects, including music and fine and applied arts. In addition to individuals with higher education, those with relevant vocational education are also eligible to enter the teaching profession, provided they complete a teacher training educational program.[45] Universities adhere to existing regulations by offering enrollment in sports teacher training educational programs to individuals with either higher education or relevant vocational education. Admission is contingent upon passing an examination that confirms their competence in physical education and sports.[46] Universities have different approaches to the prerequisites for admission to the fine and applied arts and music teacher training educational program. For admission to the mentioned programs, some universities require a Bachelor's, Master's and/or equivalent academic degree in a subject/subject group corresponding to the National Curriculum, along with a certificate confirming the passing of a subject exam.[47] However, some universities accept applicants into teacher training programs regardless

[43] Eisenschmidt E., Implementation of Induction Year for Novice Teachers in Estonia, Tallinn University Publisher, Tallinn 2006, p. 38.

[44] Ordinance No. 241 of the Government of Georgia, dated May 23, 2019 On the Approval of the Scheme for Teacher Professional Development and Career Advancement, Article 7.

[45] *Ibid*.

[46] Academic Council of the State Teaching University of Physical Education and Sport of Georgia, Resolution No. 6, dated December 4, 2019 Approved Teacher Education Program (Physical Education and Sport).

[47] Order No. 174/N..., Article 3.

of their field of study. Individuals with a bachelor's or master's degree can enroll if they have demonstrated subject competence by passing an exam administered by the National Assessment and Examinations Center.[48] t is important to note that educational programs designed to train teachers of music, as well as fine and applied arts, do not recognize relevant professional education as a prerequisite for admission. Moreover, these programs overlook the opportunity provided by legislation,[49] for individuals with relevant vocational education to enter the teaching profession in artistic disciplines. Consequently, it becomes evident that the requirements for teachers of arts and sports subjects differ across universities and programs. Some institutions fail to acknowledge the legal provision that allows individuals with vocational education to pursue teaching careers, thereby restricting access to these programs for such individuals and limiting their career development opportunities.

The law does not specify the prerequisites for admission to educational programs for training teachers in arts, sports, or other subjects, allowing universities the autonomy to establish their own admission criteria. As a result, some universities require applicants to hold higher education in a relevant field in addition to passing a subject competency exam, while others accept higher education in any field as sufficient for admission. Furthermore, the subject competency exams have been simplified.[50] Consequently, it can be argued that the standards set for admission are not particularly stringent.[51]

Estonia has long established uniform professional standards for teachers across all subjects, including physical education, art, and music.[52] These standards outline the competencies and responsibilities required of educators, ensuring consistent educational quality nationwide.[53] In Estonia, individuals who complete a teacher education program and obtain a bachelor's or master's degree are qualified to teach in schools. If an individual holds a bachelor's degree in a different field, they must complete a master's degree in pedagogy to enter the teaching profession.[54] A similar standard has been established by the state in Poland. According to current regulations, the minimum qualification for teaching at the primary level (grades I–III) is a bachelor's degree, which entails a three-year study period. However, under new regulations, a master's degree will soon be mandatory. Presently, the minimum qualification for teaching in the second stage of primary school

[48] *Ibid*.
[49] *Ibid*.
[50] Center For Civil Integration And Inter-Ethnic Relations, Teacher Certification, Professional Development, and Career Advancement from 2005 to 2023, pp. 7, 10.
[51] R. Li, H. Kitchen, B. George, M. Richardson, E. Fordham, OECD Reviews..., p. 24.
[52] A. Schleicher, Schools for 21st Century Learners: Strong Leaders, Confident Teachers, Innovative Approaches, International Summit on the Teaching Profession, OECD Publishing, Paris 2015, p. 48.
[53] A. Schleicher, Preparing Teachers and Developing School Leaders for the 21st Century: Lessons from Around the World, International Summit on the Teaching Profession, OECD Publishing, Paris 2012, p. 63.
[54] Riigikogu [Parliament], Basic Schools and Upper Secondary Schools Act [passed: 09.06.2010].

(grades IV–VIII) and secondary school is a master's degree.[55] Alternative pathways to teaching qualifications in Poland are rare and are primarily available for prospective foreign language teachers, a system introduced to address the shortage of qualified language educators.[56]

Furthermore, the current teacher salary policies in both Poland and Estonia create opportunities to enhance the competitiveness of the teacher selection process, enabling schools to employ highly qualified individuals.[57] However, in Estonia, due to a shortage of teachers, there is an ongoing discussion regarding the potential reduction of qualification requirements for teachers in subject areas with high demand.[58] Additionally, efforts have begun to plan and manage the effective training and distribution of teachers,[59] with the aim of balancing the need to increase the number of educators while maintaining high standards of qualification.[60]

As the analysis demonstrates, both Estonia and Poland impose higher qualification requirements for teachers compared to Georgia. In Georgia, teachers of sports and arts can enter the profession with a diploma that confirms vocational education, thereby simplifying the process of entering the general education workforce. However, it is important to note that not all universities recognize this pathway, and in many cases, higher education remains a prerequisite for entering the profession. Alternative routes are less accessible in Estonia and Poland. In Estonia, working as a teacher generally requires completing a pedagogy program, while in Poland, alternative pathways are available only for foreign language teachers, and their introduction is directly tied to the shortage of qualified educators in this field. Additionally, it is noteworthy that Georgia's teacher salary policy is not sufficiently competitive, which hinders the profession's ability to attract new staff and gain prestige. In contrast, the competitive salary policies in Estonia and Poland effectively attract teachers and support their professional development, positively impacting the overall quality of education. However, Estonia still faces a shortage of teachers in certain subject areas.

In conclusion, for the education system to improve in quality and competitiveness, it is essential that both the state and universities address existing needs. A key measure is raising the minimum qualification requirements, as

[55] J. Madalińska-Michalak, *Teacher*..., p. 13.
[56] J. Madalińska-Michalak, *Teacher*..., p. 14.
[57] Eurydice, Teachers' and School Heads' Salaries and Allowances in Europe, 2013, p. 14; Eurydice, Facts and Figures, 2015, p. 19.
[58] J. Lampert, A. McPherson, B. Burnett, Still Standing: An Ecological Perspective on Teachers Remaining in Hard-To-Staff Schools, 'Teachers & Teaching' 2023, 30, 1, p. 119.
[59] B. H. See, R. Morris, S. Gorard, N. El Soufi, *What Works in Attracting and Retaining Teachers in Challenging Schools and Areas*, 'Oxford Review of Education' 2020, 46, 6, p. 679.
[60] Ä. Leijen, L. Lepp, K. Saks, M. Pedaste, K. Poom-Valickis, *The Shortage of Teachers in Estonia: Causes and Suggestions for Additional Measures from the Perspective of Different Stakeholders*, 'European Journal of Teacher Education' 2024, 47, 5, p. 16.

this would help attract highly skilled professionals to the field and enhance the overall quality of education. Additionally, universities should establish standardized admission policies that align with legislative requirements to ensure equal opportunities for all applicants pursuing teacher training educational programs. This will reduce arbitrary restrictions and facilitate inclusion in the educational process. Furthermore, it is crucial to identify subject areas experiencing teacher shortages and explore alternative pathways into the profession. Exceptions to standard qualification requirements should be permitted only in cases where there is a demonstrated shortage, ensuring that established criteria remain upheld in disciplines with an adequate supply of educators. Finally, the state must implement a more competitive salary structure for teachers, particularly in high-demand subjects, to attract and retain highly qualified professionals while enhancing the overall prestige of the teaching profession.

Education of Special Education Teachers

Inclusive education is an educational approach that ensures the protection of the rights of students with special educational needs and promotes their full participation in the learning environment. A critical component of this process is the training and employment of qualified special education teachers, who play a key role in implementing inclusive practices in schools while addressing the diverse needs of students.[61] Since 2013, efforts to strengthen inclusive education have been supported by the National Center for Teacher Professional Development, which has developed several training modules aimed at enhancing teacher competencies in this field.[62] Additionally, Ilia State University introduced a master's program for special education teachers.[63] Initially, special education teachers did not hold official teacher status, and there were no bachelor's or doctoral programs dedicated to their preparation at the university level.[64] Later, a special teacher certification exam was developed.[65] Currently, a structured admission process is in place for special education teacher training programs, requiring applicants to hold at least a bachelor's degree or its equivalent and to have passed the basic professional skills examination.[66]

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[61] Order No. 16/N of the Minister of Education and Science of Georgia, dated February 21, 2018 On the Approval of the Rules for the Implementation, Development, and Monitoring of Inclusive Education, as well as the Mechanism for Identifying Students with Special Educational Needs, Article 6.

[62] Civic Development Institute, Inclusive Education Practice in Georgia, p. 45.

[63] *Ibid*.

[64] Civic Development Institute..., p. 59.

[65] Order No. 04/N of the Minister of Education, Science, Culture, and Sport of Georgia, dated January 22, 2021 On the Approval of the Procedure for Conducting the Special Teacher Examination.

[66] Order No. 113/N of the Minister of Education, Science, and Youth of Georgia, dated July 1, 2024 On the Approval of the Procedure for Admission to the Educational Program for the Preparation of Special Education Teachers.

There are several alternative pathways to becoming employed as a special education teacher in schools. The first route applies to individuals who hold a Master of Education or an equivalent academic degree and have either passed the special education teacher examination required by Georgian legislation or obtained a special education teacher training certificate.[67] The second pathway is available to those who have completed an integrated bachelor's and master's degree program in teacher training, earning a Master of Education degree while also completing a specialized training module in special education within the program. A third option allows individuals with an academic degree in special education or a Doctorate in Educational Sciences—provided they have defended a dissertation on inclusive education—to enter the profession as leader teachers.[68] Another alternative is available to those who hold a bachelor's degree or its equivalent and a master's degree in special education or possess a special education teacher training certificate.[69] Additionally, individuals with a background in psychology or occupational therapy may qualify for employment as special education teachers if they have either passed the special education teacher exam or obtained a special education teacher training certificate.[70] For those seeking employment in general education institutions that serve students with visual or hearing impairments, multiple sensory impairments, or behavioral and emotional disorders, an additional requirement applies: candidates must have completed a specialized certification program tailored to teaching students with the specific educational needs associated with these impairments.[71]

It is important to acknowledge that there are currently special education teachers employed within the system who do not meet the state's established qualification standards. However, individuals hired before 2018 were granted the opportunity to take the special education teacher certification exam, with a deadline for completion set for January 2025.[72]

Regarding international practices, Estonia's qualification requirements for special education teachers closely resemble those in Georgia. Specifically, individuals seeking employment as special education teachers must hold a master's degree or an equivalent qualification, possess formal training in special education, and demonstrate proficiency in the Estonian language.[73] Similarly, school psychologists and speech and language therapists in Estonia are required to have a master's degree or an equivalent qualification in their

[67] Order No. 174/N..., *ibid.*, Article 3.
[68] Ordinance No. 241 of the Government of Georgia, dated May 23, 2019 On the Approval of the Scheme for Teacher Professional Development and Career Advancement, Article 21.
[69] Order No. 174/N..., *ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] Law of Georgia on General Education, Article 613.
[73] Riigikogu [Parliament], Basic Schools... (*ibid.*) [passed 09.06.2010].

respective fields.[74] Poland follows comparable standards for special education teachers. A candidate must hold a master's degree in special education. However, it is also possible for individuals with a master's degree in another field to enter the profession if they have completed a qualification course or have conducted research in special pedagogy or inclusive education.[75] Notably, in these countries, university-based teacher training programs include practical teaching experience as an integral component. The primary objective of this practice is to equip future educators with hands-on experience in teaching and classroom management by applying their theoretical knowledge in real-world educational settings.[76]

Based on the above analysis, it is evident that while several master's and certificate programs for special education teachers have been established across the country, their effectiveness and accessibility remain limited. The qualification requirements set for special education teachers in Georgia allow candidates to enter the profession through multiple alternative pathways. This flexibility can be viewed positively, as it facilitates staffing in the event of teacher shortages. However, such an approach also carries certain risks. In particular, permitting individuals with lower academic qualifications to enter the field through alternative routes may undermine the overall quality of inclusive education. As observed in Estonia and Poland, alternative pathways into special education teaching are far more restricted, with stringent requirements in place to ensure professional competence. These countries are trying to make the inclusive education system more professional. Despite the existence of certification exams in Georgia, a significant number of special education teachers currently employed in the system do not meet modern professional standards. In response, the state introduced measures in 2018 that provided these individuals with an opportunity to obtain certification within a designated timeframe. However, this temporary solution does not fully address the issue. A more systematic approach is required, with clearly defined policies to ensure that all special education teachers meet contemporary professional standards.

While aspects of Estonia's and Poland's practices align with Georgia's experience, their models highlight the need for further strengthening of the inclusive education system. This includes implementing higher qualification standards for special education teachers, enhancing professional development opportunities, and ensuring continuous updates to their training and expertise.

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[74] *Ibid*.

[75] Poland: Standardisation of Special Education Teacher Position; https://eurydice.eacea.ec.europa.eu/news/poland [accessed: 15.12.2024].

[76] J. Madalińska-Michalak, *Teacher*..., p. 11.

Teachers Certification Exam

The primary objective of teacher evaluation reforms across various countries has been to enhance the professionalism of educators and ensure their competencies align with modern educational standards.[77] However, in Georgia, the establishment of a unified and stable evaluation system has proven challenging, as frequent shifts in educational policies have hindered the effective assessment of interventions.[78]

Currently, the majority of individuals aspiring to work as teachers in Georgian schools must pass a certification exam to demonstrate their competence in accordance with current legislation. This exam is designed to assess whether an applicant's knowledge and skills meet the professional standards required of a teacher.[79] The exam is administered in all subjects included in the national curriculum.[80] While the exam is open to anyone, and there are no restrictions on participation, individuals who fail to meet the teacher education requirements specified in the Law of Georgia on General Education are prohibited from using the results for teaching purposes.[81]

In recent years, many school principals in Georgia have expressed doubts about the validity of certification as an accurate measure of a teacher's subject-specific and professional knowledge.[82] However, research conducted across different periods and countries presents varying conclusions on the impact of certification. In some cases, it is argued that teacher certification does not significantly influence the quality of teaching.[83] Furthermore, it has become increasingly apparent that student performance is influenced more by factors such as individual abilities, family circumstances, and other external conditions, rather than being solely attributable to the actions of the teacher.[84] However, a number of studies provide evidence to the contrary.[85] Some researchers argue that certification is a valid and effective tool for assessing teachers' professionalism, allowing for an accurate evaluation of

[77] OECD, Education Policy Outlook 2015: Making Reforms Happen, Paris 2015.
[78] R. Tchanturia, R. Apkhazava, Continuous Professional Development System for Teachers, Education Coalition 2022, p. 20.
[79] Order No. 1101 of the Minister of Education and Science of Georgia, dated December 4, 2009 On the Regulation of Teacher Certification and the Approval of a Sample Teacher Certificate.
[80] *Ibid.*, Article 11.
[81] Registration for teachers and aspiring teachers – 2024 https://naec.ge/#/ge/post/3138 [accessed: 01.12.2024]
[82] N. Andguladze, Professional..., *passim*.
[83] R. Murnane, B. R. Phillips, *What do Effective Teachers of Inner-City Children Have in Common?*, 'Social Science Research' 1981, 10, 1, pp. 83–100.
[84] D. Ballou, M. Podgursky, *Reforming Teacher Preparation and Licensing: What Is the Evidence?*, 'Teachers College Record' 2000, 102, 1, pp. 2–7; *eidem*, *Reforming Teacher Preparation and Licensing: Continuing the Debate*, 'Teachers College Record' 2000, 102, 1, pp. 5–27.
[85] L. Darling-Hammond, *Futures of Teaching in American Education*, 'Journal of Educational Change' 2000, 1 (Dec.), pp. 353–373.

their qualifications and competencies.[86] According to these scholars, certification remains one of the primary means by which the professional level of teachers is measured.[87] Despite differing opinions on the matter, teacher certification continues to hold relevance in various countries. Its effectiveness, however, is contingent upon the alignment between university education and the certification system.[88] For instance, in Estonia, teachers undergo a certification process after completing their training curriculum, ultimately earning a professional teaching qualification[89] awarded by the Estonian Teachers Association.[90] In this regard, Estonia, like Georgia, has multiple categories of teachers. However, Estonia's competency-based career structure, which includes a certification stage, is currently voluntary.[91] Similarly, in Poland, career progression is voluntary, with teachers required to take an exam to change their status from a contract teacher to a tenured teacher or to attain a higher position.[92] It is important to note that the contract teacher position is permanent, and teachers can choose to take the exam before the relevant commission. The exam consists of several components, including a written part and an interview.[93]

In summary, the effectiveness and impact of teacher certification systems on teaching quality and student outcomes are influenced by several factors, including system stability, political and legal environments, and support for teachers' professional development. While Georgia has a certification system in place, the frequent changes to this system raise questions about its true effectiveness. In contrast, certification systems in other countries are more stable and effectively integrated with professional development processes, leading to positive results. Unlike Georgia, in Poland and Estonia, certification primarily serves to foster professional growth. In Georgia, however, teacher certification is mandatory for entering the profession, with certain exceptions. Therefore, it is recommended that a stable, long-term development strategy be implemented to systematically evaluate the certification process. Furthermore, the certification system in Georgia should not only serve as a prerequisite for entering the profession, but also as an effective tool to encourage and support the ongoing professional development of teachers.

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[86] L. Darling-Hammond, J. Bransford, (eds.), Preparing Teachers for a Changing World: What Teachers Should Learn and Be Able to Do, John Wiley & Sons, San Francisco 2007; Handbook of Research on Teacher Education. New York, Simon Schuster 1996.

[87] L. Darling-Hammond, *Research and Rhetoric on Teacher Certification: A Response to Teacher Certification Reconsidered*, 'Education Policy Analysis Archives' 2002, 10, p. 36.

[88] OECD, TALIS 2013 Results: An International Perspective on Teaching and Learning, TALIS, Paris 2013, p. 93.

[89] Riigikogu [Parliament], Basic Schools and Upper Secondary Schools Act [passed 09.06.2010].

[90] *Ibid*.

[91] P. Santiago, OECD Reviews of School Resources: Estonia 2016, OECD Publishing, Paris 2016.

[92] E. Kolanowska, The System of Education in Poland 2020, Foundation for the Development of the Education System, Warszawa 2021, p. 103.

[93] E. Kolanowska, The System..., p. 106.

Conclusion

In Georgia, while standards for entering the teaching profession have been established, these regulations lack uniformity and offer different approaches depending on the subject area. To enhance the quality and effectiveness of both teaching and learning, it is crucial to attract qualified and motivated individuals into the education system. This, in turn, will contribute to the overall improvement of the education system and elevate the social status of the teaching profession. When compared to national standards as well as the experiences of Poland and Estonia, it becomes evident that the qualification requirements for teachers in Georgia are relatively low. As a result, they are insufficient in ensuring the recruitment of highly competent professionals into the field. Notably, there is a lack of subject-specific needs assessments and an identification of areas with shortages in qualified educators. Furthermore, integrated bachelor's and master's degree programs tailored to all subject areas are not available for those pursuing teaching careers. Although teacher training programs exist for various subjects, the legal prerequisites for admission to these programs remain undefined. Universities are granted the autonomy to establish their own criteria, which creates inequality among prospective applicants. Additionally, the requirements for arts and sports teachers are inconsistent, varying by subject and institution, and do not account for the possibility of training individuals with vocational education backgrounds as teachers—a provision permitted by law.

Consequently, to attract qualified and motivated teachers, enhance the education system, and elevate the prestige of the teaching profession in society, the following recommendations should be implemented:

- Establish uniform and transparent qualification requirements for teachers across all subject areas to ensure the recruitment of highly qualified professionals into the education system.
- Conduct a needs assessment to identify subject areas with shortages, and introduce alternative pathways into the profession solely for teachers in those areas of deficiency.
- Introduce integrated bachelor's and master's degree programs across all subject areas to provide aspiring teachers with equal opportunities to obtain higher pedagogical education in their chosen fields.
- Define clear and standardized criteria for admission to teacher training programs, creating a unified system that guarantees equal opportunities for all applicants in accordance with relevant legislation.
- Increase teacher salaries to attract and retain highly competent professionals, demonstrating societal appreciation for the importance of the teaching profession.

Abstrakt

Edukacja jest priorytetem dla każdego państwa, a nauczyciele odgrywają kluczową rolę w podnoszeniu jej jakości. Ich wiedza zawodowa, umiejętności i podejście do nauczania mają bezpośredni wpływ na skuteczność procesu uczenia się i sukcesy uczniów w nauce. W odpowiedzi na zmieniające się wyzwania XXI wieku system edukacji musi pozostać elastyczny, dostosowując się do współczesnych wymagań, a jednocześnie zapewniając nauczycielom wiedzę specjalistyczną niezbędną do skutecznego prowadzenia zajęć i pomagania uczniom w pełnym wykorzystaniu ich potencjału i osiągnięciu przez nich jak najlepszych wyników.

Warto zauważyć, że zgodnie z ustawodawstwem krajowym nauczyciele w placówkach oświaty ogólnej muszą przestrzegać profesjonalnych standardów nauczania, kodeksu etyki zawodowej oraz obowiązków określonych w sektorowych wytycznych. Są oni również zobowiązani do uznania indywidualności każdego ucznia i wdrażania zróżnicowanych strategii nauczania, które wspierają rozwój osobisty, społeczno-emocjonalny i poznawczy uczniów. Ponadto nauczyciele powinni poprawiać wyniki uczniów poprzez refleksję nad własną pracą i analizę ocen uczniów. Powinni wprowadzać innowacje do swoich praktyk nauczania, skutecznie integrować technologie informacyjne i komunikacyjne z procesem uczenia się oraz pozostawać zaangażowani w ciągły rozwój zawodowy. W związku z tym wysokie kwalifikacje i profesjonalizm nauczycieli mają zasadnicze znaczenie dla poprawy jakości edukacji szkolnej. W tym właśnie celu Gruzja od 2010 roku nałożyła na nauczycieli nowe wymagania i wprowadziła egzaminy certyfikacyjne dla nauczycieli. Chociaż Gruzja ustanowiła wymagania kwalifikacyjne dla przyszłych nauczycieli i wprowadziła programy ich szkolenia, w systemie nadal pozostają pedagodzy, którzy nie spełniają minimalnych standardów kompetencji określonych przez państwo. Warto zatem przyjrzeć się, w jaki sposób nauczyciele są zatrudniani w szkołach, ponieważ – pomimo przepisów i wymagań kompetencyjnych – w systemie edukacji nadal zdarzają się przypadki, gdy nauczyciele nie dysponują podstawowymi umiejętnościami niezbędnymi do prowadzenia skutecznego, zorientowanego na wyniki procesu nauczania.

Mając to na uwadze, w niniejszym artykule przeanalizujemy skuteczność wymagań dotyczących wyboru i kwalifikacji nauczycieli w gruzińskich placówkach edukacji ogólnej, ich zgodność z przepisami krajowymi oraz standardami międzynarodowymi, a także wskażemy kluczowe reformy, które Gruzja powinna rozważyć w celu modernizacji swojego systemu edukacji. W tym procesie szczególnie istotna jest ocena skuteczności wymagań kwalifikacyjnych dotyczących rekrutacji nauczycieli, ponieważ stanowią one podstawę przyciągania i zatrzymywania wysoko wykwalifikowanych, profesjonalnych pedagogów. Ostatecznie ma to bezpośredni i wymierny wpływ na jakość edukacji i sukcesy uczniów w nauce.

Słowa kluczowe: dobór nauczycieli, wymagania kwalifikacyjne, placówki kształcenia ogólnego, konkursy, kompetencje nauczycieli, egzamin certyfikacyjny.

BIBLIOGRAPHY

Amashukeli M., Lezhava D., Gugushvili N., Educational Outcomes, Employment Market and Job Satisfaction in Georgia, Tbilisi 2017.

Andguladze N., Professional Capital and Teacher Appraisal in Georgia, Ilia State University, Tbilisi 2016.

Ballou D., Podgursky M., *Reforming Teacher Preparation and Licensing: What Is the Evidence?* [and:] *eidem*, *Reforming Teacher Preparation and Licensing: Continuing the Debate*, 'Teachers College Record' 2000, 102, 1.

Center For Civil Integration And Inter-Ethnic Relations, Teacher Certification, Professional Development, and Career Advancement from 2005 to 2023.

Civic Development Institute, Inclusive Education Practice in Georgia.

Darling-Hammond L., *Futures of Teaching in American Education*, 'Journal of Educational Change' 2000, 1 (Dec.).

Darling-Hammond L., *Research and Rhetoric on Teacher Certification: A Response to Teacher Certification Reconsidered*, 'Education Policy Analysis Archives' 2002, 10.

Darling-Hammond L., Bransford J. (eds.), Preparing Teachers for a Changing World: What Teachers Should Learn and Be Able to Do, John Wiley & Sons, San Francisco 2007.

Eisenschmidt E., Implementation of Induction Year for Novice Teachers in Estonia, Tallinn University Publisher, Tallinn 2006.

Eurydice, Teachers' and School Heads' Salaries and Allowances in Europe – 2013.

Eurydice, Facts and Figures – 2015.

Hargreaves A., Changing Teachers, Changing Times, Cassell, London 1994.

Hargreaves A., Fullan M., Professional Capital: Transforming Teaching in Every School, Teachers College Press, New York 2012.

Ingvarson L., Schwille J., Tatto M. T., Rowley G., Peck R., Senk S., An Analysis of Teacher Education Context, Structure, and Quality-Assurance Arrangements in TEDS-M Countries, Michigan, Amsterdam 2013.

Johnson S. M., The Workplace Matters Teacher Quality, Retention, and Effectiveness, National Education Association, Washington 2006.

Kolanowska E., The System of Education in Poland 2020, Foundation for the Development of the Education System, Warszawa 2021.

Kordziński J., Krakowiak K.,The Support System of Novice Teachers, Country Report, Poland, Cooperation Partnerships in School Education Project, ZNP [Warszawa] 2022.

Lampert J., McPherson A., Burnett B., *Still Standing: An Ecological Perspective on Teachers Remaining in Hard-To-Staff Schools*, 'Teachers & Teaching' 2023, 30, 1.

Leijen Ä., Lepp L., Saks K., Pedaste M., Poom-Valickis K., *The Shortage of Teachers in Estonia: Causes and Suggestions for Additional Measures from the Perspective of Different Stakeholders*, 'European Journal of Teacher Education' 2024, 47, 5.

Li, R., Kitchen H., George B., Richardson M., Fordham E., OECD Reviews of Evaluation and Assessment in Education: Georgia, OECD Reviews of Evaluation and Assessment in Education, OECD Publishing, Paris 2019.

Madalińska-Michalak J., *Teacher Education in Poland (1970–2024): Policy Development, Legislation, and Period-Specific Challenges*, 'Journal of Education for Teaching International Research and Pedagogy' 2024, 50, 5.

Marzano R. J., A Theory-Based Meta-Analysis of Research on Instruction, Mid-Continent Regional Educational Laboratory, Aurora, CO 1998.

Marzano R. J., Pickering D. J., Pollock J. E., Classroom Instruction That Works: Research-Based Strategies for Increasing Student Achievement, Alexandria, VA: ASCD 2001.

Murnane R., Phillips B. R., *What Do Effective Teachers of Inner-City Children Have in Common?*, 'Social Science Research' 1981, 10, 1.

National Center for Educational Research (NCER), Assessment of Teacher Professional Development and Career Advancement Scheme, 2023.

OECD, Teachers Matter – Attracting, Developing and Retaining Effective Teachers, OECD Publishing, Paris, 2005.

OECD, Education Policy Outlook 2015: Making Reforms Happen, Paris 2015.

OECD, Synergies for Better Learning: An International Perspective on Evaluation and Assessment, OECD Reviews of Evaluation and Assessment in Education, OECD Publishing, Paris 2013.

OECD, TALIS 2013 Results: An International Perspective on Teaching and Learning, TALIS, Paris 2013.

Santiago P., OECD Reviews of School Resources: Estonia 2016, Paris 2016.

Schleicher A., Preparing Teachers and Developing School Leaders for the 21st Century: Lessons from around the World, International Summit on the Teaching Profession, OECD Publishing, Paris 2012.

Schleicher A., Schools for 21st Century Learners: Strong Leaders, Confident Teachers, Innovative Approaches, International Summit on the Teaching Profession, OECD Publishing, Paris 2015.

See B. H., Morris R., Gorard S., El Soufi N., *What Works in Attracting and Retaining Teachers in Challenging Schools and Areas*, 'Oxford Review of Education' 2020, 46, 6.

Stronge J. H., Hindman J. L., *Hiring the Best Teachers*, 'Educational Leadership' 2003, 60, 8.

Tchanturia R., Apkhazava R., Continuous Professional Development System for Teachers, Education Coalition 2022.

Tummons J., *Professional Standards in Teacher Education: Tracing Discourses of Professionalism Through the Analysis of Textbooks*, 'Research in Post-Compulsory Education' 2014, 19, 4.

Handbooks

National Assessment and Examinations Center, Guide for Applicants 2024.

Academic Council of the State Teaching University of Physical Education and Sport of Georgia, Resolution No. 6, dated December 4, 2019 Approved Teacher Education Program (Physical Education and Sport).

Electronic Resources

Poland: Standardisation of Special Education Teacher Position https://eurydice.eacea.ec.europa.eu/news/poland [accessed: 15.12.2024].

Registration for teachers and aspiring teachers – 2024 https://naec.ge/#/ge/post/3138 [accessed: 01.12.2024].

Teacher training educational program; https://bte.iliauni.edu.ge/ganatlebis-skola [accessed: 30.10.2024].

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Natalia Pliszka*

The Right to Housing and the Institution of Expropriation: A Comparative Analysis of Legal Regulations in Poland and the Legal Systems of the Other European Countries

[Prawo do mieszkania a instytucja wywłaszczenia – analiza porównawcza regulacji prawnych w Polsce i systemach prawnych innych państw europejskich]

Abstract

The aim of the article is to analyze how the right to housing, recognized as a human right, influences the shaping of national expropriation laws. The author provides a positive response, highlighting that both EU regulations and legal acts of the Council of Europe significantly impact the limitation of arbitrariness in expropriations and strengthen the protection of individuals against excessive state interference in this area.

The analysis is based on the Universal Declaration of Human Rights (which first established legal protection of housing as a right granted to every individual), the Charter of Fundamental Rights, and the Council of Europe system. The author also employs a comparative method, examining the impact of norms guaranteeing the right to housing on expropriation laws in the states that are signatories to each of these instruments. This emphasizes the importance of shared standards of human rights protection in shaping national legislation.

The final section focuses on an issue that has recently garnered significant interest: housing as a right or a commodity? The author believes that an attempt to answer this question – based on an examination of law and economics – will provide a better understanding of why housing should be regarded as a tool enabling the realization of values and freedoms established by both national and international law. By framing housing in this way, it becomes clear that access to adequate housing is not merely an economic transaction but a fundamental element of human dignity, social justice, and the fulfillment of rights enshrined in legal systems worldwide.

Keywords: right to housing, land expropriation, housing, human rights protection system.

* **Natalia Pliszka** – PhD in Law, Institute of Law and Administration, Pomeranian University in Słupsk (affiliation); https://orcid.org/0000-0002-5359-0505; natalia.pliszka@upsl.edu.pl / dr nauk prawnych, Instytut Prawa i Administracji, Uniwersytet Pomorski w Słupsku (afiliacja).

The Right to Housing as one of the Fundamental Human Rights

"Housing holds a pivotal role within the hierarchy of human needs, serving not only to fulfill basic necessities but also addressing more elevated ones. Often viewed through a pragmatic, utilitarian lens, its deeper psychological and sociological dimensions are frequently overlooked, despite their significant impact on the well-being and functioning of individuals and communities."[1]

The first legal act of an international nature that described the concept of housing as a legal good was Universal Declaration of Human Rights.[2] According to Article 25 UDHR "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[3] The right to housing should be regarded as a fundamental attribute of every human being's existence, expressed not only in the creation of a personal living space for the individual but also in stability and security. The *ratio legis* of Article 25 of the Universal Declaration of Human Rights (UDHR) is based on guaranteeing every person a place where individual and family development can occur. It is evident that the right to housing, when compared to other fundamental human rights, such as the right to life, liberty, security, and equality, should be treated with due regard to its unique character. Its distinctiveness is primarily reflected in the substantial financial expenditures incurred by the state to ensure its provision.

The financial disparities within society, and even significant amounts of money from national budgets, are unable to guarantee access to homeownership for every individual. Therefore, in the author's opinion, this right should be regarded as a direct directive aimed at ensuring housing for every citizen. It represents a specific course of action for the state to implement mechanisms that enable equal access to housing.

UDHR not only highlighted that the right to housing should be subject to special legal protection due to the fact that its realization enables every individual to live with dignity. In light of supranational regulations, an extremely important issue is also the promotion of non-discrimination in the context of

[1] M. Kędzierska, *Kształtowanie polityki mieszkaniowej w warunkach gospodarki rynkowej*, 'Equilibrium' 2009, 1, 2, *passim* [Shaping Housing Policy in a Market Economy]. Available at: https://cejsh.icm.edu.pl/cejsh/element/bwmetal.element.ojs-doi-10_12775_EQUIL_2009_014/c/EQUIL.2009.014-6886.pdf [accessed: 01.01.2025].

[2] United Nations General Assembly, Universal Declaration of Human Rights, Resolution 217 A (III), adopted 10 Dec. 1948.

[3] *Ibid.*

this right. The Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child constitute key legal frameworks that prohibit discrimination on the grounds of sex, disability, or age in access to housing and in its use. This comprehensive protection against discrimination, combined with the clear positioning of the right to housing as a human right, demonstrates the strong determination of the international community in building a just and more equal society.

It should be pointed out that the provision concerning the right to housing does not *ipso iure* impose the obligation to provide a home for every individual. The Human Rights Committee has stated that Article 11 of the Covenant does not impose an obligation on the state to provide housing to all persons under its jurisdiction. The state's obligations concerning the realization of the right to housing have two dimensions. The first, basic dimension involves creating the conditions necessary for everyone to be able to provide a place to live for themselves and their family. The second-dimension concerns subsidiary obligations, which come into play when the subject of the right is unable to meet their housing needs independently.

Thus, the right to housing involves ensuring effective state mechanisms to support housing policy. From a normative perspective, "housing" constitutes a principle that allows an individual to realize their right to their own, secure living space, considered a foundation of civil rights.

Protection of the Right to Housing in the Council of Europe System and European Union Law

The following chapter focuses on the guarantee of the right to housing in the legal systems of the European Union (EU) and the Council of Europe. Highlighting these two systems is essential, as they provide distinct instruments for protection and enforcement mechanisms for the right to housing. In the first part, the author will analyze the right to housing within the legal framework of the Council of Europe (the European Convention on Human Rights and the European Social Charter), followed by an examination of the legal acts developed under the auspices of the Council of Europe.

In the European system of values, housing is considered an essential right that belongs to every individual and their family. This concept is based on the assumption that housing allows for the fulfillment of both basic needs and those of a higher order.[4] The first legal act established by the Council of

[4] K. Nowak, Krajowy i lokalny wymiar polityki mieszkaniowej, Warszawa–Kraków–Gdańsk 2021, p. 21 [The National and Local Dimensions of Housing Policy].

Europe regulating the right to housing was the Convention for the Protection of Human Rights and Fundamental Freedoms. Since its adoption in 1950, it has been the primary document protecting human rights in the member states of the Council of Europe. The ratio legis for introducing this legal act stems from the necessity to guarantee certain rights outlined in the Universal Declaration of Human Rights. The Convention imposes on its signatories the obligation to ensure the rights and freedoms listed within it, and additionally provides a range of international mechanisms for the proper monitoring of their implementation.[5]

Although the treaty does not explicitly define the concept of the right to housing (its interpretation must be sought in the case law of the European Court of Human Rights), Article 8 of the European Convention on Human Rights (ECHR) lists housing alongside the right to respect for private and family life. Therefore, it can be inferred that, indirectly, this article acknowledges the right to housing as a human right and imposes an obligation on signatories not to interfere with the private space of one's home, as it is a place where individuals have the right to feel safe and secure.

Furthermore, paragraph 2 of Article 8 prohibits arbitrary interference with an individual's enjoyment of their home. This provision is of significant importance to the topic of this paper. It stipulates that interference in this sphere of an individual's life is only permissible in strictly defined circumstances. Any such interference must be based on law and deemed necessary in a democratic society. Alongside these restrictions, the ECHR also refers to "national security, public safety, or the economic well-being of the country, the protection of order and prevention of crime, the protection of health and morals, or the protection of rights and freedoms."

As stated in Article 46 of the ECHR, states that have ratified the treaty are obligated to comply with the rulings of the European Court of Human Rights. The author wishes to emphasize that, although the rulings of the Court are not legally binding for all Council of Europe member states, decisions issued by the ECtHR can still be regarded as interpretative guidance for the rights expressed in the Convention. In the context of the right to housing, it is essential to reference the judgments of the European Court of Human Rights (ECtHR), which define the very concept of "home" as used in Article 8 of the European Convention on Human Rights (ECHR). As previously indicated, a home is not only a physical space but also the primary place of an individual's activities and a refuge.[6] "Whether a property should be classified as

[5] European Court of Human Rights, European Convention on Human Rights, 1950, Article 34, right to submit individual complaints to the European Court of Human Rights in Strasbourg.

[6] The European Court of Human Rights emphasizes that Article 8 of the ECHR protects an individual's right to respect for their private and family life, as well as their home and correspondence. "Although the purpose of Article 8 is essentially to protect the individual against arbitrary interference by public authorities, it may also entail the adoption of measures by the authorities aimed at securing respect for private life, even in the

a 'home' depends on the facts rather than whether the property is occupied in accordance with national law."[7] In the ECtHR's case law, it is also highlighted that the right to housing incorporates an individual's entitlement to enjoy all the amenities of the property, including the right to sleep.[8]

In its rulings, the European Court of Human Rights has repeatedly addressed the issue of expropriation, analyzing cases where states interfered with citizens' property rights in the name of public interest. The Court's case law serves as an important source of interpretation for the principles that signatories should follow when applying national regulations on expropriation, particularly regarding the principles of rule of law, proportionality, and the protection of individual interests.[9]

Alongside the European Convention on Human Rights (ECHR), the European Social Charter[10] also played a significant role in the protection of housing rights. The treaty was adopted in 1961 by the Committee of Ministers of the Council of Europe in Turin. It obligated state parties to effectively implement the right to housing and to undertake measures aimed at: promoting access to housing of an adequate standard, preventing and reducing homelessness with the goal of its elimination. In 1996, the European Social Charter was revised, and Article 31 shifted the emphasis on the right to housing from family protection to an individual right to housing. Based on the 1991 European Social

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sphere of relations between individuals." – Judgment of the European Court of Human Rights of 14 Oct. 2021, Application No. 75031/13.

7 Judgment of the European Court of Human Rights of 13 May 2008, McCann v United Kingdom, No. 19009/04

8 Judgment of the European Court of Human Rights of 8 July 2003, Hatton and Others v. the United Kingdom, No. 36022/97.

9 For example, see the judgment of the European Court of Human Rights (ECtHR) of March 25, 1999, in the case of Iatridis v. Greece (Application No. 31107/96). In this judgment, the Court found a violation of Article 1 of Protocol No. 1, as the Greek state took over a cinema owned by the applicant without a proper legal basis. In paragraph 54 of the judgment, the Court stated that the authorities must respect the rule of law, which requires a clear and predictable legal basis for the restriction of property rights. In the case of Iatridis, there was a lack of legal framework, resulting in a disproportionate interference with the right to property. Also, see the judgment of the ECtHR dated March 29, 2006, in the case of Scordino v. Italy (Application No. 36813/97). In this case, the applicant, Mr. Scordino, was the owner of a property that was expropriated by the Italian authorities for the purpose of a public project. Despite the state's takeover of the land, he was not provided with appropriate compensation, which led to a violation of his right to protection of property. The Court found that the Italian authorities failed to ensure fair compensation, and the expropriation procedure itself was inconsistent with the principle of property protection, constituting a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The Court emphasized that states must provide adequate, fair compensation in cases of expropriation, and if the compensation is not appropriate, it violates the individual's right to property. This judgment was significant for the interpretation of the legitimacy of expropriation and the necessity of providing fair compensation, establishing an important precedent in international property protection law.

10 "In order to ensure the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal, and social protection of family life, particularly by such means as social and family benefits, fiscal arrangements, the encouragement of housing construction suitable for the needs of families, benefits for young couples, and any other appropriate measures." – Article 16 of the European Social Charter, Journal of Laws 1999.8.67 – European Social Charter drafted in Turin on 18 Oct. 1961.

Charter (ESC), citizens of the state parties can enforce their right to housing, including demanding access to housing of an adequate standard, national actions aimed at preventing homelessness, and ensuring affordable residential property prices. Although Poland, pursuant to Article 20 of the ESC, is not bound by the provisions of Article 31, the values expressed in the ESC can serve as interpretative norms and guidelines for Poland's housing policy.

The Charter of Fundamental Rights[11] is part of the primary law of the European Union (Article 6 of the Treaty on European Union).[12] The right to housing under the CFR is regulated in Article 34(3). It should be noted that the cited provision does not explicitly use the term "right to housing" but refers to the necessity of ensuring housing assistance as part of broader social assistance. Additionally, it emphasizes that implementing mechanisms to facilitate access to housing helps combat social exclusion and poverty. Article 34(3) also focuses on the need to ensure adequate housing conditions, which are recognized within the framework of EU social policy as providing "a decent existence for all those who lack sufficient resources, in accordance with the principles laid down by Union law and national laws and practices." It is also worth emphasizing that the fundamental rights contained in the CFR must be interpreted in a manner consistent with the interpretation derived from the ECHR, as well as with due regard to the case law of the European Court of Human Rights, as explicitly provided for in Article 52(3) of the CFR.

Implementation of the Right to Housing Its Impact on Expropriation

The implementation of the right to housing within the framework of the Polish legal order is based on the Constitution. Article 75(1) of the Constitution of the Republic of Poland states that "public authorities shall pursue policies conducive to meeting the housing needs of citizens, in particular by combating homelessness, supporting the development of social housing, and promoting citizen initiatives aimed at obtaining their own housing."[13]

[11] European Union (2012) Charter of Fundamental Rights of the European Union. Official Journal of the European Union, C 326, 26.10.2012, pp. 391–407.

[12] "The protection of human rights, expanded and strengthened by the Charter, now has its foundation in the primary law of the European Union. By granting the CFR a legal status equal to that of the Treaties, the Charter of Fundamental Rights has acquired the rank of primary law." – Ł. Bojarski, D. Schindlauer, K. Wladasch, M. Wróblewski, Karta praw podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników. Warszawa 2014, p. 23 [The Charter of Fundamental Rights of the European Union as a Living Instrument: A Handbook for Lawyers].

[13] Konstytucja Rzeczypospolitej Polskiej, Dz.U. z 1997 r. nr 78, poz. 483, z 2001 r. nr 28, poz. 319, z 2006 r. nr 200, poz. 1471, z 2009 r., nr 114, poz. 946. [Constitution of the Republic of Poland, Journal of Laws of 1997].

The constitutional basis for the functioning of expropriation in Poland is Article 21(2) of the Constitution of the Republic of Poland. According to this provision, expropriation is permissible only if it is carried out for public purposes and with just compensation. The legislator aligns expropriation with opposing institutions, such as inheritance and property boundaries, thereby creating a mechanism of self-regulation and oversight. In this context, the legislator enjoys broad autonomy in defining the limits of protection within the Constitution, which serves as a normative point of reference for ordinary legislators in the process of drafting laws regulating ownership and inheritance rights, without exceeding the permissible boundaries of interference specified by the Constitution.

Although property rights are fundamentally granted and protected to the extent recognized by the legislator, the currently adopted concept of the state and the relationship between authorities and citizens assumes that the source of property rights is not merely the will of the legislative authority. Instead, it is a right—one of the entitlements inherent to the human being—that the legislative authority may shape but does not have the power to entirely deprive individuals of. Therefore, ownership is not the result of the legislator's will but an entitlement inherent to the individual by virtue of their existence, and the legislative authority has the ability to shape this ownership.

The Constitutional Tribunal, in its judgment of December 9, 2008,[14] indicated that expropriation is a particular type of intervention in property rights, applied only in exceptional cases where a public purpose exists. This involves the limitation or complete removal of property rights concerning a specific property in favor of a designated entity. The process includes the state's acquisition of ownership rights to a property or other rights related to the property, which belongs to a private entity, through formal administrative proceedings while ensuring the expropriated owner receives compensation determined in accordance with expropriation regulations. The Constitutional Tribunal emphasized that expropriation should only be applied in cases that are absolutely necessary and justified by public purposes, which cannot be achieved through other legal means. A public purpose must be understood as the welfare of society or a regional community, encompassing the entire society or specific regional communities.

It is also worth noting that expropriation involves the deprivation of ownership, not actual possession of the property:

"Expropriation is a legal instrument for acquiring, limiting, or extinguishing property rights to real estate. It does not result in the removal of possession of the property unless the legislator assigns the expropriation decision the effect of initiating administrative enforcement of possession of the prop-

[14] Wyrok Trybunału Konstytucyjnego z 9 grudnia 2008 r., K 61/07, Legalis nr 112749 [Judgment of the Constitutional Tribunal of 9 Dec. 2008].

erty. As a result of expropriation, involving the deprivation of ownership rights or perpetual usufruct rights, the previous holder of these rights loses the legal title to continue possessing the property. Their possession ceases to align with the legal state. The right to possess the property is acquired by the public-law entity for which the expropriation was carried out."[15]

The Act on Real Estate Management[16] specifies the detailed conditions, including the entities for which expropriation may be carried out, as well as the procedures for this process. However, for the purposes of this analysis, it is crucial to identify the relationship between the possibility of expropriating property and an individual's right to housing. To this end, it is necessary to define the criteria for permissible restrictions on property rights. The Constitutional Tribunal cumulatively outlined the criteria for deprivation of property based on Article 31(3) of the Constitution in its judgment of May 11, 1999.[17] These criteria include: a statutory basis for the restriction, the necessity of introducing the restriction in a democratic state, a prohibition against violating the essence of specific rights and freedoms, and a functional relationship between the restriction and achieving certain values derived from Article 31(3) of the Constitution, such as state security, public order, environmental protection, health, morality, as well as the rights and freedoms of others.

The Constitutional Tribunal devoted significant attention to the criterion of the "necessity of introducing the restriction in a democratic state" which relates to the essence of the principles stemming from the rule of proportionality. The discussed basis for applying property restrictions aligns with the principles of proportionality. This principle imposes on the legislator an obligation to justify the actual need for interference with an individual's specific rights or freedoms and to employ effective measures to achieve the intended goals. Such restrictions must not only be necessary but also as minimally burdensome as possible for the entities whose rights or freedoms are being restricted. Therefore, the interference must be proportional to the objectives that justify the introduction of the restriction.

This analysis requires taking into account both the values and goods protected by the given regulation and those subject to limitation, as well as an evaluation of the methods used to implement the restriction. Thus, meeting the demands of proportionality requires a detailed analysis in every case, considering the protected values and goods, as well as the methods of restriction, within the context of specific circumstances. "Legal literature also emphasizes that in assessing the admissibility of property rights restrictions, gen-

[15] J. Jaworski, A. Prusaczyk, A. Tułodziecki, M. Wolanin, Ustawa o gospodarce nieruchomościami. Komentarz [komentarz do art. 112], Warszawa 2023 [The Real Estate Management Act: Commentary: Article 112].

[16] Ustawa z 21 sierpnia 1997 r, o gospodarce nieruchomościami, Dz.U. 1997 nr 115, poz. 741, tekst jedn. Dz.U. z 2023 r. poz. 344 [Act on Real Estate Management, Journal of Laws 1997].

[17] Wyrok Trybunału Konstytucyjnego z 11 maja 1999 r., K 13/98, Legalis nr 43532 [Judgment of the Constitutional Tribunal of 11 May 1999].

eral constitutional standards play a significant role, such as the principle of equality, the principle of protecting legitimate expectations, the requirement for explicit statutory foundations, the legality and fairness of interference procedures, and the right of the affected party to judicial review. A crucial and doctrinally contentious element in determining the admissibility of property rights restrictions is the identification of the values justifying the interference."[18]

When seeking an answer to the question of the logical legislative basis justifying the necessity of depriving private property, it is essential to focus on several key reasons that may legitimize expropriation actions. First and foremost, expropriation often arises from public interest. The implementation of public utility projects, such as the construction of roads, railways, airports, or water infrastructure, is considered fundamental for the common good, thereby justifying the necessity of acquiring private property.

The socio-economic aspect is also significant. Expropriation may be essential for projects that contribute to economic and social development, such as industrial, commercial, or residential investments, which foster job creation and economic growth.

Urban planning, justified by the need for cohesive spatial planning, environmental protection, or ensuring the appropriate use of land, is another reason. Finally, when public or general interest outweighs individual interests, expropriation may be justified. The aim is typically to ensure societal well-being or maintain harmony within society, even at the expense of individual property rights.

It is also worth noting that a prerequisite for expropriation is the award of appropriate compensation based on the Constitution and the Act on Real Estate Management. The provision in Article 21(2) of the Constitution serves a protective function. Although the obligation to provide compensation arises *ex lege* under this provision, the term "just compensation" does not, in the author's opinion, necessarily imply equivalence between the compensation and the expropriated property.

The principle of balance between compensation and expropriation is expressed in Article 130 of the Act on Real Estate Management, which states: "The amount of compensation is determined based on the condition, purpose, and value of the expropriated property on the day the expropriation decision is issued." The criteria for determining the value of compensation reflect the principle of maintaining such equivalence.

The concept of the "condition of the property," which influences the amount of compensation, refers to the definition contained in Article 4, point

[18] R. Hauser, A. Wróbel, Z. Niewiadomski, Odpowiedzialność odszkodowawcza w administracji. System prawa administracyjnego, tom 12, Warszawa 2016, pp. 537 and 538 [Liability for Damages in the Administration. The Administrative Law System, vol. 12].

17 of the Act on Real Estate Management. According to this provision, it includes the state of development, legal status, technical and functional condition, the level of equipment with technical infrastructure facilities, and the condition of the property's surroundings, including the size, character, and degree of urbanization of the locality where the property is situated.

Within the framework of the concept of the property's condition, three main elements can be identified: the actual state of the property itself, its legal status, and the actual context of its surroundings.[19] When assessing the condition of a property, it is also essential to consider the structure of the building as a key factor determining the possibility of expropriation. As stated by the Supreme Administrative Court (NSA) in its judgment of January 8, 2009, "The possibility of expropriating part of a building property is determined by the structure of the building. Specifically, if the building's structure allows for such expropriation, it will be permissible, as the expropriation decision will be enforceable. However, if the building's structure makes it impossible to expropriate a part of it, such expropriation will not be feasible due to the unenforceability of the expropriation decision.

In the case of building properties, this issue cannot be reduced to the matter of purchasing 'residual plots.' In situations where the expropriation of part of a building property would lead to its demolition, the building should be regarded as an indivisible whole if its structure does not allow for physical division. This consideration is also linked to determining compensation for the building property."[20]

Regulations governing appropriate compensation for expropriation are crucial for upholding the human right to housing. Providing adequate compensation for lost property is a fundamental aspect of ensuring citizens' decent living conditions. Through fair compensation, individuals affected by the expropriation process can maintain housing stability and continue their lives without significant disruptions.

It is worth noting, however, that on June 15, 2022, a draft amendment to the Act on Real Estate Management,[21] was submitted to the Polish Parliament, proposing the removal of the principle of adequacy between the amount of compensation and the value of the expropriated property. In the author's opinion, introducing regulations that reduce the value of just compensation in cases of expropriation would not only violate international standards related to the equivalence of the value of the expropriated property. Such measures could also infringe upon individual tax rights, including the right to housing.

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[19] J. Jaworski *et al.*, Ustawa... Komentarz, *ibid.*

[20] Wyrok Naczelnego Sądu Administracyjnego z 8 stycznia 2009 r., sygn. akt I OSK 29/08, Legalis nr 219114 [Judgment of the Supreme Administrative Court of 8 Jan. 2009].

[21] Government draft bill of 15 June 2022 on amending the Act on Real Estate Management and certain other acts, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2349 [accessed: 02.01.2025].

Compensation for property, which provides the expropriated party with the means to find another place to live, plays a crucial role in the expropriation process and should be carefully considered from the perspective of social justice and individual rights.

This is not merely an economic issue but also a moral one, touching upon the essence of ownership and human dignity. Ensuring that expropriated individuals have the resources to find a new home has practical implications but also places an obligation on the state to care for its citizens. This obligation is reflected in the inclusion of such a requirement in the Constitution in cases of expropriation.

In most legal systems, expropriation is one of the tools enabling intervention in an individual's property rights. Similar to the current Polish legislation, the objectives of this institution are comparable. For instance, in Scotland, initiatives undertaken by the government in the area of compulsory acquisition of property,[22] are guided by the idea of supporting actions that contribute to the improvement of the social, economic, and environmental spheres for the benefit of society as a whole. Authorities are therefore encouraged to actively use their powers, when necessary and appropriate, to deliver immediate benefits to communities.

The Scottish Government's vision for compulsory purchases includes: "A clear, accessible, consistent, effective, and efficient system of legislation and policy that facilitates compulsory acquisition and the purchase of legal shares in land and property for the public good. Provisions for potential compensation should be fair, transparent, and enable timely redress."[23] In this legal system as well, the analysis of the justification for expropriation in the context of human rights has been the subject of numerous considerations. It was ultimately concluded that, when certain conditions are met cumulatively, compulsory acquisition does not violate human rights related to both the right to housing and the right to property. It is therefore essential to maintain proportionality between the actions of the expropriating authority, which should focus on achieving its stated goal supported by public interest, and the rights of the individual, which must be satisfied through appropriate compensation upon deprivation of property.

In the context of public interest, expropriation actions can be aimed at achieving objectives for both local communities and society as a whole. Public benefit may take various forms, including economic, environmental, or infrastructural—such as generating new jobs, creating zones for investments with medical or social purposes, or transforming public transport systems. It

[22] The laws regulating compulsory land acquisition in Scotland: Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, The Compulsory Purchase of Land (Scotland) Regulations 2003.

[23] Guidance for Acquiring Authorities: *Can I Use Compulsory Purchase?* [in:] Compulsory Purchase in Scotland: Scottish Government (ed.): Planning and Architecture Division, CPOGNAA/001, 2018, p. 1.

is also important to emphasize that compulsory purchase in Scotland should only be applied in cases where it is impossible or impractical to acquire the property through agreement with the current owner, and the public interest in such action outweighs the rights of the individual.

The Compulsory Purchase of Land (Scotland) Act, enacted on November 1, 2003, provides a comprehensive set of implementing regulations aimed at effectively enforcing the provisions concerning compulsory land acquisition. These regulations detail the procedures and requirements associated with this institution.[24]

In a comparative legal perspective, it is worth discussing the institution of land socialization, which is not known in Polish law, based on German legislation. Under German law, there exists both the institution consistent with Polish expropriation, "Enteignung" (expropriation), and "Vergesellschaftung" (socialization). Pursuant to Article 14(3) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany):[25] "Expropriation is permitted only for the benefit of the general public. It may only be carried out based on a law or statute regulating the type and amount of compensation. Compensation is paid after a fair consideration of the public interest and applicable regulations. In the event of a dispute regarding the amount of compensation, there is a possibility of appealing to the ordinary courts."

As in Polish and Scottish law, the essential condition for the application of expropriation is the fulfillment of public tasks. This means that the acquisition of ownership of someone else's property is carried out to implement a specific project aimed at improving the living conditions of the community. Expropriation, of course, is not limited solely to the acquisition of property, but for the purposes of this analysis, it will be restricted to such cases.

The German institution of expropriation requires compliance with the principle of proportionality. This means that its execution by a state authority is considered a last resort when there are no other mechanisms available that do not interfere with individual rights and can achieve the intended goal. It is also crucial to demonstrate that the state's interest in acquiring the property must outweigh the owner's interest in retaining their property.

According to Article 14(3), sentence 3 of the Basic Law, the owner is also entitled to compensation, which is determined while taking into account the interests of the general public and the affected parties. "Vergesellschaftung" is addressed in Article 15 of the Basic Law. The concept of this institution is based on the premise that "Vergesellschaftung" may lead to the transfer of ownership of real estate, natural resources, and means of production to the

[24] Ustawa z 1 listopada 2003 [Act of 1 Nov. 2003] The Compulsory Purchase of Land (Scotland), 2003 No. 446, https://www.legislation.gov.uk/ssi/2003/446/pdfs/ssi_20030446_en.pdf [accessed: 21.02.2024].

[25] Grundgesetz für die Bundesrepublik Deutschland, Ausfertigungsdatum [accessed: 23.05.1949], GG.

state. Although some sporadic arguments in German legal literature suggest that socialization is merely a specific case of expropriation, the prevailing opinion is that socialization is an independent legal institution. Evidence for this is the regulation of these institutions in separate articles of the Basic Law.[26]

Exploring the differences between "Enteignung" and "Vergesellschaftung" provides a better understanding of the common features of the expropriation institution in Germany and Poland, while also highlighting how the German legal system approaches the concept of protecting the right to housing as a human right. The terms "Enteignung" and "Vergesellschaftung" are often used interchangeably in debates about the government's ability to intervene in living spaces. A defining feature that distinguishes the socialization of property from expropriation is the necessity of adhering to the principle of proportionality in their execution.[27] According to one perspective, socialization is a specific case of expropriation, and for this reason, the principle of proportionality should apply to it. Following this view, socialization must serve a legitimate purpose and, as already indicated in the analysis of *Enteignung*, must be necessary and appropriate to achieve this social objective.[28] The opposing view holds that, since these institutions are regulated in separate articles of the Basic Law, an expansive interpretation should not be applied. While the compensation referred to in Article 15(2) of the Basic Law does, in essence, refer to Article 14(3), paragraphs 3 and 4, this does not directly imply that the same standards apply to socialization as to compensation for expropriation, particularly given the differing objectives of the two institutions.[29]

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[26] M.-S. Biatel, Aktueller Begriff, Die Enteignung nach Art. 14 Abs. 3 GG und die Vergesellschaftung nach Art. 15 GG, Nr. 05/19 (06.05.2019), Deutscher Bundestag (ed.).

[27] A similar position on compensation for expropriation is expressed by Austrian law and case law. According to Article 26 of the Constitution (*Bundesverfassung*), property is guaranteed, and expropriations and limitations of property rights will be fully compensated. The Constitutional Court (*Der Verfassungsgerichtshof*) developed the theory of special sacrifice (*Sonderopfertheorie*), which assumes that different individuals should receive differentiated compensation, in accordance with the principle that no one should suffer the same loss of property due to expropriation without compensation. Importantly, Austrian case law diverges from the position expressed by the European Court of Human Rights. The ECtHR grants compensation based on the right to property, and according to its rulings, expropriation without compensation is permissible only in exceptional circumstances, although there is no clear explanation of when such circumstances occur. Compensation for expropriation is not the only form of compensation; all inconveniences associated with expropriation, including both market value and any losses in value, should be compensated. To estimate the value of compensation, various aspects must be taken into account, including the fact that the compensation amount should be either in kind or financial, and its determination is for the court based on expert opinions. More on compensation for expropriation, with particular regard to the "special sacrifice theory" [on:] N. Seywerth, Enteignungs – Entschädigung unter besonderer Berücksichtigung der „Sonderopfertheorie", Johannes Kepler University Linz, Sept. 2022.

[28] W. Opfermann, Die Enteignungsentschädigung nach dem Grundgesetz. Grundprobleme der Entschädigungsflexibilität des Grundgesetzes bei Eingriffen in das Eigentum mit besonderer Berücksichtigung der Baulandbeschaffungsfrage, vol. 254, Berlin 1974.

[29] Wissenschaftliche Dienste, Ausarbeitung, Zur Zulässigkeit der Vergesellschaftung von Wohneigentum eines privaten Wohnungsunternehmens, WD 3-3000-108/19, 12 Apr. 2019.

Conclusion – Housing: A Right or a Commodity?

Undoubtedly, domestic (national) laws, international treaties, and EU law require treating the right to housing equally with the right to life and dignity. It is clear that satisfying housing needs affects the well-being of individuals and society as a whole. Therefore, it is necessary to agree that housing should be subject to special protection. However, the debate about whether housing should be considered a right or a commodity remains, in the author's opinion, unresolved.

Recognizing that housing should be treated as a right, not a commodity, has implications for entities engaged in professional real estate transactions. Since the heated debate in Germany about the possibility of limiting the bulk purchase of properties for investment purposes, the Polish government has made an attempt to limit this phenomenon in Poland. Proponents of the idea of treating housing as a right, rather than a commodity, believe that adopting a clear stance focusing on "housing as a right, not a commodity" would increase the availability of housing offered by the state to those unable to purchase or rent property independently. The author finds it hard to deny that these actions contribute to the realization of the state's role in implementing the right to housing. However, first of all, they not only interfere with economic freedom but can also have real economic consequences. Regulating the real estate market will not translate into increased supply or reduced property prices. Moreover, it may reduce the interest of entities in investing in the real estate market. A situation may even arise where the supply of housing decreases, demand remains the same, and prices increase. In the long term, recognizing housing as a right rather than a commodity will not lead to greater housing availability.

Certainly, the right to housing is one of the fundamental human rights; however, housing should be regarded merely as the idea of freedom and personal space. Therefore, it should be considered a tool that enables the realization of values and freedoms established by national and international law. Housing is not an end in itself. For this reason, they should be treated as a tool that enforces values and freedoms through national and international law. Housing is not an end in itself.

Recognition of housing as a right in the Universal Declaration of Human Rights, EU law, and the Council of Europe system has influenced the shaping of national law signatories of the discussed regulations, including provisions related to land expropriation. This primarily concerns limiting state discretion in the expropriation decision-making process, thereby increasing individual protection. It has also become crucial for the European Court of Human Rights (ECtHR) to emphasize the principles that should guide such decisions, namely: the necessity of a legal basis (of statutory rank) allowing

for expropriation; appropriate compensation; as well as the proportionality and necessity of such actions.

Abstrakt

Celem artykułu jest analiza wpływu prawa do mieszkania, uznawanego za prawo człowieka, na kształtowanie krajowych przepisów w zakresie wywłaszczenia. Autorka daje pozytywną odpowiedź – podkreślając, że zarówno prawo międzynarodowe, prawo UE, jak i akty prawne Rady Europy poświęcone ochronie mieszkania znacząco wpłynęły na kształtowanie prawa.

Analiza została oparta na uregulowaniach Powszechnej Deklaracji Praw Człowieka (która pierwsza ustanowiła prawną ochronę mieszkania jako prawa przyznanego każdej jednostce), Karty praw podstawowych, a także systemu Rady Europy. Autorka wykorzystuje ponadto metodę porównawczą, badając wpływ norm gwarantujących prawo do mieszkania na przepisy wywłaszczeniowe w państwach będących sygnatariuszami każdego z tych aktów. Podkreśla to znaczenie wspólnych standardów ochrony praw człowieka w kształtowaniu krajowych przepisów.

Ostatnie rozważania skupiają się na kwestii, która wzbudziła ostatnio duże zainteresowanie: mieszkanie jako prawo czy towar? Autorka uważa, że próba odpowiedzi na to pytanie – oparta na badaniu prawa i ekonomii – pozwoli lepiej zrozumieć, dlaczego mieszkalnictwo powinno być postrzegane jako narzędzie umożliwiające realizację wartości i wolności ustanowionych zarówno przez prawo krajowe, jak i międzynarodowe. Gdy ujmuje się mieszkalnictwo w ten sposób, staje się jasne, że dostęp do odpowiedniego mieszkania nie jest jedynie transakcją ekonomiczną, ale podstawowym elementem godności człowieka, sprawiedliwości społecznej i wypełniania praw zapisanych w systemach prawnych na całym świecie.

Słowa kluczowe: prawo do mieszkania, wywłaszczenie, mieszkanie, system ochrony praw człowieka.

BIBLIOGRAPHY

Biatel, M. S., Aktueller Begriff, Die Enteignung nach Art. 14 Abs. 3 GG und die Vergesellschaftung nach Art. 15 GG, Nr. 05/19, Deutscher Bundestag (ed.), 6 May 2019.

Bojarski, Ł., Schindlauer, D., Wladasch, K., Wróblewski, M., Karta praw podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników, Warszawa 2014 [The Charter of Fundamental Rights of the European Union as a Living Instrument: A Handbook for Lawyers].

Hauser, R., Wróbel, A. Niewiadomski, Z., Odpowiedzialność odszkodowawcza w administracji. System prawa administracyjnego, tom 12, Warszawa 2016 [Liability for Damages in the Administration. The Administrative Law System, vol. 12].

Jaworski, J., Prusaczyk, A., Tułodziecki, A., Wolanin, M., Ustawa o gospodarce nieruchomościami. Komentarz, Warszawa 2023 [The Real Estate Management Act: Commentary].

Nowak, K., Krajowy i lokalny wymiar polityki mieszkaniowej, Instytut Rozwoju Miast i Regionów, Warszawa–Kraków–Gdańsk 2021 [The National and Local Dimensions of Housing Policy].

Opfermann, W., Die Enteignungsentschädigung nach dem Grundgesetz. Grundprobleme der Entschädigungsflexibilität des Grundgesetzes bei Eingriffen in das Eigentum mit besonderer Berücksichtigung der Baulandbeschaffungsfrage, vol. 254, Berlin 1974.

Seywerth, N., Enteignungs – Entschädigung unter besonderer Berücksichtigung der „Sonderopfertheorie", Johannes Kepler University, Linz 2022.

Wissenschaftliche Dienste, Zur Zulässigkeit der Vergesellschaftung von Wohneigentum eines privaten Wohnungsunternehmens, WD 3-3000-108/19, 12 Apr. 2019.

Online Sources

Compulsory Purchase in Scotland: Guidance for Acquiring Authorities, Scottish Government (ed.): Planning and Architecture Division, CPOGNAA/001 2018. https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/04/guidance-acquiring-authorities-use-compulsory-purchase/documents/00534691-pdf/00534691-pdf/govscot%3Adocument/00534691.pdf [accessed: 02.01.2025].

Government draft bill of 15 June 2022 on amending the Act on Real Estate Management and certain other acts; https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2349 [accessed: 02.01.2025].

Kędzierska M., *Kształtowanie polityki mieszkaniowej w warunkach gospodarki rynkowej*, 'Equilibrium' 2009, 1 2 [Shaping Housing Policy in a Market Economy]; https://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ojs-doi-10_12775_EQUIL_2009_014/c/EQUIL.2009.014-6886.pdf [accessed: 01.01.2025].

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Giacomo Oberto*

Strategies to Deal with Backlogs and Delays in the Court System: European Experiences

[Strategie radzenia sobie z zaległościami i opóźnieniami w systemie sądowym – doświadczenia europejskie]

Paper for the Education Session of the 2025 Mid-Year Meeting of the Asian, North American and Oceanian (ANAO) Regional Group of the International Association of Judges (IAJ)
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Abstract

The article illustrates the strategies that the European Commission for the Efficiency of Justice (CEPEJ) has been developing during these last years for fighting backlogs in

* **Giacomo Oberto** – PhD in Law, Adjunct Professor, Department of Legal Studies, University of Bologna, IT (affiliation); retired judge; https://orcid.org/0009-0002-7289-2485; giacomo.oberto@unibo.it / dr nauk prawnych, profesor kontraktowy, Wydział Nauk Prawnych, Uniwersytet Boloński, Włochy (afiliacja); emerytowany sędzia.

countries belonging to the Council of Europe. In particular, the CEPEJ has recently elaborated a "Backlog Reduction Tool", intended to show how stakeholders in the judicial field should tackle the issues of delays in treating and disposing of cases before courts. In this framework also a special Resource Centre on Backlog Reduction Practices has been set up. The essay shows as well how dashboards can be used in order to assess the current situation and evaluate the compliance with certain targets related to the two main efficiency indicators: clearance rate and disposition time. Also a comprehensive list of possible measures is presented and commented in their pros and cons, such as issuing a "decalogue" of behavioural rules, using e-filing and AI in the organisation of the work of judges, relieving judges of certain (non-judicial) tasks, rationalisation of court network, ADR, transferring the competence to hear certain categories of cases from panels of judges to a single judge, temporary reorganization of courts, etc.

Keywords: efficiency of justice, CEPEJ, backlogs, dashboards, clearance rate, disposition time, e-filing, AI.

1. Introduction. The Awakening of the Awareness on Efficient Case Management in Europe: The European Commission for the Efficiency of Justice (CEPEJ)

The Council of Europe, by setting up, at the end of the year 2002, the European Commission for the Efficiency of Justice (*Commission Européenne pour l'efficacité de la justice* – CEPEJ)[1] marked the dawn of a new era. An era characterised by the awakening of the awareness about the need for efficiency in case management and fight on backlogs in the court systems of the Old Continent. In fact, the CEPEJ was established on 18 September 2002 with Resolution Res(2002)12 of the Committee of Ministers of the Council of Europe, with the purpose of developing concrete measures and tools aimed at policy makers and judicial practitioners in order to:

- Analyse the functioning of judicial systems and orientate public policies of justice.
- Have a better knowledge of judicial timeframes and optimize judicial time management.

[1] See https://www.coe.int/en/web/cepej/home/. On the CEPEJ see Jon T. Johnsen, *The European Commission for the Efficiency of Justice (CEPEJ) – Reforming European Justice Systems* – "Mission Impossible?", 'International Journal for Court Administration' 2012, 4, 3; G. Oberto, Strumenti e documenti CEPEJ per la gestione dell'efficienza e dei tempi dei processi, 2023, available at https://www.giacomooberto.com/Giacomo_Oberto_Strumenti_e_documenti_CEPEJ.pdf; E. Grisonich, *Efficacia e qualità della giustizia in Europa: pubblicato il rapporto 2024 CEPEJ sui sistemi giudiziari europei*, 'Sistema penale' 2024, https://www.sistemapenale.it.

- Promote the quality of the public service of justice.
- Facilitate the implementation of European standards in the field of justice.
- Support member states in their reforms on court organisations.

The CEPEJ also contributes with specific expertise to debates about the functioning of the justice system in order to provide a forum for discussion and proposals and bring the users closer to their justice system.

CEPEJ is made up of representatives of the Ministries of Justice of the 46 Member States of the Council of Europe. In order to pursue the above goals, it has four Working Groups. All the main initiatives and documents of the CEPEJ are elaborated by the said Groups and then brought to the attention of the CEPEJ's Plenary Assembly, for final approval.

These are the aforementioned four Working Groups:

- CEPEJ-GT-EVAL. Its task is that of analysing the functioning of judicial systems and orientate public policies of justice.[2] In this framework, the CEPEJ has set up a continuous evaluation process of the functioning of judicial systems in all the European States, on a comparative basis. This unique process in Europe enables, through the collection of quantitative and qualitative data, to have a detailed photography of the functioning of justice and to measure its evolution. This tool for in-depth analysis enables to orientate public policies of justice. Fruit of this huge work is the biannual report on the European Judicial Systems.[3] A report that, as of 2026, should be edited and published every year. We must also notice that the huge amount of data, referring to the 46 different legal and judicial European systems, are organised in the framework of a comprehensive and comparative database, called CEPEJ-STAT. A database that can be accessed by anybody and offers very different possibilities of data retrieval and research.[4]
- CEPEJ-GT-SATURN. Its task is that of providing a better knowledge of judicial timeframes and optimize judicial time management. In this framework, CEPEJ has been developing theoretical studies, as well as practical tools aimed at professionals for a better knowledge and improvement of the situation of judicial timeframes and time management in courts of the European States.[5]
- CEPEJ-GT-QUAL. Its task is that of promoting the quality of the public service of justice. Beyond the efficiency of judicial systems, the CEPEJ aims to identify the elements which constitute the quality of the service provided to users in order to improve it and aims to develop innovative measures.

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[2] See https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems.

[3] The 2024 evaluation report is available online here: https://www.coe.int/en/web/cepej/special-file.

[4] See https://www.coe.int/en/web/cepej/cepej-stat. In particular, the dashboard dedicated to an overview of all the European Systems (see https://public.tableau.com/app/profile/cepej/viz/OverviewEN/Overview), allows, by clicking on the profile of each Country as it appears on the map of Europe, to get a glimpse of the essential data of each system, and also to compare two or more Countries on issues such as: number of judges, judicial staff, efficiency of judicial systems, etc.

[5] On the purposes of this work, as well as on documents and tools elaborated by CEPEJ-GT-SATURN, see further, under § 6 of this paper.

During these last years the said Working Group elaborated tools such as the Checklist for promoting the quality of justice and the courts, a Handbook for conducting satisfaction surveys aimed at court users, the European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, etc.[6]

- CEPEJ-GT-CYBERJUST. Its task is that of developing tools with a view to offering a framework and guarantees to member States and legal professionals wishing to create or use Information and Communication Technologies and/or artificial intelligence mechanisms in judicial systems in order to improve the efficiency and quality of justice.[7] This work should be implemented in co-ordination with the work of other Council of Europe bodies in this field, in particular the European Committee on Legal Co-operation (CDCJ) and the Committee on Artificial Intelligence (CAI). The tools developed by the Working Group concern topics as varied as quality criteria for videoconferencing, artificial intelligence used in alternative methods of dispute resolution or enforcement of court decisions or court proceedings in a digital context. The Working Group manages as well a Resource Centre on Cyberjustice and AI, which is a database (easily accessible through an online dashboard) gathering information on AI systems and other advanced cyberjustice tools applied in various European Countries.[8]

Beside the above mentioned four Working Groups, CEPEJ fosters following initiatives:

- Support member States in their reforms of court organisation. The CEPEJ is entrusted with giving targeted cooperation to the Countries which request it in the framework of their institutional and legislative reforms and for organising their justice system.[9]
- Get the users closer to their justice system. The CEPEJ is at the origin of the initiative, together with the European Commission in Brussels, of the European Day of Justice. It has been celebrated each year on 25 October and enables the public, through various events organised by judicial institutions in the European states, to get better acquainted with their justice system and its functioning.[10] Within the framework of this initiative, a European Prize, "The Crystal Scales of Justice", has been created in 2005, aimed at highlighting innovative and effective practices carried out within courts to improve the functioning of justice.[11]

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[6] See https://www.coe.int/en/web/cepej/cepej-work/quality-of-justice. Since 2020 the CEPEJ-GT-QUAL integrated in its mandate the promotion of mediation as a follow up to the work previously conducted by the CEPEJ-GT-MED and continued to develop tools in this area, which can be found on the mediation webpage (see https://www.coe.int/en/web/cepej/cepej-work/mediation).

[7] See https://www.coe.int/en/web/cepej/cepej-working-group-cyber-just.

[8] See https://www.coe.int/en/web/cepej/resource-centre-on-cyberjustice-and-ai.

[9] See https://www.coe.int/en/web/cepej/ongoing-projects.

[10] See https://www.coe.int/en/web/cepej/2024-journ%C3%A9e-europ%C3%A9enne-de-la-justice.

[11] See https://www.coe.int/en/web/cepej/events/crystal-scales-of-justice-prize-form-jury.

- Creating and maintaining a Network of Pilot Courts from European States[12] to: a) support its activities through a better understanding of the day to day functioning of courts and b) to highlight best practices which could be presented to policy makers in European States in order to improve the efficiency of judicial systems. Therefore, the Network is:
    - A forum of information: Pilot courts are privileged addressees of the information on the work and achievements of the CEPEJ and are invited to disseminate this information within their national networks. Within the Network, Pilot courts communicate and cooperate.
    - A forum of reflection: The Network is consulted on the various issues addressed by the CEPEJ.
    - A forum of implementation: some Pilot courts can be proposed to trial at local level some specific measures proposed by the CEPEJ.
    - All such initiatives contribute toward relieving the case-load of the European Court of Human Rights by providing states with effective solutions to prevent violations of the right to a fair trial within a reasonable time (Article 6 of the European Convention of Human Rights). Actually, we must never forget that all the work of the Council of Europe is based on the European Human Rights Convention. The reason why the Council of Europe is interested in the field of Justice is based on the three concepts of independent tribunal, fair trial and reasonable time, enshrined in said Article 6, Para 1, of the above mentioned Convention.[13]

Documents and tools elaborated by the CEPEJ are not legally binding on Council of Europe's member States. However, the practical experience of international associations shows, for example, that "soft law" documents (like the recommendations of the Council of Europe, or the tools of the CEPEJ, or the declarations and resolutions of the International Association of Judges) may serve the cause of persuading political authorities of certain Countries not to implement measures that might have limited the independence of the judiciary. Moreover, in a large number of cases, the European Court of Human Rights has used pieces of soft law to determine the meaning of expressions like "reasonable time", or "independent and impartial tribunal".[14]

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[12] See https://www.coe.int/en/web/cepej/cepej-work/network-of-pilot-courts.

[13] "6.1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)".

[14] See e.g. on this topic J. Laffranque, *Judicial Independence in Europe: Principles and Reality* [in:] N. A. Engstad, A. Lærdal Frøseth & B. Tønder (eds.), The Independence of Judges, The Hague, 2014, p. 144 ff.; G. Oberto, Sistemi giudiziari europei a confronto: le criticità italiane, available at https://www.giacomooberto.com/Oberto_sistemi_giudiziari_a_confronto.htm, § 2; G. Oberto, Un nuovo statuto per un nuovo giudice, in Contratto e impresa / Europa 2019, p. 66, also available at https://www.giacomooberto.com/Oberto_Un_nuovo_statuto_per_un_nuovo_giudice_2017.htm, § 5.

Moreover, the case law of the European Court of Human Rights has somehow prompted even the most "stubborn" Countries (like Italy) to try to introduce measures to fight backlogs and foster efficient case management, as shown by a number of Italian initiatives:[15] some of them will be illustrated in detail further on in this paper.[16]

2. The CEPEJ-GT-SATURN Working Group on Judicial Time Management: Main Tools and Documents

The CEPEJ-GT-SATURN Working Group on Judicial Time Management[17] has been set up in 2007 by CEPEJ as one of the four permanent WGs of it and a Centre for judicial time management. According to its terms of reference, the SATURN is instructed to collect information necessary for the knowledge of judicial timeframes in the member States and detailed enough to enable member states to implement policies aiming to prevent violations of the right for a fair trial within a reasonable time protected by Article 6 of the European Convention on Human Rights.

The Working Group is a European observatory of judicial timeframes, by analysing the situation of existing timeframes in the member States (timeframes per types of cases, waiting times in the proceedings, etc.), providing them knowledge and analytical tools of judicial timeframes of proceedings. It is also in charge of the promotion and assessment of the Guidelines for judicial time management.

The CEPEJ-GT-SATURN works in particular for collecting, processing and analysing the relevant information on judicial timeframes in a repre-

[15] For a general overview see G. Oberto, Study on Measures Adopted in Turin's Court ("Strasbourg Programme") along the Lines of "Saturn Guidelines for Judicial Time Management", available at https://www.giacomooberto.com/study_on_Strasbourg_Programme.htm; F. Contini (ed.), Handle with Care: Assessing and Designing Methods for Evaluation and Development of the Quality of Justice, IRSIG-CNR, Bologna 2017, available at https://www.lut.fi/web/en/school-of-engineering-science/research/projects/handle-with-care; E. Silvestri, Notes on Case Management in Italy, available at https://ssrn.com/abstract=3158105 or http://dx.doi.org/10.2139/ssrn.3158105; D. C. Steelman & M. Fabri, Can an Italian Court Use the American Approach to Delay Reduction?, available at https://www.tandfonline.com/doi/abs/10.1080/0098261X.2008.10767868; L. Verzelloni, Reduction of Backlog: The Experience of the Strasbourg Programme and the Census of Italian Civil System, available at https://www.encj.eu/images/stories/pdf/workinggroups/Timeliness/verzelloni-reduction_of_backlog-the_experience_of_the_strasbourg_program_and_the_cebsu_of_italian_civil_justice_system.pdf; G. Esposito, S. Lanau & S. Pompe, Judicial System Reform in Italy—A Key to Growth, available at https://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf; Imf, Italy, Selected Figures, Washington, 2014, p. 15 ff., available at https://www.imf.org/external/pubs/ft/scr/2014/cr14284.pdf.

[16] See below, under §§ 9, 11 and 15.

[17] See https://www.coe.int/en/web/cepej/cepej-work/saturn-centre-for-judicial-time-management. Saturn was the Roman god of time. This name was chosen also as an acronym for: "Study and Analysis of judicial Time Use Research Network".

sentative sample of courts in the member states by relying on the Network of Pilot Courts. According to its terms of reference, the Working Group is instructed to collect and share information on time management relevant for courts and public prosecution services and to develop tools, to improve its efficiency in order to enable member States to implement policies aiming to prevent violations of Article 6 of the European Convention on Human Rights, and in particular the right to a fair trial within a reasonable time.

Since its creation in 2007 the CEPEJ-GT-SATURN has elaborated a consistent number of tools and studies, all available in its web site.[18] Among them we may mention the following:

- Time Management Checklist for public prosecution services (12/2024).
- Explanatory note for the time management checklist for public prosecution services (12/2024).
- Backlog reduction tool (06/2023).
- Time Management Checklist (06/2023).
- Explanatory Note for the Time Management Checklist (06/2023).
- SATURN Guidelines for judicial time management (12/2021).
- Handbook on court dashboards (06/2021).
- Implementation guide: Towards European timeframes for judicial proceedings (12/2016).
- Handbook for implementing CEPEJ-SATURN tools (05/2017).
- Report on case-weighting in public prosecution services (12/2023).
- Case weighting in judicial systems – CEPEJ Studies No. 28 (07/2020).
- Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Right, by Ms Françoise Calvez and Nicolas Regis, Judges (France) 3rd edition by Nicolas Regis – CEPEJ Studies No. 27 (12/2018).[19]

[18] See https://www.coe.int/en/web/cepej/cepej-work/saturn-centre-for-judicial-time-management.

[19] In order to fulfil its mandate, the CEPEJ-GT-SATURN is currently working on the following issues:
a. develop guidelines allowing the implementation of a system of case weighting;
b. develop a tool enabling to analyse the timeframes according to the steps of the civil procedure;
c. develop a database of backlog reduction practices;
d. study potential effects of the use of AI tools on court efficiency, in cooperation with the CEPEJ-GT-CYBERJUST;
e. elaborate a study on workload measurement tools in judicial systems;
f. in co-operation with the other CEPEJ Working Groups, carry out a reflection on the feasibility (i) to develop indicators and/or indexes for measuring the quality of justice as well as (ii) to prepare a tool to improve work-life balance in the judiciary;
take into account in its work the identified needs arising from the implementation of relevant co-operation programs and actively contribute thereto.

3. The CEPEJ's Backlog Reduction Tool. Its Main Features. The Resource Centre on Backlog Reduction Practices

During the years 2022 and 2023 the CEPEJ-GT-SATURN elaborated a Backlog Reduction Tool, which was approved by the CEPEJ Plenary meeting in June 2023, so becoming an official document of the CEPEJ.[20]

Starting point of this initiative was, as many other times, a reflection on Article 6 of the European Convention on Human Rights. According to this rule, "everyone is entitled to a fair and public hearing within a reasonable time". The full enjoyment of this right can be hindered by various types of inefficiencies stemming from an inadequate legal framework, inappropriate court network, increasing complexity of cases and insufficient court resources to deal with incoming cases. As a result, the accumulation of pending cases over time leads to delays in court proceedings, creating a backlog of cases and a potential violation of the "reasonable time requirement". Moreover, these delays increase the cost of court proceedings, contribute to legal uncertainty, and have a negative impact on public perception and trust in judicial systems.

Many judicial systems continue to grapple with a backlog of cases, necessitating prompt action by the authorities to remedy the situation and ensure delivery of justice within a reasonable time. This instrument is therefore intended for State and judicial authorities and courts as a tool to reduce backlogs and prevent their recurrence. It outlines a step-by-step methodology for the development of strategies aimed at backlog reduction. By identifying areas where backlogs accumulate, understanding the underlying causes, and proposing measures to address backlogs across different levels of court systems, this tool offers adaptable approaches tailored to the specific circumstances of a judicial system, rather than a fixed set of solutions.

The document starts first of all with some definitions which are essential in order to understand how the tool can work.

For the purposes of this document, "backlog" should be understood as pending cases at the court concerned, which have not been resolved within an established timeframe. For example, if the timeframe has been set at 24 months for all the civil proceedings, the backlog is the number of pending civil cases longer than 24 months. The tool underlines as well that fighting backlog should not result in a decrease of the quality of judicial decisions and services provided to court users.

Another important *caveat* of the tool relates to the fact that the process of fighting backlogs should start from the designation of a lead institution

[20] See https://rm.coe.int/cepej-2023-9final-backlog-reduction-tool-en-adopted/1680acf8ee.

responsible for activities related to backlog reduction. This institution can be an existing body, such as the High Council for Judiciary, Supreme Court, or Ministry of Justice, or a newly created body like an *ad hoc* backlog reduction working group or backlog reduction committee. The designated institution should oversee the whole process starting from analysis and identification of the scope of the problem, through defining targets and measures to reduce backlog, and concluding with the creation of monitoring mechanisms and ensuring sustainability to prevent future backlog accumulation. In addition, it should be responsible for coordination, implementation, and monitoring of backlog reduction activities at the central level, as well as facilitating effective communication with court users and the public.

This institution may be complemented by backlog reduction teams consisting of judges, court managers, and/or non-judge court staff established at the local levels. Finally, it is important to provide the lead institutions with appropriate instruments and resources in order to perform its tasks effectively.

Before delving into other details of the CEPEJ's Backlog Reduction Tool, we must add that, as a natural follow up of the adoption of the tool, in 2024 the CEPEJ-GT-SATURN created a Resource Centre on Backlog Reduction Practices,[21] based on a Backlog Reduction Database.[22]

The Centre serves as a publicly accessible platform providing reliable, up-to-date information on practices implemented by States to address backlogs of cases. The term "practices" encompasses measures, tools, reforms, and all activities geared towards reducing and preventing backlogs in judicial systems.

The Resource Centre and the database aim to:

- support authorities tasked with the planning and implementation of justice reforms by providing an overview of backlog reduction practices;
- foster co-operation among stakeholders from Europe and beyond through information-sharing on effective backlog reduction practices;
- provide practitioners and judicial systems managers with information on successful approaches used in other countries to tackle backlogs and therefore encourage exchanges of good practices.

The database contains therefore relevant information on backlog reduction practices of any part of Europe. The criteria for publication in the database include relevance, implementation, and evidence based. The Database includes measures with a proven record of successful implementation or measures under implementation.

[21] See https://public.tableau.com/app/profile/cepej/viz/BacklogReductionResourceCentre/ResourceCentre.
[22] See https://www.coe.int/en/web/cepej/database-of-backlog-reduction-practices.

4. Main Steps in the Implementation of the CEPEJ's Backlog Reduction Tool. Analysis of the Existing Situation

The concrete implementation of the CEPEJ's Backlog Reduction Tool should be achieved through three main steps: (a) Analysis of the existing situation, (b) Measures to be adopted, (c) Monitoring.

Starting with the first step, which is to say the Analysis of the present situation, it appears necessary to identify size and type of backlog(s) and analyse causes. As remarked in the CEPEJ's tool, understanding the scale of the problem requires collection and rigorous analysis of quantitative and qualitative data. Statistical data should be collected in different areas (e.g. case-flow, length of proceedings, and human and material resources) and at different levels (e.g. system, court, and court department). The collection of data must go hand-in-hand with a comprehensive analysis of the factors contributing to the backlog. This analysis is essential for the design of appropriate remedial measures. It may include the assessment of legislation, availability of human, financial and material resources, court organisation and functioning, and the quality and availability of training for judges and non-judge court staff, lawyers, prosecutors, and other relevant stakeholders.[23] The identification of backlog and the analysis should be coordinated by the above-mentioned lead institution.

Some of the main instruments which may help in diagnosing the situation are, first of all, the so-called CEPEJ efficiency indicators: actually they are certain indicators defined by the CEPEJ that can serve as a starting point for conducting the efficiency analysis in a judicial system. Such instruments are basically the following two:

- Clearance Rate (or "CR"). It is a ratio obtained by dividing the number of resolved cases by the number of incoming cases in a given period, expressed as a percentage, according to the following formula:
  [CR (%) = Resolved cases in a given period / Incoming cases in that given period x100].
  Clearance Rate equal to 100% indicates the ability of the court or of a judicial system to resolve as many cases as the number of incoming cases within the given time period. A Clearance Rate above 100% indicates the ability of the system to resolve more cases than those received. Finally, a Clearance Rate below 100% appears when the number of incoming cases is higher than the number of resolved cases. In such a situation, the number of pending cases will increase. Essentially, the Clearance Rate shows how the court or judicial system is coping with the in-flow of cases.

[23] We should never forget the teaching of Jean Bodin, according to which "Il n'est de richesse que d'hommes" ("there is no other wealth than people": Bodin, *Les six livres de la république*, livre V, chapitre II).

- Disposition Time (or "DT") is obtained by dividing the number of pending cases at the end of a given period by the number of resolved cases within that period, multiplied by 365 (days in a year), according to the following formula:
  [DT= Pending cases on a given day / Resolved cases on that given day x 365].

This indicator estimates how many days should be required to resolve the pending cases based on the court's current capacity to resolve cases. It is used as a forecast of the length of judicial proceedings. This indicator is not a calculation of the duration of the proceedings, but a theoretical estimate of the time needed to process pending cases.

5. Analysis of the Existing Situation through Statistical Data on Court Cases

To determine more precisely the presence, scope, and location of backlog, it is necessary to collect data on the number of cases and assess the current situation at different court levels. However, relying solely on the number of cases does not provide a complete assessment of the court's situation. Therefore, it is also important to examine the age structure of pending cases and compare that data with the number of incoming and resolved cases, as well as CEPEJ indicators explained above.

The data collection and analysis can be conducted at the following levels:

i) national level (total amount of cases that are processed in all courts);

ii) type of courts (courts of general jurisdiction and specialised courts);

iii) court instance (first, second, and third instance);

iv) case-type (e.g. civil, criminal, and administrative cases) or more detailed types of cases (e.g. litigious divorces, dismissal cases, robberies, bankruptcy, enforcement, gender-based violence, etc.).

The CEPEJ's Backlog Reduction Tool contains a number of tables which might help in schematizing the relevant data.

For example, we may consider the following:

(Individual) Court overview (by case types within one court of any court level)

Reporting period January 1 – December 31 (or any other period)

1	2	3	4	5	6	7	8	9
Case Type	Number of pending cases at the beginning of the reporting period	Number of incoming cases during the reporting period	Caseload (2+3)	Number of resolved cases during the reporting period	Number of pending cases at the end of reporting period	Percentage of increase/decrease of pending cases at the end of the reporting period compared to the beginning of the reporting period	Clearance Rate	Disposition Time
Criminal								
Civil								
Labour								
Family								
Bankruptcy								
Enforcement								
Administrative								
Other types of cases								
Total								
Average per case type								

Another very important analysis is the one concerning the age of cases composing the backlog. This survey can be made by analysing, first of all, the age of pending cases:

Age of pending cases (calendar year)

1		2	3	4	5	6	7	8
Case Type		Total number of pending cases	Pending cases from 2023 (up to 1 year)	Pending cases from 2022 (between 1 and 2 years)	Pending cases from 2021 (between 2 and 3 years)	Pending cases from 2020 (between 3 and 4 years)	Pending cases from 2019 (between 4 and 5 years)	Pending cases from 2018 and prior years (over 5 years)
Criminal	Number of cases							
	Percentage of total							
Civil	Number of cases							
	Percentage of total							
Labour	Number of cases							
	Percentage of total							
Family	Number of cases							
	Percentage of total							
Bankruptcy	Number of cases							
	Percentage of total							

It might be also very useful to analyse the age of resolved cases:

Age of resolved case (calendar year)

1		2	3	4	5	6	7	8
Case Type		Total number of resolved cases	Resolved cases from 2023 (up to 1 year)	Resolved cases from 2022 (between 1 and 2 years)	Resolved cases from 2021 (between 2 and 3 years)	Resolved cases from 2020 (between 3 and 4 years)	Resolved cases from 2019 (between 4 and 5 years)	Resolved cases from 2018 and prior years (over 5 years)
Criminal	Number of cases							
	Percentage of total							
Civil	Number of cases							
	Percentage of total							
Labour	Number of cases							
	Percentage of total							
Family	Number of cases							
	Percentage of total							
Bankruptcy	Number of cases							
	Percentage of total							

This second kind of table is useful in order to understand whether the system (or the court, or the judge/s) is dealing (mainly and with priority) with older cases, in order to reduce the backlog and in this way improving its efficiency, or, on the contrary (as it can happen), it deals rather with newer cases, so aggravating the bulk of the backlog.

6. Detailed Statistical Data on Court Cases. Paying Attention to the Different Case Categories and Levels of Jurisdiction. Tables on the Average Duration of Cases

In order to better understand the reasons of (and the remedies to) judicial backlogs in given situations, it might be useful to have an idea of the above described situations, also considering the different types of cases and the different levels of adjudication. In this framework, we may show here some of the tables suggested by the CEPEJ's Backlog Reduction Tool, concerning the way of reporting the number of backlog cases.

Number of backlog cases during the reporting period (by case type – court level)

1	2	3	4	5	6	7	8
Case type	Number of pending backlog cases at the beginning of the reporting period	Number of backlog cases received during the reporting period	Number of pending cases that became backlog during the reporting period	Total number of backlog cases during the reporting period (2+3+4)	Number of resolved backlog cases during the reporting period	Number of pending backlog cases at the end of the reporting period (6-5)	Percentage of increase/decrease of pending backlog cases at the end of the reporting period compared to the beginning of the reporting period
Criminal							
Civil							
Labour							
Family							
Bankruptcy							
Enforcement							
Administrative							
Other types of cases							
Total							
Average per case type							

Number of backlog cases during the reporting period (system level)

1	2	3	4	5	6	7	8
Court instance	Number of pending backlog cases at the beginning of the reporting period	Number of backlog cases received during the reporting period	Number of pending cases that became backlog during the reporting period	Total number of backlog cases during the reporting period (2+3+4)	Number of resolved backlog cases during the reporting period	Number of pending backlog cases at the end of the reporting period (6-5)	Percentage of increase/decrease of pending backlog cases at the end of the reporting period compared to the beginning of the reporting period
3rd instance							
2nd instance							
1st instance							
Any other type of specialised courts…							

It is also essential to keep an eye on the average duration of cases. This can be done with the help of some of the following tables.

Average duration of pending cases

1	2	3	4	5	6
Case type	Number of pending cases on the date of creation of the report (beginning of the reporting period – e.g. on 1 January)	Average duration of pending cases on the date of creation of the report (beginning of the reporting period – e.g. on 1 January)	Number of pending cases on the date of creation of the report (end of reporting period – e.g. on 31 December)	Average duration of pending cases on the date of creation of the report (end of reporting period – e.g. on 31 December)	Difference in days between 3 and 5 – longer duration (+ days) or shorter duration (- days)
Criminal					
Civil					
Labour					
Family					
Bankruptcy					
Enforcement					
Administrative					

The duration of a pending case (in days) is the period from the date of filing of the initial act until the date when the report is generated. The average is obtained by adding the duration of all pending cases (in days) divided by the number of pending cases. The figures on the average duration of pending cases are generated for a specific date, not for a reporting period. To effectively analyse court performance, it is advisable to compare the values for different dates, allowing for tracking and comparison of data. By doing so, it becomes possible to identify trends and determine whether the average duration of pending cases is increasing (indicating a decline in court performance) or decreasing (indicating an improvement in court performance).

Average duration of resolved cases

Case type	Number of resolved cases in the reporting period	Average duration of resolved cases at the end of reporting period	Clearance Rate
Criminal			
Civil			
Labour			
Family			
Bankruptcy			
Enforcement			
Administrative			

The duration of a resolved case (in days) is the period from the date of filing of a case until the date of resolution. The average is obtained by adding the duration of all resolved cases in days, divided by the number of resolved cases. There are two options for creation of this report: 1) the duration of resolved cases can be calculated from the date of the initial filing to the date of the final decision, regardless of which instance renders the final decision; 2) from the date of the case registration at a particular court instance, regardless of the date of the initial filing, to the date of the decision in that instance (calculation by court instances/phases of the court proceedings, such as first instance, second instance, third instance). Both options are recommended for analysing the duration of cases, as they offer different perspectives. Option 1 provides a holistic view of the overall proceedings. Option 2 allows for a more detailed analysis of case duration within specific instances or phases of the court proceedings.

We must also notice that the above are among the most important indicators for detection of reasons for creation of backlog cases. If these indicators are used on different dates (e.g. on 1 January 2021 and on 31 December 2021), they can give valuable insights on court performance.

To gain deeper insights, it is beneficial to compare information on duration of pending cases with the Clearance Rate. It is important to note that even if

the Clearance Rate indicator is below 100% in a particular period, this does not necessarily indicate an ongoing backlog issue at that point in time. However, if such performance continues over a longer period, it will eventually lead to creation of backlogs. This is why it is important to compare the Clearance Rate level with the average duration of pending cases.

If the duration of pending cases decreases during the observed period, it suggests that judges are likely prioritising the resolution of "older" cases over newly received ones. Conversely, if both indicators show negative trends across compared periods (Clearance Rate below 100% and an increasing duration of pending cases), further analysis is necessary to understand the underlying reasons for the underperformance and backlog creation.

In situation where the Clearance Rate is above 100%, which is usually a positive sign in courts, it is important to compare that data with the average duration of pending cases. If the second indicator is increasing, it implies that judges are resolving "newer" cases and there is a risk of creation of backlog cases, even though they resolve more cases than they receive.

Average duration of resolved cases is another vital indicator for identifying backlogs and excessive duration of cases. If this indicator is increasing in the previous reporting periods, this may signal not only longer case durations but also a potential violation of the right to trial within a reasonable time.

7. The Use of Dashboards

The above reference to the importance of statistical data (and of the spreading of them among judges, courts and justice stakeholders) leads to the consideration of the capital role that dashboards should play in the fight against backlogs. On this subject it is important to point out that in 2021 the CEPEJ officially adopted a Handbook on Court Dashboards, prepared by the CEPEJ-GT-SATURN Working Group.[24]

The document is organised in 6 different chapters and was developed through research and collection of examples of dashboards, also via the Pilot Courts network of the CEPEJ. It outlines the possible contents of dashboards and their layout and provides guidelines for the judiciary on how to set up a dashboard system. It also gives several examples while highlighting that judge-level dashboards are intended to better manage their work time and should under no circumstances be considered tools for performance assessment of judges. Several templates for dashboards and tables, both at court and judge-level, complement the work, so that it can be made readily available to the courts.

[24] See https://rm.coe.int/cepej-2021-8-handbook-on-court-dashboards-en/1680a2c2f6.

Many of the key performance indicators (KPI) composing a court dashboard (like: number of incoming, pending and terminated cases per court, section and judge, disposition time, clearance rate, etc.) can be automatically and easily extracted from the case management IT programmes at all levels (Country, court, judges). Therefore, court dashboards represent now a remarkable tool in the fight against backlogs. In fact, it is certain that the first step in this direction is represented by a detailed and deep awareness about all the elements that may concur to an efficient case management and to the elimination of backlogs.

Keeping in mind the purpose of the exercise, which is to say to cut the backlogs in court systems and to monitor the situation, in order to avoid that new backlog is created, it is advisable to consider (with the help of *ad hoc* dashboards) an observation period of at least five (or, if possible, even more) years. In this kind of works, actually, it is important to have a clear idea not only about the present and (recently) past data, but also about general trends. In fact, trends are better understood in a longer perspective, than in a time lapse of only two or three years. In fact, if we want to propose effective measures aiming at fighting backlogs, we need to understand whether the most recent data (positive or negative) show a situation which is consolidated in a certain way, or are just the result of temporary and conjunctural events.

The creation of uniform dashboards for Courts, heads of Courts and judges, should be the responsibility of the leading institution of the project of backlog reduction.

8. Developing a Winning Strategy to Address Judicial Backlogs. Setting Targets and Timeframes

Once a clear analysis of the current situation of backlogs has been completed, it is time to plan strategies and measures to tackle with such problems. Actually, the second step of the CEPEJ's Backlog Reduction Tool is represented by the development of a strategy to effectively address backlog. Essential part of this step is the setting of realistic targets to be attained in a given period. Any strategy and/or action plan should contain realistic targets and measures to be implemented in the short, medium, and long-term periods.

It might also be beneficial to pilot a strategy or, parts of it, in a limited number of courts for a limited period of time before its full, system-wide roll-out. Such a piloting phase is beneficial for determining realistic and effective targets and measures, and gives the possibility to make any adjustments needed for their implementation in all courts.

The process of identifying the target is equally important as the target itself. The involvement of members of the organisation (court system / individual court) in this process is crucial. They should share their perspectives on the current situation, envision the desired state in the near future, and reach a consensus on realistic targets and the actions required to attain them.

In cases where there are measurable and easily calculated indicators, it is possible to set related targets. For example, if the court monitors indicators such as the Clearance Rate, Disposition Time, percentage of decrease of the number of pending backlog cases etc., the following targets can be set: reach and maintain a Clearance Rate above 100%, decrease the Disposition Time each year by a certain percentage, decrease the number of pending backlog cases by 20% each year etc.

Another aspect of target setting involves setting timeframes in which cases should be resolved. Timely resolution of cases per court type/court instance/case type can be set as a target. The indicator used is the case processing time. The target may be set at, for example, 90% of the cases have to be handled within a certain number of months (e.g. nine or twelve months). Timeframes can be considered as a practical operational tool since they are concrete benchmarks helping to measure to what extent each court, and more generally the whole judicial system, adheres to the timeliness of case processing and the principle of a fair trial within a reasonable time. It should be noted that the timeframes are not the main cure for reducing the length of judicial proceedings, but they have proven to be a useful tool to assess the courts' functioning and policies, leading to improvements in the duration of proceedings.

The CEPEJ Implementation Guide "Towards European Timeframes for Judicial Proceedings"[25] offers a number of conditions and measures for properly establishing targets and standards. It emphasises that, in addition to the standards and targets set at the higher level (national, regional), there should be specific targets at the level of individual courts. Court management should have sufficient authority to actively set or participate in the setting of these targets.

In setting up realistic timeframes, court management may take into account (maximum and minimum) legally defined deadlines for different procedural steps (e.g. serving documents, filing a response to the legal action by the defendant, setting up hearings and issuing written judgment) in order to calculate minimum and maximum statutory duration of the proceedings. In addition, the average duration of the actual proceedings for the given case type should be taken into account (e.g. criminal, civil, and administrative). The result may provide the basis for determining the desired duration of proceedings that may constitute the framework for setting the timeframes.

[25] See https://rm.coe.int/16807481f2.

When calculating the desired duration of proceedings, court management must respect the principles of Article 6 ECHR and criteria provided by the European Court of Human Rights (ECtHR) in relation to the protection of the right to a hearing within a reasonable time.

Some examples of targets relating to increasing efficiency, reducing the backlog, and shortening the duration of the resolution of cases are displayed in table below.

. A percentage of the cases disposed of in a certain timeframe, usually a year (e.g., 75% of cases should be disposed of in 12 months from the late of filing);

1	2	3	4	5	6
Case Type	Resolved up to 12 months (up to 1 year)	Resolved between 12 and 24 months (between 1 and 2 years)	Resolved between 24 and 36 months (between 2 and 3 years)	Resolved after 36 months (after 3 years)	Total resolved cases in the reporting period
Criminal	Number	Number	Number	Number	
	% of total	% of total	% of total	% of total	100%
TIMEFRAME (targets for criminal cases)	75%	15%	5%	5%	
Civil	Number	Number	Number	Number	
	% of total	% of total	% of total	% of total	
TIMEFRAME (targets for civil cases)	75%	15%	5%	5%	
Labour	Number	Number	Number	Number	
	% of total	% of total	% of total	% of total	
TIMEFRAME (targets for labour cases)	80%	15%	10%	0	
Family	Number	Number	Number	Number	
	% of total	% of total	% of total	% of total	
TIMEFRAME (targets for family cases)	30%	40%	20%	10%	

9. Organisational Measures for Tackling with Judicial Backlogs. The Need of a "Decalogue". No Need to Set Statutory Timeframes for Court Proceedings

Once the above described strategies have been envisaged, an essential part of the second step designed by the CEPEJ's Backlog Reduction Tool consists in singling out all possible legal and organisational measures to be adopted in order to facilitate the attainment of the above described targets and timeframes. Starting from the organisational reforms that might be introduced (very often

without the need to change the statutory framework), we must say that the CEPEJ's Backlog Reduction Tool contains a comprehensive list of such measures. It might be useful to consider here some of the most relevant. However, we have always to take into account the rich variety of judicial and procedural systems, so that some of the suggested measures could not be applicable in some given legal orders, because they might not result compatible with those legislative rules. In any case, beyond the comparative perspective, me must keep in mind that, even among very distant systems, it is not impossible to find some common denominators, both in written rules and in judicial praxis.

In my opinion, an essential part of the strategy should be represented by the introduction of a sort of "Decalogue", similar to the document that was inserted in the "Strasbourg Programme", launched by the then President of the First instance court of Turin (Italy) in 2001, which managed to consistently reduce the backlog of that jurisdictional office. Actually, the "Strasbourg Programme" was the first experiment of case management tested in Italy, aiming at obtaining a significant reduction of judicial backlogs and the acceleration of the treatment of civil cases.[26] As remarked by some legal scholars, "Under the banner of reform headed the "Strasbourg Programme", the court succeeded by April 2009 to reduce the percentage of pending cases older than three years to under 5%, where 85% of its cases were not more than two years old." As an important Italian scholar remarks, "It is worth mentioning that the remarkable success of this delay reduction programme is not the fruit of a major law or structural reform, but of a systematic and tenacious local initiative, which has followed most of the key factors already pointed out by the international literature to fight court delays."[27]

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[26] See https://www.giustizia.it/giustizia/it/mg_2_9_10_2.page#; see also G. Oberto, *Managing Quality and Efficiency of Justice: Italian Strategies in Case Management*, 'Richterzeitung' 2019, 4, available at https://richterzeitung.weblaw.ch/fr/rzissues/2019/4/managing-quality-and_544bc61390.html__ONCE&login=false; also available at https://www.giacomooberto.com/Oberto_Managing_quality_of_justice.htm; Id., *Il «Programma Strasburgo» del Tribunale di Torino e le direttive del* Groupe de pilotage SATURN *della* CEPEJ: *Breve raffronto*, 'Richterzeitung' 2012, 3; as well available at https://giacomooberto.com/studio_sul_Programma_Strasburgo.htm; Id., *Il Consiglio d'Europa e i temi della giustizia*, available at https://www.giacomooberto.com/oberto_consiglio_europa_temi_giustizia.htm; L. Verzelloni, Reduction..., *ibid*.; Team Managemernt Uniupo, Nuovi schemi collaborativi tra Università e uffici giudiziari per il miglioramento dell'efficienza e delle prestazioni della giustizia nell'Italia Nord Ovest, available at https://www.giustizia.it/cmsresources/cms/documents/1nextgen_unipior_modorg_civ_report.pdf; B. Rrugia & B. Biti, *Guaranteeing the Judgment of Civil Cases Within a Reasonable Time as a Requirement of the Right to a Fair Trial in Albania*, 'Academic Journal of Interdisciplinary Studies', MCSER Publishing, Rome–Italy 2014, 3, 3, (Jun.), p. 509 ff.

[27] M. Fabri, *The Italian Maze Towards Trials Within Reasonable Time* [in:] Council of Europe (ed.), The Right to Trial Within a Reasonable Time and Short-Term Reform of the European Court of Human Rights, Round Table organised by the Slovenian Chairmanship of the Committee of Ministers of the Council of Europe Bled, Slovenia, 21–22 September 2009, Directorate General of Human Rights and Legal Affairs Council of Europe Ministry of Justice Ministry of Foreign Affairs Republic of Slovenia, Strasbourg 2009, p. 21; see also A. Bartolini, V. Colcelli, D. E. Zammit, Individual Legal Status: A Tool for Developing European Law?, Proceedings of the Conference on European Dimensions of Individual Status (Malta, 3 July, 2017), University of Malta 2017, p. 107.

The Programme was started first of all through a monitoring activity of the whole backlog. Then the President drafted a circular letter containing several provisions and suggestions for Judges (the so-called "Decalogue"), with the aim of reaching the goal of a relevant shortening of judicial timeframes. The "Decalogue" invited first of all the clerk offices of the court to "map" the seniority of cases (at that time, of course, e-filing systems were not yet in use). Cases pending for more than 3 years had to be marked with a red stamp on the cover of their files, so that judges and clerks could immediately single them out.

A special monitoring programme on processes older than 3 years was created and a president of a section of the Turin Court was tasked to monitor each and any of them. A program for disposal of those cases was drafted; according to this plan, precise deadlines for disposal of those files were set and in case of not compliance with those deadlines, the concerned judges had to provide written explanations. As a general rule, the Strasbourg Programme set the so called rule of "first in – first out", meaning that older proceedings had to be considered as priority cases, to be dealt with and disposed of before "ordinary" cases pending for less than three years. In fact, this rule created a new category of 'urgent' cases, beside the ones that can be argued on the basis of the study of the ECtHR case law.

Moreover, the "Decalogue" consisted in a number of recommendations about good practices to introduce in the management of cases by any judge of the court. "Good practices" means here actions and behaviours that, although not contemplated by the law, may lead to a more efficient case management by encouraging a more responsible use of judicial discretion in handling the processes. So, for instance, one of the most qualifying points of this "Decalogue," was the already mentioned rule concerning the introduction of a sort of "priority principle" in tackling older cases. Judges were as well encouraged to make proposals to parties, in order to settle cases, so "pushing" litigants to reach a friendly agreement. They were also warmly invited to make use of all the procedural instruments to punish parties trying to procrastinate the length of the procedures, as well as to put under pressure court experts who delayed without reasons their reports and expertises. Judges were also invited to choose, among court experts, those who, in previous cases, had given evidence of being able to help parties to reach friendly agreements,[28] and so on.

A part of the "Strasbourg Programme" was also dedicated to the need to convince the other main actors of the process, which is to say the lawyers, to co-operate with the Turin Court in fighting against backlogs. For this reason the programme was presented to the local bar and discussed with the lawyers. This was particularly important, in the attainment of the aim to inform them

[28] On this issue see also below, under § 13.

that the "new" priority category, represented by the older cases (to be dealt and disposed with, as already explained, before the others), was not intended to "harm" the position of certain parties in the processes, but was aimed just at the attainment of the overreaching objective to fight the backlog of the court.

We must also add that a part of the Strasbourg Programme consisted in the elaboration of detailed statistics (at a time, we must underline, where such exercises were absolutely unknown by judges and clerks) on the productivity of single Sections of the Court and of the judges. Spreading such data among judges played, in practice, a very important role in making judges aware of the need to get their involvement and active contribution to the successful implementation of the initiative.

Needless to say that the drafting of such "Decalogue" and the spreading of it among courts, heads of courts and judges, should be the responsibility of the leading institution of the project.

Having said this, we must notice that one of the most debated questions in Europe is about the question on whether or not time limits for judicial proceedings should be imposed by law.

In my opinion, it is doubtful that the introduction of procedural statutory timeframes to proceedings (or for some parts of them) would reduce the backlogs. Actually, a procedural legal provision can be made effective only if also sanctions for non-compliance are set. Now, the typical procedural sanction for non-compliance with a given provision is the nullity of the act that has been done not in compliance with the said provision (e.g.: a summon act is null and void when it does not contain all the indications that it should, according to the law).

However, when we talk about judicial decisions, acts and measures, the sanction of nullity would be not only useless, but also counterproductive. Actually, if we consider as null and void a judgement which has been rendered after a certain deadline, this means that the whole case must be re-started from zero. The final result would therefore be the creation of additional backlog, instead of the elimination of it. On the other hand, disciplinary sanctions against judges not complying with the proposed deadlines would result in a number of disciplinary proceedings in which the concerned judges could easily show that the delays were caused by other reasons (as they very often are) and the problem of backlog would not be resolved.

Therefore, strategically, it is far better to act on other levels, like providing (not at the legislative, but at the regulatory level) a set of "recommended" timeframes, together with other measures, like (as it was already explained) the use of dashboards for comparative purposes among judges of the same court (and/or other courts), or spreading among them comparative statistical data, so that each and any judge of a given court can easily understand whether he/she is "in line" with the productivity of "next door's colleague",

etc. The proposed strategy, consequently, should be placed less on the level of legal provisions than on the domain of "moral suasion". Once again, the recommendation we are talking about here should come from the leading institution at national level and/or from the level of the heads of courts and/or heads of court sections.

10. Exchange of Best Practices Between Courts. Training and Allocation of Resources

Another very useful recommendation deals with the exchange of practices between colleagues working in similar circumstances: an activity which may also be organized through regular exchanges between courts or more structured exchanges by collecting good practices at central level (e.g. Superior Council of Justice, Courts Administration Agency, Supreme Court of Justice, etc.). The exchange of good practices should also be part of continuous training programs within national and international training institutes and academies.

We may add at this point that, during the December 2024 Plenary Meeting of the CEPEJ, it has been decided to approve the creation by the CEPEJ-GT-SATURN Working Group of an online data base about Backlog Reduction Practices, which is already available in the web site of the said Working Group.[29]

Training on Case Management and Backlog Reduction Practices should be introduced. Actually, it is essential to provide adequate initial and continuous education for judges and court staff: the initial and in-service judicial educational programmes and coaching should cover aspects related to the length of proceedings, effective court and case management. The in-service training should also include the use of digital tools and case law databases.

In this framework, it is self-evident that appropriate human and financial resources should be allocated: authorities should assess the number of judges and non-judge court staff needed to enable the courts to timely handle incoming and pending cases. Case weighting or other workload measurement tools can help to determine the required number of judges having regard to the volume and complexity of cases.

It could be also useful to implement and/or improve (whenever existing) the systems for measurement of judges' and courts' workload: the introduction of case weighting,[30] or other workload measurement tools generally im-

[29] See the remarks above, under § 3.

[30] On this topic see Cepej, Case weighting in judicial systems – CEPEJ Studies No. 28, https://rm.coe.int/study-28-case-weighting-report-en/16809ede97.

proves the efficiency of handling of cases. Case weighting aims to assess the complexity of cases to measure the workload in courts taking into account the fact that one case type may differ from another case type in the amount of judicial time required for processing. The case weighting methodologies are designed for determining the required number of judges, court staff, prosecutors and/or public defenders; supporting funding and budgetary requests; allocating justice system personnel within the different work units; assigning cases within the courts to ensure balanced allocation among judges within the same court department; setting quotas and evaluation standards; and planning the merger or reduction of work units. There are also other workload measurement tools based, for example, on "quotas" attributing the number of cases the judge should resolve within a certain period of time.

Also reinforcing the specialisation in judiciary could be a relevant strategy: specialisation introduced for courts, judges and court staff can reduce the time needed for processing cases. This measure could ensure a better quality of the work of a single judge specialised in resolving a certain type of cases. Similarly, specialised departments may be introduced in larger courts, where the number of judges is sufficient to ensure that specialisation will not be detrimental to the resolution of other cases. Finally, a court can be specialised for all cases of a certain type in a region (e.g., federal unit) or entire State.

11. E-Filing and Virtual Hearings. Lessons From the Italian Experience. The Importance of AI

One of the recommendations of the CEPEJ's Backlog Reduction Tool concerns the full digitalisation of civil cases. Actually, talking about civil cases, all of them, with only very few exceptions, should always be entirely managed in electronic way, via a system of e-filing. "Physical" hearings in presence should be almost completely banned (except only in very exceptional cases, in which the judge deems useful to hear personally parties/lawyers/experts/witnesses) and replaced by virtual hearings, meaning by this the exchange by electronic means of short notes between the lawyers and the judge. All submissions should be lodged with the Court exclusively in electronic way and hearings, as just said, should be replaced by the exchange (in the e-filing system) of short notes by the parties.

The lesson learnt during the COVID-19 era should be carefully retained. A modern system based on e-filing in civil cases shows how outdated the old kind of civil procedures is. The Napoleonic codes based on oral presentation of arguments before the judge are of no use today and represent a waste of time that modern time courts can no longer afford.

Of course, e-filing systems should be inspired by modern concept of case management and should be created by IT experts under the close monitoring of legal experts. Therefore, they should be able to distinguish, for instance, between documents, acts and submissions which should be automatically sent to the judge and those which only concern clerks of offices, contrary to what has happened, for instance, in Italy, where the creation of such e-filing system by experts totally unaware of legal issues, has caused and is causing unnecessary and painful additional delays.

Having just quoted the unfortunate Italian experience, I would like to dwell now on it, in order to try to see what lessons we might have learnt. Generally speaking, it is true that digitalisation of cases and of case management can have a positive impact on the timely resolution of litigations, more efficient judicial proceedings and cost savings. Examples include: *e-filing* systems, which can facilitate communication between court users and courts and improve internal workflows; ensuring interoperability of ICT systems of the judiciary and other bodies (e.g. prosecution, enforcement system, registers) can save time in obtaining documents and information necessary for efficient management of court proceedings; introduction of a unified and automated reporting system based on ICDP with daily updates and access to relevant data necessary for decision making.

However, there is an important *caveat*, which we may extract from the Italian experience of these last years.

In fact, in Italy, since 2014, a pivotal role has been played by the so called "processo civile telematico" project (which in English can be translated into "On-line Civil Trial" or "Electronic Filing System in Civil Cases"), developed by the Italian Ministry of Justice. This initiative aims at increasing the availability of on-line services building a two-way data and document interchange and application interoperability between all the external users (in particular lawyers and judicial experts), all the Courts' internal users (staff and judges) and all the public administrations involved in civil cases, implementing a high-security PKI (Public-Key Infrastructure) architecture and adopting state-of-the-art technical standards, according to the recently available Italian laws.

Main features of the Italian Electronic Filing System in Civil Cases are the following ones.

(a) for external users (lawyers and court experts) the possibility to:

- create, digitally sign and transmit their own legal acts, submissions and documents to the defined Court, through a high-security encrypted connection, receiving the official timestamp by the Central System and the digital receipt of acceptance by the Court;
- receive service of acts and Court judgments from the Court at their certified e-mail addresses;

- get full access to the information and the electronic acts, regarding their own civil cases, with a wide range of searching criteria, information retrieval functions and conceptual searches.

(b) for judges and their staff, the possibility to:

- receive lawyers' applications, submissions, acts and documents;
- manage and plan duties, activities, hearings and documents related to the proceedings assigned;
- create, digitally sign and transmit to parties' legal acts (such as minutes of hearings) and court decisions (*lite pendente*, provisional, final, etc.);
- set up a database of local case law;
- analyse proceedings' and documents' data, thus enabling the judge to perform a case management activity, checking the flow of incoming and outgoing cases, consistence of the case load, compliance with time frames, etc., so to avoid the creation of undue backlogs;
- for office clerks to automatically insert and upgrade information on each step of the civil procedures, thus avoiding manual data-entry and enabling automatic delivering of official notifications to external users.

(c) in particular, as far as the judge is concerned, every Italian judge is equipped with a so called "judge's console", which is a software instrument, installed on a laptop, that allows:

- searching and managing of all the assigned proceedings (usually using the names of parties and/or the file official registry number);
- managing of a personal and/or group (section) agenda, and planning of all judge's duties and activities;
- receiving, viewing and editing of all electronic files created by the judge him/herself;
- receiving and viewing of all electronic files created and officially sent by the lawyers, such as petitions, acts, submissions, documents, etc.;
- receiving and viewing of all electronic files created and officially sent by Court's experts, such as the written expertise reports and annexed documents;
- defining and creating legal acts (typically decisions and judgements of any kind) using templates and model documents: similarly to the external user, it's a Microsoft Word embedded application which, after the choice from one of the available models and automatic insertion of pre-defined text (according to the chosen model), enables the judge (or his staff personnel) to complete the document directly using Word and, once done, to automatically transform it to .pdf document;
- digitally signing and transmitting the decisions to the Court's staff, which has to "accept" judges' documents and officially deliver and serve them to the concerned parties;
- (as already said) analyse proceedings' and documents' data, thus enabling the judge to perform a case management activity, checking the flow of incom-

ing and outgoing cases, consistence of the case load, compliance with time frames, etc. so to avoid the creation of undue backlogs,

- most of the "judge's console" functionalities are also available from outside the Court (typically for home-work) using an external secure connection (though the Point of Access specifically developed for this use by the Ministry of Justice) to the Internet.

Having so far illustrated the positive aspects of the introduction of the Italian PCT, it is however necessary to point out its flaws, so that other possible systems of this kind may "learn" from such mistakes.

- First of all, the Italian system is very slow, it often breaks down; even when it works, it is really time consuming.
- Secondly, the system is conceived in such a way to inform and alert the judge of each and any event which takes place in the proceedings: at least 60-70% of them are events which do not involve judge's activity, but only have to do with the staff (e.g. the lawyers paid the fees which must be paid for lodging a petition with the Court; the file has been transmitted to the public fiscal registry offices to pay taxes on the judgments rendered by the judge; the staff sent a copy of an act to a lawyer, etc.).
- The system does not allow making a distinction between events directly concerning the judge (e.g.: a petition made *lite pendente* for provisional measures to be urgently given by the judge) and events not concerning the judge at all (see the previous point). Therefore, the judge has to click on the file each time he/she receives information on a new event affecting the case, just in order to painstakingly try to understand if this new event requires (or does not require) an intervention by him/herself: the final result is clearly a consistent loss of time for the judge, as this activity has to be repeated tens and tens of times every single day.
- System can be at times very cumbersome. The official editing, signing and delivering procedure for judicial acts (such as interim decisions, final judgments, etc.) is really complex and time consuming: one has to click many times on different areas of the screen, to wait for different replies from the system, to log in with the pw, to check for possible mistakes of the automatic system, etc., whereas, before the implementation of this current IT system, it was much easier to simply print the decision and hand it over to the staff! The simple signature (any single signature!) of an act requires at least 7 (seven!) different steps and clicks by the judge.

In a nutshell: the Italian Electronic Filing System in Civil Cases is requiring at present days, when compared to the previous "traditional approach", a much higher level of attention, culture, effort, stress, fantasy and good will by judges, who are called now in Italy to do also the job of the staff. Just to complete the above information, the typewriting of the minutes of the hearings in the e-filing system is done by the judge, for lack of staff. Moreover, in

order to properly work, the Italian system requires not only the "good will" of judges, who must accept the idea of changing the way they have been working for years or decades, but also the constant assistance of technical staff, duly trained to solve all the possible problems which arise every day from the use of this technology. It requires as well that the judge be assisted also (what in Italy is absolutely not the case) by the "traditional" kind of staff/clerks, who may help him/her in the preparation of cases: looking for precedents and case-law, trying to summarize and very often to understand the meaning of the hundreds and hundreds of (many times absolutely useless and unreadable) pages of the lawyers' submissions, select among the redundant pieces of information provided by the IT system on each and any case, what are those on which the judge is called to take a decision, drafting and checking the minutes of the hearings, etc.

It must be added that, despite the above mentioned and described compulsory system of Electronic Filing System in Civil Cases, digital recording of court proceedings is not yet foreseen in Italy. Therefore we still rely on the drafting of written minutes, which should be made by clerks, according to the Italian Code of Civil Procedure. However, as already explained, this activity is entirely done by the judge. Yet another clear anachronism of the Italian system!

Needless to say that the present AI revolution could be of much help, if only the Italian Ministry of Justice wanted to "open" its views to the modern world. Just to give an example, during a recent meeting of the Network of Pilot Courts of the CEPEJ, a delegate from the Prague (Czech Republic), informed the assembly that in his Country the local Government has equipped each and any judge with a free (and recommended!) access to the "Copilot" system implemented by Microsoft. This AI system does for the judge all the preparatory work, creating summaries of parties' submissions, as well as of the evidences and expertises collected during the trial phase of the proceedings. Finally, it elaborates also a draft reasoning of the judgement, that the judge has of course to check and approve (or modify) and to sign.[31]

Of course, AI can be of use for reducing timeframes not only in the adjudication phase of proceedings, but also in the delicate process of case management. Here, AI could—up to a certain extent—"replace" the lack of judicial staff in the "triage" work I described above, by separating those pieces of information which must reach the judge, so allowing him/her to have a clear idea about claims, rights, reasons and torts at stake, from those events which, on the contrary, are irrelevant for the judge, as they display no effect on the adjudication of the case. At the same time, AI could help the judge in organising

[31] For more information on this issue see e.g. M. Dunn, How the Microsoft Cloud and AI are Transforming Court Operations, available at https://www.microsoft.com/en-us/industry/blog/government/public-safety-and-justice/2023/12/13/how-the-microsoft-cloud-and-ai-are-transforming-court-operations/.

his/her agenda, avoiding unnecessary overlapping etc. AI is as well of help in enhancing communication across agencies and jurisdictions, or in delivering smart and secure hybrid hearings, improving court operations, growing capacity, and driving savings through enhanced productivity tools that benefit court employees and the public through machine learning and analytics.[32]

The performance of this kind of tools has also been tested, for instance, by the Czech Bar. To evaluate the language models, a set of 1,840 bar exam questions from the Czech Bar Association were used. These questions covered commercial, civil, criminal, constitutional, administrative law, and legal practice legislation. Bar exam takers usually receive 100 randomised questions and must choose the correct answer from three options. Passing requires accurately answering at least 85 questions. Therefore, the experiment followed a similar procedure. Five rounds of testing were conducted, with each round containing a set of 100 questions to different models of AI. Thus, each system faced a total of 500 identical questions.

The test results clearly demonstrated that combining a proficient language model (GPT-4) with intelligent integration of resources is effective. WAIR application not only substantially outperformed all language models, but also surpassed the 85% threshold mandated by the Czech Bar Association in all five testing rounds. In contrast, none of the evaluated language models achieved success in any trial. The testing showed the level of ability of the language models and WAIR app to comprehend the legal issue and select the right option using their own knowledge. It should be noted, however, that the evaluation of language models and legal skills as such is considerably more complex. For instance, such assessments did not examine written argumentation skills, utilising resources, persuasiveness, speed or cost. Regardless, the test findings have shown us that we should keep evaluating AI and creating our own solutions.[33]

This complex process has to be implemented having always in mind the limits that common sense and legal orders are trying to draw for this new kind of activities. Limits that, for reasons of space, cannot be explained here, in a moment in which a reach literature is being elaborated on this theme in any part of the world.[34]

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[32] For an example see D. H. Yamasaki, Orange County Superior Court Modernizes Case Management Systems Data to Better Serve Community, available at https://www.microsoft.com/en/customers/story/1576760116852361985-occourts-government-azure-en-united-states.

[33] See D. Kovář & J. Nečas, How Will AI Language Models Cope with Czech Law? Will It Pass the Bar Exam?, available at https://en.havelpartners.blog/how-will-ai-language-models-cope-with-czech-law-will-it-pass-the-bar-exam.

[34] On the delicate issues related to the use of AI in the judicial activities see G. Oberto, Artificial Intelligence and Judicial Activities: the Position of the European Commission for the Efficiency of Justice (CEPEJ), 20 October 2024, available at https://www.iaj-uim.org/iuw/wp-content/uploads/2024/09/Giacomo_OBERTO_ARTIFICIAL_INTELLIGENCE_AND_JUDICIAL_ACTIVITIES.pdf. As for the guidelines which are elaborated in Common Law Countries on the use of AI in the legal field see e.g. Courts and Tribunal Judicia-

12. Reducing the Size of Submissions (and the Size of Judgments' Reasonings)

Some European legal systems are currently experiencing the setting by law a certain number of limitations of the number of pages for lawyers' pleadings, sometimes also limiting the remedies for cases with a minimum value (not exceeding a certain amount).

The envisaged provision is really wise, as—following the complexification process currently characterising all European legal systems—lawyers tend to "flood" judges with mountains of papers, most of them completely useless. The extent of this phenomenon is today so worrying, that we could even dare to say that the real quality of a good judge, at present days, is the ability to discover (possibly not in biblical times!), among the hundreds and hundreds of useless pages, that one "hidden" part of the submissions, where are located those no more than two or three lines that, typically, contain the "key" to the solution of the case.

However, as a sort of "counterbalance" to that despicable tendency, also judges seem to follow the same trend. We happen to read, many times, reasoning of judgements which resemble more to a law treaty, than to the resolution of a concrete dispute. Once again, we face an issue of legal and judicial training, as judicial training institutes do not seem to grasp the importance of teaching to (both newly appointed and senior) judges the technique of concentrating in a few sentences the essence of the *ratio decidendi*.

We may point out here that this very issue is tackled by the CEPEJ in the "Revised SATURN Guidelines for Judicial Time Management (4th revision)"[35] in the following textual way: "E. 12. The reasoning of judgments—The reasoning of all judgments should be concise in form and limited to those issues requiring to be addressed. The purpose should be to explain

ry, United Kingdom, Artificial Intelligence Guidance for judicial Office holders, available at https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf; The Law Society of New South Wales, Court Protocols on AI, available at https://www.lawsociety.com.au/AI-hub/court-protocols-ai; Supreme Court of Victoria, Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation, available at https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation; Courts of New Zealand, Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals, available at https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/practice-directions/practice-guidelines/all-benches/20231207-GenAI-Guidelines-Judicial.pdf; Canadian BAR Association, Guidelines Relating to [AI] Use, available at https://www.cba.org/resources/practice-tools/ethics-of-artificial-intelligence-for-the-legal-practitioner/3-guidelines-relating-to-use/. See as well Unesco, Draft Unesco Guidelines for the Use of AI Systsems in Courts and Tribunals, available at https://unesdoc.unesco.org/ark:/48223/pf0000390781.

[35] See https://rm.coe.int/cepej-2021-13-en-revised-saturn-guidelines-4th-revision/1680a4cf81.

the decision. Only questions relevant to the decision of the case should be taken into account."

To be more precise, we should also bear in mind that one of the reasons why reasoning of cases tend to be longer and longer (and of course more time consuming) is that judges who desire to climb the steps of a system unfortunately still conceived in a "hierarchical" way (whereas no hierarchy at all should exist among judges!), tend to think that elaborated reasoning of cases will help them to be better assessed when applying for a "higher" post. For this reason, the High Council for the Judiciary should adopt regulations on the need to consider as a preference criterion in the assessment of judges the ability of the candidate judge to "superior" or managerial functions, to issue exhaustive but concise explanations of the *rationes decidendi* of their judgements. Same should be true for the assessments of candidates to posts of judges and newly appointed judges in the selection process.

13. Improving the Management of Court-Appointed Experts (or Translators, Interpreters)

Another relevant possible recommendation, that does not require any statutory reforms, focuses on a remarkable point of the fight against court backlogs. This time, the focus is cast on the improvement of the managing of court-appointed experts. The document suggests correctly to introduce centralized/regional/court registers, to provide a better overview of the availability of court-appointed experts. This could also ensure a better division of tasks between available experts, thus avoiding delays. The signing of protocols with experts (e.g. scientific institutes) may help to prevent delays in the preparation of expert opinions.

Actually, one the most relevant aspects of the managing of court-appointed experts resides in the criteria judges should follow in order to get the best results from the use of court experts. The first rule in this field is to avoid legal or regulatory rules imposing (as it was and still is unfortunately intended by some dull ministry of justice officers in Italy) a sort of "automatic rotation" of all registered experts. Experience shows that very few are those experts who possess all the qualities which may help a judge to reduce his/her backlog. It is therefore up to the judges to "discover" what (few) legal experts in the different fields (medicine, mechanics, chemical, real estate, etc.) show those qualities that might really provide good solutions of court claims.

In fact, the first requirement to be looked for, is for the expert to be independent-minded, as well as to be able and strong enough to "resist" the

attempts that many lawyers do in order to "convince" them to draw their reports in a given way, rather than in another. So, it may happen (and it did happen, unfortunately, too many times) that unscrupulous lawyers try to influence the court-appointed experts, threatening them in many ways, like, for instance, with the perspective of suing them in court for alleged "mistakes" in their expertise, and so on.

The second quality is the ability of the expert to convince the parties to friendly settle the case. Just to provide for an example, the great majority of civil cases in Italy are based on conflicts of medium or small value, that with a little bit of good will and intelligence could be easily avoided, sparing to the parties the disproportionately enormous amounts of the lawyers' fees. Once again, the experts have to show their ability to convince the parties of the advantages for them to find an agreement, even though their lawyers "work against", simply because they are seeking their own interest and not the interest of their clients.

The third quality of the expert is to be strictly compliant with the timeframes assigned by the judge. As prescribed by the SATURN Guidelines on Judicial Time Management,[36] experts "should also submit their opinions by the date laid down in the decision of the judge". The same principles prescribe that, "18. If an expert encounters particular difficulties in completing an assignment, they should immediately notify the judge and request an extension, so that the decision granting the extension can be given before the initial deadline has expired. 19. In addition, if the initial deadline expires without an extension having been granted, the expert should immediately answer the first request for an explanation made by the judge. 20. When experts fail to complete an assignment within the agreed time, their remuneration may be reduced, or they may be replaced. 21. Where lists are available, if experts cause delays in several procedures, their place on the list of available experts may not be renewed, or they may be withdrawn or deleted from that list. 22. While late delivery of an opinion is not a ground of nullity and does not render the opinion null and void, the expert's professional civil liability may be incurred in respect of any damage caused by the delay".

All the above rules show that the judge has a particular duty to check that the experts fully comply with the deadline for the completion of their reports.

[36] See "Part IV: guidelines for Court-appointed experts."

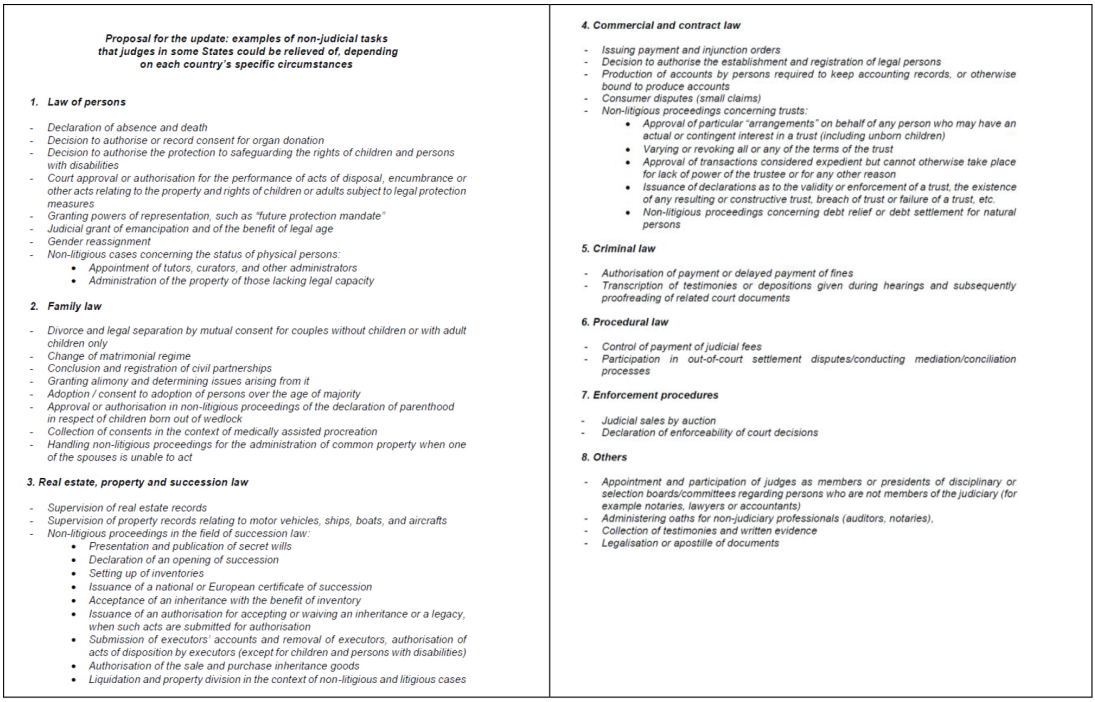
14. Statutory Measures Affecting the Organisation of the Judiciary and of Courts. Relieving Judges of Certain (non-Judicial) Tasks

Passing now to examine some possible statutory and legal reforms, we notice that the CEPEJ's Backlog Reduction Tool correctly points out that authorities are encouraged to consider the possibility of transferring certain tasks from judges to non-judicial court staff or other institutions (e.g. notaries, mediators, etc.). In this process a balance has to be struck, taking into account the importance of the separation of powers in a democratic society. In this framework, we have to point out that Recommendation (86)12 of the Committee of Ministers of the Council of Europe to member States "On measures to prevent and reduce excessive workload in courts and its appendix" may provide some guidance in this respect.

We must add, at this point, that, unfortunately, Recommendation (86)12 of the Committee of Ministers of the Council of Europe's Committee of Ministers to member states "On measures to prevent and reduce excessive workload in courts" and its appendix date back to a very distant time (1986) and do not reflect any more a situation which has radically changed in these last decades.

This is why CEPEJ, on the basis of a thorough work done by the CEPEJ-GT-SATURN Working Group, has approved, in June 2023, at its 40th Plenary meeting, an "Opinion on possible update" [(CEPEJ(2023)7] of said Recommendation and decided to submit it to the European Committee on Legal Co-operation (CDCJ), in accordance with Article 2.1.e. of Appendix 1 to Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ). Although this activity of updating has not been finished yet by the CDCJ, the CEPEJ opinion can be considered *per se* as final and contains an extended number of non-contentious matters, in which judges could be easily replaced by other law professionals and practitioners (notaries, lawyers, clerks, etc.).

Just to give an idea of the extent of this exercise, the document contains following 8 chapters: 1. Law of persons, 2. Family law, 3. Real estate, property and succession law, 4. Commercial and contract law, 5. Criminal law, 6. Procedural law, 7. Enforcement procedures, 8. Others. In order to facilitate the understanding of the width of the field which could be covered by this "de-jurisdictionalisation" process, we may copy here below the table annexed to the draft recommendation as an enclosure.



Proposal for the update: examples of non-judicial tasks that judges in some States could be relieved of, depending on each country's specific circumstances

1. Law of persons

- *Declaration of absence and death*
- *Decision to authorise or record consent for organ donation*
- *Decision to authorise the protection to safeguarding the rights of children and persons with disabilities*
- *Court approval or authorisation for the performance of acts of disposal, encumbrance or other acts relating to the property and rights of children or adults subject to legal protection measures*
- *Granting powers of representation, such as "future protection mandate"*
- *Judicial grant of emancipation and of the benefit of legal age*
- *Gender reassignment*
- *Non-litigious cases concerning the status of physical persons:*
  - *Appointment of tutors, curators, and other administrators*
  - *Administration of the property of those lacking legal capacity*

2. Family law

- *Divorce and legal separation by mutual consent for couples without children or with adult children only*
- *Change of matrimonial regime*
- *Conclusion and registration of civil partnerships*
- *Granting alimony and determining issues arising from it*
- *Adoption / consent to adoption of persons over the age of majority*
- *Approval or authorisation in non-litigious proceedings of the declaration of parenthood in respect of children born out of wedlock*
- *Collection of consents in the context of medically assisted procreation*
- *Handling non-litigious proceedings for the administration of common property when one of the spouses is unable to act*

3. Real estate, property and succession law

- *Supervision of real estate records*
- *Supervision of property records relating to motor vehicles, ships, boats, and aircrafts*
- *Non-litigious proceedings in the field of succession law:*
  - *Presentation and publication of secret wills*
  - *Declaration of an opening of succession*
  - *Setting up of inventories*
  - *Issuance of a national or European certificate of succession*
  - *Acceptance of an inheritance with the benefit of inventory*
  - *Issuance of an authorisation for accepting or waiving an inheritance or a legacy, when such acts are submitted for authorisation*
  - *Submission of executors' accounts and removal of executors, authorisation of acts of disposition by executors (except for children and persons with disabilities)*
  - *Authorisation of the sale and purchase inheritance goods*
  - *Liquidation and property division in the context of non-litigious and litigious cases*

4. Commercial and contract law

- *Issuing payment and injunction orders*
- *Decision to authorise the establishment and registration of legal persons*
- *Production of accounts by persons required to keep accounting records, or otherwise bound to produce accounts*
- *Consumer disputes (small claims)*
- *Non-litigious proceedings concerning trusts:*
  - *Approval of particular "arrangements" on behalf of any person who may have an actual or contingent interest in a trust (including unborn children)*
  - *Varying or revoking all or any of the terms of the trust*
  - *Approval of transactions considered expedient but cannot otherwise take place for lack of power of the trustee or for any other reason*
  - *Issuance of declarations as to the validity or enforcement of a trust, the existence of any resulting or constructive trust, breach of trust or failure of a trust, etc.*
  - *Non-litigious proceedings concerning debt relief or debt settlement for natural persons*

5. Criminal law

- *Authorisation of payment or delayed payment of fines*
- *Transcription of testimonies or depositions given during hearings and subsequently proofreading of related court documents*

6. Procedural law

- *Control of payment of judicial fees*
- *Participation in out-of-court settlement disputes/conducting mediation/conciliation processes*

7. Enforcement procedures

- *Judicial sales by auction*
- *Declaration of enforceability of court decisions*

8. Others

- *Appointment and participation of judges as members or presidents of disciplinary or selection boards/committees regarding persons who are not members of the judiciary (for example notaries, lawyers or accountants)*
- *Administering oaths for non-judiciary professionals (auditors, notaries),*
- *Collection of testimonies and written evidence*
- *Legalisation or apostille of documents*

15. Other Possible Statutory Measures: Rationalisation of Court Network, ADR, Transferring the Competence to Hear Certain Categories of Cases from Panels of Judges to a Single Judge; Temporary Reorganization of Courts

Another possible (legislative) measure that might be needed is the rationalisation of the court network: carrying out court mapping and, if necessary, redefine judicial maps, to ensure that the optimum level of efficiency and quality is achieved. The process should take into account the creation of backlog in courts. The objective is to maximise the service level of justice while optimising operational costs and investments.

It might be of help also introducing and/or promoting appropriate use of ADR, such as arbitration, court-annexed mediation, or conciliation: i) arbitration is a procedure by which the parties select an impartial third person known as arbitrator to determine a dispute between them, whose decision is binding; ii) mediation is a structured and confidential process in which an impartial third person, known as a mediator, assists the parties by facilitating

communication between them for the purpose of resolving issues in dispute. Mediation may be mandatory, either as a pre-requisite to the institution of proceedings, or as requirement of the court during proceedings; and iii) conciliation is a confidential process by which an impartial third person, known as a conciliator, makes a non-binding proposal to the parties for the settlement of a dispute between them.

Another possible legislative reform aiming to reduce the excessive burden on judges and give them more time to deal with the cases assigned to them, could consist in transferring the competence to hear certain categories of cases from panels of judges to a single judge. Panels of judges should remain competent for the most complex, voluminous or sensitive cases, as collegiality is a factor that can enhance the quality of decisions.

This very same measure was adopted by the Italian legislator many years ago with the Legislative Decree of 19th February, 1998, No. 51, with positive results under the viewpoint of reduction of backlogs. However, having mentioned the pros, we cannot underestimate also the cons of such a reform. In particular, we must underline consequences like the loss of uniformity in the case law of a given court, the loss of a precious moment of self-training of younger judges, represented by the discussions in chamber with the older members of the panels. Such setbacks can be partially repaired by regular meetings among judges of the same court and/or section, what however brings about the inevitable need to devote a certain part of the judges' (already very busy) working time to such initiatives.

Finally, we cannot avoid mentioning another negative situation that took place in Italy as a consequence of the introduction of the single judge in all the courts of first instance. We must refer here to the deterioration of relations between judges and lawyers. Actually, once this reform was introduced, lawyers immediately understood that now they had to deal with just one (and no longer three) judges for the decision of their petitions. It happened therefore that the most "enterprising" and "pushing" of them (not all of them, of course, but a certain, non-negligible, percentage of them) started to try to exert forms of (direct or indirect) pressures on judges, on how they should conduct trials and decide cases, also by trying to contact Presidents of courts and sections, just to make judges understand how they should "behave" in given cases.

It goes without saying that, before that legal act, such "initiatives" were deterred by the very fact that cases had to be decided by a panel of judges and exerting pressure on a panel is technically much more difficult than doing it with a single judge. Of course, this problem touches aspects and delicate questions that cannot be dealt with in this expertise: let us think e.g. to the issue of the "careerism" of Presidents of Sections and Courts who, for quiet living and desire not to have problems with the local bars—what might somehow hinder

their *cursus honorum*—prefer tolerate such preposterous behaviours. However, despite such risks, we must consider the above mentioned proposed reform as surely "positive", at least under the viewpoint of reduction of judicial backlogs, up to the point that it could be nowadays defined as "unavoidable".

Another suggestion of the CEPEJ's Backlog Reduction Tool concerns the possible need of temporary reorganization of courts. According to this idea, if the court determines that there is a large backlog of cases, which may jeopardize the timely consideration of new cases, the court may temporarily set up (or require) backlog processing sections. Such divisions should be limited in time until the backlog is cleared. The laws of some States allow such sections to include retired judges in exceptional circumstances.

In this framework it could be of use to refer to the Italian experience of the so called "sezioni stralcio" (or sections for the liquidation of the backlog). In fact, in accordance with the Italian Act No. 276 of 22 July 1997, provisional sections (*sezioni stralcio*), specially responsible for dealing with cases pending before the civil courts on 30 April 1995, became operational in November 1998. These sections were composed of one career judge and at least two aggregated honorary judges, coming from the ranks of (in service or retired) lawyers, notaries, university law professors and researchers.

This initiative was successful and was also praised, for instance, by the Committee of Ministers of the Council of Europe in its Interim Resolution DH (99) 437 (adopted by the Committee of Ministers on 15 July 1999, at the 677th meeting of the Ministers' Deputies), as well as by the Interim Resolution ResDH(2005)114, concerning the judgments of the European Court of Human Rights and decisions by the Committee of Ministers in 2183 cases against Italy relating to the excessive length of judicial proceedings.[37]

16. The Third (and Final) Step of the Monitoring Reduction Strategy: Monitoring the implementation process

The third step (the first two being, as pointed out above, the analysis of the existing situation and the adoption of concrete measures) suggested by

[37] On the positive experience of the "Sezioni stralcio" see e.g. G. Ferrante, Non è mai troppo tardi. Spunti di riflessione per la riforma della giustizia civile, p. 10 ff., available at https://www.hennaion.it/wp-content/uploads/2019/11/Ferrante-Giuseppe-Spunti-e-riflessioni.pdf; F. Di Majo, Tre anni di esperienza delle sezioni stralcio, 'La Pazienza' 2001, 73 (Dec.), p. 48 ff.; see also the Relazione to the Italian parliamentary bill No. 2840/XIV, available at https://leg14.camera.it/_dati/leg14/lavori/stampati/sk3000/relazion/2840.htm. A moderately positive assessment of the work of the Sezioni Stralcio was given also by the General Prosecutor before the Supreme Court of Cassation in his inaugural speech for the year 2004 (see F. Favara, Relazione sull'amministrazione della giustizia nell'anno 2004, p. 14, available at https://www.cortedicassazione.it/resources/cms/documents/2005_relazioneAG.doc).

the CEPEJ's Backlog Reduction Tool as an essential element in the strategy to address the backlog problem, is the implementation of the strategy. This step includes establishing a regular monitoring mechanism to track the fulfilment of the targets and the implementation of the defined measures. This monitoring should fall within the remit of the institution leading the backlog reduction process. Here again, statistical data and indicators are indispensable for monitoring, as they provide insights into the progress achieved and serve as the basis for necessary adjustments in the strategy.

Monitoring is the process of tracking progress towards achievement of targets and implementation of measures over a period of time. It includes identification of shortcomings and challenges, lessons learned, and collection of good practices identified during the implementation phase. Monitoring helps to identify adjustments needed to achieve desired results.

In order to set up effective monitoring mechanisms, the following questions should be considered:

i) WHO is responsible for monitoring the strategy's implementation?
A lead institution should be appointed to be responsible for monitoring the implementation of the overall strategy. Usually, the designated lead institution responsible for backlog reduction activities will also oversee monitoring.[38] Communication should focus on the actual results stemming from backlog reduction activities, presentation of implemented measures, and potential benefits for court users. Communication is particularly important in gaining support for the strategy's implementation.[39]

ii) WHAT data, indicators, targets and measures should be monitored?
It is here relevant to identify statistical data and indicators which should be monitored to determine if targets have been reached. Creating statistical reports and following data and indicators can give an initial picture of the progress achieved. Once again, the use of dashboards could be very effective.[40] Reports on court/s performance could and should be drafted, along the example set by table 16 of the CEPEJ's Backlog Reduction Tool.

iii) WHEN should monitoring be performed?
Creating statistical reports and comparing values of the data and indicators in regular periods is an efficient way of tracking results of backlog reduction efforts. Although the targets will usually be set as annual, the strategy can define shorter monitoring periods (e.g. six-months).

[38] See the above, under § 3.

[39] For more details on how to effectively organise communication with the public and the media, you may refer to the CEPEJ Guide on communication with the media and the public for courts and prosecution authorities (available at: https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe).

[40] See above, under § 7.

COURT PERFORMANCE REPORT – PER CASE TYPE or AT THE JUDGE LEVEL

Table 16: Comprehensive report on court performance

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
Case type	Number of judges by case type	Number of pending cases at the beginning of the reporting period	Number of pending backlog cases at the beginning of the reporting period	Percentage of pending backlog cases in the number of pending cases at the beginning of the reporting period	Number of incoming cases during the reporting period	Number of received backlog cases during the reporting period	Percentage of received backlog cases in the number of incoming cases	Average number of incoming cases per judge	Caseload in the reporting period	Number of backlog cases in the caseload	Average caseload per judge in the reporting period	Average number of backlog cases per judge in the reporting period	Percentage of backlog cases in the caseload	Number of resolved cases during the reporting period	Number of resolved backlog cases during the reporting period	Percentage of resolved backlog cases in the number of resolved cases	Average number of resolved cases per judge	Average number of resolved backlog cases per judge	Clearance rate	Number of pending cases at the end of the reporting period	Number of pending backlog cases at the end of the reporting period	Percentage of pending backlog cases in the number of pending cases at the end of the reporting period	Percentage of increase/decrease of pending backlog cases at the end of the reporting period compared to the beginning of the reporting period
1																							
2																							
3																							

Regular monitoring will give the institution in charge an opportunity to timely identify whether the implementation has progressed towards fulfilment of targets or not.

iv) HOW should the strategy be monitored?

At the end of each stage of monitoring of the strategy's implementation, the responsible institution(s) should determine if its implementation is satisfactory or not. If the statistical data and indicators show expected progress towards fulfilment of the targets, it will be a signal that its implementation is proceeding according to plan, requiring no further intervention in most cases. However, in some instances, the responsible institution(s) may consider adjusting the targets to a higher level if they appear to be too low. In the event of insufficient progress in the strategy's implementation, indicating setbacks and unmet targets, the responsible institution(s) should examine if any adjustments are needed. It could also be useful to draft a checklist for monitoring implementation measures, alongside the one proposed by the Table 17 of the CEPEJ's Backlog Reduction Tool.

Table 17 - Checklist for monitoring implementation of measures

The following table gives an example of a checklist that might be used for monitoring implementation of measures

MEASURE (1)	STAGES OF IMPLEMENTATION OF MEASURES (2)	DEADLINE (3)	INSTITUTION RESPONSIBLE FOR IMPLEMENTATION (4)	ACCOMPLISHED (5)
Measure 1 – Transfer of cases to less burdened courts	Adopting plan of transfers based on statistical analysis	31.03.2024	Supreme Court	
	Communicating the plan to the parties and public	30.06.2024	Supreme Court	
	Transferring cases and commencement of trials	31.12.2024	Individual courts	
Measure 2 -				

Abstrakt

Artykuł przedstawia strategie opracowane w ostatnich latach przez Europejską Komisję ds. Efektywności Wymiaru Sprawiedliwości (CEPEJ) w celu zwalczania zaległości (zatorów) wynikłych z nagromadzonych spraw w krajach należących do Rady Europy. W szczególności CEPEJ opracowała niedawno „narzędzie redukcji zaległości", którego celem jest pokazanie, w jaki sposób podmioty działające w dziedzinie wymiaru sprawiedliwości powinny rozwiązywać problemy związane z opóźnieniami w rozpatrywaniu i rozstrzyganiu spraw przed sądami. W ramach tych działań utworzono również specjalne centrum zasobów poświęcone praktykom zmniejszania zaległości (zatorów). W artykule pokazano również, jak można wykorzystać pulpity nawigacyjne do oceny bieżącej sytuacji i uzyskania zgodności z określonymi celami związanymi z dwoma głównymi wskaźnikami efektywności: *wskaźnikiem* rozpatrywania spraw oraz *czasem* rozpatrywania spraw. Przedstawiono ponadto wyczerpującą listę możliwych środków wraz z omówieniem ich zalet i wad – takich, jak: wydanie „dekalogu" zasad postępowania, wykorzystanie elektronicznego składania dokumentów i sztucznej inteligencji w organizacji pracy sędziów, zwolnienie sędziów z niektórych (nieorzeczniczych) zadań, racjonalizacja sieci sądów, alternatywne metody rozwiązywania sporów, przeniesienie kompetencji do rozpatrywania niektórych kategorii spraw z zespołów sędziowskich na pojedynczego sędziego, tymczasowa reorganizacja sądów itp.

Słowa kluczowe: efektywność wymiaru sprawiedliwości, CEPEJ, zaległości, tablice wyników, wskaźnik rozpatrywania spraw, czas rozpatrywania spraw, elektroniczne składanie dokumentów, sztuczna inteligencja (AI).

BIBLIOGRAPHY

Bartolini, Antonio, Colcelli, Valentina, Zammit, David E., Individual Legal Status: A Tool for Developing European Law?, Proceedings of the Conference on European Dimensions of Individual Status (Malta, 3 July, 2017), University of Malta 2017.

Contini, Francesco (ed.), Handle with Care: Assessing and Designing Methods for Evaluation and Development of the Quality of Justice, IRSIG-CNR, Bologna 2017; .

Council of Europe (ed.), The Right to Trial Within a Reasonable Time and Short-Term Reform of the European Court of Human Rights, Round Table organised by the Slovenian Chairmanship of the Committee of Ministers of the Council of Europe Bled, Slovenia, 21–22 September 2009, Directorate General of Human Rights and Legal Affairs Council of Europe Ministry of Justice Ministry of Foreign Affairs Republic of Slovenia, Strasbourg 2009.

Di Majo, Fabrizio, *Tre anni di esperienza delle sezioni stralcio*, 'La Pazienza' 2001, 73 (Dec.).

Dunn, Michael, How the Microsoft Cloud and AI are Transforming Court Operations; https://www.microsoft.com/en-us/industry/blog/government/public-safety-and-justice/2023/12/13/how-the-microsoft-cloud-and-ai-are-transforming-court-operations/.

Engstad, Nils A., Lærdal Frøseth, Astrid & Tønder, Bård (eds.), The Independence of Judges, The Hague 2014.

Esposito, Gianluca, Lanau, Sergi & Pompe, Sebastiaan, Judicial System Reform in Italy—A Key to Growth, https://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf; Imf, Italy, Selected Figures, Washington, 2014; https://www.imf.org/external/pubs/ft/scr/2014/cr14284.pdf.

Favara, Francesco, Relazione sull'amministrazione della giustizia nell'anno 2004, https://www.cortedicassazione.it/resources/cms/documents/2005_relazioneAG.doc.

Ferrante, Giuseppe, Non è mai troppo tardi. Spunti di riflessione per la riforma della giustizia civile; https://www.hennaion.it/wp-content/uploads/2019/11/Ferrante-Giuseppe-Spunti-e-riflessioni.pdf.

Grisonich, Elisa, *Efficacia e qualità della giustizia in Europa: pubblicato il rapporto 2024 CEPEJ sui sistemi giudiziari europei*, 'Sistema penale' 2024, 23 October; https://www.sistemapenale.it.

Johnsen, Jon T., *The European Commission for the Efficiency of Justice (CEPEJ) Reforming European Justice Systems – "Mission Impossible"?*, 'International Journal for Court Administration' 2012, 4, 3.

Kovář, Dalibor, Nečas, Jiří, How Will AI Language Models Cope with Czech Law? Will It Pass the Bar Exam?; https://en.havelpartners.blog/how-will-ai-language-models-cope-with-czech-law-will-it-pass-the-bar-exam.

Oberto, Giacomo, Il Consiglio d'Europa e i temi della giustizia: la raccomandazione del 2010 sul tema «indipendenza, efficienza e responsabilità dei giudici»;

https://www.giacomooberto.com/oberto_consiglio_europa_temi_giustizia.htm;

Oberto, Giacomo, *Il «Programma Strasburgo» del Tribunale di Torino e le direttive del* Groupe de pilotage SATURN *della* CEPEJ: *Breve raffronto*, 'Richterzeitung' 2012, 3; https://giacomooberto.com/studio_sul_Programma_Strasburgo.htm.

Oberto, Giacomo, Sistemi giudiziari europei a confronto: le criticità italiane, 2016; https://www.giacomooberto.com/Oberto_sistemi_giudiziari_a_confronto.htm, § 2.

Oberto, Giacomo, Un nuovo statuto per un nuovo giudice, in Contratto e impresa / Europa 2019; https://www.giacomooberto.com/Oberto_Un_nuovo_statuto_per_un_nuovo_giudice_2017.htm, § 5.

Oberto, Giacomo, *Managing Quality and Efficiency of Justice: Italian Strategies in Case Management*, 'Richterzeitung' 2019, 4, https://richterzeitung.weblaw.ch/fr/rzissues/2019/4/managing-quality-and_544bc61390.html__ONCE&login=false; https://www.giacomooberto.com/Oberto_Managing_quality_of_justice.htm.

Oberto, Giacomo, Study on Measures Adopted in Turin's Court ("Strasbourg Programme") along the Lines of "Saturn Guidelines for Judicial Time Management" 2019, 18 September; https://www.giacomooberto.com/study_on_Strasbourg_Programme.htm.

Oberto, Giacomo, Strumenti e documenti CEPEJ per la gestione dell'efficienza e dei tempi dei processi, 2023; https://www.giacomooberto.com/Giacomo_Oberto_Strumenti_e_documenti_CEPEJ.pdf.

Oberto, Giacomo, Artificial Intelligence and Judicial Activities: the Position of the European Commission for the Efficiency of Justice (CEPEJ), 20 October 2024; https://www.iaj-uim.org/iuw/wp-content/uploads/2024/09/Giacomo_OBERTO_ARTIFICIAL_INTELLIGENCE_AND_JUDICIAL_ACTIVITIES.pdf.

Rrugia, Beslinda & Biti, Bledar, *Guaranteeing the Judgment of Civil Cases Within a Reasonable Time as a Requirement of the Right to a Fair Trial in Albania*, 'Academic Journal of Interdisciplinary Studies', MCSER Publishing, Rome–Italy 2014, 3, 3 (Jun.).

Silvestri, Elisabetta, Notes on Case Management in Italy; https://ssrn.com/abstract=3158105 or http://dx.doi.org/10.2139/ssrn.3158105.

Steelman, David C. & Fabri, Marco, Can an Italian Court Use the American Approach to Delay Reduction?; https://www.tandfonline.com/doi/abs/10.1080/009826 1X.2008.10767868.

Team Management Uniupo, Nuovi schemi collaborativi tra Università e uffici giudiziari per il miglioramento dell'efficienza e delle prestazioni della giustizia nell'Italia Nord Ovest; https://www.giustizia.it/cmsresources/cms/documents/1nextgen_unipior_modorg_civ_report.pdf.

Verzelloni, Luca, Reduction of Backlog: The Experience of the Strasbourg Programme and the Census of Italian Civil System; https://www.encj.eu/images/stories/pdf/workinggroups/Timeliness/verzelloni-reduction_of_backlog-the_experience_of_the_strasbourg_program_and_the_cebsu_of_italian_civil_justice_system.pdf.

Yamasaki, David H., Orange County Superior Court Modernizes Case Management Systems Data to Better Serve Community; https://www.microsoft.com/en/customers/story/1576760116852361985-occourts-government-azure-en-united-states.

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Rastislav Funta*
Jörg Kohlenz**

Antitrust Implications of Tying Transactions in the Digital Economy

[Konsekwencje transakcji wiązanych dla prawa antymonopolowego w gospodarce cyfrowej]

Abstract
This paper aims to explore the unique characteristics of tying transactions within digital markets. Emerging competitive conditions have led to novel business models that require analysis through the lens of antitrust laws, specifically focusing on abuse provisions. Historically, the abuse of tying transactions marked the initial significant legal proceedings in the digital economy. Given the lack of standardized terminology concerning tying transactions, a preliminary conceptual clarification is necessary. Before delving into their legal treatment and selected regulatory options, the paper examines the pro-competitive and anti-competitive impacts of such transactions.

Keywords: antitrust law, digital economy, DMA, TFEU, tying.

Introduction

Antitrust law does not prohibit companies from holding a dominant market position, but only from abusing such a position. Article 102 TFEU requires a dominant market position on the defined market for abuse control. Our research focuses on analyzing the implications of antitrust law, specifically Article 102 TFEU, concerning tying transactions in the digital economy. The article aims to understand the responsibilities of dominant companies, the challenges posed by digitalization, and the impact of the Digital Mar-

* **Rastislav Funta** – DSc, Associate Professor and Vice-Rector at Danubius University, Slovakia (affiliation); https://orcid.org/0000-0003-4510-4818; rastislav.funta@vsdanubius.sk / dr hab. nauk prawnych, profesor uczelni i prorektor Uniwersytetu Dunajskiego (Danubius), Słowacja (afiliacja).
** **Jörg Kohlenz** – doctoral student at Danubius University, Slovakia (affiliation); https://orcid.org/0009-0003-0261-4516; kohlenz@kanzlei-kohlenz.de / doktorant na Uniwersytecie Dunajskim (Danubius), Słowacja (afiliacja).

kets Act on tying transactions. We conducted a thorough review of academic literature, case law, and regulatory documents to gather comprehensive information on antitrust law, tying transactions, and the digital economy. By integrating data from literature, case law, and policy documents, we created a comprehensive view of the regulatory landscape and its implications for platform operators. These methods enabled us to thoroughly explore the research question: What are the legal and economic implications of tying transactions in the digital economy, and how should competition law adapt to address the unique challenges posed by digital platforms and ecosystems?

Legal and Economic Impacts of Tying Transactions

According to Article 102, sentence 2, letter d, TFEU, the condition attached to the conclusion of contracts that the contracting parties must accept or provide additional services that are neither objectively nor according to commercial practice related to the subject matter of the contract is a case of abuse.[1] If these practices lead to anti-competitive market closure, they are an impermissible form of conduct in the form of tying transactions. 'Tying' usually refers to situations where "customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis."[2] The European practice has developed certain characteristics of abuse in connection with tying transactions: The tying requirement is met if

(i) a company has a dominant position on the tying market and
(ii) the tying good and the tied good are separate goods,
(iii) the tying product cannot be purchased without the tied product,
(iv) the tying is likely to lead to anti-competitive market foreclosure, and
(v) there are no objective justifications for this.[3]

Due to the lack of standardized terminology regarding tying transactions, an initial conceptual clarification is necessary to address these transactions effectively. The paper will elucidate the protective intent of the tying provision and evaluate varying perspectives on the competition-promoting versus competition-restricting impacts of tying transactions. Subsequently, these perspectives will be analyzed in the context of legal treatment through practical case studies. The terminology surrounding bundling lacks uniformity;

[1] T. Peráček, *E-Commerce and Its Limits in the Context of the Consumer Protection: The Case of the Slovak Republic*, "Juridical Tribune" 2022, 12, 1, pp. 35–50.
[2] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).
[3] P. Craig, G. de Búrca, EU Law: Text, Cases, and Materials. 7th Edition, Oxford 2020, p. 1101 ff.

bundling can occur between products, services, or a combination of both, collectively referred to as "goods" hereafter. In tying transactions, it is essential to distinguish between the tying good and the tied good. From an antitrust standpoint, the tying good is the product offered by the dominant company in the market, while market dominance is not required for the tied good. In simpler terms, the contracting party seeks to acquire the tying good and would not obtain the tied good without the tying arrangement. Tying transactions can involve not only individual goods but also multiple tying or tied goods. Since there is no fixed terminology with regard to tying transactions, a conceptual clarification is first required as a basis for dealing with tying transactions. The protective purpose of the tying provision is then worked out and the different perspectives with regard to the competition-promoting or competition-restricting effect of tying transactions are determined. In a next step, these different views are to be examined in the context of the legal treatment of tying transactions using practical cases.[4] The literature distinguishes between: „tying," „pure bundling," and „mixed bundling."

In the European Union, the Microsoft case is highly significant in this context. The General Court of the European Union identified a tying situation because the Windows operating system (tying good) was sold exclusively with the Windows Media Player (tied good).[5] Theoretically, a distinction is made between "static tying" and "dynamic tying." If the goods in question are physically or technologically related, it is "static tying." Conversely, if the goods are physically or technologically loosely related, it is "dynamic tying." Pure bundling occurs when both goods are only available together in a bundle, meaning that neither can be purchased individually. In mixed bundling, the goods are offered separately, but their individual prices are higher than when bundled, making mixed bundling a financial discount (also known as a bundle or package discount).[6]

The fundamental protective purpose of the tying provision is discussed below (a). Additionally, there are two primary perspectives: one viewpoint suggests that tying transactions have a pro-competitive effect and should not be legally prohibited (b); the opposing viewpoint argues that tying transactions have a restrictive impact on competition and should therefore be subject to strict legal regulation (c).

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[4] Judgment of the General Court of 14 Sept. 2022, Case T-604/18, Google and Alphabet v Commission (Google Android), ECLI:EU:T:2022:541.

[5] Judgment of the Court of First Instance of 17 Sept. 2007, Case T-201/04, Microsoft Corp. v Commission of the European Communities, ECLI:EU:T:2007:289.

[6] D. Spector, *Bundling, Tying, and Collusion*, "International Journal of Industrial Organization" 2007, 25, 3 (Jun.); DOI: 10.1016/j.ijindorg.2006.06.003, pp. 575–581.

Protective Purpose of the Tying Provision

a) Overview

The prohibition of tying, as outlined in Article 102, sentence 2, letter d TFEU, aims to protect competition in the tied market by preventing dominant companies from leveraging their market power into the market for the tied good (leverage theory) and thus displacing competition. This displacement creates barriers to market entry. When the demand for the tied good is dependent on the demand for the tying good, a reduction in competition in the tied market makes market entry more costly and challenging for potential competitors. Consequently, competitors must enter both markets simultaneously due to tying transactions. According to the "defensive leveraging theory," tying strategies can also protect or even strengthen the dominant company's position in the tying market. By tying two goods together, the dominant company can keep competitors away from the tied market. If competitors fail to establish a presence in the tied market, it becomes difficult for them to compete with the tied good in the tying market.[7] Additionally, the rules on tying transactions are intended to protect the freedom of choice for contracting parties.

b) Competition-promoting effects of tying

In the context of the competition-promoting effects of tying deals, it is argued that tying leads to significant efficiency gains, which legitimize tying practices.[8] These efficiency gains can be categorized as follows:

(i) Economies of Scale and Scope: Companies can achieve substantial cost reductions in production or sales through tying deals, benefiting from economies of scale and scope.

(ii) Reduction in Transaction or Search Costs: Tying simplifies the purchasing process for consumers, as they can buy applications already linked to an operating system, rather than searching for and purchasing them separately. This reduces the search costs associated with finding the ideal combination of applications and operating systems.

(iii) Improvement of Goods and Quality: By combining two goods, a company can harness synergistic effects and offer a coordinated bundle, enhancing quality. This is particularly important in technological integration.

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[7] S. Holzweber, *Tying and Bundling in the Digital Era*, "European Competition Journal" 2018, 14, 2–3; DOI: 10.1080/17441056.2018.1533360, pp. 342–366.

[8] G. Csurgai-Horváth, *Is it Unlawful to Favour Oneself?* "Hungarian Journal of Legal Studies" 2022, 62, 4; DOI: 10.1556/2052.2022.00349, pp. 297–319.

(iv) Neutralization of Double Marginalization: According to economic theory, a monopoly company sets lower prices in complementary markets compared to two independent monopolists. By offering complementary goods at lower prices when bundled, the monopoly company can account for the positive effects on demand for one good when the price of the other good decreases.

c) Anti-competitive effects of tying

The theory proposed by the Chicago School has been critically evaluated by *post*-Chicago economics. Critics argue that the Chicago School's theory is based on highly restrictive assumptions, applicable only in specific circumstances. These assumptions are seldom met in practice, rendering the Chicago approach generally inapplicable.[9] Post-Chicago economics has demonstrated that tying strategies can be a rational tactic for causing market displacement (leverage theory). Whinston's foreclosure model is particularly relevant in this context, as it shows that the single monopoly profit theorem does not hold under certain conditions. This model assumes a company holds a monopoly in market X while facing actual or potential competition in market Y. The demand and pricing for goods X and Y are independent. By tying goods in markets X and Y, the dominant company sacrifices part of its monopoly rent. Although both the tying company's profit and that of its competitors decline, the impact on competitors is more severe, benefiting the dominant company's position in market X.[10] According to Whinston, bundling intensifies price competition in the tied market compared to offering the same good separately. This reduces the profit for new entrants, thereby deterring market entry, especially in markets where economies of scale are significant. The high fixed costs associated with market entry can lead to decisions against entering the market, ultimately eliminating competition. Furthermore, Choi and Stefanadis have illustrated with their chilling innovation model that simultaneous entry into both the tying and tied markets poses substantial risks, particularly in innovation markets where competition occurs at the research and development stage.[11] Competitors must enter both markets simultaneously to challenge tying practices effectively. However, the probability of successfully entering two markets is lower than entering just one. Consequently, these companies are less inclined to invest in research and development, resulting in a reduced

[9] H. Hovenkamp, Post-*Chicago Antitrust: A Review and Critique*. "Columbia Business Law Review" 2001, 2, pp. 257–336.

[10] M. D. Whinston, *Tying, Foreclosure, and Exclusion*, "The American Economic Review" 1990, 80, 4; DOI: 10.1257/aer.80.4.837, pp. 837–859.

[11] J. P. Choi, Ch. Stefanadis, *Tying, Investment, and the Dynamic Leverage Theory*, "The RAND Journal of Economics" 2001, 32, 1; DOI: 10.2307/2696397, pp. 253–272.

willingness to challenge the dominant company in the tying market and diminishing incentives for innovation in the tied market.[12]

Legal Treatment of Tying Transactions

The following part will first examine European case law (a), and then, based on this analysis, it will outline how tying transactions should be treated in the future (b).

a) Previous European Union case law

Over the years, European Union institutions have evolved their approach to tying practices. Initially, tying was deemed illegal *per se* in the EU, with proceedings focusing on the nature of the tying rather than its impact on consumers. Authorities evaluated the following characteristics of abuse:

(i) a dominant position in the tying market,

(ii) the existence of two separate goods (tying good and tied good), and

(iii) an element of coercion on consumers.[13]

In the Hilti case,[14] the European Commission determined that a company abuses its dominant position if the sale of patented cartridge strips is conditional upon ordering a corresponding quantity of bolts. According to the Commission, these practices leave consumers with no choice (element of coercion) regarding where to buy the bolts, thus exploiting them abusively. Similarly, in the Tetra Pak II case,[15] European authorities concluded that tying practices were abusive. Neither the European Commission nor the courts accepted Tetra Pak's justifications based on "technical reasons, responsibility for product quality, health reasons, and protection of the company's reputa-

[12] T. Peráček, B. Mucha, Š. Palatický, K. Keller, A. Mußmann, *European Digital Strategy and Its Impact on the Conclusion of Selected Types of Business Contracts* [in:] Developments in Information and Knowledge Management Systems for Business Applications. Studies in Systems, Decision and Control, N. Kryvinska, M. Greguš, S. Fedushko (eds.), Cham 2023, 463; DOI: 10.1007/978-3-031-25695-0_20, pp. 443–468.

[13] D. Mandrescu, *Tying and Bundling by Online Platforms – Distinguishing Between Lawful Expansion Strategies and Anti-Competitive Practices*, "Computer Law & Security Review" 2021, 40; DOI: 10.1016/j.clsr.2020.105499, pp. 1–24. R. Funta, *Competition Law Aspects Of Amazon's Business Model*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2023, 15, 2; DOI:10.7206/kp.2080-1084.592, pp. 23–38. P. Miskolczi-Bodnár, *Visszaélés gazdasági erőfölénnyel* [*Abuse of Economic Dominance*] (in:) A. Tóth, M. Juhász, D. Juhász (eds.), Kommentár a tisztességtelen piaci magatartás és versenykorlátozás tilalmáról szóló 1996. évi LVII [Commentary on Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restriction of Competition], Gazdasági Versenyhivatal [Hungarian Competition Authority]: HVG-ORAC, Budapest 2015, pp. 280–320.

[14] Commission Decision of 22 Dec. 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 – Eurofix-Bauco v. Hilti).

[15] Commission Decision of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.043 – Tetra Pak I (BTG licence).

tion." The General Court of the European Union upheld the Commission's decision, stating that Tetra Pak could have addressed these concerns with less drastic measures than contractual tying. The European Commission applied the same principles in the Coca-Cola Export case[16] regarding mixed bundling practices, concluding that mixed bundling was also illegal *per se*. However, Coca-Cola agreed to cease these practices as part of a settlement.

In the cases described, authorities overlooked the potential pro-competitive effects, particularly efficiency gains, of tying transactions. Instead, they assumed market foreclosure due to the dominant company's practice of tying its goods with other goods. This formalistic approach, based on typified case groups ("form-based approach"), has led to a reevaluation since the Microsoft decision,[17] although the direction of this rethinking remains unclear. In the Microsoft case, the European Commission found that Microsoft tied its Windows Media Player to the Windows operating system. The Commission applied a new test basis for tying cases, examining the following conditions:

(i) the existence of separate goods (tying good and tied good),

(ii) the company's dominant position in the tied market,

(iii) the lack of consumer choice to purchase the tying good without the tied good, and

(iv) the foreclosure of competition.

In this decision, the Commission departed from the form-based approach seen in the Hilti and Tetra Pak II cases by considering the specific circumstances of the case and evaluating the likely and actual effects of the tying arrangements on consumers and competition, thus adopting an effect-based approach. The General Court of the European Union confirmed the criteria for tying applied by the Commission.[18] However, the Court indicated that a practice is generally considered abusive only if it restricts competition, implicitly requiring an examination of potential competitive restrictions. The Court also noted that tying does not inherently have an exclusionary effect on the market, "in view of the specific circumstances of the present case," although it is typically the case in instances of abusive tying. According to the General Court of the European Union, tying practices continue to have an exclusionary effect *per se*.

The European Commission has recently scrutinized tying practices in the Google Android case,[19] modifying the elements of tying slightly. For tying to be deemed illegal, the following conditions must be met:

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[16] On 19 Dec. 1989, the Commission accepted a unilateral formal undertaking from The Coca-Cola Corporation, IP/90/7.

[17] Commission Decision of 24 Mar. 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft).

[18] Judgment of the Court of First Instance of 17 Sept. 2007, T-201/04, Microsoft Corp. v Commission of the European Communities. ECLI:EU:T:2007:289.

[19] Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 – Google Android).

(i) the presence of separate goods (tying good and tied good),

(ii) the company holds a dominant position in the tying market,

(iii) consumers are not given the option to purchase the tying good without the tied good, and

(iv) the tying is capable of restricting competition.

If the Commission determines that tying is illegal, it is up to the company to provide objective justification. Although the Priorities Communication sought to change the elements of tying as a guideline, the Commission still references the Microsoft decision of the General Court of the European Union in the Google Android case. The Commission delves deeper into the considerations from the Microsoft case, noting that to determine whether competition is impaired, it must be examined whether the tying reduces consumers' incentives to purchase products from other companies or whether third-party suppliers are encouraged to develop products that only implement the underlying technology of the tied product. The General Court of the European Union has slightly adjusted the criteria for tying cases. These criteria include:

(i) the existence of separate goods (the tying good and the tied good), (ii) the dominant position in the tying market,

(iii) the lack of an option for consumers to purchase the tying good without the tied good,

(iv) anti-competitive market foreclosure, and

(v) the absence of an objective justification.

These criteria are identical to those used in the Microsoft decision. Rather than introducing a "rule of reason" test, this adjustment is a cautious attempt to approximate such a rule. In this context, it is more appropriate to refer to "adapted *per se* illegality" instead of the rule of reason.[20] The Court frequently cites the Microsoft decision, particularly concerning the fourth criterion, "anti-competitive market foreclosure." It emphasizes that "a practice is only considered abusive if it is capable of restricting competition." However, in this case, a more detailed examination was required to determine the anti-competitive effects of the tying. Although authorities typically examine the anti-competitive effects of tying transactions in detail, the Court still could not identify an exclusionary effect *per se* based on the circumstances. This suggests that the Court generally prefers to adhere to a formalistic approach and only considers a detailed analysis of the effects necessary in exceptional cases.

The statements on competition restriction are of greater importance. According to the Court, in the context of tying transactions, it is essential to examine whether these practices have the capacity to restrict competition, as noted in the Google Android case, rather than whether they actually do.

[20] Judgment of 14 Sept. 2022 – Google and Alphabet v Commission (Google Android), T-604/18, ECLI:EU:T:2022:541.

In this case, the distinction between "restricting competition" and "having the capacity to restrict competition" was less significant, as the Commission was able to prove the actual anti-competitive effects of the tying. However, in the Google Android case, the Court may at least deviate from the view that the Commission did not introduce a new condition regarding the ability to restrict competition, since it expressly does not refer to paragraph 866 of the Microsoft decision, which stated that no new condition regarding tying was introduced. Therefore, future case law on tying practices requires the following elements:

(i) the existence of separate goods (tying good and tied good),
(ii) a dominant position in the tying market,
(iii) no option for consumers to purchase the tying good without the tied good,
(iv) the potential to restrict competition, and
(v) no objective justification.

Notably, there is no need for an actual restriction of competition. Additionally, if conditions (i)–(iv) are met, it is up to the dominant company to provide an objective justification.[21] The question still remains regarding the Court's intention behind referencing the *per se* exclusionary effect of the tying. According to the Court's reasoning, tying transactions as a typical offense still constitute *per se* illegal conduct. Despite this added comment, it is likely that the standard practice in the future will involve analyzing whether specific tying transactions are capable of restricting competition, with authorities probably assuming *per se* illegality only in exceptional cases. It is also unclear why the Court has not provided legal certainty on this matter or established a new practice. This may change with the pending decision of the Court of Justice of the European Union.

b) Forthcoming approach to tying cases

In European case law, it is generally accepted that an unlawful tying transaction must meet the following three criteria:

(i) a dominant market position,
(ii) separate goods, and
(iii) a form of tying, such as consumers being unable to purchase the tying good without the tied good.

However, there is a debate regarding the element of anti-competitive market foreclosure and the closely related issue of objective justification.[22]The scientific literature has extensively discussed the element of illegal foreclosure

[21] V. Mulaj, *Protection of Competition from Abuse with Dominant Positions and Anticompetitive Agreements in the Kosovo Market*, "Studia Iuridica Lublinensia" 2022, 31, 2; DOI: 10.17951/sil.2022.31.2.207-227, pp. 207–227.

[22] V. Šmejkal, *Digitisation and EU Competition Law – Time to Rethink the Basics?*, "The Lawyer Quarterly" 2024, 14, 1, pp. 66–81.

of competition.[23] When legally assessing tying transactions, it is essential to consider economic findings. To adequately incorporate economic models into the legal context, it is necessary first to determine the meaning and purpose of the illegal behavior, specifically tying transactions. This analysis can be used to identify the elements of tying. Subsequently, the economic models should be applied to these elements where appropriate. To determine the correct element of the offense, it is first necessary to examine the fundamental objective of Article 102 TFEU. Neither legal system prohibits the acquisition, maintenance, or strengthening of a dominant market position as long as it is done without inappropriate conduct. However, the abuse of such a market position is prohibited.[24] As previously explained, the law aims to maintain competition on the merits within the framework of abuse control, thus primarily protecting the competitive process and striving for undistorted competition. Unlawful behavior in the form of exploitative abuse is directed against the respective opposing side of the market, while exclusionary abuse is directed against other companies in competition, which can indirectly harm consumers by limiting the competitiveness of the market. However, Article 102 TFEU ultimately protects the competitive process and undistorted competition, rather than the opposing side of the market or other market participants.[25] Regarding the degree of danger at which the prohibition of abuse applies, case law indicates that it is sufficient if behavior is capable of or aimed at restricting competition.[26] If a behavior is aimed at restricting competition, it is usually also capable of doing so.[27] For instance, in cases of market structure abuse, the reference point is the change in market structure, not the weakening of competitors' market positions. This danger of restricting competition must be concrete and not merely abstract, meaning the behavior must actually be capable of producing its effects. The European Court of Justice confirmed this view in the Intel case. For a violation of Article 102 TFEU, there is no need for a restrictive effect on competition, as the assessment of whether the conduct of a market-dominant company is abusive depends on the "analysis of the potential for exclusion." In this context, the more detailed impact assessment, which has gained importance with the "more economic approach," must also

[23] A. Ezrachi, EU Competition Law: An Analytical Guide to the Leading Cases, London 2024, p. 244ff. P. Plavčan, R. Funta, *Regulatory Concepts for Internet Platforms*. "Online Journal Modelling the New Europe" 2021, 35 (Apr.); DOI: 10.24193/ojmne.2021.35.0, pp. 44–59.

[24] This is in contrast to the US American Sherman Act, which, according to Section 2 of the Sherman Act, already criminalizes monopolization or the attempt to monopolize.

[25] O. Blažo, *Bypassing Competition Law, Bypassing through Competition Law* [in:] EU Antitrust: Hot Topics & Next Steps. Proceedings of the International Conference Held in Prague on Jan. 24–25, 2022, V. Šmejkal (ed.), Praha 2022, pp. 372–382.

[26] Judgment of the Court of 6 Sept. 2017, C-413/14 P, Intel Corp. v European Commission, ECLI:EU:C:2017:632.

[27] Judgment of the Court of First Instance of 30 Sept. 2003, T-203/01, Manufacture française des pneumatiques Michelin v Commission of the European Communities, ECLI:EU:T:2003:250.

be addressed.[28] Such an intensified analysis is not legally required, as proof of a potential anti-competitive effect is sufficient. The Draft Guidelines[29] further clarify that tying and bundling are among the categories of conduct with a high potential to lead to exclusionary effects. As such, they may not require a full-blown effects analysis in every case, especially when coercion or lack of consumer choice is evident. This supports a more predictable enforcement standard for digital markets. The Draft Guidelines complement the DMA by providing a coherent framework for assessing exclusionary conduct under Article 102 TFEU. While the DMA applies *ex-ante* obligations to gatekeepers, the Guidelines clarify how abusive conduct by dominant undertakings is evaluated *ex-post*. Importantly, they reflect lessons learned from landmark cases such as Microsoft and Google Android, and they emphasize the importance of consumer welfare and competition on the merits.

c) Overview of the regulatory proposals

Observing international trends in digital economy markets, a shift is noticeable.[30] Specifically, there's a clear transition from the 'rule of reason' towards *ex-ante* regulations.

In the European Union, the Digital Markets Act (DMA) came into force on September 14, 2022, and has been applicable since May 2023. The DMA is an *ex-ante* regulation that outlines specific dos and don'ts for gatekeepers in Article 5. These rules aim to prevent unfair or contestable practices. The European Commission does not need to conduct market dominance or other lengthy, resource-intensive impact analyses of behavior. Instead, the law applies as soon as a gatekeeper is identified (Articles 3 and 4), and this gatekeeper must comply with or refrain from certain actions as specified in Articles 5 and following. For example, gatekeepers are required to allow interoperability of number-independent interpersonal communication services and must not favor their own services and products over those of third parties, including in rankings.[31] The advantage of the DMA is its clear *ex-ante* regulatory approach. Given the recent challenges faced by authorities at various stages of the process and the complex economic discussions that have arisen, the DMA is a welcome development for the regulated entities.

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[28] R. Funta, *Data, Their Relevance to Competition and Search Engines*. "Masaryk University Journal of Law and Technology" 2021, 15, 1; DOI: 10.5817/MUJLT2021-1-5, pp. 119–140.

[29] Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, available online: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

[30] R. Funta, D. Buttler, *The Digital Economy and Legal Challenges*, "InterEULawEast" 2023, 10, 1; DOI: 10.22598/iele.2023.10.1.8, pp. 145–160; G. Skara, O. Muçollari, B. Hajdini, *Adapting the Competition Policy for the Digital Age: Assessing the EU's Approach*. "Laws" 2024, 13, 5, 64; DOI: 10.3390/laws13050064, pp. 1–5.

[31] V. Šmejkal, *Abuse of Dominance and the DMA – Differing Objectives or Prevailing Continuity?*. "Acta Universitatis Carolinae. Iuridica" 2023, 69, 2; DOI: 10.14712/23366478.2023.13, pp. 33–51.

The United Kingdom has adopted a different strategy compared to the European Commission. The 'Digital Markets, Competition and Consumers Bill' aims to grant statutory powers to the Digital Markets Unit (DMU), a division within the Competition and Market Authority (CMA), to oversee the new 'pro-competitive regime' for digital markets. Additionally, the CMA will have the authority to designate companies with 'Strategic Market Status' (SMS). Unlike the DMA, the UK will still require proof that the company under investigation possesses significant and consolidated market power.

Even in the United States of America a move away from the "rule of reason" is evident, although the literature and courts were and still are strong advocates of the "rule of reason."[32] In addition to various initiatives in Congress,[33] the statements of the Federal Trade Commission (FTC) since the appointment of Lina Khan as Chair of the FTC are of particular interest. In a statement dated November 10, 2022,[34] the FTC expressed its intention to increasingly rely on Section 5 FTC Act, which prohibits illicit methods of competition in addition to unfair competition. Accordingly, the meaning of Section 5 FTC Act goes beyond the Sherman Act and the Clayton Act and includes various types of unfair conduct that negatively affect the conditions of competition. The FTC has also expressly clarified that, contrary to its own statements of August 15, 2015,[35] it will not pursue the "rule of reason" approach when applying Section 5 FTC Act. This direct reference to its own statement from 2015 is a clear statement: The FTC explains that Congress originally did not require anti-competitive harm or anti-competitive intent, but rather intended to stop monopolies in the early stages (incipiency). Consequently, it is not in keeping with the spirit of the law that the FTC has to prove anti-competitive effects, as would be required under the "rule of reason." It is sufficient if a conduct already shows a tendency to negatively affect competitive conditions in accordance with Section 5 of the FTC Act. According to this approach, the ability of a conduct to restrict competition with a certain probability should be sufficient to meet Section 5 of the FTC Act. In this context, the FTC expressly refrains from applying the "rule of reason."

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[32] E. Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, "Harvard Law Review" 2009, 123, 2, pp. 33–51.

[33] E.g. S.4258 – Competition and Transparency in Digital Advertising Act 117th Congress (2021–2022); S.2710 – Open App Markets Act 117th Congress (2021–2022).

[34] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202, Nov. 10, 2022.

[35] Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, Aug. 15, 2015. The FTC withdrew this opinion on July 1, 2021, because it violates the structure and history of Sec. 5 FTC Act and largely eliminates the FTC's independent authority. See. Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, July 1, 2021.

Challenges for Tying Transactions in the Digital Economy

In the digital economy, the number of users is particularly significant.[36] While user share alone does not indicate market dominance, it raises questions about its role in tying deals, potentially outweighing traditional measures of market dominance. It's crucial to assess whether companies can leverage methods like digital integration to direct their large user base to dominate a new market through tying deals. This is not limited to integrating users into new products within the digital ecosystem but also involves new data processing capabilities.[37] These capabilities enable increased usage of their services and performance optimization across the ecosystem. For instance, companies can position themselves to generate higher advertising revenues due to a larger and more detailed data set.

This issue ties into another major challenge of the digital economy: companies often do not offer physical goods alone but combine them with digital services.[38] For instance, companies can pursue coupling strategies either across different platforms or within a single platform. When coupling across platforms, a company typically aims to transfer market power. This occurs when a company that already dominates one market uses its platform to offer a different service on another platform within its ecosystem. In such cases, the company employs tying practices to transfer market power to the new platform (leverage theory). This raises the question of whether we need to consider the entire business model of the digital ecosystem and whether these different platforms constitute separate goods. Identifying separate goods becomes more challenging when a company expands its services within a single platform. In this scenario, the company integrates new services into the existing platform rather than creating a new one. As the new service becomes part of the existing platform, it is debatable whether it should be considered a separate good or merely an addition to the existing one. Given that the new service is free and there is no obligation to use it, it also raises the question of whether such integration can be classified as a tying transaction.

Another important aspect is the impact of tying on competition. While the effects of tying are extensively debated in the context of the Chicago School and post-Chicago economics, the digital economy is likely to further divide these perspectives. The Chicago School's views on price discrimination are becoming increasingly relevant due to the unique pricing structures of digi-

[36] R. Funta, *Economic and Legal Features of Digital Markets*, "Danube: Law, Economics and Social Issues Review" 2019, 10, 2; DOI: 10.2478/danb-2019-0009, pp. 173–183.

[37] A. Piskorz-Ryń, *European Data Governance Act: Essential Problems for Re-Use of Public Sector Information*, "Prawo i Więź" ["Law and Social Bonds"] 2025, 53, 6; DOI.org/10.36128/PRIW.VI53.1148, pp. 321–333.

[38] B. Šramel, P. Horváth, *Internet as the Communication Medium of the 21st Century: Do We Need a Special Legal Regulation of Freedom of Expression on the Internet?*, "The Lawyer Quarterly" 2021, 11, 1, pp. 141–157.

tal platforms. Companies can charge zero or even negative prices on one side of the platform while generating necessary revenue on the other side. This enables cross-subsidization, which mimics price discrimination and results in efficiency gains through better coordination across the platform. Economies of scale are also crucial in the digital economy. According to the Chicago School, these economies can lead to significant efficiency gains, representing a pro-competitive effect of tying. The low marginal costs in the digital economy are particularly important, as the cost of selling an additional good or service approaches zero, providing a cost advantage and high value for consumers. This increases the attractiveness of the platform and boosts demand. High fixed costs and low marginal costs are often cited to justify tying practices, as they help recoup high investment costs. Potential competitors are prevented from achieving these economies of scale from the outset, allowing the market-dominating company to secure markets it does not yet dominate. The software sector exemplifies tying practices well, as marginal costs in this sector are very low or even zero. Tying deals become less attractive as marginal costs increase. These observations about the software sector can be broadly applied to digital economy markets. In the digital economy, the average cost per unit of service decreases as the quantity increases. Given the very low marginal costs, there is a higher risk of tying deals having anti-competitive effects.[39]

In the digital economy, pre-installed applications act as significant barriers to market entry. Pre-installation not only enables companies to automatically reach a large user base but also allows them to benefit from economies of scale and optimize their services. The lack of interoperability in the digital economy further amplifies the effects of pre-installation. Additionally, winner-takes-all markets provide dominant companies with greater incentives to strengthen their market position through tying practices. Although the digital economy is rapidly evolving and new technological developments can potentially counteract winner-takes-all markets, companies can mitigate this risk by employing tying strategies. If dominant companies use tying to establish high barriers to market entry and reduce incentives for innovation and research and development, they can consolidate their market position and mitigate the risk of losing their market power. The characteristics of digital economy markets are therefore often central to the arguments of both the Chicago School and *post*-Chicago economics. When these arguments are applied to the digital economy, the divergence between the two perspectives becomes even more pronounced than in traditional markets.

[39] Q. Wu, N. J. Philipsen, *The Law and Economics of Tying in Digital Platforms: Comparing Tencent and Android*, "Journal of Competition Law and Economics" 2023, 19, 1; DOI: /10.1093/joclec/nhac011, pp. 1–20.

Concluding Remarks

Our findings demonstrate that tying practices in the digital economy present both pro-competitive efficiencies and anti-competitive risks, but the balance increasingly tilts toward the latter due to the structural characteristics of digital markets. These include network effects, data-driven dominance, low marginal costs, and ecosystem lock-in, all of which amplify the exclusionary potential of tying strategies. From a legal perspective, the traditional framework under Article 102 TFEU, which prohibits the abuse of a dominant position, has evolved significantly. While earlier case law relied on a formalistic, *per se* approach, recent decisions (e.g., Microsoft, Google Android) have moved toward a more nuanced, effects-based analysis. However, this shift has not always provided sufficient legal certainty or timely intervention in fast-moving digital markets. The 2024 Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct mark a pivotal development in this context. They consolidate EU case law and enforcement experience, offering clearer criteria for assessing exclusionary practices such as tying and bundling. Notably, the Guidelines distinguish between: Conduct requiring proof of capability to exclude, Conduct with a high potential to exclude, and Naked restrictions, which are presumed unlawful. Tying and bundling fall into the second category, meaning that authorities need not prove actual harm but only the capability to restrict competition. This aligns with the broader trend toward proactive enforcement and supports a more structured legal test that balances legal certainty with flexibility.

In parallel, the EU is revisiting the idea of "new competition tools," a concept originally proposed to address structural risks in digital markets that fall outside traditional antitrust enforcement. The 2024 Draghi Report has reignited this discussion, calling for instruments that allow regulators to intervene before harm materializes. Some Member States, such as Germany and Austria, have already introduced such tools into their national laws, enabling *ex-ante* intervention against systemic market risks even in the absence of proven abuse. Together with the Digital Markets Act (DMA), which imposes *ex-ante* obligations on designated gatekeepers, these developments reflect a paradigm shift in EU competition policy. The focus is no longer solely on punishing past abuses but on preventing future harm in structurally fragile markets.

In conclusion, tying in the digital economy cannot be viewed in isolation. It is often a strategic lever for ecosystem control, with long-term implications for innovation, market structure, and consumer choice. The legal and regulatory response must therefore be flexible, forward-looking, and integrated—combining traditional antitrust tools with new regulatory instruments and cross-disciplinary insights from data protection and consumer law. Only then

can competition law effectively safeguard open digital markets in the face of evolving technological and economic realities.

Abstrakt

Celem niniejszego artykułu jest zbadanie szczególnych cech transakcji wiązanych na rynkach cyfrowych. Powstające warunki konkurencji doprowadziły do powstania nowych modeli biznesowych, które wymagają analizy z punktu widzenia przepisów antymonopolowych, ze szczególnym uwzględnieniem przepisów dotyczących nadużyć. W przeszłości nadużywanie transakcji wiązanych stało się przedmiotem pierwszych znaczących postępowań sądowych w gospodarce cyfrowej. Biorąc pod uwagę brak ujednoliconej terminologii dotyczącej transakcji wiązanych, konieczne jest wstępne wyjaśnienie pojęć. Przed zagłębieniem się w kwestie ich prawnego traktowania oraz wybranych opcji regulacyjnych – w artykule przeanalizowano prokonkurencyjny i antykonkurencyjny wpływ takich transakcji.

Słowa kluczowe: prawo antymonopolowe, gospodarka cyfrowa, DMA, TFUE, transakcje wiązane.

BIBLIOGRAPHY

Choi J. P., Stefanadis Ch., *Tying, Investment, and the Dynamic Leverage Theory*, "The RAND Journal of Economics" 2001, 32, 1.

Craig P., de Búrca G., EU Law: Text, Cases, and Materials, 7th Edition, Oxford 2020.

Csurgai-Horváth, G., *Is It Unlawful to Favour Oneself?* "Hungarian Journal of Legal Studies" 2022, 62, 4.

Developments in Information and Knowledge Management Systems for Business Applications. Studies in Systems, Decision and Control, N. Kryvinska, M. Greguš, S. Fedushko (eds.), Cham 2023, 463.

Elhauge E., *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, "Harvard Law Review" 2009, 123, 2.

EU Antitrust: Hot Topics & Next Steps. Proceedings of the International Conference Held in Prague on Jan. 24–25, 2022, V. Šmejkal (ed.), Praha 2022.

Ezrachi A., EU Competition Law: An Analytical Guide to the Leading Cases, London 2024.

Funta R., *Economic and Legal Features of Digital Markets*, "Danube: Law, Economics and Social Issues Review" 2019, 10, 2.

Funta R., *Data, Their Relevance to Competition and Search Engines*. "Masaryk University Journal of Law and Technology" 2021, 15, 1.

Funta R, Buttler D., *The Digital Economy and Legal Challenges*, "InterEULawEast" 2023, 10, 1.

Funta R., *Competition Law Aspects Of Amazon's Business Model*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2023, 15, 2.

Holzweber S.: *Tying and Bundling in the Digital Era*, "European Competition Journal" 2018, 14, 2–3.

Hovenkamp H., Post-*Chicago Antitrust: A Review and Critique*. "Columbia Business Law Review" 2001, 2.

Mandrescu D., *Tying and Bundling by Online Platforms – Distinguishing Between Lawful Expansion Strategies and Anti-Competitive Practices*, "Computer Law & Security Review" 2021, 40.

Mulaj V. *Protection of Competition from Abuse with Dominant Positions and Anticompetitive Agreements in the Kosovo Market*, "Studia Iuridica Lublinensia" 2022, 31, 2.

Peráček T., *E-Commerce and Its Limits in the Context of the Consumer Protection: The Case of the Slovak Republic*, "Juridical Tribune" 2022, 12, 1.

Piskorz-Ryń, A. *European Data Governance Act: Essential Problems for Re-Use of Public Sector Information*, "Prawo i Więź" ["Law and Social Bonds"] 2025, 53, 6.

Plavčan P., Funta R., *Regulatory Concepts for Internet Platforms*, "Online Journal Modelling the New Europe" 2021, 35 (Apr.).

Skara G., Muçollari O., Hajdini B., *Adapting the Competition Policy for the Digital Age: Assessing the EU's Approach*. "Laws" 2024, 13, 5.

Šmejkal V., *Abuse of Dominance and the DMA – Differing Objectives or Prevailing Continuity?*. "Acta Universitatis Carolinae. Iuridica" 2023, 69, 2.

Šmejkal V., *Digitisation and EU Competition Law – Time to Rethink the Basics?*, "The Lawyer Quarterly" 2024, 14, 1.

Spector D., *Bundling, Tying, and Collusion*, "International Journal of Industrial Organization" 2007, 25, 3 (Jun.).

Šramel B., Horváth P., *Internet as the Communication Medium of the 21st Century: Do We Need a Special Legal Regulation of Freedom of Expression on the Internet?*, "The Lawyer Quarterly" 2021, 11, 1.

Tóth A., Juhász M. , Juhász D. (eds.), Kommentár a tisztességtelen piaci magatartás és versenykorlátozás tilalmáról szóló 1996. évi LVII [Commentary on Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restriction of Competition], Gazdasági Versenyhivatal [Hungarian Competition Authority]: HVG-ORAC, Budapest 2015.

Whinston M. D., *Tying, Foreclosure, and Exclusion*, "The American Economic Review" 1990, 80, 4.

Wu Q., Philipsen N. J., *The Law and Economics of Tying in Digital Platforms: Comparing Tencent and Android*, "Journal of Competition Law and Economics" 2023, 19, 1.

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Łukasz Dawid Dąbrowski*

The Architecture of International Trade Law: Towards a Cohesive Global Trade Law Framework

[Architektonika źródeł międzynarodowego prawa handlowego – w drodze do spójnych globalnych ram regulacyjnych]

Abstract
International trade serves as a cornerstone of the global economy, necessitating comprehensive legal frameworks to regulate cross-border commercial and economic cooperation. The objective of this research is to analyze the structural and functional relationship between *hard law* and *soft law* sources in international trade, with the aim of proposing a cohesive global framework capable of reducing legal fragmentation and enhancing the coherence, predictability, and resilience of international trade law.

Thereby, this article, categorizes the sources of international trade law into universal (global), regional, and bilateral treaties, while highlighting the growing significance of non-binding *soft law* instruments. It argues that although formal treaties form the foundational legal structure, the adaptability and effectiveness of international trade law increasingly depend on *soft law*—flexible norms widely adopted by practitioners that facilitate normative convergence without formal harmonization.

The article underscores the role of institutions such as the ICC and UNCITRAL in developing model contracts and trade customs, emphasizing the evolving *lex mercatoria's* influence on dispute resolution and contract interpretation. It also examines the practical consequences of fragmentation among international, regional, and national trade regimes —such as overlapping and sometimes conflicting obligations, which in turn produce legal uncertainty, forum shopping, and inconsistent dispute resolution outcomes, increased transaction costs, and diminished enforceability of rights—and argues that a cohesive framework built on coordinated treaty law and harmonized *soft law* instruments can effectively mitigate these challenges.

Through formal-dogmatic and historical-comparative analyses, the article explores how multilateral treaties, international commercial custom, and informal norms collectively shape a transparent, stable, and equitable global trade order. It further clarifies that the strategic aim of this inquiry is to identify pathways toward reducing fragmenta-

* **Łukasz Dawid Dąbrowski** – PhD in Law; Assistant Professor, Collegium of World Economy at the SGH Warsaw School of Economics, PL (affiliation); https://orcid.org/0000-0003-2251-7791; ldabro@sgh.waw.pl / dr nauk prawnych, adiunkt, Kolegium Gospodarki Światowej w Szkole Głównej Handlowej (SGH) w Warszawie (afiliacja).

tion and promoting coherence through a layered approach that integrates both hard and *soft law* mechanisms. In particular, *soft law* performs a harmonizing function, bridging gaps between diverse legal systems by fostering voluntary convergence and mutual trust among economic actors.

The study concludes that while full unification of international commercial law remains unrealized, ongoing expansion of unified legal instruments and *soft law* frameworks are crucial not only for reducing fragmentation and legal uncertainty but also for strengthening the stability, inclusiveness, and predictability of the global trade law system.

JEL Classification: K33.

Keywords: international trade law, sources of international law, *lex mercatoria*, hard law, soft law, model contracts, international commercial customs, legal fragmentation, harmonization.

Introduction

The global economic system relies on international trade law to regulate the foreign exchange of goods, services, and capital. As trade evolved—from national and cross-border trade to fully international exchanges—the need for common, legally binding frameworks to regulate interstate economic cooperation became essential. While initially shaped by customary practices, international trade law has increasingly been formalized through treaty-based mechanisms, enhancing legal certainty and predictability. These agreements differ in scope and participation, allowing classification into three main types: universal, regional, and bilateral treaties. Analyzing these categories reveals key legal and institutional structures and highlights the progress of international trade law in specific areas. Moreover, the evolving concept of *lex mercatoria* and the diversification of recognized sources emphasize the growing relevance of flexible, functional norms that meet the practical demands of global commerce.

In recent decades, however, the accelerating diversification of trade instruments and the overlapping nature of international, regional, and bilateral regimes have created a fragmented legal environment. This fragmentation undermines legal certainty and coherence, as states and entrepreneurs must navigate inconsistent obligations and interpretive frameworks. Consequently, the development of a cohesive global trade law framework has become a strategic necessity. Such a framework should not replace existing legal systems but rather integrate them through coordination and mutual reinforcement of norms.

In the view of the foregoing this article advances three central theses through an analysis of international legal sources governing trade cooperation at global, regional, and bilateral levels, alongside an assessment of *soft law* and its regulatory influence. First, while formal sources—namely treaties—form the foundation of international trade law, the system's adaptability increasingly depends on *soft law* instruments, whose flexibility better suits the dynamic nature of cross-border transactions. Second, the article argues that *soft law* plays an increasingly important role in fostering greater coherence among different legal systems and mitigating fragmentation by encouraging normative alignment without necessitating complete legal unification. The strategic objective is to examine how this potential for harmonization can be further developed into a more cohesive framework that strengthens predictability, reduces transaction costs, and promotes fairness in international trade Third, within the EU, consumer protection rights place substantive limits on the free formation of contractual terms and constrain the use of *soft law* by economic entities.

The research employs the formal-dogmatic method to examine legal norms within international and European law. A historical approach is used to trace the development of these norms within the broader historical and institutional context of the EU. Additionally, a comparative analysis assesses the effectiveness of various legal instruments in practice. This methodological triangulation allows the author to connect doctrinal findings with strategic implications for the future architecture of global trade law.

The Origins of International Trade Law

A concise overview of the origins of international trade law serves to highlight the distinctive nature of legal regulations governing international trade cooperation, which are deeply rooted in the historical evolution of trade among diverse communities and states. As early as antiquity, advanced civilizations such as Mesopotamia, Egypt, and Greece developed rudimentary legal frameworks to regulate trade between city-states and across regions. These early laws aimed to facilitate transactions, protect merchants' interests, and ensure fair dispute resolution—illustrated, for example, by the Code of Hammurabi, which included provisions on trade contracts, credit, and penalties for fraud.[1] During the Middle Ages, international trade law was shaped by *lex mercatoria*, a body of merchant customs functioning independently of local

[1] See E. A. Santos, International Law in the Ancient World: Origins, Practices, and Influence on Modern Systems, https://www.diplomacyandlaw.com/post/international-law-in-the-ancient-world-origins-practices-and-influence-on-modern-systems [accessed: 31.05.2025].

laws. It operated as a *de facto* international commercial code, regulating contracts, carriage of goods, security instruments, and dispute resolution via specialized merchant tribunals, thereby facilitating long-distance trade.[2] From the 16th to 18th centuries, colonial expansion and growing global commerce accelerated the development of trade law, marked by the first interstate trade agreements and the rise of institutions such as exchanges and banks, which aimed to promote free trade, protect investors, and formalize competition rules.[3]

In the 19th and 20th centuries, international trade law evolved in response to industrialization, technological innovation, and increasing emphasis on consumer rights.[4] The Industrial Revolution significantly expanded global trade, creating a need for more uniform legal frameworks. Treaties of Friendship, Commerce, and Navigation—primarily concluded by the United States during this period—aimed to regulate trade, legal, and diplomatic relations with other nations.[5] The 20th century witnessed intensified efforts at legal unification through international institutions, culminating in the post–World War II establishment of the General Agreement on Tariffs and Trade (GATT), later succeeded by the World Trade Organization (WTO), alongside the proliferation of Free Trade Agreements.

The present author finds that the historical trajectory of international trade law reveals a consistent movement from decentralized merchant practices to increasingly institutionalized frameworks. This evolution underscores the enduring tension between spontaneous commercial order and state-driven codification—a dynamic that continues to shape modern harmonization efforts.

In the 21st century, trade law continues to adapt to emerging challenges such as digitalization, e-commerce,[6] sustainable trade,[7] and evolving dispute resolution mechanisms.[8] According to the present author, this adaptability highlights the discipline's hybrid nature, balancing tradition with innovation and reflecting the continuous negotiation between economic globalization and legal sovereignty. Overall, international trade law has developed from

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[2] See B. Fuchs, *Lex mercatoria – od średniowiecza po XXI wiek* [in:] J. Ciągwa *et al.* (eds.), O prawie i jego dziejach księgi dwie, Białystok–Katowice 2010, p. 1085.

[3] N. Srivastava, *History of Contemporary International Trade Law*, 'International Journal of Law Management & Humanities' 2018, 1, 4, p. 6.

[4] See M. Hesselink, *Europejskie prawo umów: kwestia ochrony konsumenta, obywatelstwa czy sprawiedliwości?*, 'Nowa Europa. Przegląd Natoliński' 2008, 2, 7, p. 221.

[5] J. K. Vandevelde, The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties, Oxford University Press 2017, p. 57.

[6] The rise of electronic trade has led to specialized regulatory instruments like the UNCITRAL Model Law on Electronic Commerce, promoting secure, legally recognized digital transactions.

[7] There is growing integration of environmental and social standards into trade agreements, aligning with sustainable development goals.

[8] International commercial arbitration has gained prominence, with bodies such as the ICC International Court of Arbitration playing crucial roles in resolving cross-border disputes efficiently and impartially.

informal merchant customs into a complex, institutionalized system that reflects broader socio-economic and political transformations.

Unification of Law and Commercial Practices in International Trade

The contemporary global trade system is marked by diverse national legal regimes, creating legal and practical challenges for cross-border transactions. Legal unification addresses these issues by harmonizing private-law rules through supranational instruments—primarily international conventions—that establish uniform standards overriding conflicting domestic laws. These instruments regulate specific private-law relationships directly, reducing reliance on conflict-of-law rules and minimizing discrepancies across jurisdictions.[9] Their effectiveness depends on clearly defined substantive scope and territorial applicability. Despite notable progress, comprehensive unification remains limited due to factors such as uneven state participation, varying economic interests, and the sector-specific nature of many instruments. In the opinion of the present author, as a result, legal dualism persists: unified rules apply to international transactions among contracting states, while domestic law continues to govern internal matters. This unevenness demonstrates that unification alone cannot ensure coherence; it must be complemented by flexible interpretative mechanisms such as *soft law* to achieve legal integration.

International organizations play a crucial role in the unification of commercial law.[10] The United Nations Commission on International Trade Law (UNCITRAL)[11] leads efforts to harmonize trade law through conventions and model laws. The International Institute for the Unification of Private Law (UNIDROIT)[12] similarly promotes legal standardization, particularly in areas like franchising and commercial contracts. The International Chamber of Commerce (ICC)[13] contributes by issuing widely adopted instruments such as Incoterms and model contracts. The Hague Conference on Private International Law (HCCH)[14] focuses on unifying rules related to jurisdiction, applicable law, and the recognition and enforcement of foreign judgments.

[9] See A. Całus, *Umowa międzynarodowa jako instrument ujednolicania porządków prawnych w dziedzinie prawa prywatnego* [in:] Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana, L. Ogiegło, W. Popiołek, M. Szpunar (eds.), Kraków 2005, p. 375.

[10] See J. Poczobut, *Organizacje promujące rozwój międzynarodowego prawa handlowego. Charakter prawny, cele, struktura, osiągnięcia. Na przykładzie UNCITRAL i MIH* [in:] Rozprawy prawnicze. Księga..., *ibid.*, p. 462.

[11] United Nations Commission on International Trade Law, https://uncitral.un.org/ [accessed: 31.05.2025].

[12] The International Institute for the Unification of Private Law, https://www.unidroit.org/ [accessed: 31.05.2025].

[13] International Chamber of Commerce, https://iccwbo.org/ [accessed: 31.05.2025].

[14] Hague Conference on Private International Law, https://www.hcch.net/en/home [accessed: 31.05.2025].

Regionally, the Council of Europe promotes legal convergence through conventions and recommendations, while the European Union has established a common commercial market with specific rules and policies that significantly influence the development of international trade law. The present author argues that these institutions collectively represent the structural backbone of modern trade governance, yet their fragmented competences and overlapping mandates illustrate the persistent challenge of achieving a cohesive legal order.

Universal Instruments as Sources of International Trade Law

The unification and harmonization of legal frameworks are fundamental to modern international trade. Universal legal instruments play a central role by establishing standardized rules for cross-border commerce, enhancing legal certainty, lowering transaction costs, and promoting regulatory consistency.

The harmonization of international trade law began with early conventions on industrial property and trademark protection, laying the foundation for deeper legal integration. A major starting point in the unification of intellectual property law was the Paris Convention for the Protection of Industrial Property (1883), which, through successive revisions, established a global framework for patents, trademarks, and industrial designs. The Patent Cooperation Treaty (1970) further streamlined patent applications, reduced costs, and expanded access to technological information, particularly for developing countries. Trademark protection was strengthened by the Madrid Agreement (1891) and its 1989 Protocol, while the Agreement on False or Deceptive Indications of Source enhanced anti-counterfeiting measures. In copyright, the Berne Convention (1886) and the WIPO Copyright Treaty (1996) set uniform standards, notably in response to digital technologies. In the opinion of the present author, these early conventions mark the beginning of an institutional logic in international trade law—one that prioritizes predictability and economic efficiency over localized discretion.

A key pillar of this process is the unification of frameworks for commercial dispute resolution. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[15] remains one of the most widely ratified instruments, binding in nearly all major trading nations, including Poland. It is complemented by the European Convention on International

[15] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), https://www.newyorkconvention.org/english [accessed: 31.05.2025].

Commercial Arbitration (Geneva, 1961),[16] which has shaped arbitration practices in Europe and enhanced legal certainty for international commerce.

Another cornerstone is the United Nations Convention on Contracts for the International Sale of Goods (CISG),[17] adopted by 97 countries,[18] which provides a uniform framework for the formation, performance, and enforcement of international sales contracts, reducing legal uncertainty and facilitating cross-border transactions.[19]

Further harmonization efforts have focused on specific contractual relationships such as agency, leasing, factoring, and secured transactions. UNIDROIT has played a leading role through instruments like the Conventions on International Factoring and Financial Leasing (1988),[20] and the Model Law on Secured Transactions, aimed at removing legal barriers (2016)[21] and fostering cross-border investment.

In the practical sphere of goods exchange, conventions such as the Convention on the Contract for the International Carriage of Goods by Road (CMR, 1956)[22] and the Geneva Conventions on Bills of Exchange and Promissory Notes (1930–1931)[23] have unified key aspects of transport and payment, ensuring legal predictability and operational efficiency in international trade.

A major milestone in institutional trade governance was the Marrakesh Agreement Establishing the WTO (1994)[24] and its Annexed Agreements (GATT 1994, GATS, TRIPS, and others) forming the backbone of the multilateral trading system, which promotes trade liberalization, addresses discriminatory practices, and enhances the position of developing countries. These treaties derive legitimacy from state consent and evolve through negotiation, amend-

[16] European Convention on International Commercial Arbitration United Nations, Treaty Series, vol. 484, p. 349

[17] Convention on Contracts for the International Sale of Goods, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf [accessed: 29.05.2025] – date of adoption: 11.04.1980, entry into force: 01.01.1988.

[18] Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status [accessed: 29.05.2025].

[19] See H. M. Flechtner, *The CISG's Impact on International Unification Efforts* [in:] The 1980 Uniform Sales Law: Old Issues Revisited, ed. F. Ferrari, Verona 2003, pp. 170–174, O. Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 'The American Journal of Comparative Law' 2005, 53, 2, p. 379.; J. Felemegas, An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, Cambridge 2007, p. 12.

[20] Conventions on International Factoring and Financial Leasing, https://www.unidroit.org/instruments/leasing/convention/ [accessed: 31.05.2025].

[21] Model Law on Secured Transactions, aimed at removing legal barriers, https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions [accessed: 31.05.2025].

[22] Convention on the Contract for the International Carriage of Goods by Road, https://treaties.un.org/doc/Treaties/1961/07/19610702%2001-56%20AM/Ch_XI_B_11.pdf [accessed: 29.05.2025].

[23] Convention providing a Uniform Law for Bills of Exchange and Promissory Notes Geneva, 7 June 1930, https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=559&chapter=30&clang=_en [accessed: 29.05.2025].

[24] Marrakesh Agreement Establishing the World Trade Organization, https://www.wto.org/english/docs_e/legal_e/marag_e.htm [accessed: 29.05.2025].

ment, and interpretation. Its dispute settlement mechanism reinforces the rule of law by providing a binding forum for resolving state-to-state trade disputes. Evolutionary approaches to the development of trade law rely on the continuous interpretative practice of WTO bodies and the customary principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties (1969). For instance, the Appellate Body's jurisprudence has clarified and progressively developed norms concerning non-discrimination (Articles I and III of GATT), security exceptions (Article XXI).[25] Similarly, waivers and ministerial declarations—such as the 2001 Doha Declaration on TRIPS and Public Health or the 2022 TRIPS Waiver Decision—illustrate how states adapt treaty law to emerging challenges without renegotiating the entire framework.

In the opinion of the present author, such instruments exemplify functional harmonization, addressing pragmatic business needs rather than pursuing doctrinal uniformity. This reflects a shift from formal to outcome-oriented international lawmaking. Universal legal instruments form the foundational sources of international trade law, aiming to harmonize national regulations, facilitate economic exchange, protect intellectual property, and ensure effective dispute resolution. However, not all of these instruments have entered into force or achieved broad international acceptance. Notably, the CISG Convention—despite being one of the most widely ratified trade conventions—permits contractual parties (business entities) to exclude its application. This opt-out clause is frequently invoked, which weakens the Convention's universal applicability. The present author finds that the CISG's opt-out flexibility, while criticized for undermining universality, in fact preserves party autonomy—a principle central to both classical contract theory and the *lex mercatoria* tradition. Nonetheless, the broader adoption of such instruments could foster a stable and predictable legal environment essential to the growth of global commerce. By reducing legal fragmentation and promoting regulatory coherence, they help build mutual trust among international commercial actors. The CISG's real unifying function lies not in its universal ratification, but in its capacity to influence domestic legal reasoning and promote convergence in judicial interpretation across jurisdictions.[26] This observation confirms that the effectiveness of universal trade instruments extends beyond formal adherence, encompassing their interpretive and harmonizing impact on national law.

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[25] Since December 2019, the Appellate Body has been unable to function due to the United States' continued blockage of appointments to fill vacant positions. As a result, no new appeals can be heard, leaving the WTO dispute settlement system effectively paralyzed at the appellate stage, see e.g. K. Pan, *Breaking the Impasse of Appointing Members of the WTO Appellate Body: A Perspective from International Institutional Law*, 'World Trade Review' 2025, 24, 3, pp. 404–422.

[26] See F. Ferrari, The CISG and its Impact on National Legal Systems, Walter de Gruyter GmbH, 2009, pp. 345––481.

Regional Instruments as Sources of International Trade Law

Within the framework of international trade law, regional legal instruments complement universal agreements by regulating commerce within specific geographical areas. Though they involve a narrower scope of participation, such instruments enhance legal coherence, support cross-border economic integration, and adapt international legal principles to regional political, economic, and cultural contexts. The present author observes that regional frameworks serve as laboratories for legal experimentation, where integration mechanisms can be tested and refined before potential global application. Regions including Europe, the Americas, Africa, and Asia have developed such frameworks.

Europe has been a leader in regional legal integration. The Council of Europe have promoted legal harmonization through instruments such as the European Convention on International Commercial Arbitration (1961), which established a legal framework for resolving commercial disputes through arbitration within the region, the European Convention on Information on Foreign Law (1968), facilitated judicial cooperation by enabling the exchange of information on civil, commercial, and procedural laws between national courts, and the European Patent Convention (1973) created a unified procedure for granting patents in multiple European countries, establishing consistent standards for the protection of industrial property. While territorially limited, these agreements have significantly shaped international trade law. In the opinion of the present author, the European model illustrates how regional integration can reconcile national sovereignty with collective governance, offering a pragmatic template for balancing legal diversity and economic unity.

In the Americas, regional trade integration has progressed through agreements such as the United States-Mexico-Canada Agreement (USMCA),[27] which replaced North American Free Trade Agreement (NAFTA), and the Southern Common Market (MERCOSUR),[28] a South American customs union facilitating the free movement of goods, services, capital, and people.

In Africa, regional integration accelerated in the late 1990s with the rise of economic organizations such as the Economic Community of West African States (ECOWAS), which promotes economic and monetary integration,[29] and

[27] The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [accessed: 29.05.2025].

[28] MERCOSUR in brief, https://www.mercosur.int/en/about-mercosur/mercosur-in-brief/ [accessed: 29.05.2025].

[29] Economic Community of West African States (ECOWAS), https://www.ecowas.int/wp-content/uploads/2022/06/THE-1975-TREATY-OF-ECOWAS.pdf [accessed: 29.05.2025].

the Central African Economic and Customs Union (UDEAC),[30] later replaced by the Central African Economic and Monetary Community (CEMAC) in 1994 to advance trade and customs harmonization.[31]

In Asia and the Pacific, various economic frameworks—differing in legal formality and enforceability—have contributed to the harmonization of commercial practices. Key examples include the Asia-Pacific Economic Cooperation (APEC) – a non-binding economic forum based on voluntary commitments and political declarations, Association of Southeast Asian Nations (ASEAN) – has progressively created a free trade area and enhanced regional economic cooperation, Central European Free Trade Agreement (CEFTA) – initially formed by Visegrád countries to prepare for EU accession, now includes non-EU Balkan states, European Free Trade Association (EFTA) an alternative to the EU, aimed at eliminating trade barriers among member states, Caribbean Community (CARICOM) – supports economic integration among Caribbean states. These organizations employ diverse legal and institutional tools to harmonize regulations, attract investment, and facilitate regional trade.

The region encompassing the Caucasus, Central Asia, and Russia is marked by significant diversity in legal traditions and levels of economic integration. Following the dissolution of the Soviet Union, states in this area have pursued distinct paths of legal and institutional development, resulting in a fragmented regulatory landscape. While some countries have sought alignment with global trade frameworks such as the WTO and the CISG, others maintain bilateral or informal trade arrangements shaped by historical, political, and economic factors. Regional organizations, including the Eurasian Economic Union, play a central role in promoting limited legal harmonization, yet disparities in implementation, institutional capacity, and judicial practice persist. As a result, international trade in the region operates within a hybrid system combining elements of treaty law, administrative coordination, and customary commercial practices.[32]

Regional trade agreements often complement global frameworks like the General Agreement on Tariffs and Trade (GATT)[33] and the WTO,[34] with GATT serving as a legal foundation for regional liberalization and dispute resolution mechanisms.

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[30] Treaty establishing a central African economic and customs union, https://repository.uneca.org/bitstream/handle/10855/10234/Bib-50915.pdf?sequence=1&isAllowed=y [accessed: 29.5.2025].

[31] Central African Economic and Monetary Community (CEMAC), https://cemac.int/ [accessed: 29.05.2025].

[32] See A. Trunk, A. Aliyev, M. Trunk-Fedorova (eds.), Law of International Trade in the Region of Caucasus, Central Asia and Russia, Brill, 2022, pp. 19–108.

[33] General Agreement on Tariffs and Trade (GATT), https://www.wto.org/english/docs_e/legal_e/gatt47_e.htm [accessed: 29.05.2025].

[34] Agreement establishing the World Trade Organization, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf [accessed: 29.05.2025].

Although these initiatives differ in institutional structure and levels of integration, they share common goals: reducing trade barriers, coordinating economic policies, and promoting regional development. Regional legal instruments and organizations serve as a crucial intermediary layer within international trade law. By adapting global legal principles to regional realities, they enhance legal predictability, facilitate economic cooperation, and streamline cross-border transactions. Functioning as a bridge between domestic and international legal regimes, regional frameworks are essential for the effective governance of global commerce. As globalization progresses, their role in addressing legal and economic disparities and advancing sustainable, inclusive trade remains critical.

Sources of Trade Law in the European Union

The EU commercial law is based on a complex, multilayered legal system regulating economic activity and trade within the EU internal market. Its primary objectives are to ensure regulatory harmonization among member states, remove trade barriers, promote competition, and enhance economic integration. The present author argues that the EU's legal architecture provides a unique hybrid of supranational authority and national implementation, making it a paradigmatic example of how multilevel governance can institutionalize harmonization.

Historically, international conventions significantly contributed to harmonizing private and commercial law in the EU.[35] However, their influence has declined, as binding EU regulations now prevail and apply directly across all member states.

The Treaty on the Functioning of the European Union[36] serves as the foundational legal basis for the EU's competences in trade policy, competition law, intellectual property, and consumer protection. It establishes the framework for adopting legislation that facilitates the free movement of goods, services, capital, and business activities within the internal market.

At the level of secondary legislation, EU commercial law is primarily shaped by two categories of legal acts: regulations and directives. In the opinion of the present author, this two-tiered structure allows the EU to combine flexibility and legal certainty—attributes essential to the evolution of a coher-

[35] Notable examples include: the Rome Convention (1980) on the law applicable to contractual obligations; and the Brussels Convention (1968) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[36] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47––390.

ent internal market. Regulations offer the most direct and effective means of legal unification within the EU. Key examples include the Rome I Regulation on contractual obligations,[37] Rome II Regulation on non-contractual obligations,[38] Brussels I bis Regulation on jurisdiction and enforcement of judgments,[39] as well as regulations on the European Union trademark,[40] the European Economic Interest Grouping (EEIG),[41] and the Statute for a European Company.[42] These instruments are essential for harmonizing conflict-of-law rules, facilitating dispute resolution, and establishing uniform standards for intellectual property protection and business operations throughout the internal market.

Directives constitute another essential category of EU legal instruments, primarily aimed at harmonization rather than full unification. Notable examples include Directive 2005/56/EC on cross-border mergers of limited liability companies,[43] later repealed by Directive (EU) 2017/1132 on certain aspects of company law,[44] and Directive 86/653/EEC on the coordination of laws relating to self-employed commercial agents.[45] These directives promote the free movement of services and provide legal protection for agents, enhancing business mobility and fostering fair commercial practices across the EU.

Consumer protection directives also play a crucial role by safeguarding weaker parties in commercial transactions, while imposing diverse obligations on professionals (business entities).[46] Compliance with these regulations

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[37] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 04.07.2008, pp. 6–16.

[38] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.07.2007, pp. 40–49.

[39] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, pp. 1–32.

[40] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), OJ L 154, 16.06.2017, pp. 1–99.

[41] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) OJ L 199, 31.07.1985, pp. 1–9

[42] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, pp. 1–21.

[43] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, pp. 1–9.

[44] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.06.2017, pp. 46–127.

[45] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382, 31.12.1986, pp. 17–21.

[46] E.g. Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.05.2019, pp. 28–50; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22.11.2011, pp. 64–88; Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of

is essential in commercial and trade relations within the Union. Also, the Rome I Regulation mandates the application of consumer protection rules in cross-border relations, which must be observed by any business conducting or directing its activities within the EU.

The sources of EU commercial law form a coherent and dynamic legal system, where the foundational treaties, binding regulations, and harmonizing directives interact to support the effective functioning of the internal market. This comprehensive body of law not only provides a level playing field for businesses operating within the EU but also protects the rights of all participants in commercial transactions. As such, EU commercial law serves as a critical driver of economic integration, legal convergence, and competitiveness on both the European and international stage.

Documents of a Bilateral Nature

Bilateral international agreements constitute a significant source of international trade law, shaping the conditions of economic exchange between states. The present author notes that bilateralism persists not as a relic of pre-globalization, but as a pragmatic complement to multilateral governance, offering agility and targeted cooperation – regulate cross-border commercial activities, enhance predictability in economic relations, and mitigate risks arising from divergent legal and regulatory frameworks. Their primary aim is the liberalization of trade in goods and services through measures such as tariff reduction or elimination, streamlined customs procedures, removal of non-tariff barriers, and harmonization of technical standards, thereby improving market efficiency and competitiveness.

Contemporary bilateral agreements increasingly transcend traditional trade disciplines, extending to investment, technology transfer, intellectual property, and human rights—domains that exert a direct influence on sustainable development and environmental governance. In the view of the present author, this expansion reflects the functional diversification of trade law and its growing intersection with economic and environmental governance. Instruments such as Bilateral Investment Treaties (also Treaties of Friendship, Commerce, and Navigation), and Free Trade Agreements—e.g. between

the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, pp. 7–28; Directive (EU) 2023/2673 of the European Parliament and of the Council of 22 November 2023 amending Directive 2011/83/EU as regards financial services contracts concluded at a distance and repealing Directive 2002/65/EC, OJ L, 2023/2673, 28.11.2023, ELI: http://data.europa.eu/eli/dir/2023/2673/oj.

the Republic of China and the Republic of Peru (2009)[47] or Mauritius (2019)[48] —serve distinct purposes but collectively shape the broader regulatory framework of international trade. These agreements complement each other and contribute to a coherent regulatory system. A key feature of many bilateral treaties is the inclusion of dispute resolution mechanisms, which enhance legal certainty, ensure effective implementation, and facilitate the peaceful resolution of conflicts, thus supporting stable trade relations.

However, from the European Union's perspective, bilateral treaties have a limited role. In areas covered by the EU's Common Commercial Policy, the Union holds exclusive competence to negotiate and conclude trade agreements, effectively replacing individual Member States in this capacity.

Harmonization of Private Law Through Model Law Instruments (Soft Law)

The numerous harmonization efforts have emerged within private law, prominently through *soft law* instruments. Although lacking the formal enforceability of statutes or treaties, these instruments are pivotal in standardizing legal norms, particularly in obligations and contract law. The present author finds that their normative flexibility allows for harmonization through persuasion rather than coercion, promoting convergence while preserving national autonomy. In the broader strategic context, *soft law* represents not merely a supplementary tool but a central harmonizing force within international trade law. Its ability to operate across diverse jurisdictions allows it to bridge the gaps left by incomplete treaty coverage and fragmented national regimes. Through consensus-based and adaptable standards, *soft law* fosters gradual convergence that can eventually form the basis of a more cohesive global framework.

Among the most influential *soft law* frameworks are:

- the UNIDROIT Principles of International Commercial Contracts (UPICC)[49] serve as a transnational framework for regulating contractual relations in international commerce.[50] Their defining features are universality and the ab-

[47] Free Trade Agreements between the Republic of China and the Republic of Peru https://fta.mofcom.gov.cn/topic/enperu.shtml [accessed: 31.05.2025].

[48] Free Trade Agreement between the People's Republic of China and the Republic of Mauritius https://fta.mofcom.gov.cn/topic/enmauritius.shtml [accessed: 31.05.2025].

[49] UNIDROIT Principles of International Commercial Contracts 2016, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf [accessed: 29.05.2025].

[50] See J. Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 'Uniform Law Review' 2000, 5, p. 130.; M. J. Bonell, *UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts*, 'Uniform Law Review' 2004, 9, pp. 9–11.

sence of limitations regarding the "international" or "commercial" nature of contracts, allowing parties considerable freedom in choosing to apply them.[51] The UPICC can function as the governing law of a contract when expressly selected by the parties, as a source of general principles of law (*lex mercatoria*), or as a tool for filling gaps in domestic legal systems. Their systemic neutrality fosters legal trust between parties from diverse legal traditions. Additionally, the UPICC provide valuable interpretative support for international instruments such as the CISG Convention, reinforcing their importance in global legal integration;[52]

- the Principles of European Contract Law (PECL)[53] were conceived as a model code aimed at creating a common core of European contract law. Inspired by the CISG Convention, the PECL go further by facilitating harmonization of private law within the EU.[54] Their flexible structure enables them to function as a self-contained normative framework (if chosen by the parties) or as a supplementary and interpretative instrument. In practice, the PECL have found widespread application in international arbitration, where their status as expressions of general legal principles supports dispute resolution while respecting party autonomy and the transnational nature of commercial relations;[55]
- the Draft Common Frame of Reference (DCFR)[56] represents the most comprehensive and ambitious harmonization project in European private law. Building upon the PECL, it extends its scope beyond contract law to include areas such as torts, unjust enrichment, the transfer of movable property, and fiduciary arrangements. A fundamental innovation of the DCFR is its shift in focus from "contract" to "obligation" as the overarching legal category. The DCFR also introduces a dual structure of principles: one legal-technical (freedom of contract, legal certainty, efficiency) and the other normative-political (solidarity, protection of human rights, support for the internal market).[57]

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[51] A. Hartkamp, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, 'European Review of Private Law' 1994, 2, p. 343.

[52] M. J. Bonell, R. Peleggi, *UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table*, 'Uniform Law Review' 2004, 9, p. 438.

[53] Principles of European Contract Law (PECL), https://www.trans-lex.org/400200/_/pecl/ [accessed: 29.05.2025].

[54] M. A. Zachariasiewicz, *Konwencja wiedeńska o międzynarodowej sprzedaży towarów a inne akty ujednoliconego prawa umów ze szczególnym uwzględnieniem odpowiedzialności kontraktowej dłużnika*, „Problemy Prawa Prywatnego Międzynarodowego" 2007, 2, p. 40.

[55] See M. W. Hesselink, G. J. P. de Vries, Principles of European Contract Law, Deventer 2001, pp. 24 and 25.

[56] Draft Common Frame of Reference (DCFR), https://www.trans-lex.org/400725/_/outline-edition-/ [accessed: 29.05.2025].

[57] See O. Lando, *The Structure and the Legal Values of the Common Frame of Reference (CFR)*, 'European Review of Contract Law' 2007, 3, 3, p. 245; K. Lilleholt, *The Draft Common Frame of Reference and "Cancellation" of Contracts*, 'Iuridica International' 2008, XIV, 1, p. 117; H. Beale, *The Nature and Purposes of the Common Frame of Reference*, 'Juridica International' 2008, XIV, 1, pp. 12 and 16.

While not legally binding, the DCFR plays a significant role in shaping a shared legal culture across Europe;[58]

- the TRANS-LEX Principles[59] constitute a dynamic, open-access codification project based on informal consensus among legal scholars and practitioners. Their distinguishing characteristics are their evolving nature and online accessibility, supported by a comprehensive source database. These principles are particularly useful when parties invoke *lex mercatoria* or general principles of law without specifying a governing legal system. TRANS-LEX serves not only normative functions but also educational and interpretive roles, acting as a medium for transnational legal dialogue. Their flexibility and global orientation make them especially relevant in international commercial arbitration;
- the *Acquis Communautaire* Principles of Contract Law (ACQP)[60] are distinctive among *soft law* instruments due to their exclusive basis in the existing *acquis communautaire*. Their primary function is organizational and implementational rather than traditional harmonization. The ACQP facilitate the transposition of EU directives into national legislation by offering clear legislative and interpretative templates.

Soft law play a crucial role in harmonizing private law at both regional and global levels. Despite their non-binding nature, they serve as indispensable tools for contract drafting,[61] legal interpretation, and academic teaching. The normative authority of non-state rules lies not in their formal enactment, but in their voluntary acceptance by the global commercial community, which transforms private standards into de facto law.[62] These instruments contribute to the development of a shared legal infrastructure, foster trust in cross-border economic relations, and enable the creation of flexible legal frameworks tailored to the needs of contracting parties. In the field of international trade finance, *soft law* has proved to be the most efficient harmonizing force, operating as a functional equivalent of treaty law through voluntary adoption by global commercial actors.[63] In this way, *soft law* functions as both a corrective and an integrative mechanism—reducing legal fragmentation by promoting

[58] E. M. Rott-Pietrzyk, *Czy DCFR ma znaczenie przy wykładni prounijnej przepisów o umowie agencyjnej* [in:] Wpływ europeizacji prawa na instytucje prawa handlowego, J. Kruczalak-Jankowska (ed.), Warszawa 2013, pp. 374–389.

[59] TRANS-LEX Principles, https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria) [accessed: 29.05.2025].

[60] *Acquis Communautaire* Principles of Contract Law, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0398 [accessed: 29.05.2025].

[61] See B. Fuchs, *Kształtowanie treści umowy zawieranej w międzynarodowym obrocie handlowym* [in:] Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji. Księga jubileuszowa Profesora Józefa Okolskiego, M. Modrzejewska (ed.), Warszawa 2010, p. 312.

[62] J. Hoekstra, Non-State Rules in International Commercial Law — Contracts, Legal Authority and Application, Routledge, 2021, pp. 45–47 and 224–226.

[63] See A. Brandao de Oliveira, L. Gama, G. Saumier (eds.), Soft Law in International Trade Finance, Ius Comparatum Series, vol. 1, Brill, 2025, pp. 3–52.

functional alignment among divergent systems, and laying the groundwork for a cohesive global trade law framework capable of balancing flexibility with certainty. Additionally, when widely adopted and applied, model laws and *soft law* standards may constitute subsequent practice under Article 31(3)(b) of the Vienna Convention, thereby guiding the uniform interpretation of treaty obligations.[64]

Lex Mercatoria and New *Lex Mercatoria* as a Part of International Trade Law

Lex mercatoria, or 'the law of merchants,' is a foundational component of contemporary international commercial law.[65] It comprises customary, non-legislative norms governing cross-border civil-law relations.[66] In the opinion of the present author, its enduring relevance lies in its capacity to adapt to economic transformation without formal amendment, making it an archetype of dynamic and evolving transnational law. Although lacking formal legislative authority, these norms—derived from trade customs—are widely recognized and applied in global commerce. Functioning independently of national laws, *lex mercatoria* provides a neutral, transnational framework that complements formal international legislation.

In response to the incomplete harmonization of international commercial law, the concept of the *new lex mercatoria* has emerged. It incorporates codified trade usages, contract templates, and practice guides developed by institutions such as the ICC, offering consistent standards for contract formation, performance, and dispute resolution. The evolving *new lex mercatoria* character encompasses standardized terms (e.g., INCOTERMS), arbitral jurisprudence, and instruments such as the UNIDROIT Principles and the Principles of European Contract Law. Increasing codification of these norms reflects a broader trend toward institutionalization.[67] Transnational commercial law has emerged as the connective tissue between domestic legal orders and international treaty law, achieving a practical form of unification through the cumulative effect of *soft law* instruments and arbitral interpretation.[68]

[64] Compare I. Bantekas, *Uniformity in Model Laws as Subsequent Practice under Article 31 of the Vienna Convention on the Law of Treaties*, 'Austrian Review of International and European Law Online' 2018, 20, 1, pp. 145––163.

[65] See J. H. Dalhuisen, *Legal Orders and their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 'Berkeley Journal of International Law' 2006, 24, p. 180.

[66] B. Fuchs, *Lex mercatoria* w międzynarodowym obrocie handlowym, Kraków 2000, p. 22.

[67] See M. Pryles, *Application of the* Lex Mercatoria *in International Commercial Arbitration*, 'Mealey's International Arbitration Report' 2003, 18, 2, p. 27.

[68] B. Zeller, C. Baasch Andersen (eds.), Routledge Handbook on Transnational Commercial Law, Routledge, 2025, p. 103.

Model contracts, or contract templates, play a crucial role in standardizing and facilitating international commercial transactions. Typically developed by chambers of commerce, trade associations, governments, and international bodies such as the United Nations Economic Commission for Europe (UNECE)[69] and the ICC, these templates may include general terms with customizable fields or fully standardized clauses. Though non-binding, model contracts carry significant persuasive authority, especially when issued by reputable organizations. UNECE templates often address industry-specific needs, while ICC models provide detailed, adaptable provisions, including force majeure and hardship clauses. These instruments enhance legal clarity and predictability when incorporated into tailored agreements. Many ICC models also include arbitration clauses following attempts at amicable settlement. While adoption remains voluntary, their widespread use advances harmonization in international commercial practice.

Complementing these are standardized trade interpretation rules, notably the ICC's Incoterms, which define delivery terms allocating costs, risks, and responsibilities between buyers and sellers for transport and insurance. Since their first edition in 1936, Incoterms have evolved to reflect logistics developments; the 2020 edition distinguishes terms for all transport modes (e.g., EXW, DDP, CIP) and maritime-specific terms (e.g., FOB, CIF, FAS), simplifying contract drafting by clearly defining risk transfer and delivery obligations.[70]

For specialized logistics, particularly containerized and multimodal transport, Combiterms provide detailed rules on duties and risk transfer, often at freight forwarder terminals.[71] In the Americas, the Revised American Foreign Trade Definitions (RAFTD 1941) serve a similar role but differ in interpretation, requiring explicit contractual reference. RAFTD remains prevalent in the U.S., Mexico, and parts of Central America.[72]

Beyond formal codifications, commercial practice recognizes numerous customary trade terms and usages—such as discounts for damaged goods or weight loss, and product quality standards like FAQ (Fair Average Quality), TQ (Top Quality), or RT (Running Time)—which clarify seller and buyer obligations during transport.[73]

The concept of the *new lex mercatoria* marks a significant advancement in international commercial law, addressing the challenges posed by fragmented national regulations and incomplete harmonization. This modern framework enhances consistency and predictability in contract formation,

[69] United Nations Economic Commission for Europe, Trade, https://unece.org/trade [accessed: 31.05.2025].
[70] Incoterms® 2020, https://iccwbo.org/business-solutions/incoterms-rules/incoterms-2020/ [accessed: 31.05.2025].
[71] *Combine Trade Terms with a Comprehensive System for Cost Distribution Between Seller and Buyer* [in:] Międzynarodowe prawo handlowe. System prawa handlowego, vol. 9, W. Popiołek (ed.), p. 53.
[72] *Ibid.*
[73] *Combine…*, p. 54.

performance, and dispute resolution, effectively bridging divergences among diverse legal systems. The present author argues that this modern form represents not a break but a continuity with historical mercantile practice—elevating custom into a self-sustaining normative order parallel to state law. Consequently, the *new lex mercatoria* preserves the original 'law of merchants' flexibility and neutrality while reinforcing its role as a coherent and widely accepted legal foundation that both supports and complements formal international trade law.

Conclusions

The legal framework of international trade is complex, encompassing public international law, domestic regulations, and private law governing contractual relations. A key element of this framework is non-binding instruments—such as model contracts, customs, and *soft law*—which, despite lacking formal legal force, play a crucial role due to parties' broad autonomy. The framework also highlights the importance of international commercial customs—trade usages and standards developed by intergovernmental and non-governmental organizations. These customs can be incorporated into contracts or invoked in interpretation, provided they do not conflict with mandatory norms. Classified as sectoral, local, or universal, such customs are valued for their clarity, acceptance in commercial practice, and flexibility.

This informal body of norms is known as the *new lex mercatoria*. Unlike the historical *lex mercatoria* based on customary law, the modern form consists of non-binding rules, commercial practices, and arbitral jurisprudence that, while not legally binding, significantly influence contract behavior and dispute resolution. Some commercial customs may evolve into binding norms, especially when recognized in international arbitration.

At the core of international trade law are multilateral treaties adopted by international organizations, which serve as the most authoritative regulatory sources and require ratification to bind states. However, *soft law* instruments often exert greater practical influence by harmonizing trade rules and reducing legal uncertainty, despite their non-binding nature.

In the context of the EU, consumer protection rights place substantive constraints on the free formation of contractual terms and limit the extent to which economic actors can rely on *soft law*. This highlights the distinctive regulatory environment within the EU, where consumer protection norms serve as significant limitations on the application and influence of *soft law* in commercial relations.

Beyond treaties, customary international law plays a supplementary role, particularly in defining principles of good faith, proportionality, and due process in dispute settlement. Institutional practice—for example, the functioning of the WTO General Council, committees, and plurilateral initiatives like the Joint Statement Initiatives (JSIs)—contributes to the ongoing elaboration of norms. Furthermore, soft law instruments, including the OECD Guidelines for Multinational Enterprises or UNCTAD's Investment Policy Framework for Sustainable Development, influence state behavior and treaty design, bridging the gap between legal obligations and policy guidance.

The analysis demonstrates that the persistence of fragmentation within the global trade law system poses serious challenges for legal certainty, equality of treatment, and the efficiency of dispute resolution. Fragmentation leads to overlaps and inconsistencies that undermine trust in the rule-based order of international commerce. Consequently, reducing such fragmentation emerges as both a practical and normative imperative.

The analysis confirms the theses set out in the Introduction: first, that treaty law provides the structural foundation of international trade regulation; second, that *soft law* performs an indispensable harmonizing function, bridging gaps between divergent legal systems; and, that developing a cohesive global trade law framework requires the strategic integration of both. By addressing fragmentation and reinforcing predictability, such a framework can significantly enhance the functionality and legitimacy of the global trade system. Third, within the EU, consumer protection rights place substantive limits on the free formation of contractual terms and constrain the use of *soft law* by economic entities.

Moreover, the study demonstrates that fragmentation remains a critical obstacle to coherence and equality within international trade law. This fragmentation manifests in overlapping treaty obligations, conflicting standards, and inconsistent dispute resolution practices. Mitigating these effects demands a multilayered harmonization process, in which soft law and *lex mercatoria* provide the connective tissue that unites diverse regulatory regimes. A cohesive global trade law framework can be achieved not through the imposition of a single universal code but through a coordinated, multi-level structure in which *soft law* complements and harmonizes treaty-based mechanisms. By promoting convergence across jurisdictions, facilitating interpretation, and filling regulatory gaps, *soft law* helps unify the legal architecture of global trade.

Future research should further explore practical models for institutionalizing this coordination, including the interaction between WTO mechanisms and *soft law* frameworks such as the UNIDROIT Principles or ICC model clauses. Comparative studies examining how regional systems (e.g., the EU, ASEAN, and MERCOSUR) employ *soft law* to harmonize private commercial

relations could also yield valuable insights. In particular, interdisciplinary research linking legal harmonization with economic governance and sustainable development would deepen understanding of how a cohesive global trade law framework might evolve in practice.

By outlining these avenues for further inquiry, the paper aims to demonstrate that reducing fragmentation through more harmonized legal and institutional interaction is both a theoretical necessity and a pragmatic path toward a stable, equitable, and sustainable international trade order. Ultimately, the ongoing development of harmonized instruments—whether binding or non-binding—represents a strategic pathway toward greater coherence, predictability, and inclusiveness in the international trading system. The creation of such a cohesive framework is therefore essential for ensuring that global trade law evolves as an integrated, transparent, and equitable system capable of addressing the complexities of modern economic interdependence.

Abstrakt

Handel międzynarodowy – jako fundament współczesnej gospodarki światowej – wymaga istnienia spójnych i kompleksowych ram prawnych regulujących współpracę gospodarczą o charakterze międzynarodowym. Celem niniejszego opracowania jest analiza strukturalnych i funkcjonalnych relacji między źródłami twardego (*hard law*) i miękkiego prawa (*soft law*) w handlu międzynarodowym – w celu zaproponowania zwartych globalnych ram, które mogłyby ograniczyć fragmentację prawną oraz zwiększyć spójność, przewidywalność i odporność międzynarodowego prawa handlowego.

W artykule podjęto analizę źródeł międzynarodowego prawa handlowego, opierając się na powszechnie przyjętej klasyfikacji, obejmującej umowy uniwersalne (globalne), regionalne oraz bilateralne. Uwzględniono również rosnące znaczenie niewiążących instrumentów o charakterze *soft law*. Podkreślono, że choć formalne traktaty stanowią fundament systemu prawnego, to coraz większą rolę w zapewnianiu skuteczności i elastyczności międzynarodowego prawa handlowego odgrywają normy *soft law* – elastyczne, powszechnie stosowane w praktyce reguły, które sprzyjają konwergencji normatywnej bez konieczności formalnej harmonizacji.

Artykuł akcentuje rolę instytucji takich jak Międzynarodowa Izba Handlowa (ICC) oraz Komisja Narodów Zjednoczonych ds. Międzynarodowego Prawa Handlowego (UNCITRAL) w opracowywaniu wzorcowych umów i zwyczajów handlowych, zwracając uwagę na rosnący wpływ ewoluującej *lex mercatoria* na rozstrzyganie sporów i wykładnię umów. Opracowanie analizuje również praktyczne konsekwencje fragmentacji pomiędzy reżimami handlu międzynarodowego, regionalnego i krajowego — takie jak nakładanie się i kolizja zobowiązań, które z kolei prowadzą do niepewności prawnej, zjawiska „forum shopping", niespójnych rozstrzygnięć sporów, wzrostu kosztów transakcyjnych oraz ograniczonej egzekwowalności praw. Autor argumentuje, że spójne ramy

oparte na skoordynowanym prawie traktatowym oraz zharmonizowanych instrumentach *soft law* mogą skutecznie złagodzić te problemy.

Z wykorzystaniem analiz formalnodogmatycznej i historycznoporównawczej wykazano, w jaki sposób umowy międzynarodowe, normy *soft law* oraz zwyczaj wspólnie kształtują przejrzysty i stabilny mechanizm międzynarodowego prawa handlowego. Wskazano również, że strategicznym celem badań jest identyfikacja sposobów redukcji fragmentacji i wzmacniania spójności poprzez podejście warstwowe, integrujące zarówno instrumenty twardego, jak i miękkiego prawa. W szczególności *soft law* pełni funkcję harmonizującą, wypełniając luki między zróżnicowanymi systemami prawnymi poprzez wspieranie dobrowolnej konwergencji i wzajemnego zaufania między uczestnikami obrotu gospodarczego.

W konkluzji stwierdzono, że choć pełna unifikacja międzynarodowego prawa handlowego pozostaje niezrealizowana, to dalszy rozwój zharmonizowanych instrumentów prawnych i ram *soft law* ma kluczowe znaczenie nie tylko dla ograniczenia fragmentacji i niepewności prawnej, lecz także dla wzmocnienia odporności, inkluzywności i przewidywalności globalnego systemu prawa handlowego.

Klasyfikacja JEL: K33.

Słowa kluczowe: międzynarodowe prawo handlowe, źródła prawa międzynarodowego, *lex mercatoria*, *hard law*, *soft law*, wzorcowe kontrakty, międzynarodowe zwyczaje handlowe.

BIBLIOGRAPHY

Bantekas I., *Uniformity in Model Laws as Subsequent Practice under Article 31 of the Vienna Convention on the Law of Treaties*, 'Austrian Review of International and European Law Online' 2018, 20, 1.

Basedow J., *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 'Uniform Law Review' 2000, 5.

Beale H., *The Nature and Purposes of the Common Frame of Reference*, 'Juridica International' 2008, XIV, 1.

Bonell M. J., *UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts*, 'Uniform Law Review' 2004, 9.

Bonell M. J., Peleggi R., *UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table*, 'Uniform Law Review' 2004, 9.

Brandao de Oliveira A., Gama L., Saumier G. (eds.), Soft Law in International Trade Finance, lus Comparatum Series, vol. 1, Brill 2025.

Ciągwa J., *et al.* (eds.), O prawie i jego dziejach księgi dwie, Białystok–Katowice 2010.

Dalhuisen J. H., *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and its* Lex Mercatoria, 'Berkeley Journal of International Law' 2006, 24.

Felemegas J., An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, Cambridge 2007.

Ferrari F., The CISG and its Impact on National Legal Systems, Walter de Gruyter GmbH, 2009.

Fuchs B., *Lex mercatoria* w międzynarodowym obrocie handlowym, Kraków 2000.

Goode R., *A New International Lex Mercatoria*?, 'Juridisk Tidskrift' 1999–2000, 2.

Hartkamp A., *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, 'European Review of Private Law' 1994, 2.

Hesselink M. W., de Vries G. J. P., Principles of European Contract Law, Deventer 2001.

Hesselink M., *Europejskie prawo umów: kwestia ochrony konsumenta, obywatelstwa czy sprawiedliwości*?, 'Nowa Europa. Przegląd Natoliński' 2008, 2, 7.

Hoekstra J., Non-State Rules in International Commercial Law — Contracts, Legal Authority and Application, Routledge 2021.

Lando O., *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 'The American Journal of Comparative Law' 2005, 53, 2.

Lando O., *The Structure and the Legal Values of the Common Frame of Reference (CFR)*, 'European Review of Contract Law' 2007, 3, 3.

Lilleholt K., *The Draft Common Frame of Reference and 'Cancellation' of Contracts*, 'Iuridica International' 2008, XIV.

Międzynarodowe prawo handlowe. System prawa handlowego, vol. 9, W. Popiołek (ed.), Warszawa 2013.

Pan K., *Breaking the Impasse of Appointing Members of the WTO Appellate Body: A Perspective from International Institutional Law*, 'World Trade Review' 2025, 24, 3.

Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji... Księga jubileuszowa Profesora Józefa Okolskiego, M. Modrzejewska (ed.), Warszawa 2010.

Pryles M., *Application of the* Lex Mercatoria *in International Commercial Arbitration*, 'Mealey's International Arbitration Report' 2003, 18, 2.

Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana, L. Ogiegło, W. Popiołek, M. Szpunar (eds.), Kraków 2005.

Santos E. A., *International Law in the Ancient World: Origins, Practices, and Influence on Modern Systems*; https://www.diplomacyandlaw.com/post/international-law-in-the-ancient-world-origins-practices-and-influence-on-modern-systems [accessed: 31.05.2025].

Srivastava N., *History of Contemporary International Trade Law*, 'International Journal of Law Management & Humanities' 2018, 1, 4.

The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences, F. Ferrari (ed.), Milano–München 2003.

Trunk A., Aliyev A., Trunk-Fedorova M. (eds.), Law of International Trade in the Region of Caucasus, Central Asia and Russia, Brill 2022.

Vandevelde J. K., The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties, Oxford University Press 2017.

Wpływ europeizacji prawa na instytucje prawa handlowego, J. Kruczalak-Jankowska (ed.), Warszawa 2013.

Zachariasiewicz M. A., Konwencja wiedeńska o międzynarodowej sprzedaży towarów a *inne akty ujednoliconego prawa umów ze szczególnym uwzględnieniem odpowiedzialności kontraktowej dłużnika*, „Problemy Prawa Prywatnego Międzynarodowego" 2007, 2.

Zeller, B., Baasch Andersen, C. (eds.), Routledge Handbook on Transnational Commercial Law, Routledge, 2025.

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Jerzy Trocha*

Analysis of Polish Police Activity in the Aspect of Security in Railway Areas

[Analiza działań polskiej Policji w aspekcie bezpieczeństwa obszarów kolejowych]

Abstract
This publication provides a comprehensive overview of Polish Police activities regarding railway safety from 2016 to 2023.

Railways play a strategic role in the national and European economy, remaining one of the most efficient modes of freight and passenger transport. However, ensuring an optimal level of security in railway areas—which are particularly vulnerable to mass-scale threats—remains a major challenge. Currently, there is no state-run uniformed service specializing in the protection of railway areas (premises) and trains in Poland; therefore, the Police play the most important role in this regard.

The author presents data on the number of crimes and their detection rates, as well as the value of losses incurred in railway areas resulting from criminal acts. Attention is also drawn to the need to take appropriate measures aimed at improving the security of transport and railway areas (premises) in response to growing public demand.

Keywords: Police, security, threats, railway areas (premises).

Introduction

Security remains one of the most important human needs that enables progress.[1] This is confirmed by historical and cultural analyses of the conditions for civilization growth.[2] The need for an appropriate level of protection

* **Jerzy Trocha** – PhD, EMBA, Assistant Professor, Institute of Security Studies, University of Justice (affiliation); https://orcid.org/0000-0002-2561-4485; jerzy.trocha@aws.edu.pl / dr (ASW), EMBA, adiunkt, Instytut Nauk o Bezpieczeństwie, Akademia Wymiaru Sprawiedliwości (afiliacja).

[1] A. H. Maslow, Motywacja i osobowość [Motivation and Personality], transl. Jerzy Radzicki, Warszawa 2006, p. 62.

[2] A. Czupryński, *Bezpieczeństwo w ujęciu teoretycznym* [in:] Bezpieczeństwo. Teoria – Badania – Praktyka [Safety: Theory – Research – Practice], A. Czupryński, B. Wiśniewski, J. Zboina (eds.), Centrum Naukowo-Badawcze Ochrony Przeciwpożarowej im. Józefa Tuliszkowskiego, Józefów 2015, p. 9.

applies to various areas of life. Basically, wherever people are, threats are also present, and thus the need to ensure security arises. A customer in a shopping mall, a fan during a match, a concert attendee or a passenger waiting for a train at a railway station are an attractive and relatively easy target not only for petty criminals, but also for modern terrorism.[3] Providing adequate protection is a difficult area that requires significant financial outlays and the involvement of adequate forces and resources.

Security on railway areas plays a key role in ensuring the smooth flow of transport, protecting human life and counteracting various types of threats. The railway, as an important element of transport infrastructure, not only facilitates the movement of people and goods, but also attracts the attention of people violating the law, which requires an appropriate response from law enforcement agencies. In this context, the activities of the Police is fundamental importance for maintaining public order, as well as for effectively counteracting crimes and offenses in railway areas.

The work of the Police in this area covers a wide range of activities, from monitoring public space, through preventing acts of vandalism and theft, to responding to more serious incidents, such as accidents, terrorist attacks or other crisis events. Contemporary challenges, including the growing importance of critical infrastructure and the dynamic development of transport technologies, require the Police to adapt their methods of operation and intensify cooperation with other entities, such as railway protection guards, rail carriers, managers of railway and station infrastructure or emergency services.

The aim of this article is to analyze the activities of the Police in the security area of the railway zone, with particular emphasis on its role in counteracting threats and minimizing their effects. The first part presents the specificity of threats to railway areas as a space for the operation of uniformed services, then discusses the key tasks of the Police, as well as the challenges associated with ensuring security in areas with such a complex structure and function. Finally, an attempt was made to assess the effectiveness of the activities based on data from the Police Headquarters and indicated possible directions for their improvement in the light of current threats and legal requirements. Taking up the topic of Police activity in the security sector of railway areas is particularly important in the context of the increasing number of travelers, intensification of freight transport and increasingly advanced technologies used in railway infrastructure. A comprehensive understanding of this issue

[3] J. Trocha, R. Wilczek, *Rola środków przymusu bezpośredniego w działaniach podejmowanych na rzecz utrzymania bezpieczeństwa obiektów – na przykładzie dworców kolejowych* [in:] Środki przymusu bezpośredniego. Zakres i sposoby użycia na przykładzie wybranych podmiotów bezpieczeństwa [Measures of Direct Coercion: Scope and Methods of Use, Illustrated by Selected Security Entities], T. Kośmider (ed.), Instytut Wymiaru Sprawiedliwości, Warszawa 2020, p. 196.

is important not only for security sciences, but also for the practical functioning of the security system in Poland.

Police in the Internal Security System In Poland

The Police is one of the key foundations on which the internal security of the country is based. The main source of law establishing the formation and regulating the tasks, organizational structure, powers and scope of its activities is the Act of 6 April 1990 on the Police.[4] It is the basic, uniformed and armed unit responsible for ensuring security and public order in the country, and consequently also railway stations, trains and other railway areas. To this end, the Police undertakes several activities, including cooperation with local communities, state and local government bodies, various institutions, other services and international law enforcement agencies, striving to fulfill the tasks imposed under the regulations, including:

- Protection of human health and life and property against unlawful attack.
- Protection of public safety and order, including ensuring peace in public places, road traffic, water areas dedicated to common use and public transport.
- Initiating and conducting activities aimed at preventing crimes and offences and criminogenic phenomena in cooperation with public administration and social organizations.
- Conducting counter-terrorist activities in accordance with the Act of 10 June 2016 on anti-terrorist activities.
- Detecting crimes and offences and prosecuting their perpetrators.
- Protection of government facilities of members of the Council of Ministers indicated by the minister responsible for internal affairs (except for the facilities of the Minister of Justice and the Minister of National Defense).
- Supervision of specialized armed protection formations.
- Monitoring compliance with order and administrative regulations regarding public activities or applicable in public places.

[4] Other sources of Polish law related to the activities of the Police can be found in: The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78 item 483; The Act of 24 May 2013 on means of direct coercion and firearms, Journal of Laws 2024 item 383; The Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws 2024 item 37; The Act of 20 May 1971 – Code of Petty Offences, Journal of Laws 2023 item 2119; The Act of 20 March 2009 on the safety of mass events, Journal of Laws 2023 item 616; The Act of 29 July 2005 on counteracting drug addiction, Journal of Laws 2023 item 1939; The Act of June 21, 2002 on a state of emergency, Journal of Laws 2017 item 1928; The Act of April 19, 2002 on a state of natural disaster, Journal of Laws 2017 item 1897; The Act of August 22, 1997 on the protection of persons and property, Journal of Laws 2021 item 1995; The Act of June 10, 2016 on counter-terrorist activities, Journal of Laws 2024 item 92 and other implementing acts (regulations, orders).

- Cooperation with police services of other countries, international organizations and bodies of the European Union in accordance with concluded international agreements and arrangements.
- Processing criminal information, including personal data.[5]

The multitude of obligations resulting from binding legal regulations indicate that the Police in the field of public safety is a universal and multi-tasking formation. The tasks include preventive, interventional, and investigative actions aimed at prosecuting perpetrators of crimes and offenses. With the progress of civilization and the emergence of new challenges in the field of security, the role of the Police is becoming increasingly multifaceted and complex. Threats in cyberspace, unconventional actions of organized crime groups or terrorism using modern technologies mean that the formation must adapt its methods and forms of combating new threats while remaining within the limits of the law.

An important aspect of the Police's activities is also taking care of the image by striving to shape the authority and trust in the formation, which allows building a sense of security among the population. This would not be possible if the formation had not been equipped by the legislator with many powers enabling it to effectively fulfill its tasks, including: checking the identity and detaining people, applying direct coercion measures, using firearms, conducting inspections, including personal inspections and searches of premises, vehicles and luggage contents, imposing fines in the form of penalty tickets, submitting applications to the court for punishment, conducting preparatory proceedings or using intervention techniques.

The Chief Commander of the Police, who is the central government administration body in the field of protecting public safety, is responsible for the formation's activities. He is appointed by the Prime Minister at the request of the minister responsible for internal affairs.[6] In order for the Chief Commander of the Police to implement statutory tasks, the formation's structures include the National Police Headquarters consisting of the Office of the Chief Commander of the Police, the Police Headquarters, the Labor Protection Audit Department, the Internal Audit Team and 15 offices responsible for a number of different areas of the Police's operation (including the Criminal Bureau, the Control Bureau, the Road Traffic Bureau, the Prevention Bureau, the Bureau for Combating Economic Crime).[7] The Commander of the Police Chief is responsible for the Commander of the Central Bureau of Investigation of the Police, the Commander of

[5] The Act of 6 April 1990 on the Police, Journal of Laws 2024, item 145, Article 1, paragraph 2.
[6] *Ibid.*, Article 5, paragraphs 1 and 3.
[7] Annex to Order No. 7 of the Police Commander-in-Chief of 14 February 2024 amending the order on the regulations of the Police Headquarters.

the Internal Affairs Bureau of the Police, the Commander of the Central Counter-Terrorist Unit of the Police "BOA", the Commander of the Central Bureau for Combating Cybercrime and the Director of the Central Forensic Laboratory of the Police.

The further structure of the formation is in accordance with the levels of public administration. At the provincial level, there are 16 commands headed by provincial commanders appointed by the minister responsible for internal affairs at the request of the Police Chief Commander.[8] Excluded from the territorial scope of the Provincial Commander Police in Radom responsible for the Masovian Voivodeship is the area of the capital city of Warsaw and the counties of Grodzisk, Legionowo, Mińsk, Nowy Dwór, Otwock, Piaseczno, Pruszków, Warsaw West and Wołomin.[9] The Capital Police Commander with headquarters in Warsaw is responsible for this region, carrying out tasks and competences appropriate to the provincial commander.[10]

At the next administrative level are the county (municipal) commanders or district commanders (in the area of the capital city of Warsaw), who are subordinate to the relevant provincial commander or the Capital Police Commander. Their area of activity includes ensuring public safety and order at the level of the county or larger cities by, among others, conducting investigations, preventive actions or coordinating patrols of officers.

Polish Police Activities in Railway Areas

A very important competence of provincial police commanders is the establishment of specialist police stations in a specific field, e.g. railway, water, aviation or other specializations. This is done in agreement with the Chief Commander of the Police, while the commander of the specialist police station reports to the territorially competent provincial or capital police

[8] The following commanders are responsible for coordinating the activities of the Police in the individual provinces: Provincial Police Commander in Białystok (podlaskie), Provincial Police Commander in Bydgoszcz (kujawsko-pomorskie), Provincial Police Commander in Gdańsk (pomorskie), Provincial Police Commander in Gorzów Wielkopolski (lubuskie), Provincial Police Commander in Katowice (śląskie), Provincial Police Commander in Kielce (świętokrzyskie), Provincial Police Commander in Kraków (małopolskie), Provincial Police Commander in Lublin (lubelskie), Provincial Police Commander in Łódź (łódzkie), Provincial Police Commander in Olsztyn (warmińsko-mazurskie), Provincial Police Commander in Opole (opolskie), Provincial Police Commander in Poznań (wielkopolskie), Provincial Police Commander in Radom (mazowieckie outside the area referred to in Article 6 paragraph 3 of the Act of 6 April 1990 on the Police), the Provincial Police Commander in Rzeszów (podkarpackie), the Provincial Police Commander in Szczecin (zachodnio -pomorskie), the Provincial Police Commander in Wrocław (dolnośląskie).

[9] The Act of 6 April 1990 on the Police..., Article 6, paragraph 4.

[10] *Ibid.*

commander.[11] The role of specialist police stations is to take action for the protection and public order in a specific field. For this purpose, with the mission of strengthening the security of railway stations, trains and other railway areas, there are 2 railway police stations:

- Railway Police Station in Warsaw;
- Railway Police Station in Wrocław.

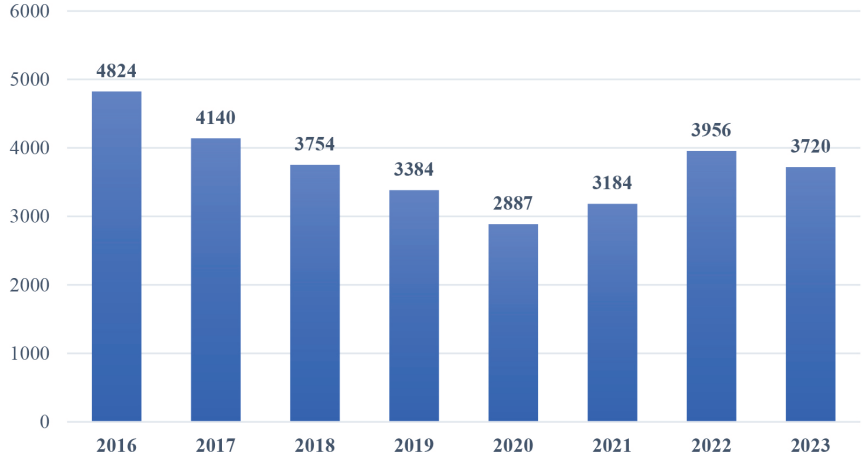
The Railway Police Station in Warsaw is located at the PKP Warszawa Centralna station, employing 87 officers, while the Railway Police Station in Wrocław is located at the PKP Wrocław Główny station, with a staff of 31 police officers.[12] Until 1 November 2012, the Railway Police Station in Poznań also operated. It was dissolved by decision of the then provincial commander. The liquidation was the result of the low number of cases, covering an estimated 180 per year, mainly concerning thefts, with a staff of around 37 officers. The initial plan for the Poznań Railway Station assumed its closure in April 2011. However, considering the upcoming European Football Championship in 2012, during which one of the arenas of football competition was the stadium in Poznań, and the use of rail transport to move fans around the country, it was decided to extend its operation.

The operation of the Railway Police Stations covers specific challenges and threats occurring in the railway area, which are related to the high traffic of passengers, including terrorist threats, accidents involving rail vehicles and common crimes or misdemeanours. The accumulation of a significant number of people in one place in a relatively small area such as a station, platform or train increases the risk of threats, which is why the functioning of police stations specializing in railway areas is extremely important. This affects the increased level of security in the area of railway and station infrastructure, more efficient response to crisis situations and increased protection of critical railway infrastructure.

Data on crimes in railway areas, like all other crimes, are recorded in the National Police Information System (KSIP). However, it should be noted that the modus operandi values are not mandatory when registering in KSIP, and therefore the number of actual crimes committed on railway premises may be higher. In addition, the data collected by the Police do not include registration from preparatory proceedings conducted by the prosecutor's office on its own. Chart 1 presents statistics of crimes detected by the Police on railway premises covering the years 2016–2023. In these statistics, this concerns crimes committed on passenger and freight trains, railway stations, railway stops, railway lines and other railway areas.

[11] *Ibid.*, Article 8, paragraph 1.
[12] Data of the National Police Headquarters as of October 9, 2024.

Chart 1. Crimes detected on railway areas (premises) in 2016–2023

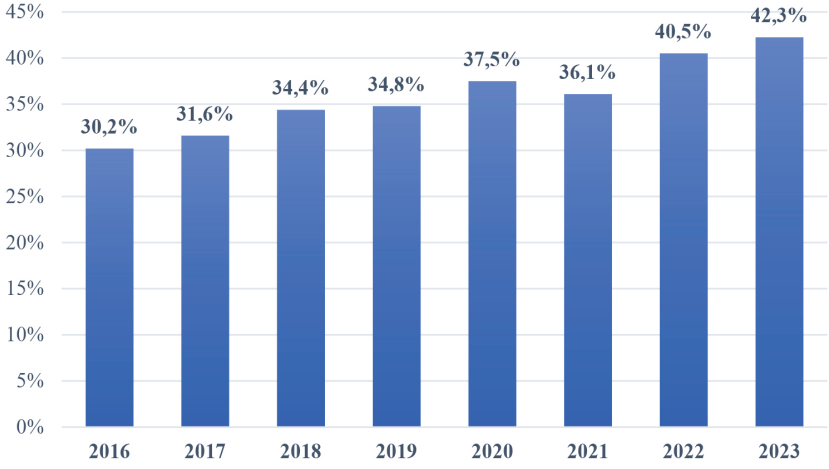


Source: Own study based on data from the National Police Headquarters.

The presented list shows that in the period 2016–2020 there was a constant downward trend in crimes committed in the railway area. Their number in 2020 (2887) fell by as much as 1937 incidents compared to 2016 (4824). In the years 2021–2022 a gradual increase in the scale of crimes was noted, while in 2023 there was another decrease to the level of 3720 incidents per year, which is still a number significantly lower than in 2016. The number of crimes decreased by 1104. One of the most important elements subject to crimes was railway equipment, i.e. devices for controlling railway traffic, track elements or railway traction. This is significant from the point of view of train traffic safety. Nevertheless, in the case of railway stations, crimes primarily related to theft, robberies, assaults and burglaries.

Crimes on railway premises require the Police to take appropriate action aimed at detecting the perpetrators or arresting them. Chart 2 presents data on the detection of crimes identified on railway premises in the years 2016–2023.

Chart 2. Detection rate of crimes detected on railway areas (premises) in 2016–2023

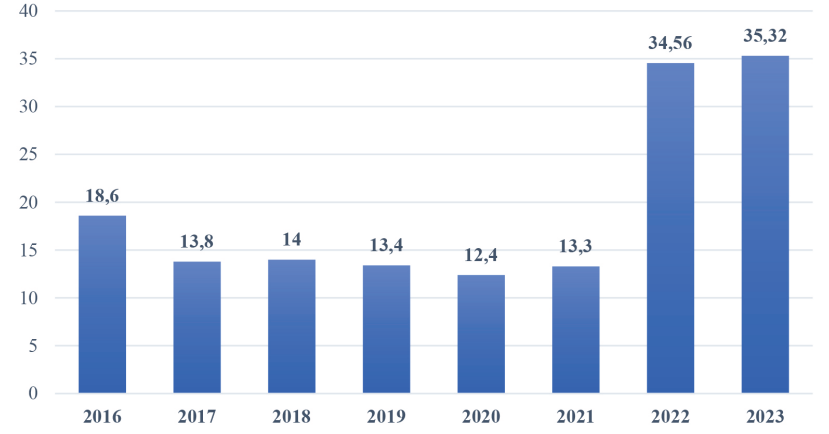


Source: Own study based on data from the National Police Headquarters.

Police statistics show a gradually increasing level of crime detection on the railway. In 2016, the indicator remained at a level of just over 30%, while over the years of the period under review, an almost constant increase was recorded (with the exception of 2021). In 2023, crime detection was 42.3%, which was a significant increase in the effectiveness of the Police by over 12% compared to 2016.

Another element included in the reports of the Police Headquarters in the field of railway areas are the recorded losses resulting from crimes, which are presented in chart 3.

Chart 3. Losses in millions of zlotys (PLN) recorded in railway areas (premises) in 2016–2023

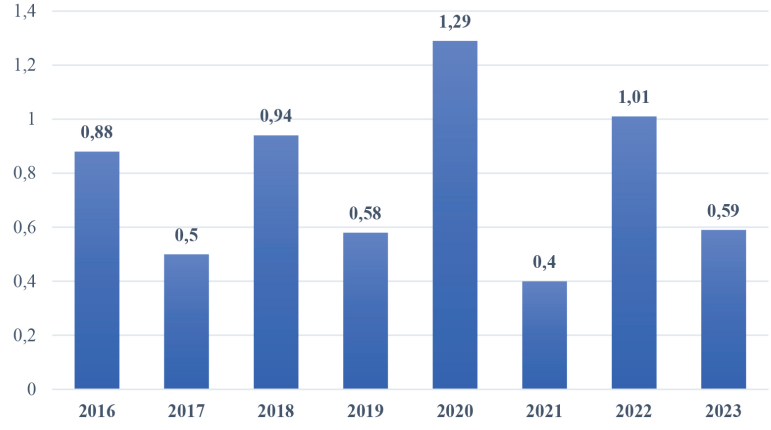


Source: Own study based on data from the National Police Headquarters.

In the period under review, losses with a total value of PLN 156.38 million were recorded. The recorded property damage on the railway referred to the property of railway and station infrastructure managers, rail carriers, but also losses incurred by passengers at stations and other railway areas and on trains. The data show that in the years 2017–2021 the value of recorded losses remained at a constant level of PLN 12.4 million to PLN 14 million, which translated into an average of PLN 13.38 million per year. A significant increase in recorded damage on the railway area and on trains occurred in 2022 – PLN 34.56 million and 2023 – PLN 35.32 million. This is an increase in losses incurred by over 160% compared to the average for the years 2017–2021. Due to the fact that the number of crimes recorded on railway premises (graph 20) in the same period was quite similar, the reasons for such a significant increase in damage in the period covering the years 2022–2023 should be sought in criminal activity focused on property of greater value than before (2016–2021).

Losses incurred as a result of criminal activity on railway premises and on trains are painful for the injured parties, regardless of whether they are natural or legal persons. Therefore, it is very important for the Police to strive to detect the perpetrator and return the lost property to the injured parties. Chart 4 shows the value of property recovered by the Police on the railway in the years 2016–2023.

Chart 4. Value of recovered property in millions of zlotys (PLN) recorded in railway areas (premises) in 2016-2023



Source: Own study based on data from the National Police Headquarters.

Taking into account the recorded amount of losses resulting from crimes on railway premises, the value of recovered property is significantly lower. In the period under review, total damage amounted to PLN 156.38 million, while

property recovered had a total value of PLN 6.19 million. This constituted only less than 4% of the total size of losses incurred on railway premises and in trains from 2016–2023. It should be emphasized that it is not always possible to recover lost property even despite the detention of the perpetrator. This results from the type of damage suffered, which may be caused by deliberate destruction of infrastructure or an object that is no longer recoverable by the Police. Only stolen property has a chance of being returned to the injured party, if it has not been damaged.

Conclusion

The Police's activities in the security area of railway zones constitute an extremely important element of the protection of critical infrastructure and public order. Railway areas, a key component of the transport system, are exposed to various threats that require a multi-faceted approach and inter-institutional cooperation. The Police, as the primary body responsible for ensuring security, plays a key role in this context, combining preventive, operational and intervention functions.

The analysis conducted in this article shows that the effectiveness of Police activities in this area depends on several fundamental factors. Firstly, the appropriate organization of Police structures is important, which allows for a quick and effective response to threats. The specialization of officers, especially in the area of counteracting crimes on railway areas, is becoming crucial in the face of contemporary challenges. Secondly, cooperation with other entities responsible for the security of railway areas, such as the Railway Protection Guard, rail carriers, railway and station infrastructure managers or emergency services, is essential for coordinating actions in crisis situations and for preventing threats.

Technological development, although it brings new possibilities for monitoring and protecting railway areas, poses new challenges to the Police. The implementation of modern monitoring systems, data analysis and prediction of potential threats can significantly improve the effectiveness of preventive actions. At the same time, the development of technology requires constant improvement of officers' competences and provision of appropriate financial resources for the modernization of infrastructure and equipment.

Education is also important. It is the most effective and at the same time the cheapest form of preventing threats.[13] Therefore, it is necessary to strive

[13] J. Trocha, Propedeutyka ochrony ludności w Polsce. Problemy. Możliwości. Perspektywy [An Introduction to Civil Protection in Poland: Challenges – Opportunities – Prospects], Akademia Sztuki Wojennej, Warszawa 2020, p. 153.

to intensify educational activities of the Police in the area of railway zones security. This plays an important role in shaping responsible attitudes among passengers and rail transport personnel. Information campaigns, training and cooperation with local communities can contribute to reducing the number of incidents resulting from improper human behavior, such as intrusions into the track or acts of vandalism.

To sum up, the activities of the Police in the area of railway zones security require a flexible and multidimensional approach. The threats that officers face are complex and dynamic, which requires continuous improvement of methods of action, including adaptation to changing conditions and challenges. In the context of the growing number of passengers, the intensification of freight transport and technological progress, the role of the Police in ensuring safety on railway premises is becoming even more significant. Further research in this area should focus on assessing the effectiveness of the actions taken and on identifying best practices in managing safety in the railway environment. It is particularly important to seek innovative technological solutions and develop international cooperation in the area of protecting railway and station infrastructure. The conclusions drawn from this research can contribute to increasing safety not only at the local level, but also on a systemic scale, which is of key importance for the functioning of rail transport in Poland and worldwide.

Abstrakt

W publikacji dokonano obszernego przeglądu aktywności polskiej Policji w aspekcie bezpieczeństwa obszarów kolejowych w latach 2016–2023.

Kolej pełni strategiczną rolę w gospodarce krajowej i europejskiej, pozostając jednym z najefektywniejszych środków transportu towarowego oraz osobowego. Dużym wyzwaniem pozostaje jednak zapewnienie optymalnego poziomu bezpieczeństwa na obszarze kolejowym, który jest szczególnie podatny na zagrożenia o charakterze masowym. Obecnie nie ma państwowej formacji mundurowej specjalizującej się w ochronie terenów kolejowych oraz pociągów w Polsce, dlatego też najważniejszą funkcję pełni tutaj Policja.

Autor przedstawił dane związane z liczbą przestępstw i ich wykrywalnością oraz wartością strat poniesionych na terenach kolejowych wynikających z czynów zabronionych. Zwrócono również uwagę na konieczność podjęcia stosownych działań ukierunkowanych na poprawę ochrony transportu i obszarów kolejowych w związku z rosnącym zapotrzebowaniem społecznym.

Słowa kluczowe: Policja, bezpieczeństwo, zagrożenia, obszary kolejowe.

REFERENCES

Bezpieczeństwo. Teoria – Badania – Praktyka [Safety: Theory – Research – Practice], A. Czupryński, B. Wiśniewski, J. Zboina (eds.), Centrum Naukowo-Badawcze Ochrony Przeciwpożarowej im. Józefa Tuliszkowskiego, Józefów 2015.

Data from the National Police Headquarters on safety in railway areas from 2016 to 2023 [Polish: Dane Komendy Głównej Policji dotyczące bezpieczeństwa na terenach kolejowych w latach 2016–2023].

Data from the National Police Headquarters as of October 9, 2024 [Polish: Dane Komendy Głównej Policji według stanu na 9 października 2024 r.].

Maslow A. H., Motywacja i osobowość [Motivation and Personality], tłum. Jerzy Radzicki, Wydawnictwo Naukowe PWN, Warszawa 2006.

Środki przymusu bezpośredniego. Zakres i sposoby użycia na przykładzie wybranych podmiotów bezpieczeństwa [Measures of Direct Coercion: Scope and Methods of Use, Illustrated by Selected Security Entities], T. Kośmider (ed.), Instytut Wymiaru Sprawiedliwości, Warszawa 2020.

Trocha J., Propedeutyka ochrony ludności w Polsce. Problemy. Możliwości. Perspektywy [An Introduction to Civil Protection in Poland: Challenges – Opportunities – Prospects], Akademia Sztuki Wojennej, Warszawa 2020.

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(10) The article and glossary will also include: a title in English, an abstract in Polish and English (approximately 500–2500 characters each), keywords in Polish and English (three to nine), and an appendix bibliography.

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[1] Order of the CJ of 12 February 2019, RH, C 8/19 PPU, EU:C:2019:110, para 60.

[2] Judgment of the EU General Court of 15 December 2010, E.ONEnergie/Commission, T 141/08, EU:T:2010:516, para 56 and case law cited therein.

[3] ECtHR judgment of 25 March 1998, Belziuk v. Poland, Application no. 23103/93, § 37. Subsequent citations of the same judgment omit either the ECL (CJEU) or the complaint number (ECtHR).

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[1] Judgment of the Supreme Court of 12 March 2008, I CSK 430/07, OSNC 2009, no. 5, item 75.

[2] Order of the Constitutional Court of 27 September 2005, U 2/05, OTK ZU-A 2005, no. 8, item 96, part II, point 2.

[3] Judgment of the Constitutional Court of 3 December 2015, K 34/15, OTK ZU-A 2015, no. 11, item 185, part III, point 6.12.

[4] Judgment of the Supreme Administrative Court of 24 October 2000, V SA 613/00, OSP 2001, no. 5, item 82.

[5] Judgment of the Court of Appeal in Kraków of 23 April 1998, II AKa 48/98, LEX no 35155.

[6] Decision of the Court of Appeal in Łódź of 15 February 2023, II AKz 74/23 (unpublished). Subsequent citation of the same national judgment shall omit the place of publication or a note of its absence.

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Publisher of the ERL&IR [EPPiSM]

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[3] Wyrok ETPC z 25 marca 1998 r., Belziuk v. Polska, skarga nr 23103/93, § 37.

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[3] Wyrok TK z 3 grudnia 2015 r., K 34/15, OTK ZU-A 2015, nr 11, poz. 185, cz. III, pkt 6.12.

[4] Wyrok NSA z 24 października 2000 r., V SA 613/00, OSP 2001, nr 5, poz. 82.

[5] Wyrok SA w Krakowie z 23 kwietnia 1998 r., II AKa 48/98, LEX nr 35155.

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