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FROM THE EDITOR-IN-CHIEF

Dear Readers,

On behalf of the Editorial Board, I present to you the next issue of the journal "Teka Komisji Prawniczej PAN Oddział w Lublinie" Volume XVI (2023), Issue 2. Since 2021 the journal has been published entirely in English.

In accordance with the Announcement of the Minister of Education and Science of 3 November 2023 *regarding the amendment and correction of the announcement on the list of scientific journals and peer-reviewed international conference proceedings*, the following disciplines have been assigned to the journal: medical biology; health sciences; legal sciences; canon law; biological sciences.

The current issue contains 35 scientific articles, structured by discipline. The authors of the published texts represent 23 research centres, including 5 foreign (Coventry University & University Hospitals Coventry – Great Britain; Sulkhan-Saba Orbeliani University – Georgia; University of Bari "Aldo Moro" – Italy; University of South Bohemia in České Budějovice – Czech Republic; Uzhhorod National University – Ukraine) and 18 domestic (University of Economics and Human Sciences in Warsaw; University of Łomża; War Studies University; the John Paul II Catholic University of Lublin; University of Applied Sciences in Chełm; University of Gdańsk; Adam Mickiewicz University in Poznań; Jagiellonian University; Jan Kochanowski University in Kielce; University of Lodz; Maria Curie-Skłodowska University in Lublin; Medical University of Lublin; Casimir Pulaski Radom University; University of Szczecin; University of Silesia in Katowice; University of Warsaw; University of Wroclaw; University of Kalisz).

I would like to thank the authors, reviewers and members of the Editorial Board for their efforts in preparing this issue. I wish all of you an interesting read.

Rev. Prof. Dr. habil. Mirosław Sitarz
Editor-in-Chief

LEGAL SCIENCES

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THE LAW OF ASSOCIATIONS IN UKRAINE IN THE ABSENCE OF SYSTEMATIZED LEGISLATION

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Abstract. The article is devoted to the issues of legal regulation of citizen associations in Ukraine since the content itself and structure of the right to "freedom of association" at the level of the Constitution are not detailed. At the same time, legal regulation at the level of laws also introduces ambiguity into the conceptual apparatus and leads to the conclusion that legal regulation in this area is not systematized. The article examines the constitutional provisions of the right to freedom of association in political parties and public organizations to exercise and protect one's rights and freedoms and satisfy political, economic, social, cultural, and other interests, and analyzes the term "association" in the legislation of Ukraine. Features, which are common to all associations of citizens are highlighted, such as the voluntary nature of the association; the presence of specific intangible, but legally permitted goals; self-organization and self-regulation; and lack of authoritative powers in citizens' associations. The article proposes to include creative unions, religious organizations, and the association of condominiums to the three types of associations foreseen by the Constitution: political parties, public organizations, and trade unions.

Keywords: associations of citizens; the right to freedom of association; political parties; religious organizations; public organizations; creative unions

INTRODUCTION

In foreign literature and legislation, the term "freedom of association" is used, which means the right of a person to join or leave a group voluntarily, the right of a group to take collective action to ensure the interests of its members, the right of an association to accept or refuse membership based on certain criteria. Freedom of association covers organized and professional organizations such as trade unions, public associations, and non-governmental organizations, extends to voluntary organizations, and can apply to political parties, groups, and organizations with or without legal entity status. The association involves joint actions and the achievement of a common goal under the conditions of compliance with certain rules of conduct (corporate norms) [Giese 2008, 34]. Freedom of association is a fundamental right and affects the realization of a number of other rights, and the level

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of democracy in a country can be measured by how freedom of association is enshrined in national legislation and how authorities implement the law in practice.[1]

The equivalent of "freedom of association" in the Ukrainian legal sphere is the concept of "freedom of association". This right is enshrined in the provisions of Article 36 of the Constitution of Ukraine. The content and structure of this right at the level of the Constitution are not detailed, but separate forms of manifestation of this right are provided for, in particular, participation in political parties, public organizations, and trade unions, which, obviously, do not limit the possible participation of citizens in associations, but indicate only the main ones of them.

Legal regulation at the level of laws also does not define the association, moreover, it introduces ambiguity into the conceptual apparatus due to confusion in the concepts of "association of citizens", "public associations", and "public organizations". The scientific literature contains attempts to interpret and systematize the normative array [Boyko 2015, 48-53; Vikhliaiev 2013, 70-73; Davydova and Mendzhul 2020, 51-57], however, the structural and content hierarchy of these concepts has not been established.

Therefore, it should be noted specifically that the constitutional provisions define the association of citizens as a generalizing concept similar to what is denoted by "association" in the English-language literature, and "Verein" in the German-language literature. Associations include voluntary associations of people who have united and pursue the goal of achieving a certain "ideal" in the political, religious, cultural, public, and environmental spheres, may also implement important economic and socio-political tasks, but their goals are not to make a profit and pursue commercial interests. Such associations include public associations (including public organizations and unions), creative unions, religious organizations, political parties, trade unions, and their associations, and associations of condominiums. The name of the organizational and legal forms of these associations contains an indication of the direction of activity or their specialty: *public* associations, *religious* organizations, *trade* unions, etc.

1. CONSTITUTIONAL PROVISIONS

Article 36 of the Constitution provides citizens with the right to freedom of association in political parties and public organizations to exercise and protect their rights and freedoms and satisfy political, economic, social, cultural, and other interests. Foreign nationals are also entitled to this

[1] ECHR, Gorzelik and Others v. Poland, 17.02.2004, No. 44158/98.

freedom, as Article 11 of the ECHR grants everyone the right to freedom of association with others, including the right to form and join trade unions to protect their interests.

Freedom of association means the legal and factual possibility to form or join associations of citizens voluntarily, without coercion or prior permission (Decision of the Constitutional Court of Ukraine of December 13, 2001, No. 18-рп/2001). According to Part 4 of Article 36 of the Constitution of Ukraine, no one can be forced to join any association of citizens.

The right to freedom of association is not absolute, so its limitations are permitted. In particular, the constitutional provisions determine that such a restriction must be: 1) established by law; 2) carried out in the interests of national security and public order, public health protection, or protection of the rights and freedoms of other people. At the same time, none of such restrictions should completely void the right to freedom of association or infringe on the very essence of this right.

The Constitutional Court of Ukraine also emphasizes that the state must create such legislative mechanisms for the activities of citizens' associations that will ensure the free development of the individual, the possibility of realizing one's creative potential and individual abilities in political, economic, social, cultural, or other spheres of public life. Any restrictions on the right to freedom of association, including the imposition of additional duties on citizens in connection with the implementation of this constitutional right, must be established by law (available, provided for, and formulated with sufficient precision), pursue one or several legitimate goals, and must also be necessary for a democratic society, that is, due to an "urgent public need", comply with the principle of proportionality (Decision of the Constitutional Court of Ukraine (Grand Chamber) of June 6, 2019, No. 3-p/2019).

The interference of state authorities, local self-government bodies, their officials and servicemen in the activities of citizens' associations carried out within the framework of the law is not allowed, since the internal organization, relations of members of citizens' associations, their subdivisions, and the charter responsibility of members of these associations are regulated by corporate norms established by the associations of citizens themselves, which are based on the law, and issues that belong to their internal activity or exclusive competence are subject to independent resolution. Therefore, the intervention of state authorities, local self-government bodies, their officials and servicemen in the activities of citizens' associations carried out within the framework of the law is not allowed (Decision of the Constitutional Court of Ukraine dated May 23, 2001, No. 6-рп/2001).

2. GENERAL TERMS

2.1. The content of the term "association" in the legislation of Ukraine

The concept of "association" is not defined in the law, but it is used by the legislator when interpreting the concepts of "public association" (in the Law 'On Public Associations'), "political party" (in the Law 'On Political Parties in Ukraine').

The Guidelines on Freedom of Association published by the European Commission for Democracy through Law define an "association as an organized independent non-commercial body in the form of a voluntary association of persons bound by a common interest, activity, or purpose." It is noted that the association does not necessarily have to be a legal entity, but must have a certain institutional form or structure.[2]

In order to generalize various types of associations of citizens, the Law 'On State Registration of Legal Entities, Individual Entrepreneurs, and Public Organisations' introduces the concept of "public formations", which means political parties, structural units of political parties, public associations, local branches of a public association with the status of a legal entity, trade unions, their associations, trade union organizations, trade unions and their associations provided for in the charter, creative unions, local branches of creative unions, permanent arbitration courts, employers' organizations, their associations, separate units of foreign non-governmental organizations, representative offices, and branches of foreign charitable organizations.

Also, this law defines the possibility of the existence of public formations, both those that have the status of a legal entity and those that do not.

2.2. The features of an association

Common features of all citizen associations include: 1) *the voluntary nature of the association*, which is expressed in the possibility of joining and leaving the association of citizens by free decision, the prohibition of mandatory membership. Accordingly, the charter of the association must contain provisions on the procedure for acquiring and terminating membership, conditions of participation; 2) *the presence of specific intangible, but legally permitted goals.* The activity of the association is not aimed at making a profit (Article 1 of the Law 'On Public Associations', Article 1 of the Law 'On Trade Unions, Their Rights and Guarantees of Activity'), however, they may receive income and profit. A non-profit organization is an organization

[2] Organization for Security and Co-operation in Europe, 2015, *Guidelines on Freedom of Association. OSCE's Office for Democratic Institutions and Human Rights (ODIHR)*, https://www.osce.org/odihr/132371 [accessed: 07.12.2023].

registered under the procedure specified for a non-profit organization and entered by a controlling body in the Register of Non-Profit Institutions and Organizations, and the founding documents of which contain a prohibition on the distribution of received income (profits) among founders, members, employees, etc. (clause 133.4.1 of the Tax Code). Accordingly, in this case, it is not the goals of the association (primary and secondary), but the directions of profit use that are decisive. Thus, the income or property of a public association is not subject to distribution among its members (participants) and cannot be used for the benefit of any individual member (participant) of the public association or its officials (Part 6, Article 3 of the Law 'On public associations'); 3) the achievement of program goals of the association is carried out based on *self-organization and self-regulation*. If the association is founded as a legal entity, the corporate regulatory act is the charter (regulations); 4) *lack of authoritative powers in citizens' associations,* except for cases when the state delegates certain authority to them and enshrines them in legislation [Aver'yanov 2004, 249]. Granting certain public associations or their representatives a certain competence indicates that such associations of citizens and their representatives have acquired the public nature of their activities, and therefore gives the right to the state to introduce appropriate control over the activities of associations of citizens and their representatives in such cases (Decision of the Constitutional of the Court of Ukraine (Grand Chamber) dated June 6, 2019, No. 3-p/2019).

2.3. Types of associations and their goals

Depending on the set goals and tasks, associations can be divided into separate types. As already noted, the provisions of the Constitution provide for the existence of three types of associations: political parties, public organizations, and trade unions. However, the features highlighted above allow us to expand the list of such species, so we suggest including: 1) public associations; 2) creative unions; 3) religious organizations; 4) political parties; 5) trade unions and their associations; 6) associations of condominiums.

Also, due to the absence of a general law on the association of citizens, the question arises of including in their list other non-entrepreneurial societies (Article 85 of the Civil Code) and non-profit organizations (Resolution of the Cabinet of Ministers of Ukraine No. 440 of July 13, 2016). It concerns commodity exchanges, chambers of commerce and industry, credit unions, self-regulatory organizations, retirement funds, social insurance funds, etc. We believe that associations whose purpose is to carry out banking or credit activities, mutual insurance, and savings banks are not associations of citizens in the sense given above. Also, associations that aim to carry

out professional activities, such as bar associations, chambers of commerce and industry, etc., are also not aimed at the realization of public goals.

It should be noted that despite the fact that the Classifier of Organizational and Legal Forms of Business has included self-organization bodies of the population in the group "800: public associations, trade unions, charitable organizations, and other similar organizations", they are not associations of citizens, but subjects of local self-government, although they are formed on a voluntary basis (order of State Committee for Technical Regulation and Consumer Policy of Ukraine of May 28, 2004, No. 97).

In order to establish the limits of the association's activity, the founders determine the purpose of the association's activity. However, it should not contain the property interest of the members, which is also confirmed by judicial practice (ruling of the Kharkiv District Administrative Court dated February 27, 2015 in case No. 820/1107/15).

3. FORMATION OF ASSOCIATIONS

The general rules for the formation of all associations of citizens foresee the need for their *state registration*, regardless of whether they are formed with or without the status of a legal entity, following the procedure provided for by the Law 'On State Registration of Legal Entities, Individual Entrepreneurs, and Public Organisations'. Peculiarities of state registration of types of public formations are determined by separate laws, which are special concerning the above.

3.1. The formation of public associations (public organizations and unions)

The process of creating public associations has two stages: 1) *initiative-establishing*, which includes expression of intent (initiative) of the founders, development, and approval of the charter, formation of management bodies; 2) *registration*, which provides for state registration [Bilash and Mendzhul 2021, 24].

The initiative to create a public association is recorded at the statutory meeting of the founders and formalized in the protocol. The number of founders cannot be less than two persons. To create a public union, legal entities under private law participate in this process through managers or other authorized representatives. The founders take part in the process of creating a public association: for public organizations – natural persons who have reached the age of 18 (for youth and children's public organizations – 14 years), and for public unions – legal entities under private law.

After the registration of the association, the founders become its members together with others who have joined the organizations already after registration, and members of the public union can be both legal entities under private law and natural persons.

Registration of a public association is carried out by the authorities of the Ministry of Justice of Ukraine in the regions, and cities of Kyiv and Sevastopol. Article 17 of the law defines the list of documents to be submitted by the applicant for state registration of a legal entity (regardless of whether it is a public organization and its type), and Article 19 – requires the list of documents to be submitted for state registration of a public association, which does not have the status of a legal entity. In particular, the main documents submitted for state registration of the creation of a legal entity are: 1) application; 2) founders' decision to create a legal entity; 3) information about the governing bodies of public formation; 4) founding document; 5) register of persons (citizens) who participated in the statutory congress (conference, meeting).

When creating a public formation without the status of a legal entity, the following documents are submitted: 1) an application for state registration; 2) a decision on the formation of a public association; 3) information about the founders of the public association – for an individual; name, location, identification code – for a legal entity); 4) information about the person authorized to represent the public association.

State registration data are entered into the *Unified State Register of Legal Entities, Individual Entrepreneurs, and Public Organizations*. The data of this register is actually open since the norms of the law and the information system make it possible for the applicant to obtain information about the beneficiary owners, location and types of activities, information about making registration changes, etc. based on a free online request, which is executed immediately once it is sent. The request on a paid basis is provided only for information about the founder of the legal entity, the head of the legal entity, the person who has the right to sign without a power of attorney of the legal entity, as well as when choosing a date other than the current one.

Information on public associations is also entered in the Unified Register of Public Formations. The unified register consists of the following sections: register of political parties; register of public organizations; register of charitable organizations; register of creative unions; register of chambers of commerce and industry; register of permanently active arbitration courts; register of charters; register of associations of local self-government bodies. The holder of both of these registers is the Ministry of Justice of Ukraine, which ensures their functioning.

The grounds for a refusal to register public associations may be those established for all types of public associations (contained in Part 1 of Article 37 of the Constitution of Ukraine, Article 4 of the Law of Ukraine 'On Public Associations'); 2) those established for all legal entities (provided in Article 28 of the Law 'On State Registration of Legal Entities, Individual Entrepreneurs, and Public Organisations'). Refusal to carry out state registration of a public organization must be justified (decision of the Brovary district court of the Kyiv region of November 24, 2015 in case 361/4162/15-a).

3.2. The formation of creative unions

Despite the similarity in the name of creative unions with such a type of public association as a public union, as well as despite the contiguity of the goals and tasks of creative unions and public associations, creative unions are a separate type of associations of citizens and are not a subtype of public associations connections. This is evidenced by the clarity of the legislative regulation of their areas of activity, state support for the development of creative unions through the provision of grants and placement of state orders, their involvement in the drafting of legislation, the development of national programs, and other socially important cultural activities. Their difference from public associations is also evidenced by the procedure for their formation and activity established by the Law 'On Professional Creative Workers and Creative Unions', as well as by the legally defined governing bodies. However, if the association of professional creative workers is rejected for the status of a creative union, they have the right to legalize their association as a public organization [Gaeva 2000, 146-54].

In accordance with the provisions of Article 8 of the law, a creative union is created by a group of professional creative workers of the relevant professional direction in the field of culture and art (all-Ukrainian – consisting of at least 100 people, regional (local) – at least 20 people), who have completed and published works of culture and art or their interpretations. Members can be professional creative workers who have reached the age of 18. The decision to form a creative union is made by a general meeting (congress, conference) of a group of creative workers.

All creative unions are subject to state registration. All-Ukrainian creative unions are registered by the Ministry of Justice of Ukraine, and regional (local) creative unions are registered by territorial bodies of the Ministry of Justice of Ukraine under the procedure established by the Law 'On State Registration of Legal Entities, Individual Entrepreneurs, and Public Organisations'. The decision to introduce changes to the charter of the creative union, its territorial unit, changes in the composition of the elected bodies of the creative union or its territorial unit shall be made in the manner determined

by the charter and shall be formalized in the protocol of the meeting of the creative union's authorized body, the subject of state registration shall be only notified about the following.

3.3. The formation of religious organizations

In Ukraine, the procedure for creating religious organizations is regulated by the Laws 'On Freedom of Conscience and Religious Organizations' and 'On State Registration of Legal Entities, Individual Entrepreneurs, and Public Organisations'. The general procedure for the formation of religious organizations is confusing, which gives rise to thoughts about "ineffective dialogue between the government and society" [Sopilko and Vozniak 2013, 76], although, in fact, it is the result of the imperfection of the special regulation of the Law 'On Freedom of Conscience and Religious Organizations' on the procedure for the formation of religious organizations [Bilash 2019, 300-301].

In particular, from the provisions of this law, which determine that the notification of state authorities on the formation of a religious community is not mandatory (Article 8) and that the charter (regulations) of a religious organization, which under civil legislation determines its legal capacity, is subject to registration (Article 14), conclusions are the following: 1) a religious organization can operate without the status of a legal entity, but the above applies only to a religious community; 2) religious administrations, centers, monasteries, religious brotherhoods, missionary societies (missions), spiritual educational institutions, as well as associations can act only in the status of a legal entity; 3) "state registration of a legal entity" in the sense of the Law 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations' for religious organizations means "registration of the charter (regulations)" of this organization, as provided by the Law 'On Freedom of Conscience and Religious organization'.

Therefore, the creation of a religious organization can go through one stage – initiative-establishing, which involves the approval of the charter by the founders at the founding meeting and the adoption of a decision on the creation of a religious organization, as well as two stages, the second of which is the state registration of a legal entity (registration of the charter of a religious organization). The charter of a religious organization is adopted at a general meeting of religious citizens or at religious congresses and conferences. Mandatory components of the charter of a religious organization are defined in Article 12 of the Law 'On Freedom of Conscience and Religious Organizations': 1) type of religious organization, its religious affiliation, and location; 2) the place of a religious organization in the organizational structure of a religious association; 3) property status; 4) the right

of a religious organization to establish enterprises, mass media, other religious organizations, and establish educational institutions; 5) the procedure for introducing changes and additions to the charter; 6) the procedure for resolving property and other issues in the event of termination of the activity of a religious organization.

Registration of the charter of a religious community is carried out by regional state administrations, whilst religious centers, administrations, monasteries, religious brotherhoods, missions, and spiritual educational institutions submit their charters (regulations) for registration to the State Service of Ukraine for Ethnopolitics and Freedom of Conscience.

The Law 'On Freedom of Conscience and Religious Organizations' establishes a list of documents submitted for state registration of a religious organization for each of its types (Article 14), grounds for refusal to register the charter (regulations) of a religious organization (Article 15), the procedure for terminating a religious organization organizations (Article 17).

The term for consideration of documents submitted for state registration and other registration actions regarding religious organizations is 1 month: within a month, the registration body reviews the application, the charter of the religious organization, makes the appropriate decision, and within ten days, notifies the applicants in writing about it.[3] In some cases, the registration authority may request the opinion of the local state administration, the executive committee of the village, settlement, city council, as well as specialists. In this case, the decision to register the charters (regulations) of religious organizations is made within three months. The result of the registration procedures is the inclusion of a religious organization in the Unified State Register of Legal Entities, Individual Entrepreneurs, and Public Organizations where, in addition to general information that applies to all legal entities, the type of religious organization (community, center, monastery, etc.) and its religious affiliation are indicated.

The registering body may refuse to register the charter (regulations) of a religious organization if its charter or activity contradicts the current legislation.

3.4. The formation of political parties

The formation of a political party is conducted in two stages: the initiative-establishing stage, which involves the adoption of a decision to create a party at the founding congress, and the stage of state registration.

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[3] During the state of war period in Ukraine, the term of providing the administrative registration service is suspended and renewed within a month after the termination or abolition of martial law in the relevant territory of Ukraine.

A political party is created by a group of citizens of Ukraine consisting of at least 100 people by deciding to create a political party at its founding congress (conference, meeting), which must be supported by the signatures of at least 10,000 citizens of Ukraine who have the right to vote in elections, collected in at least two-thirds of the districts of at least two-thirds of the regions of Ukraine, the cities of Kyiv and Sevastopol, and in at least two-thirds of the districts of the Autonomous Republic of Crimea. The decisions of the Constitutional Court of Ukraine of June 12, 2007 No. 2-рп/2007 (the case on the formation and registration of party organizations) and of October 12, 2007 No. 9-рп/2007 in the case on the constitutional submission of the Ministry of Justice of Ukraine on the official interpretation of the provisions of the sixth part of Article 11 of the Law of Ukraine 'On Political Parties in Ukraine' are important in this context. This decision recognizes that all the listed administrative-territorial units have equal status and rights in matters related to the creation of political parties, therefore the provisions of Part 6 of Art. 11 of the law regarding the requirement for each political party to form party organizations in the Autonomous Republic of Crimea was recognized as unconstitutional. Therefore, the legislative provision that a political party ensures the formation and registration of its regional organizations in most oblasts of Ukraine, the cities of Kyiv, Sevastopol, and the Autonomous Republic of Crimea should be understood as the obligation of a political party to form and register regional and equivalent party organizations no less than in fourteen out of twenty-seven administrative-territorial units of Ukraine.

At the founding congress (conference, meeting) of the political party, the charter and program of the political party are approved, its governing and control and auditing bodies are elected. However, the activity of a political party can be carried out only after its registration under the procedure defined by the Law 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations'. The subject of registration is the Ministry of Justice of Ukraine (for political parties) or its territorial bodies (for structural entities of political parties).

When registering a political party, in addition to the general list of documents submitted for the registration of a public formation, the registration body is provided with the program of the political party, a register of persons who participated in the founding congress (conference, meeting), as well as a list of signatures of citizens of Ukraine.

Registration of regional, city, and district organizations or other structural entities provided for by the party charter, as well as the legalization of the primary branches of a political party, is carried out only after the registration of the political party. The subject of state registration is notified of the formation of regional, city, district organizations, or other structural

formations of a political party, provided for by the party's charter, within 10 days from the date of their formation. Their registration is carried out with the acquisition of the status of a legal entity if such a status is provided for by the party's charter, or without the status of a legal entity.

Every year, the Ministry of Justice publishes a list of registered political parties and their legal addresses.[4]

3.5. The formation of trade unions and their associations

The peculiarity of the formation of trade unions and their associations is resulted from the fact that, unlike other public associations and legal entities, the beginning of their activity cannot be determined by the moment of registration, since this is equivalent to the requirements for prior permission for the formation of a trade union and prevents the exercise of the right to create trade unions "based on the free choice of their members." As the Constitutional Court established in its decision, the constitutional provisions require the establishment by law of such a procedure for the registration of trade unions, which would be an act of granting the status (rights) of a legal entity and no more (Decision of the Constitutional Court of Ukraine of October 18, 2000 No. 11-рп/2000).

Accordingly, the Law 'On Trade Unions, Their Rights, and Guarantees of Activity' links the formation of trade unions and their acquisition of the status of a legal entity with the adoption of a decision by the founders on their creation and the approval of the charter (Article 16 of the law). At the same time, a special legalization procedure has been established for notifying the state authorities about the establishment of a trade union body. Trade unions and their associations are legalized by notification of compliance with the declared status. Organizations of trade unions can have the status of primary, local, district, regional, republican, or all-Ukrainian.

At the same time, the legalization carried out by the bodies of the Ministry of Justice of Ukraine is the same state registration ("state registration is a certification of the fact of the existence of the relevant status of a trade union, its organization or association": clause 4 part 1 of Article 1 of the Law 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations'. For their legalization, founders or heads of elected bodies submit applications, charters (regulations), protocols of congresses, conferences, founding or general meetings of trade union members with a decision on its approval, and information about elected bodies. The registration body

[4] Ministry of Justice of Ukraine, *Register of political parties*, https://minjust.gov.ua/m/str31094 [accessed: 07.12.2023].

does not have the right to refuse the registration of a trade union, but it has a month to consider the submitted documents and to include the trade union, association of trade unions in the register of citizens' associations and issue a certificate of legalization.

3.6. The formation of associations of condominiums

The association is formed by owners of apartments and non-residential premises in a condominium (condominiums) in accordance with the procedure provided for by the Law 'On Association of Condominiums'. The formation of an association involves two stages: initiative-establishing, the holding of the founding meeting of co-owners, who decide on the establishment of the association and approve its charter, as well as the stage of state registration. State registration of an association is carried out under the procedure established by the Law 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations'. For registration, an application, the protocol of the founding meetings, and the charter of the condominium are submitted.

4. ASSOCIATION ACTIVITIES

4.1. Rights and obligations

Among the list of rights of citizens' associations, which belong to them regardless of their type, the following rights can be included: freely conduct their activities within the limits provided by legislation and constituent documents, disseminate information about their activities; to represent and protect the rights and legitimate interests of its members; address state authorities, local self-government bodies, their officials, and servicemen; to receive public information that is in the possession of subjects of authority, other managers of public information; to participate in the development of projects of regulatory and legal acts issued by state authorities, local self-government bodies and related to the sphere of activity of the association and important issues of state and social life; to hold peaceful meetings, etc.

In addition, an association with the status of a legal entity has the right to be a participant in civil legal relations, a founder of mass media, other legal entities, etc.

Individual rights of citizens' associations are acquired if they are provided for by charters on their activities. Such rights include, in particular, the right to defend in court the personal non-property and property rights of both its members, as well as the rights and legally protected interests of other persons who applied to it for such protection (Decision of the Constitutional Court

of Ukraine of November 28, 2013 No. 12-рп/2013; Decision of the Grand Chamber of the Supreme Court in case No. 367/4695/20). However, it should be noted here that an association can act as a plaintiff in a court of law for the protection of its own rights, for example, the right to access public information, regardless of whether such an association is formed with the status of a legal entity or not.

The rights of citizen associations of various types are also defined in special laws. For example, political parties have the right to participate in the elections of the President of Ukraine, the Verkhovna Rada of Ukraine, to other state authorities, local self-government bodies and their officials, to maintain international relations with political parties, public organizations of other states, ideologically, organizationally and financially support youth, women's and other associations of citizens, provide assistance in their creation, etc. Religious organizations have the right to establish and maintain freely accessible places of worship or religious gatherings, to manufacture and distribute objects of religious purpose, religious literature, and other informational materials of religious content, to form societies, brotherhoods, associations, other associations of citizens for charity, study and distribution religious literature and other cultural and educational activities.

All associations of citizens are obliged to keep legal documents, documents that contain information about the activities carried out by the association, make financial and other reports, and ensure record-keeping and preservation of accounting documents. For non-profit organizations, financial statements shortened by indicators are provided, which can be used by non-profit organizations.

4.2. Association management

As it was noted, the internal organization, relations of members of citizens' associations, their subdivisions are regulated by corporate norms established by the citizens' associations themselves. However, information about the management bodies of a legal entity and information about the head of an association without the status of a legal entity are displayed in the United State Register of Legal Entities, Individual Entrepreneurs and Public Organisations.

Laws that regulate the activities of certain types of citizen associations approach the definition of governing bodies in different ways. For some types of associations, full freedom to define governing bodies and their powers in statutory documents is established. In particular, the Law 'On Public Associations' specifies that the powers of the head, the highest governing body, other governing bodies of the public association, the procedure for their formation and changes in composition, the term of authority,

as well as the procedure for determining the person authorized to represent the public association, are defined in the charter. Similar provisions are contained in special laws regarding trade unions, political parties, and religious organizations.

Concerning creative unions and the association of condominiums, the governing bodies and their main powers are determined by legislation, not by charter. In particular, the activities of the creative union are managed by the general meetings (congress, conference), the board, the presidium, and the chairman of the board. The general meeting approves the charter of the union, determines the main areas of activity of the creative union for the next period, hears the report of the board on the activity of the creative union and the report of the inspection committee, elects the board, presidium, chairman of the board and the inspection committee of the creative union, makes decisions on the reorganization or liquidation of the creative union, etc. The management of the union's activities in the period between general meetings belongs to the competence of the board. The current activities of the creative union are managed by the presidium and the chairman of the board of the creative union, and the inspection committee exercises control over financial and economic activities, correct management of affairs, timely consideration of letters, appeals, statements, and complaints (Chapter III of the Law 'On Professional Creative Workers and Creative Unions').

In the same way, the Law 'On Association of Condominiums' in Article 10 defines the governing bodies of the association, which are the general meeting of co-owners, the board, the inspection committee of the association, regulates in detail their powers and the procedure of formation.

4.3. Accounting

The Law 'On Accounting and Financial Reporting in Ukraine' dated July 16, 1999 No. 996-XIV defines the need for accounting and financial reporting by all legal entities, regardless of their organizational and legal forms, and forms of ownership. This also applies to associations that have the status of a legal entity. However, for the unification of citizens, it is important to include them in the Register of Non-Profit Institutions and Organizations, after which they cease to be taxpayers of corporate income tax. At the same time, they retain the obligation to keep accounting records and keep accounting documents.

According to the provisions of Article 133 of the Tax Code, an association is non-profit if it simultaneously meets the following requirements: a) formed and registered in the prescribed manner; b) the founding documents contain a prohibition on the distribution of received income (profits)

among the founders, members of such an organization, employees (except for payment of their labor, calculation of a single social contribution), members of management bodies and other related persons; c) the constituent documents provide for the transfer of assets to one or more non-profit organizations or their inclusion in the budget income in the event of termination of the legal entity (except for the association of condominiums and housing and construction cooperatives); d) entered by the controlling body in the Register of Non-Profit Institutions and Organizations.

Income (profits) of a non-profit organization can be used only to fund expenses for the maintenance of the organization itself and the realization of its statutory goals. The income of non-profit religious organizations can also be used for charitable activities, including the provision of humanitarian aid, charitable activities, and charity.

5. TERMINATION OF ASSOCIATIONS

General grounds for termination of activities of citizens' associations include: 1) the decision of the association itself through liquidation (self-dissolution) or reorganization, adopted by the highest governing body (for a public association), a general meeting, congress, conference (for a political party, trade union, creative union) or co-owners of apartments (for the association of condominiums) in the manner determined by the statute; 2) by a court decision on the prohibition, liquidation (forced dissolution) of an association or cancellation of the registration of a political party.

In addition to the above two reasons, the association of condominiums can cease its activity as a result of the purchase by one person of all premises in an apartment building.

A court prohibition on the association of citizens is carried out at the request of the registration body in the event of: 1) conviction of his authorized persons for committing a criminal offense against the foundations of national security of Ukraine, provided for in Article 111-1 of the Criminal Code of Ukraine; 2) detection of signs of violation by the association of the requirements of Articles 36 and 37 of the Constitution of Ukraine or the requirements of special legislation.

Unlike other legal entities, citizens' associations cannot be terminated by a court decision in the event of a lawsuit by the tax authorities, if the organization does not submit tax records.

Additional grounds of special legislation regarding termination of associations in a court order for different types of associations of citizens may differ. In particular, in relation to a religious organization, they are: 1) committing actions by a religious organization related to the preaching of hostility,

intolerance towards non-believers and believers of other faiths, activities of political parties and providing them with financial support, arbitrary seizure of religious buildings or appropriation of religious property; 2) a combination of ritual or preaching activities of a religious organization with encroachments on the life, health, freedom, and dignity of a person; 3) systematic violation by a religious organization of the procedure for conducting public religious events (worships, rites, ceremonies, marches, etc.) established by law; 4) encouraging citizens to fail to fulfill their constitutional duties or actions that are accompanied by gross violations of public order or encroachment on the rights and property of the state, public or religious organizations.

For a political party, the grounds for banning a political party are the discovery of the facts of the political party's actions aimed at: a) liquidation of the independence of Ukraine, change of the constitutional order by violent means, violation of the sovereignty and territorial integrity of the state, undermining of its security, illegal seizure of state power, propaganda of war, violence, incitement of inter-ethnic, racial, religious hostility, encroachment on human rights and freedoms, public health; b) propaganda of communist or national socialist (Nazi) totalitarian regimes and their symbols; c) violation of the equality of citizens depending on their race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, on linguistic or other grounds; d) dissemination of information containing justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine.

Grounds for canceling the registration of a political party are the discovery within three years from the date of registration of the political party of inaccurate information in the documents submitted for registration, failure of the political party to nominate its candidates for the elections of the President of Ukraine and the elections of People's Deputies of Ukraine for ten years.

Termination of association activities is subject to state registration. For state registration of the termination of a public association that does not have the status of a legal entity, a decision of the authorized public association management body on its self-dissolution is submitted. However, the termination of the activity of an association with the status of a legal entity occurs in two stages, where the decision to terminate the public association is made at the first stage and the state registration of the termination at the second stage. State registration of the termination takes place on the condition that there is no debt owed to the controlling authorities and there are no pending executive proceedings. Therefore, for state registration of the decision to terminate the association-legal entity, adopted by the body of the association, the decision of the relevant body of the legal

entity on termination, a document approving the personal composition of the termination commission (reorganization commission, liquidation commission) or liquidator is submitted. For state registration of the termination of an association-legal entity based on a court decision, an application for state registration of the termination of a legal entity as a result of its liquidation and a certificate of the archival institution on the acceptance of documents subject to long-term storage are submitted.

CONCLUSIONS

It can be concluded that in the Ukrainian normative sphere, there are two concepts with synonymous meanings: "association of citizens", which is used in some laws that regulate certain types of associations, and "public formation", which is used in legislation that regulates the issue of their state registration. The term "association" is also used, but it means "an association of associations", such as an association of condominium associations. Special laws determine the specifics of making changes to the activities of certain types of citizen associations. In particular, the Law 'On Freedom of Conscience and Religious Organizations' establishes that in case of a decision to change its affiliation, a religious organization shall notify the State Service of Ukraine for Ethnopolitics and Freedom of Conscience, or regional state administrations, which shall ensure the publication of this decision on their official website.

The internal organization, relations of members of citizens' associations, their units, and the charter responsibility of these associations' members are regulated by corporate norms established by the public associations themselves (Decision of the Constitutional Court of Ukraine No. 6-рп/2001 of May 23, 2001). However, the relations between citizens' associations and administrative bodies regarding their registration and legalization, control over their activities, and the application of coercive measures (for example, due to the pursuit of prohibited goals) are regulated by the norms of administrative law, requirements and restrictions are also established imperatively by the norms of public law. The legal grounds in this case are the provisions of the laws 'On Public Associations' of March 22, No. 4572-VI, 'On Professional Creative Workers and Creative Unions' of October 7, 1997, No. 554/97-BP, 'On Freedom of Conscience and Religious Organizations' of April 23, 1991, No. 987-XII, 'On Political Parties in Ukraine' of April 5, 2001, No. 2365-III, 'On Trade Unions, Their Rights, and Guarantees of Activity' of September 15, 1999, No. 1045-XIV, 'On Association of Condominiums' of November 29, 2001, No. 2866-III, 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations' of May 15, 2003, No. 755-IV. Despite the large layer of legislation regarding

the rights of citizens' associations, unfortunately, even today it remains unsystematized.

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THE CONSTITUTIONAL RIGHT OF PARENTS TO BRING UP THEIR CHILDREN IN THE CONTEXT OF ATTEMPTS TO AMEND THE EDUCATION LAW

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Abstract. In recent years, there has been a significant amount of public debate, particularly from conservative and right-wing circles, regarding the issue of external organizations, notably NGOs, conducting extracurricular activities in Polish schools. In some cities, parents decided to let their children take part in extracurricular activities without full knowledge and awareness of the content of these activities and the teaching aids applied to them. There were frequently justified suspicions of children and young people being demoralised during these classes, particularly in relation to gender ideology and the so-called "hard" sex education. The article examines three pieces of legislation regarding education: 1) the Education Law Amendment Act on the Government's Initiative, 2) the Education Law Amendment Act on the Deputies' Initiative, and 3) the Citizens' Bill "Let's Protect Children. Let's support parents."

Keywords: children; parents; school; Education Law

INTRODUCTION

The last years of the functioning of schools in Poland have been filled with discussion and wide interest of public opinion, especially conservative and right-wing, among others, as to the problem of conducting extracurricular activities in schools by external entities, especially NGOs. In some cities, parents decided to let their children take part in extracurricular activities without full knowledge and awareness of the content of these activities and the teaching aids applied to them. There were suspicions, often justified, of demoralizing children and young people during such classes, especially regarding gender ideology and the so-called hard sex education. In response to this state of affairs, first of all recognising the constitutional right of parents to educate their children according to their convictions,[1] but also

[1] Article 48 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended): "1. Parents have the right to bring up their children in accordance with their own convictions. Such upbringing should take account of the child's maturity and of his or her freedom of conscience, religion and belief. 2. Restriction or deprivation

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the constitutional obligation to protect children from demoralization,[2] first the Council of Ministers, then a group of deputies to the Sejm of the Republic of Poland, and finally citizens numbering more than 250,000 decided on legislative initiatives aimed at amending the education law[3] in such a way that extracurricular activities in schools would be totally transparent, and that parents' decisions about their children's participation in such activities would be totally conscious and responsible.

1. THE RIGHT OF PARENTS TO BRING UP THEIR CHILDREN

Article 48 of the Constitution recognises the right of parents "to bring up their children in accordance with their own convictions" (paragraph 1) and establishes the right to restrict or deprive parental rights, but "only in cases specified by law and only on the basis of a final court decision" (paragraph 2). These provisions complement the normative content resulting from the principle of family protection.[4]

The relationship between the first („Parents have the right to bring up their children in accordance with their own convictions") and the second sentence of paragraph 1 ("This education should take into account the degree of maturity of the child, as well as his freedom of conscience, religion and belief") may give rise to interpretative doubts and thus lead to misunderstandings. For example, it is possible to point out some possible disputes regarding the scope of parents' right to raise children, attempts to establish standards of proper parenting depending on the age of the child or demands to check whether the child's maturity is taken into account. Depending on the interpretation, parental rights could be significantly curtailed, which, consequently, would not serve the family.

The source of these interpretative doubts lies in the scope of the matter covered by the provision of that article. The constitutional regulation (second sentence of paragraph 1) covers the issue which, as it seems, is not a matter of law at all. Considering – in the process of upbringing – the degree of maturity of the child, as well as his freedom of conscience and religion and his beliefs, requires an individual approach to the child (i.e. a high degree of flexibility). It is in fact a matter of preparing parents for their educational role and not imposing legal norms, which by their very

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of parental rights may occur only in cases specified by law and only on the basis of a final court decision."

[2] Article 72 of the Polish Constitution: "1. The Republic of Poland ensures the protection of children's rights. Everyone has the right to demand that public authorities protect a child from violence, cruelty, exploitation and demoralization."

[3] All these initiatives have been dubbed Lex Czarnek by the mainstream media.

[4] In detail, see Dobrowolski 1999; Czarnek and Dobrowolski 2012.

nature establish a rigid framework. Such wording of the provision is an expression of the organizer's great mistrust towards parents. After all, it does not seem possible for parents to allow themselves to disregard the maturity of the child to any degree, even to the smallest extent. For these reasons, the second sentence of paragraph 1 should be deleted and replaced by a provision stating that the aim of education is the best interests of the child.

However, even on the basis of this provision, the principle of raising children by parents is indisputable. It is expressed directly in the provisions of the Constitution, not only in the discussed Article 48, but also in Article 53(1) of the Constitution, which indicates that parents have the right to the moral and religious upbringing of their children in accordance with their own views, and reaffirmed in Article 70(3) by giving parents the freedom to choose a non-public school for their children. The requirement to take into account the degree of maturity of the child, his freedom of conscience and religion, as well as his beliefs, refers to the process of upbringing itself, and does not change the subjects entitled to upbringing. It is only a guideline for parents on how to exercise their right. But they are the subjects most entitled to take into account the degree of maturity of the child in the upbringing process, after all, they know their children best and are responsible for their behaviour. It should therefore be stressed that although the beliefs and attitudes of the child are to be taken into account by the parents in the process of upbringing, according to the degree of development and maturity of the child, this does not mean that they are to be accepted uncritically, which would mean at the same time "abandoning further upbringing by the parents at a given stage, since their child already has certain beliefs" [Sarnecki 2003, 4].[5]

Bringing up children is, on the one hand, a manifestation of the private and personal involvement of parents in the lives of those closest to them, for whom they bear full legal responsibility; on the other hand, it is the clearest example of the social function of the family: after all, a "well" brought up child will in the future be an important pillar of the society in which he or she grows up and lives. *A contrario*, a "poorly" brought up child will be a problem for the society, the subject of necessary care and rehabilitation measures on the part of social institutions and state authorities [ibid., 1-2].

Education (bringing up) means instilling and strengthening in children certain manners of behaviour that are considered "good" in the society, a certain worldview, a system of values, beliefs, and moral principles. In short,

[5] It is difficult to demand a passive attitude from parents and respect the child's freedom of conscience and religion when a 10-year-old son does not want to go to church with them on Sunday because ... for example, he does not believe in God, or prefers a Muslim or atheistic value system that he has drawn from the environment or from television.

upbringing is teaching how to distinguish between "good" and "evil", passed on by parents to their children. It is nothing but the disposition of man to the right action. Man is not born fully ready for life, but only has natural dispositions that require improvement and proper direction. As the ancient classics asserted, "that which is natural (sensual, lustful, animal) must be cultivated (Greek paideia, Latin cultura) through the process of education, ennobled and subjected to the service of the truth, goodness and beauty" [Zalewski 2003, 11-12].[6]

In this context, education also appears as the duty of parents, consisting in teaching children to be – as the March Constitution put it – "the right citizens of the Homeland", the citizens who, thanks to the education received primarily from their parents, will be able to find their place in the future society governed by the principles and values derived, among others, from the current Constitution [Sarnecki 2003, 3].

Parents have the right to raise their children in accordance with their convictions, and thus have the freedom to do so and enjoy freedom from interference by other persons, institutions and organizations. The obligations of these entities boil down first and foremost precisely to the prohibition of interference [ibid., 2]. This is particularly evident in the example of the Children's Ombudsman, who, as the guardian of children's rights, has the duty to intervene when these rights are violated, but always with respect for parents' responsibilities, rights and obligations and taking into account the fact that the child's natural environment for development is his or her family.[7]

The right to education is of paramount importance for the protection of the very existence of the family. The process of education is one of the main tasks of the family, it is a good that requires protection by the state. Without this permission, normal family life is almost impossible. Interference by the State in the affairs of the family, in accordance with the principle of safeguarding its well-being and stability, must be particularly prudent and carried out only by an independent tribunal. The exclusive power of the court to restrict or deprive parental rights (see Article 48(2) of the Constitution) guarantees parents that no one else (including other representatives of the state) will interfere in their family's problems. Although this provision relates strictly only to the restriction or deprivation of parental rights, it cannot be interpreted in isolation from the general (everyone's) right to a court (see Article 45) and from the principle of protection of the family. Therefore, it must be considered that only the court has the power to interfere

[6] See also Jaroszyński 1994, 31-42.

[7] See Article 1(2-3) of the Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws No. 6, item 69 as amended).

in any way with the inviolability (subjectivity) of the family, including, first and foremost, to assess the way in which parental authority is exercised, also with regard to "taking into account the degree of maturity of the child." The doctrine of family law regards the right to education as part of a whole series of duties and powers that parents have in relation to their children, referred to as "parental authority."[8] The Constitution does not use that term (this does not mean, however, that under ordinary legislation such an institution has no reason to exist, because the essence of a given legal institution depends not so much on its name as on the content of the regulations regulating it [Winiarz 1994, 210]), but on its basis it can be said that parents are granted power (parental rights) in relation to their children.

For this reason, the role of parents should also be strengthened in the life of the school in which their children attend. Since it is up to them, and not to teachers, to have parental authority and the resulting right to bring up children in accordance with their convictions, parents should be the ones who have the first opportunity to familiarize themselves with the content of extracurricular activities at school. Only then will they be able to make an informed decision whether or not to allow their children to participate in such activities. To this end, appropriate legislative initiatives have been taken.

2. THE ACT ON THE AMENDMENT OF THE EDUCATION LAW ON THE INITIATIVE OF THE GOVERNMENT

In the Act of 13 January 2022 amending the Act – Education Law and Certain Other Acts, which was finally vetoed by the President of the Republic of Poland on 2 March 2022, the Sejm of the Republic of Poland proposed that in Article 86 para. 2, add a paragraph. 2a-2g reads as follows: "If the agreed conditions of activity […] provide for the conduct of classes with pupils, the organization and conduct of these classes shall require obtaining a positive opinion from the educational supervisor […] concerning the conformity of the programme of these classes with the provisions of law. […] In order to obtain the opinion referred to in para. 2a, the headmaster of the school or an educational institution, no later than 2 months before the start of classes referred to in para. 2a, shall transmit, as appropriate, to the educational supervisor or to the specialized supervisory unit

[8] Parental authority is a set of interrelated rights and obligations of parents towards the person and property of the child, which serve to protect the child's well-being and prepare the child for an independent life. This authority consists of three elements: 1) custody of the child, 2) representation, and 3) administration of the child's property. The above definition is not a statutory definition; it has been established by the doctrine of family law. See: Winiarz 1994, 210; Smyczyński 1997, 139.

referred to in Article 53 para. 1, the programme of classes and materials used for the implementation of the programme of classes, as well as the positive opinions of the school or the institution board and the parents' board referred to in para. 2. The opinion referred to in para. 2a, as the case may be, the educational supervisor or the specialized supervisory unit referred to in Article 53(2) issue within 30 days from the date of receipt of the documents referred to in para. 2b. Failure to deliver an opinion within that period shall be tantamount to delivering a favourable opinion. The headmaster of the school or of an education institution, after obtaining a favourable opinion from the educational supervisor or the specialized supervisory body referred to in Article 53(3), as the case may be first or after the expiry of the time limit for issuing the opinion referred to in para. 2c, is obliged before the start of the classes referred to in para. 2a, present to the pupil's parents and, in the case of adult pupils, to these pupils: 1) full information on the objectives and contents of the course programme; 2) a positive opinion from the educational supervisor or the specialist supervisory body referred to in Article 53 para. 1 – if they have been issued; 3) positive opinions of the school or institution board and the parents' board referred to in p. 2.

The principal of the school or of an educational institution shall make the materials – used for the implementation of the programme of classes – available to the parents of the pupil, and in the case of adult pupils to these pupils, upon their request. Participation in the classes referred to in para. 2a, requires the written consent of the parents of the pupils, and in the case of adult pupils – of those pupils.

Opinions referred to in para. 2a, are not required for the classes referred to in para. 2a, organized and conducted: 1) as part of a task entrusted to the public administration, or 2) by scouting organizations under the Honorary Protectorate of the President of the Republic of Poland operating in the territory of the Republic of Poland."[9]

The explanatory memorandum to the government bill states that "the bill also contains other amendments of a more precise nature. These amendments concern those provisions which most often give rise to questions of interpretation. These are primarily changes in the scope of activities carried out by associations and other organizations whose statutory objective is educational activity or to expand and enrich the forms of didactic, educational, caring and innovative activity of a school or institution. According to the draft law, the headmaster of a school or an educational institution will be obliged to obtain a positive opinion from the curator of education, and in the case of a school and artistic institution and an institution referred

[9] Sejm Printing No. 1812, https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=1812 [accessed: 05.11.2023].

to in Article 2 point 8 of the Act of 14 December 2016 – Educational Law, for students of artistic schools – from a specialized supervisory unit referred to in Article 53(1) of the Act. 1 of this Act, prior to the commencement of classes and to present to the parents of the pupil or an adult pupil the information about the objectives and content of the class programme, the positive opinion of the educational supervisor and the positive opinions of the school or institution board and the parents' board, and at the request of the parent or adult pupil – also materials used for the implementation of the class programme. Such a procedure will increase the awareness of pupils and parents of the content of the proposed programmes. The parent should have the right to decide on the participation of the child in the activities, as well as to obtain information, e.g. as to the professional experience, competences and skills of the persons conducting the activities, within the scope of the activities."

The public was also very interested in the issue of the role of the Curators of Education in the proposed procedure for admitting non-governmental organizations to extracurricular activities. The explanatory memorandum to the Act clarifies that "the constitutional duty of public authorities is to ensure universal and equal access to education for citizens. The Basic Law recognises the importance of pedagogical supervision of schools and the need to define its rules by statute. Thus Pedagogical supervisory bodies, in particular educational supervisors, play an extremely important role in the education system. The pedagogical supervisory authority, which has the appropriate tools and a specialized unit, is obliged to pay particular attention to the proper quality of education in the broad sense (training, upbringing and care) and to its examination and evaluation. The Curator of Education is a body within the unified administration in the voivodship, which, on behalf of the voivodship, performs the tasks and competences in the field of education, defined in the Act of 14 December 2016 – Education Law (Journal of Laws of 2021, item 1082) within the voivodship. The Curator of Education, in addition to the tasks resulting from the provisions of the Act, also carries out tasks specified in other legal acts, including the Act of 26 January 1982 – The Teacher's Charter (Journal of Laws of 2021, item 1762). Pedagogical supervision is one of the tasks carried out by the curator of education. It should be stressed that the other tasks carried out by the educational supervisor are closely linked to the pedagogical supervision exercised by that authority. The curator of education carries out these tasks, having comprehensive knowledge about the functioning of schools and institutions, which he obtains as part of his pedagogical supervision. At the same time, the curator of education has a statutory obligation to cooperate with other bodies and organizations in matters concerning the conditions of development of children and young people, to support teachers, schools and their

leading bodies. In order to ensure that schools and institutions carry out their teaching, education and care tasks properly, it is essential that the educational supervisor has a strong voice in local decision-making on important issues concerning the functioning of the units of the education system."

The developer also pointed out that "a different role in the education system is played by the bodies running schools and institutions, including local government units, whose statutory obligation is to run public schools and institutions. The task of the governing bodies is, in particular, to ensure the operating conditions of the school or institution, to equip it with teaching aids and equipment necessary for the full implementation of statutory tasks, to carry out renovations of school facilities and necessary investments, to provide administrative services, including legal, financial, organizational services of the school or institution, as well as to carry out activities related to labour law vis-à-vis the headmaster of the school or institution. The school and its functioning is thus an area in which the competences of the pedagogical supervisory authority and the school management authority intersect."

The explanatory memorandum also explains that „as part of pedagogical supervision, an assessment is made of the state of compliance by the school or institution with the legal provisions concerning didactic, educational and care activities and other statutory activities of the school or institution. If irregularities are found, i.e. non-compliance with the law, recommendations are issued. Signals about cases of non-implementing by school or institution headmasters recommendations issued as a result of pedagogical supervision and the lack of effective tools for enforcing this obligation were reported to the Ministry of Education and Science (formerly the Ministry of National Education) by educational supervisors. Information on such situations was already provided before the introduction of temporary restrictions on the functioning of units of the education system in connection with the prevention, control and control of COVID-19." It was additionally stressed that "education supervisors also provided the Ministry of Education and Science (formerly the Ministry of National Education) with information on problems of pedagogical supervision in schools and non-public institutions, pointing out that it was not possible to carry out pedagogical supervision in a school or a non-public institution. Such situations resulted from avoidance of contact by the headmaster of the school or institution or the supervisor (often the same person), failure to reply to letters sent to the headmaster (the supervisor), failure to provide documentation during the performance of pedagogical supervision at the school or institution." And although "failure to implement recommendations by school or institution principals and to prevent non-public pedagogical supervision from being carried out in a school or institution is not common, it is

nevertheless impossible, given the importance of pedagogical supervision, to leave the educational supervisor without effective means of influence in such cases." Therefore, "it is extremely important to secure the conditions for the proper performance of teaching, educational and care tasks by schools and institutions, which justifies the introduction in the draft law of solutions strengthening the role of pedagogical supervisory authorities, including the curator of education, when making decisions at the local level regarding the functioning of schools and institutions."

3. THE ACT ON THE AMENDMENT OF THE EDUCATION LAW ON THE INITIATIVE OF THE DEPUTIES

The veto of the President of the Republic of Poland blocked the effects of legislative work undertaken to create transparency of activities of non-governmental organizations in schools and to realize the constitutional right and priority of parents to educate their children in accordance with their world views. However, on the day of the veto, the President of the Republic of Poland agreed with the Minister of Education and Science that the deputies of the Sejm Committee on Education, Science and Youth, together with the Ministry of Education and Science, would consult on new legislative solutions on this subject together with the ministers in the Chancellery of the President of the Republic of Poland.[10]

The regulations developed in this way were recorded in the new Act of 4 November 2022 amending the Education Law Act and certain other acts.[11] This time, the legislator proposed that in Article 86(2), add a paragraph. 2a-2n with the following adjustment.

An association or other organization intending to operate in a school or in an educational institution would be required to send to the headmaster of that school or institution, in electronic and paper form, information including in particular: 1) the description of the past activities of the association or other organisation; 2) objectives and contents to be implemented in the school or institution as part of the activities carried out by an association or other organization; 3) the description of the materials used to achieve the objectives and content referred to in p 2.

Subsequently, the headmaster of the school or institution, within 7 days from the date of receipt of the above information, would be required to: 1) inform the parents of pupils of the intention of the association or other

[10] Such arrangements were made in an interview between the author and the President of the Republic of Poland Andrzej Duda.

[11] Sejm Printing No. 2710, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=2710 [accessed: 05.11.2023].

organisation to take up activities in that school or establishment and to hold consultations thereon; 2) provide the parents of the pupils with the information referred to in para. 2a; 3) provide the school or institution board and the parents' board with the information referred to in para. 2a.

All the information should be communicated to the parents of pupils in the manner customary at the school or institution, in particular by placing it prominently on the premises of the school or institution or on its website.

The school or institution's board and the parents' board would have to give an opinion on the matter within 21 days of receipt of the information referred to in paragraph 1. 2a, or to receive additional materials, information or clarifications. Before issuing its opinion, the parents' board should consult the parents of the pupils on the association or other organization taking up activities at the school or institution and could request from the headmaster of the school or institution any additional materials, information or explanations necessary to give the opinion referred to in paragraph 1. 2. The Parents' Council would be obliged to inform the parents of the pupils of the start and end dates of the consultation, except that the consultation could last no less than 7 days.

Under these provisions, pupils' parents could at any time submit to the head of the school or institution their views on the activities of the association or other organization in question. If, on the other hand, the agreed conditions of activity provided for the conduct of classes with pupils, the organization and conduct of these classes would require obtaining a positive opinion from the educational supervisor or a specialist supervision unit. In order to obtain this opinion, the headmaster of the school or institution would, no later than 2 months before the start of the classes, present the programme of classes and the materials used for the implementation of the programme, as well as the positive opinions of the school or institution's board and the parents' board to the educational supervisor. Such an opinion would be issued by the supervisor of education or a specialized supervisory unit within 30 days of receipt of the documents, and failure to issue an opinion within that period would be tantamount to issuing a positive opinion. The principal of the school or institution, after obtaining a positive opinion from the educational supervisor or a specialist supervisory unit, or after the expiry of the deadline for issuing such opinion, was obliged to present to the pupil's parents and, in the case of an adult pupil, to the pupil: 1) full information about the objectives and contents of the course programme; 2) a positive opinion of the educational supervisor or a specialist supervisory unit, as appropriate – if they had been issued; 3) a positive opinion of the school or institution board and the parent board.

The director of the school or institution was to make available to the parents of the pupil, and in the case of an adult pupil – to the pupil, upon their request, the materials used for the implementation of the programme of classes. Participation in classes would, of course, require the written consent of the student's parents, and in the case of an adult student – of that student. The whole procedure was abandoned in the case of the classes organized and conducted: 1) as part of a task entrusted to the public administration, or 2) as part of the tasks carried out by the National Centre for Counteracting Addiction, or 3) by a scouting organization under the Honorary Protectorate of the President of the Republic of Poland operating in the territory of the Republic of Poland, or 4) by the Polish Red Cross operating in the territory of the Republic of Poland under the supervision of the Prime Minister.

The explanatory memorandum of the second draft law on transparency of non-curricular activities conducted at school by non-governmental organizations states that "the changes introduced are aimed at strengthening the position and voice of parents and their representatives in the social body of the school (parents' council) in the area of deciding on the content addressed to their children by associations or other organizations referred to in Article 86(1) of the Act of 14 December 2016 – Educational Law. The Parents' Council will be empowered to consult all parents before issuing the opinion required for the headmaster of the school or an educational institution to authorize the institution or an association or other organization. Tasks have been set for the principal and the parents' board to conduct the consultation on the basis of information received from the applicant association or other organization (the information should include the description of the activities of the association or other organization to date, the objectives and content to be pursued by the school or establishment and the description of the materials used). Only after consultation will the Parents' Council be able to give its opinion. The powers of the Parents' Council will also be extended to monitor the activities of associations or other organizations operating in the school or institution and to inform the parents of pupils about their results. Thanks to this regulation, parents will gain wider information about the organization's offer, its achievements and potential effects in terms of supporting their educational impact. The way of conducting consultations and the manner and frequency of informing parents of pupils about the results of monitoring will be specified in the rules of its activities.

In addition, according to the draft law, if the agreed conditions of activity are to be provided for classes with pupils, the headmaster of the school or institution will be obliged to obtain a positive opinion from the curator of education, and in the case of a school and artistic institution and an institution

referred to in Article 2 point 8 of the Act of 14 December 2016 – Educational Law, for students of artistic schools – a specialized supervisory unit referred to in Article 53(1) of the Act. 1 of the above-mentioned Act, prior to the commencement of classes and to present to the parents of the pupil or an adult pupil full information on the objectives and contents of the class programme, the above-mentioned positive opinion of the pedagogical supervisory authority and the positive opinions of the school or institution board and the parents' board, and at the request of the parent or an adult pupil – also materials used for the implementation of the class programme. Such a procedure will increase the awareness of pupils and parents of the contents of the proposed programmes. The parent should have the right to decide on the participation of the child in the classes, as well as to obtain information, e.g. as to the professional experience, competences and skills of the persons conducting the classes, in the scope covered by the classes.

4. CITIZENS' BILL "LET'S PROTECT CHILDREN. LET'S SUPPORT PARENTS"

The President's unexpected veto of the Parliamentary Act amending the Education Law, applied on 16 December 2022, led to the mobilization of the parents themselves, who, in the spring of 2023, in the number of more than 250,000, submitted a citizen's bill amending the Education Law Act to the Marshal of the Sejm of the Republic of Poland. The legislative process carried out on the basis of this draft led to the adoption of the Act of 17 August 2023 with the same title.[12] It is proposed that Article 86(1) of the Act should be amended. 1 add the following provision: "Associations and other organizations promoting issues related to the sexualisation of children shall be prohibited in kindergartens, pre-school departments of primary schools, primary schools and art schools providing general primary education." Thus, the applicant decided unequivocally that any action aimed at demoralizing children and young people with regard to their sexuality and the sexual sphere of their lives is prohibited. In turn, by the mouth. 2 the legislator added the following provisions: 'An association or other organization referred to in para. A person intending to take up an activity in a school or in any educational institution shall communicate to the headmaster of that school or establishment, in electronic and paper form, information containing in particular: 1) the description of the past activities of the association or other organization; 2) objectives and contents to be implemented in the school or institution as part of the activities carried out by an association or other organization; 3) the description of the materials used to achieve the objectives and content referred to in p 2.

[12] Sejm Printing No. 3520.

The principal of the school or of an educational institution, immediately upon receipt of the information referred to in para. 2a, shall ask the board of the school or institution and the parents' board to express the opinion referred to in para. 2 and at the same time informing the competent authority responsible for the pedagogical supervision and the authority running the school or institution of the receipt of the information. After obtaining the opinions referred to in para. 2, the headmaster of the school or institution allows parents to familiarize themselves with them. Participation in classes conducted by an association or organization referred to in para. 1 requires the written consent of the pupil's parents or, in the case of an adult pupil, of that pupil.

The above procedure does not apply to classes organized and conducted: 1) as part of a task entrusted to the public administration, or 2) as part of the tasks carried out by the National Centre for Counteracting Addiction, referred to in Article 8b para. 2 points 2-7 of the Act of 11 September 2015 on Public Health (Journal of Laws of 2022, item 1608), or 3) by a scouting organization under the Honorary Protectorate of the President of the Republic of Poland operating in the territory of the Republic of Poland, or 4) by the Polish Red Cross referred to in the Act of 16 November 1964 on the Polish Red Cross.

The explanatory memorandum to the bill states that the proposed solutions, "in order to meet social expectations, are aimed at strengthening the position and voice of parents and their representatives in the social body of the school (parents' council) in terms of effectively opposing undesirable contents directed at their children by associations or other organizations." It was also pointed out that the current situation creates a significant legal gap, which is that the parents of children whose rights are infringed or at risk of being infringed have a very limited legal path to be able to effectively prevent them directly.

The applicants also referred to the scientific studies which show that "early exposure of children to sexual or violent materials and behaviour may result in lifelong difficulties in sexual development and in building close relationships. […] If a child experiences sexual abuse in the form of epathetic material or behaviour, it is difficult for him to bear; the child is overwhelmed and has to defend himself against it. In psychoanalytic theories, the defenses that explain self-sexualization and risky sexual behaviour that lead to retraumatization are called experiencing and repetition. They can lead to the choice of destructive lifestyles."[13]

[13] A report from the American Psychological Association, The explanatory memorandum for a citizen's bill, Sejm Printing No. 3520.

However, the legislative process has not yet been completed. The Senate rejected the bill in its entirety on 7 September this year.[14] Due to the fact that citizens' bills are not subject to discontinuation of work, the Senate resolution will be dealt with by the Sejm of the next term of office, which begins on 13 November 2023.

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[14] Sejm Printing No. 3644.

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ACCREDITATION OF FORENSIC LABORATORIES

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Abstract. The modern trial requires that the results of forensic research are credible reliable, carried out according to standard procedures, and that the experts performing them have the highest competences. The guarantee of precision, reliability and trust in forensic expertise is rightly observed in the most important international standard for research, EN ISO/IEC 17025. The article presents specific requirements relating to the mandatory accreditation of forensic laboratories that conduct genetic and dactyloscopic tests. The role played by the European Network of Forensic Science Institutes in the area of accreditation is also discussed, with particular emphasis on the most recent ENFSI initiative related to the development of the document entitled "Vision of the European Forensic Science Area 2030".

Keywords: forensic experts; DNA tests; fingerprint examination; forensic science; EN ISO/IEC 17025

INTRODUCTION

Due to the rapid development of science and technology and its use by the judiciary, the issue of the quality of opinion and accreditation of forensic laboratories has gained in importance. Judicial proceedings require that the results of forensic examinations meet the criteria of: reliability; performance according to standard procedures; consistency with the results obtained in other countries, in other scientific circles and in internationally recognized institutions; that they are performed within a specified time frame in an effective and efficient manner [Ivanovic 2019, 21]. The forensic laboratory, in performing advanced tests, should therefore guarantee the high quality of services provided and the credibility of opinions drawn up on this basis. It is also important to employ professional experts with the highest competences and to have appropriate equipment by the reviewing institution.

The modern court trial rightly sees the most important international standard EN ISO/IEC 17025 "General requirements for the competence of testing and calibration laboratories" as a guarantee of precision, reliability and trust in forensic expertise[1] [Hebenstreit 2007, 608; Wójcikiewicz

[1] Hereinafter: ISO 17025.

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2009, 263].The ISO 17025 standard formulates a number of requirements for the quality system in the laboratory and technical competence to carry out tests. The most important include: compliance with the quality management system, regular audits, training of experts, care for laboratory premises and appropriate equipment, validation of tests, quality control, standards for reporting test results, and continuous improvement [Skorecki 2008, 35-36]. Obtaining an accreditation certificate is possible after meeting the requirements specified in the standard. In view of the above, it should be emphasized that accreditation is the issuance of an official confirmation that the laboratory operates in accordance with a documented management system and is competent for tests specified in the scope of accreditation [Girdwoyń 2011, 107].

Accreditation and quality control are covered by the current Framework Decision of the EU Council of 30 November 2009 on the accreditation of forensic service providers performing laboratory activities.[2] The aim of the regulation is to introduce common accreditation rules in accordance with ISO 17025 [Bednarek 2012, 80], which is to ensure that the results of laboratory tests carried out by accredited entities in one Member State are recognized by the judicial authorities in another Member State (Article 5 of the Framework Decision). The Framework Decision imposes on the Member States of the European Union the obligation to ensure that their forensic service providers, in performing laboratory activities in the field of DNA testing and dactyloscopic tests,[3] are accredited by a national accreditation body for compliance with the EN ISO/IEC 17025 standard (Article 4 of the Framework Decision). In accordance with Article 3, the Framework Decision recognizes as a laboratory activity, any activity undertaken in the laboratory related to the disclosure and protection of traces on objects, examination, analysis and interpretation of evidence, in order to prepare an expert opinion. However, all activities carried out outside the laboratory (e.g. at the scene of the incident) are not covered by the Framework Decision.

Due to the extent of the issues outlined above, the element of this study is to present specific requirements relating to the accreditation of forensic laboratories performing genetic and fingerprint tests and to reveal the role played by the European Network of Forensic Science Institutes – an organization associating leading European laboratories and promoting

[2] Council Framework Decision 2009/905/JHA of 30 November 2009 on the accreditation of forensic service providers performing laboratory activities (Official Journal of the European Union of 2009, L322/14) [hereinafter: the Framework Decision].

[3] In the field of DNA testing, the Framework Decision has been in force since 30 November 2013, and in the field of fingerprint tests – since 30 November 2015.

the introduction of international standards guaranteeing quality assurance and accreditation.

1. SPECIFICITY OF ACCREDITATION OF LABORATORIES PERFORMING GENETIC AND DACTYLOSCOPIC TESTS

Accreditation of forensic laboratories that perform DNA and fingerprint tests under the 2009 Council Framework Decision is mandatory. In Poland, the accreditation body is the Polish Centre for Accreditation (PCA), which operates on the basis of the Act on conformity assessment and market surveillance systems of 13 April 2016.[4] The Polish Centre for Accreditation, acting in accordance with national and international requirements, has developed a number of documents regulating the principles of evaluation of laboratories wishing to operate in the accreditation system. Laboratories performing tests in the above-mentioned fields, when applying for accreditation, should therefore meet: A) General accreditation requirements indicated by the PN-EN ISO/IEC 17025 standard, B) Specific accreditation guidelines specified in: the Framework Decision of the Council of 2009 and in the document of the Polish Centre for Accreditation – "Accreditation of research laboratories – forensic service providers performing laboratory activities" DAB-10.[5]

The DAB-10 document deserves special attention in the context of the discussed issues. This regulation was developed by the Polish Centre for Accreditation and introduced by Communication No. 330 of 15 December 2020, and is valid from 15 March 2021. Due to the framework of this article, the characteristics of the specific accreditation guidelines set out in the aforementioned DAB-10 document (which was developed to harmonize the approach to accreditation of forensic service providers performing laboratory activities, with particular emphasis on genetic testing and dactyloscopic testing), will be presented.

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[4] Journal of Laws of 2022, item 1854.

[5] Hereinafter: DAB document – 10]. Document available on the PCA website: https://www.pca.gov.pl/publikacje/dokumenty/pca/dokumenty-dotyczace-laboratoriow-badawczych [accessed: 30.08.2023]. The forensic laboratory should also meet the conditions that are suitable for the accreditation of research laboratories according to the program specified in the document "Accreditation of research laboratories" (DAB-07). Document available on the PCA website, https://www.pca.gov.pl/publikacje/dokumenty/pca/dokumenty-dotyczace-laboratoriow-badawczych [accessed: 30.08.2023].

1.1. Structure requirements

The laboratory management system should concern activities involving laboratory activities, i.e. the disclosure and securing of traces on objects, examination, analysis, evaluation and interpretation of forensic evidence, in order to develop an expert opinion or exchange forensic evidence. It is also required to implement a procedure for managing the process of formulating an expert opinion and interpreting research results.

1.2. Personnel requirements

Experts performing genetic tests on their own should at least: have higher biological, chemical, medical or related education, have one year of experience in the use of molecular biology techniques, have formal confirmation of competence by their supervisor and participate in intra-laboratory confirmation of the validity of test results with a positive result. Moreover, an employee of the laboratory authorizing a genetic test report is required, in addition to higher education in the above-mentioned fields, to have a formal confirmation of competence by their supervisor and to participate in an intra-laboratory confirmation of the validity of test results with a positive result. It is also necessary to have two years of professional experience in the field of performing tests under supervision and/or to develop 100 drafts of test reports carried out under supervision and to participate in PT/ILC programs[6] with a positive result [Bednarek and Miąskiewicz 2010, 23-24].

The laboratory employee performing dactyloscopic examinations and authorizing test reports must have higher education, two years of experience in performing this type of activities and/or develop 150 drafts of test reports carried out under supervision, have formal confirmation of competence by the supervisor, participate in PT/ILC programs with a positive result and participate in intra-laboratory confirmation of the validity of test results with a positive result.

Both experts issuing opinions in the field of DNA testing and experts giving opinions in the field of fingerprint testing must have documented, advanced knowledge of the research method used, estimating its uncertainty

[6] According to the PCA document "Policy on participation in proficiency tests" (DA-5 of 12 April 2023), PT – a proficiency testing is: assessment of the results of the participant's activities according to a previously established criterion, using interlaboratory comparisons, while ILC – an interlaboratory comparison is: organization, performance and evaluation of measurements or tests of the same or similar objects, by at least two laboratories, in accordance with previously determined conditions. Document available on the PCA website, https://www.pca.gov.pl/publikacje/dokumenty/pca/dokumenty-ogolne/pny on the PCA website [accessed: 30.08.2023].

and the requirements of legal provisions related to a given area of research. The indicated detailed requirements of persons employed in an accredited laboratory create a standard of competence, allowing to ensure the credibility and reliability of experts giving opinions for the purposes of court proceedings.

1.3. Requirements for the laboratory and its equipment

It is necessary for the laboratory to monitor, control and document the environmental conditions that may affect the validity of the test results, including, among others, temperature and humidity in rooms for storing evidence and reagents, in refrigerators and freezers where, for example, samples and evidence are stored, in rooms where there is measuring equipment. The accredited laboratory should have appropriate equipment, including measuring devices that are technically and qualitatively appropriate. The devices should be checked before they are put into use during testing activities, and then periodically calibrated and checked according to the relevant instructions. Activities related to the supervision of equipment must be planned and documented. In an accredited forensic laboratory, ensuring compliance with procedures and instructions regarding the equipment used during laboratory activities is a guarantee of the reliability of tests, and also prevents the use of devices that do not work properly.

1.4. Requirements for the selection and validation of the research method

The laboratory should use documented research methods that are described in professional literature, methodological studies of renowned technical organizations, or national or international institutions that result from the current state of scientific knowledge. In the event of unavailability of the methods described in professional publications, the laboratory may approve and use its own methods provided that they are validated. The entire validation process is carried out by qualified personnel using technically efficient and calibrated devices.

In genetic testing, validation must include at least: specificity, sensitivity, repeatability, reproducibility, resistance to external factors, limits of detection and quantification of the method under repeatability and reproducibility conditions, as well as evaluation of DNA extraction efficiency and measurement uncertainty. Validation of methods in the case of fingerprint tests concerns: specificity, sensitivity, repeatability, reproducibility, identification of uncertainty components and estimation of uncertainty of false positive or false negative opinion.

1.5. Requirements for handling the research material

Handling the research material entering the laboratory, including its movement, preparation and activities performed during the tests, should eliminate changes that could affect the validity of the research results. Notably, it is necessary to: have and apply procedures for revealing and securing traces and preparing samples for researching, keep documentation in this regard, ensure the performance of activities by qualified personnel, return objects not used for testing to the Principal or store in the laboratory, record the destruction or wear of the entire test objects in the appropriate documentation, and assess the suitability of the objects (the test materials). The accreditation requirements also emphasize the obligation to keep and maintain complete technical records of the tests performed for a period of not less than 5 years.

1.6. Research and opinion requirements

It is necessary for the forensic laboratory to ensure an adequate degree of confidence in the results of the conducted research as part of establishing and maintaining the consistency of the results. In genetic testing, the following should be used: certified reference materials provided by accredited manufacturers, molecular weight standards, DNA concentration patterns, DNA sequence patterns and human DNA patterns. In contrast, in dactyloscopic research, the correct reference is the use of a numerical standard, specifying the occurrence of 12 common features on the trace and comparative print. It is permissible to use the rules established by Edmund Locard, i.e. the desire to indicate compliance of at least 12 minutias, and when there is a smaller number of common features (8-11), the DAB-10 document indicates the need to take into account the identification value of the minutia (legibility of the trace, frequency of occurrence, presence of the pattern center and deltas), as well as poroscopic and edgeoscopic features. When performing fingerprint tests, a catalog of classic special features of the construction of fingerprints should be used.

The laboratory must also monitor the validity of the test results. In the case of DNA testing, for example, by testing samples with known characteristics or monitoring the stability of research methods. In fingerprint tests, activities in this regard will include: observation of at least two tests performed by each expert during the year in terms of the selection of the sequence of techniques used, substantive verification of at least two opinions (categorical, positive) performed by each expert during the year. The accredited laboratory is also obliged to participate in proficiency tests (PT/ILC) once a year.

It is also important to estimate the measurement uncertainty. Indeed, the laboratory is obliged to identify the components of measurement uncertainty. In this area, all components, including those resulting from sampling, should be taken into account and the measurement uncertainty assessed [Pękała and Marciniak 2008, 48-49].

The discussed DAB – 10 document allows the client to participate in genetic and dactyloscopic tests. The judicial body may reserve its presence at all or some stages of the laboratory activities, provided that the test results are not adversely affected. The accredited laboratory is obliged to determine the rules of presence during the tests, taking into account: impartiality and independence of the laboratory, confidentiality of information and protection of customers' property rights, and the lack of involvement of the client's representative in activities that may affect the validity of the test results.

The test report should be prepared in the form of a paper or electronic document and contain unambiguous and objective test results. It is necessary to take into account: the data of the persons performing the tests and the data and signature of the person authorizing the test results, information on all observed deviations from the methods of performing the tests, preparation of illustrative material (boards, photographs, printouts, CDs, DVDs, sketches), interpretation of the results obtained, as well as the name, degree, scientific title, position in the laboratory and signature of the person responsible for issuing the opinion. The test report should also contain information about the accreditation held by the laboratory.

1.7. Environmental management system requirements

The accredited laboratory must conduct internal audits of all technical activities, including observation of the tests performed. Of relevance, auditors must have knowledge in the field of auditing the management system in laboratories and knowledge and experience in carrying out activities in genetic or dactyloscopic research. In addition, the laboratory should define detailed rules for the supervision of records establishing the identification, storage, protection, backup, archiving, retrieval, retention and deletion of records created during research.

2. THE ROLE OF THE EUROPEAN NETWORK OF FORENSIC SCIENCE INSTITUTES IN THE PROCESS OF ACCREDITATION OF FORENSIC LABORATORIES

Established in 1995, the European Network of Forensic Science Institutes (ENFSI) plays an important role in the area of accreditation of forensic laboratories. The organization currently brings together 72 laboratories from

39 countries. In Poland, ENFSI cooperates with the Central Forensic Laboratory of the Police, the Forensic Research Office of the Internal Security Agency and the Institute of Forensic Experts named after Professor Jan Sehn, in Krakow.

From the beginning of its existence, ENFSI has set itself the goal of promoting quality in the performance of laboratory tests, improving the mutual exchange of information in the field of forensic sciences, enhancing the quality of forensic research carried out by experts and ensuring the best conditions for the development of forensic sciences [Filewicz 2003, 5-13]. The Constitution adopted by the Network emphasizes in § 2 that one of its basic tasks is to introduce among all member laboratories, the principles of good laboratory practice and international standards guaranteeing the quality of tests and the competence of persons performing them.[7] It should be pointed out that according to § 4 of the Constitution, any laboratory that meets a number of detailed criteria may become a member of ENFSI. Herein, three of the more important issues are: a) having a wide range of expert services – over 50% of the research areas represented by ENFSI Expert Working Groups; b) employing at least 25 experts in the fields represented by Expert Working Groups; c) having an accreditation certificate certifying the competence of the laboratory according to ISO 17025 or documenting progress in quality assurance with a clear plan to obtain accreditation within 3 years.[8]

The Network includes seventeen Expert Working Groups, referred to as ENFSI scientific and organizational facilities [Rybicki 2009, 9], which coordinate and supervise individual departments of forensic sciences. Currently, ENFSI has groups from the following thematic areas: Animal, Plant and Soil Traces, Digital Imaging, DNA, Documents, Drugs, Explosives, Fingerprint, Firearms/GSR, Fire and Explosions Investigation, Forensic Information Technology, Forensic Speech and Audio Analysis, Handwriting, Marks, Paint, Glass & Taggants, Road Accident Analysis, Scene of Crime, Textile and Hair.[9]

The European Network of Forensic Science Institutes has also established a standing committee – The Quality and Competence Committee (QCC). Its main task is to ensure the development of quality and competence policy by advising Working Groups and member laboratories, as well as helping laboratories affiliated to ENFSI to comply with international best practices

[7] ENFSI Constitution, https://enfsi.eu/wp-content/uploads/2017/06/181107_ENFSI-Constitution_181107-approved.pdf [accessed: 30.08.2023].

[8] ENFSI document "Policy on Accreditation" – BRD-ACR-001 (10.05.2023), https://enfsi.eu/wp-content/uploads/2017/06/BRD-ACR-001_Policy-on-Accreditation.pdf [accessed: 30.08.2023].

[9] Information available on the ENFSI website, https://enfsi.eu/about-enfsi/structure/working-groups/ [accessed: 30.08.2023].

and standards.[10] The Quality and Competence Committee promotes accreditation of laboratories affiliated to ENFSI certifying technical competence according to the international ISO 17025 standard. QCC activities are also concerned with the implementation of ISO 17020 on-site work.[11]

The Committee has developed a number of documents, guidelines, recommendations and manuals of good practices, allowing experts and laboratories to achieve and maintain the highest quality standards [Sołtyszewski and Wójtowicz 2002, 17]. Reference should be made here to the two main studies: "Guidance on the Assessment of Competence for Forensic Practitioners" (QCC-CAP-006-001)[12] and "Performance Based Standards for Forensic Science Practitioners" (QCC-CAP-003-002).[13] These documents emphasize that, in accordance with the ENFSI policy, all member laboratories should have a formal and documented system for assessing the competence of experts and must comply with the Code of Conduct (BRD-GEN-003).[14] It is important that the competence assurance system is an integral part of the quality system in accordance with ISO 17025 and, where applicable, ISO 17020. The indicated regulations set standards for people performing forensic examinations, based on work performance indicators. These indications should be used both during research activities and in the process of education and training of experts by institutions conducting activities in the field of forensic sciences and by academic centers.

The Quality and Competence Committee is also responsible for the implementation of the Framework Decision already mentioned at the outset. The data collected by the Committee shows that virtually all European countries have been accredited by their forensic institutions, most often according to the ISO 17025 and ISO 17020 standards [Ivanovic 2019, 20-21].

It is worth recalling that already in 2011, during the Polish Presidency of the Council of the European Union, the creation of the European area of forensic sciences (EFSA 2020) was approved, and the document: "Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe" was prepared, approved and released.

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[10] Information available on the ENFSI website, https://enfsi.eu/about-enfsi/structure/standing-committees [accessed: 30.08.2023].

[11] "Policy on Accreditation" – BRD-ACR-001 (10 May 2023), https://enfsi.eu/wp-content/uploads/2017/06/BRD-ACR-001_Policy-on-Accreditation.pdf [accessed: 30.08.2023].

[12] Document available at ENFSI https://enfsi.eu/wp-content/uploads/2017/11/QCC-CAP-006-001.pdf [accessed: 30.08.2023].

[13] Document available at ENFSI https://enfsi.eu/wp-content/uploads/2017/11/QCC-CAP-003-002.pdf [accessed: 30.08.2023].

[14] Code of Conduct, https://enfsi.eu/wp-content/uploads/2016/09/code_of_conduct.pdf [accessed: 30.08.2023].

This listed a number of key directions for the development of European forensic sciences, among others: accreditation of forensic science institutes and laboratories; respect for minimum competence criteria for forensic science personnel; establishment of common best practice manuals and their application in daily work of forensic laboratories and institutes; conducting of proficiency tests/collaborative exercises in forensic science activities at international level; application of minimum quality standards for scene-of-crime investigations and evidence management from crime scene to court room; recognition of equivalence of law enforcement forensic activities with a view to avoiding duplication of effort through cancellation of evidence owing to technical and qualitative differences; and achieving significant reductions in the time taken to process crimes with a cross-border component.[15] On 9 June 2016, the Council approved the "Council Conclusions and Action Plan on the way forward in view of the creation of an European Forensic Science Area."[16]

EU documents have highlighted the need to ensure high quality standards for expert research, to take into account recognized quality standards in relation to the collection, processing and use of data obtained during forensic research, and to educate and train law enforcement and judicial staff. The Council of the European Union has appointed ENFSI as one of the main coordinators of the activities specified in the above-mentioned documents. When EAFS 2020 came to an end, the European Network of Forensic Science Institutes, using its experience, decided to pave a new way to improve the reliability and validity of forensic sciences and to support the implementation of new technologies.

One of the latest ENFSI initiatives is the development of the document "Vision of the European Forensic Science Area 2030."[17] The vision consists of three pillars that are important for ENFSI when developing strategic plans and defining the subject of new projects. These are: 1) "Meeting the Future" including: Biometrics, Applications of Artificial Intelligence, New tools for crime scene investigation, Emerging Biological and chemical evidence types' – omics', Emerging technologies and Industry 4.0; 2) "Strengthening the impact of forensic results" including: Transfer, persistence

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[15] Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126875.pdf [accessed: 30.08.2023].

[16] Council Conclusions and Action Plan on the way forward in view of the creation of an European Forensic Science Area, https://data.consilium.europa.eu/doc/document/ST-10128-2016-INIT/en/pdf [accessed: 30.08.2023].

[17] Hereinafter: Vision. Document available on the ENFSI website, https://enfsi.eu/wp-content/uploads/2021/11/Vision-of-the-European-Forensic-Science-Area-2030.pdf [accessed: 30.08.2023].

and background abundance, Forensic data sharing, Facing the challenges with Migration-Trafficking-Smuggling; 3) "Demonstrating Reliability in Forensic Results" including: Fundamentals in Forensic Science, "Forensic human factors, Quality and competence assurance."

Due to the subject matter of this study, the third indicated area of issues deserves special attention, in which, in specifying the activities in the field of "Fundamentals in Forensic Science", "Forensic human factors" and "Quality and competence assurance", it was emphasized that ENFSI supports research on the foundations of forensic science, including indicating a wide range of possible areas for research and development, while respecting the methods currently used. It is important to understand the impact of interpersonal interactions on decisions made at all levels of investigation, from the scene of the crime to the courtroom. In turn, ENFSI considered the issue of quality and ensuring competence to be the most important in the study of new techniques and methods of forensic science that are not yet fully established in the forensic environment. The vision states that in order to achieve this goal, it is necessary to disseminate training (including e-learning) for experts and to conduct proficiency tests.

In the light of the above, the Council of the European Union considered it necessary to continue work to create a European area of forensic science and to support law enforcement and judicial authorities in the European Union in the field of forensic science. To this end, based on the "Vision of the European Forensic Science Area 2030", the Council adopted two documents: 1) Council Conclusions on the vision of the European Forensic Science Area 2.0 – EFSA 2.0 (13 October 2022),[18] 2) Council Conclusions on the Action Plan for the European Forensic Science Area 2.0 (9 March 2023).[19]

The Council Conclusions approved by the Council of the European Union in 2022 emphasize the important role of ENFSI in developing minimum quality requirements for forensic research, facilitating international cooperation and identifying important systemic needs arising in the environment of forensic sciences. The Council of the European Union, based on the Vision developed by ENFSI, confirmed all the thematic areas defined within the three pillars indicated therein.

The second document, referring to the Action Plan on the European Forensic Science Area 2.0, was also developed on the basis of work carried out in this regard by the European Network of Forensic Science Institutes.

[18] Council Conclusions on the vision of the European Forensic Science Area 2.0 – EFSA 2.0 [hereinafter: Council Conclusions], https://data.consilium.europa.eu/doc/document/ST-13369-2022-INIT/pl/pdf [accessed: 30.08.2023].

[19] Council Conclusions on the Action Plan for the European Forensic Science Area 2.0 [hereinafter: Action Plan], https://data.consilium.europa.eu/doc/document/ST-7152-2023-INIT/pl/pdf [accessed: 30.08.2023].

This Action Plan, in relation to the issues discussed in this study, emphasizes that the constant development of quality and competence is an issue of fundamental importance for the implementation of new technologies and the maintenance of trust in forensic sciences. The actions to be taken in this regard are primarily the development of training programs for forensic practitioners and the definition of opportunities for the development and hosting of platforms (part C, point 6 of the Action Plan). It was also considered important to facilitate training and disseminate training materials intended for end users using forensic evidence. These trainings should take into account the subject matter related to the interpretation of research results obtained as part of forensic sciences and the understanding of the strength of forensic evidence (part C, point 7 of the Action Plan). Part C, point 8 of the Action Plan contains the need for action aimed at strengthening the quality assurance of non-accredited forensic services, both existing and new, in order to ensure their legitimacy.

There is no doubt that the indicated initiatives and activities emphasize the importance of continuous improvement of forensic research, increasing its quality and credibility, as well as its accreditation – and the important role played by the European Network of Forensic Science Institutes in this process [Waltoś 2015, 33].

CONCLUSIONS

The use of up-to-date scientific knowledge in court proceedings requires from experts great responsibility, reliability, possession of the highest qualifications and their continuous improvement. Accreditation of forensic laboratories is undoubtedly one of the important pillars of improving the quality and credibility of research carried out by experts. This is particularly important from the point of view of both international and national cooperation in the field of forensics, and in particular, in increasing confidence in the research methods applied. The functioning of forensic laboratories performing DNA tests and dactyloscopic tests in the accreditation system allows us to assume that all laboratory procedures carried out comply with the ISO 17025 standard, the Framework Decision and the detailed guidelines specified by the Polish Centre for Accreditation in the DAB-10 document.

Accreditation of forensic laboratories is also one of the priority activities of the European Network of Forensic Science Institutes. The identification by ENFSI of the most important needs in the area of improving the credibility of forensic science and determining the directions of its development is of fundamental importance in building the European area of forensic sciences 2030.

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MARRIAGE, THE RIGHT TO MARRY, AND THE CONSTITUTION OF GEORGIA

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Abstract. With its profound meaning, marriage is one of the oldest social constructs, predating the formation of the state and even the law. Despite its growing importance, states have not defined marriage within the framework of fundamental law. As a result, the legal aspects of marriage have undergone significant changes, and it is only recently that marriage has come under the jurisdiction of the state. As a rule, marriage and related issues are part of civil legislation; they may be provided for in both the Unified Civil Code and the Special Family Code. The article discusses the Georgian experience with the constitutionalisation of marriage and the evolution of the constitutional regulation of marriage in the Democratic Republic of Georgia.

Keywords: marriage; European Convention; Constitution of Georgia; constitutionalisation

INTRODUCTION

With its profound significance, marriage is one of the oldest social constructs, predating the formation of the state and even the law [Wardle 2007, 1370]. In relation to marriage, the state should be prudent since any arbitrary interference with personal freedom and space might lead to severe and critical consequences. It is the primary, central family law institution [Herring 2009, 37], consisting of economic and legal "rights, benefits, and obligations" [Eskridge 1996, 70; Kristen 1999, 104-105].

Marriage and other institutions fell under the jurisdiction of the state at a recent stage of history, and there was a rationale behind this. Despite its growing importance, states did not define marriage within the framework of basic law. Along with this development, marriage-related legal challenges have evolved. Over time, the increase in support for same-sex marriages

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has gained momentum [Wardle 2007, 1368]. The states have also developed different approaches toward this issue; therefore, the eligibility criteria for marriage and a person's right to marry fall outside the purview of this research, as this necessitates an entirely different study. The primary objective of the study is to examine the essentiality of marriage within the framework of legal institution and constitutional regulation, as well as delves into the constitutional understanding of marriage. The analysis is situated in the context of the functional objectives of the constitution, with a little infusion of political ideas.

Continental European family law states are distinguished by the codification of the legal norms governing family law institutions. As a general rule, marriage and related issues are part of civil legislation; they can be provided in both the unified civil law code and the specialized family law code or statute. Many states have expanded the concept of marriage to include not only heterosexuals but also cohabiting homosexual couples who have legal and factual relationships. Nowadays, an increasing number of Western European states offer some form of partnership for homosexual couples while some other states legalize equal right to marry [Casto 2005, 278]. This is entirely an issue of people and society's preferences, choices, and priorities; however, one thing is certain: from legal perspective, it is essential to incorporate the key elements of legal regulation pertaining to marriage as a civil institution within the legislative framework and the rest is a legal technique.

The article discusses the Georgian experience with marriage constitutionalization and the evolution of constitutional regulation of marriage in the Democratic Republic of Georgia from a traditional to a contemporary and more inclusive legal framework.

1. EUROPEAN COURT OF HUMAN RIGHTS AND RIGHT TO MARRY

1.1. Article 8 of the European Convention and Right to Marry

The European Convention on Human Rights (ECHR) was adopted in the wake of World War II to protect individuals and ensure that tragic history does not repeat itself. The Convention incorporates essential political and civil rights,[1] and the right to marry is prominent alongside other fundamental rights.[2] The conventional right to marry is believed to be inspired by Article 16 of the Universal Declaration on Human Rights (UDHR), which

[1] See: European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

[2] Ibid. Article 12.

allows men and women of marriageable age to marry.[3] By adopting this provision, the international community intended to prevent the widespread propaganda against interracial and same-sex marriages while also tackling child and forced marriage that was primarily contributing to the stigmatization of females. In addition to the reference to "women and men" as possessors of the right to marry, the prevailing inequality was addressed by the explicit reference to equality in every phase of marriage, including divorce [Van der Sloot 2014, 2-3]. Furthermore, it placed substantial attention on marriage and family as two independent rights, thus protecting the stigmatization of children born out of wedlock [Morsink 1999, 241]. Considering the various legal, religious, and cultural backgrounds of signatory states to the Convention, the legal landscape in marriage-related matters significantly differs [Spano 2014, 495]. This is the reason why the Universal Declaration on Human Rights explicitly mentioned that no one should be deprived of the right to marry due to characteristics such as race, religion, and nationality [Brueggemann and Newman 1998, 56]. On the other hand, the European Convention opted not to explicitly refer to specific grounds for discrimination, as it could lead to speculation in the future and the establishment of a hierarchy among discriminatory grounds. Moreover, Article 14 of the ECHR ensures the ability of people to enjoy their Conventional rights and freedoms without discrimination.

The institution of Marriage was perceived by the Commission and later by European Court of Human Rights (ECtHR) as union of one man and one woman. Their earliest rulings strengthen the conservative views on "family" and "marriage".[4] This was explained by the fact, that during the adoption of the Convention, no signatory states' domestic law provided an opportunity for an equal right to marry, implicitly or explicitly, marriage was a heteronormative institution that sought to strengthen the so-called traditional family values; Considering the various legal, cultural or religious backgrounds of Council of Europe Member states, the ECtHR stated that marriage does not fall within the ambit of Article 9 ECHR. The court was clear in stating that marriage is not a form of expression of religion, thought, or conscience,[5] and it has no religious origins, marriage was created for alliances and not for religion [Abrams and Brooks 2009, 6-7]. By omitting the religious element from the legal institution of marriage, the Universal Declaration on Human Rights and the European Convention on Human Rights affirmed the idea of the family and a person preceding the state and society.

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[3] The Universal Declaration of Human Rights, 10 December 1948, Article 16.

[4] Sheffield and Horsham v. The United Kingdom [ECtHR], App. nos. 31-32/1997/815-816/1018-1019, 30 July 1998, paras. 66-67.

[5] X v. Federal Republic of Germany [ECHR], App. no. 6167/73, 18 December 1974.

The discussions over marriage and marital status started with Article 8 ECHR as it paved the way for future developments on the marital status of homosexual couples. The commission interpreted Article 8 beyond its traditional frame and stated that the prohibition of male intimacy is an unjustifiable interference in a person's private life.[6] In the commission's view, even if such relationships fall within the realm of private life, they are beyond the protection of family life. During the first stage of development, the commission did not consider the legal situation of heterosexual couples to be comparable to that of homosexual couples [Shahid 2023, 399-400]. Although both the commission and the court found it very difficult to define the essence of Article 8 ECHR, it was evident that the journey to recognition of marriage as right to all adult individuals hinged on the recognition of homosexual relationships within the ambit of family life. Thus, the necessity to abandon the so-called traditional views on "family" and "marriage" was inevitable.

Over the past decade, the ECtHR has been on its journey to marriage equality. However, it has never found enough courage to affirm marriage as a human right of all individuals. Article 12 of ECHR ensures that all "women and men" of marriageable age have the right to marry and found a family. In the 1980s, the court was of opinion that Article 12 was intended to protect family through traditional marriage – a union of one biologically female and one biologically male.[7] The court's reasoning was based on the explicit reference to 'women and men' and the historical context in which the European Convention was adopted. Although the historic background proves that marriage in the 1950s was understood as a heteronormative institution,[8] the Convention did not explicitly forbid homosexual marriages. The attempt to apply the historic and teleological reading of conventional rights caused confusion and contradictions in ECtHR's future case law [Shahid 2017, 186, 189].

The human rights protection is commonly considered as a standard that applies to all humans equally; however, in practice, the protection provided by the constitution is often based on more than one legal standard. The court's alternative approach to implementing the equal protection clause is essentially linked to personal characteristics [Gerstmann 2004, 13]. While it is true that states' diverse cultural, religious, and legal aspects have significantly influenced the essence of marriage in domestic legislations, on regional level, under the umbrella of Conventional protection, it creates inconsistent practices. While some states' legislation ensures right to marry exclusively for heterosexual couples, others support the more liberal

[6] See: Dudgeon v. The United Kingdom [ECtHR], App. no. 7525/76, 22 October 1981.
[7] Rees v. The United Kingdom [ECtHR], App. no. 9532/81, 17 October 1986, par. 49.
[8] Schalk and Kopf v. Austria [ECtHR], App. no. 30141/04, June 24 2010, par. 55.

understanding of marriage, particularly the union of two adults coming together to establish terms upon which they agree to share lives. Considering, on the one hand, the states' collective endorsement of constructing a society in which everyone's rights and freedoms are respected, as well as the core values the convention aspires to protect, on the other hand, the states are responsible for enacting more human rights and dignity-centered regulations [McCrudden 2008, 692]. The grey zones in Conventional protection push the Conventional right to marry to strike a balance between factual and fictional, biological, and legal, traditional, and evolutionary definitions. As a result, the marital status is being entirely entrusted to domestic authorities and for these reasons, the domestic authorities are empowered to regulate marriage-related procedures. Even at this stage, the ECtHR accepted that the institution of marriage has undergone changes;[9] these changes, of course, are related to humans, their choices, and their preferences. Thus, by referring to the convention as a living instrument,[10] it seems court acknowledges the global shift toward unchaining marriage from the hands of states and their political decisions.

1.2. States Margin of Appreciation and Right to Marry

Article 12 of the ECHR, unlike other conventional rights, does not include any grounds or circumstances that allow the state to intervene.[11] Article 12 is not an absolute right, and it delegated power to states' to regulate marriage-related procedures. In the ECtHR view, national governments are in a better position to assess and evaluate the needs of their own communities and, thus, are better equipped to make the most difficult decisions involving political and social matters[12] [Gerards 2018, 488]. In order to ensure states discretion in deciding who, when, and under what conditions an individual can solemnize marriage [Shahid 2023, 399], the court grants states' margins of appreciation. Depending on the rights at stake, the scope of the margin of appreciation varies. If the ECtHR deems the issue at hand requires careful evaluation, the state's margin of appreciation can be narrowed[13] [Gerards 2018, 502-503]. In circumstances where the court was of the opinion that the interpretation of marriage is strongly affected by cultural aspects and therefore varies from one country to another,[14] the court concluded that states' margins of appreciation are wide. Furthermore, where

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[9] Christine Goodwin v. The United Kingdom, [ECtHR], App. no. 28957/95, 11 July 2002 par. 100.
[10] Tyrer v. United Kingdom [ECtHR], App. No. 5856/72, 25 April 1978, par. 31.
[11] Frasik v. Poland [ECtHR], App. no. 22933/02, 5 January 2010, par. 90.
[12] Schalk and Kopf v. Austria [ECtHR], App. no. 30141/04, June 24 2010, par. 98.
[13] See: Pretty v. The United Kingdom [ECtHR], App. No. 2346/02, 29 July 2002, par. 71.
[14] F. v. Switzerland [ECtHR], App. no. 11329/85, 18 December 1987, par. 33.

the case raised 'sensitive, moral, or ethical'[15] issues, especially in the absence of European consensus, states were granted wide autonomy [Shahid 2017, 189, 193]. The European Consensus aims at demonstrating that a particular practice gains a certain measure of uniformity [ibid., 185]. Therefore, in the context of Article 12, by referring to the absence of such consensus, EctHR is willing to show that the contracting states are not yet ready to unchain marriage from its "traditional" framework. While the court's interpretation of Article 12 regarding homosexual marriages is rather restrictive and the state enjoys wide autonomy, in other marriage-related cases, the ECtHR ruled against the respondent, concluding that if a state prevents a prisoner from marrying a former partner, even if he raped her, it constitutes an infringement of the right to marry[16] [Johnson and Falcetta 2020, 92]. Although the ECtHR is reluctant to narrow a state's margin of appreciation in marriage equality cases, the court has called on a respondent state to cease enforcing legal provisions supporting "traditional" forms of marriage and family [ibid., 91]. Moreover, the ECtHR ruled against the respondent by stating that the state exceeded its margin of appreciation when it failed to provide a specific legal framework to ensure comprehensive protection of homosexual relationships.[17] However, in the case where homosexual couples argued that the heteronormative nature of marriage was in breach of their conventional rights, the court relied on the state's margin of appreciation and concluded that states are not forced to change domestic legislation and include homosexuals within the right to marry.[18]

2. INCORPORATING MARRIAGE IN THE CONSTITUTIONS

The modern era has seen a significant decline in the demand for citizen's discipline; therefore, the degree of state supervision of marriage and family also decreased [Maclean 2005, 29]. Some states define marriage at the constitutional level. If marriage is subject to constitutional lawmaking, it will necessarily mean that the issues related to marriage are regulated by special legislation [Dalby 2001, 2].

State constitutions regarding the issue of marriage can be divided into several categories. Constitutions that fall into the first category do not address the issue of marriage, and this subset of basic laws constitutes the most extensive group. In some constitutions, whether explicitly or implicitly,

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[15] Hämäläinen v. Finland [ECtHR], App. no. 37359/09, 16 July 2014, par. 67.

[16] Frasik v. Poland [ECtHR], App. no. 22933/02, 5 January 2010, par. 100.

[17] Oliari and Others v. Italy [ECtHR], App. nos.18766/11 and 36030/11, 21 October 2015, par. 185.

[18] Fedotova and Others v. Russia [ECtHR], App. nos. 40792/10, 30538/14 and 43439/14, 17 January 2023, par. 34.

the concept of marriage is defined as the union between one man and one woman [Gegenava 2020, 126-27].

The reasons marriage should be incorporated in the constitution or even mentioned vary across the world. If, in some places, this is related to fundamentalism and religiosity of the people, in others, it is an encouragement of discriminatory treatment or unhealthy politics, which is justified by the voters' sentiments and the political choices of the state. Additionally, there is collective fear and aggression toward changes in the conventional idea of marriage, innovations, and alternative types of partnership. The religion and customs of a specific geographical area have a significant impact on public perception of the relationships between homosexual partners [Olson, Cadge, and Harrison 2006, 342-43].

In a religious society like the United States, religious beliefs play an essential role in shaping opinions on marriage [ibid., 355]. The House of Representatives and the Senate have voiced their voices on the nature of marriage, either jointly or separately, including through resolutions that have strictly defined marriage as a relationship between persons of the opposite sex – a man and a woman.[19] Nevertheless, the Supreme Court soon reversed this approach and recognized marriage equality.[20] This demonstrates the quick shift in political, social, and legal preferences. Furthermore, it emphasizes an essential justification for the claim that states' fundamental laws should not regulate marriage. Indeed, by the constitutional regulation of marriage, nothing changes because it does not guarantee the permanence and stability of marriage, especially given the current political landscape in which constitution changes more frequently than laws.

3. MARRIAGE IN THE CONSTITUTION OF GEORGIA: FROM THE DEMOCRATIC REPUBLIC TO THE MODERN CONSTITUTION

Historically, family law matters in Georgia remained under the jurisdiction of the church and states rarely intervened in these relationships. Marriage includes religious and legal implications and the church regulated marriage registration, like many other legal matters [Gegenava 2018, 150-51].

The secular policies of the Democratic Republic of Georgia significantly changed the social function of the church [Gegenava 2013, 179-81], and unsurprisingly, no one would give the church authority over civil act registration. As a result of state activism, on December 3, 1920, the "Law on the Registration of Civil Status Acts" was adopted, establishing the state's exclusive, comprehensive institutional authority over marriage.

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[19] H.R.J. Res. 56, 108th Cong., 1st sess. (2003); S.J. Res. 30, 108th Cong., 2nd sess. (2004).

[20] Obergefell v. Hodges, 576 U.S. 644 (2015).

In the 1921 Constitution, marriage was included in the category of fundamental rights. Article 40 of the Constitution of the Democratic Republic of Georgia established that "marriage is based on "equality of rights and the free will"[21] thus, emphasis was placed not on the institution of marriage but rather on the legal status of married individuals and the voluntary nature of marriage. For this reason, it is incorrect to consider this provision as a mere marriage-related constitutional provision. Indeed, it has a tremendous ideological purpose and openly presented the young Georgian state's attitude towards marriage, including the vicious tradition of forced and child marriages. This is further illustrated by the fact that constitution delegated the authority to the lawmaker to define the scope and restrictions of marriage in line with existing legal framework.[22]

The initial edition of the 1995 Constitution of Georgia essentially repeated the wording of the First Constitution. The decision was inspired by a strong desire to create an ideological and hereditary bond with the first constitution rather than a mere constitutional regulation of marriage. For more clarity, the constitutional right to marry was slightly modified, and the word "between spouses"[23] was inserted in the article. From stylistic or grammatical perspectives, the change was merely technical, and there was no genuine need for such change. In such circumstances, it is impossible to assume that the concept of marriage was defined at the constitutional level since the essence of the legal provision derived from the First Constitution was not providing a legal definition. It was only as a general rule of conduct.

Following the adoption of the Civil Code of Georgia (since 1997), the code provided the legal definition of marriage, specifically as a union between a man and a woman for the purpose of founding a family. Furthermore, it mandated that marriage must be registered with the state's relevant authorized entirety.[24] The provision mentioned above became the subject of a dispute in the Constitutional Court. The plaintiff, with completely immature and absurd reasoning, attempted to demonstrate how marriage-related provision in the Civil Law Code was in violation of the fundamental right to equality. The plaintiff's reasoning was inconsistent and contradictory. While arguing that the legal provision in question violated the equality principle, it was also admitted that Georgia was not ready to expand the legal scope of marriage.[25] The Constitutional Court declared the case inadmissible because the plaintiff has argued against the constitutionality

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[21] Constitution of the Democratic Republic of Georgia, 21 February 1921, Article 40, Sentence 1.

[22] Ibid., Article 40, Sentence 2.

[23] Constitution of Georgia (Redaction of 24.08.1995), Article 36.

[24] Civil Code of Georgia, 1997, Article 1106.

[25] See: Citizen of Georgia Giorgi Tatishvili v. Parliament of Georgia, Judgment N2/11/714 of the Constitutional Court of Georgia, 29 December 2016, II-2.

of marriage-related provision and not against the fundamental right to equality.[26] There was no further development concerning this matter. Consequently, the legal understanding of marriage in the Civil law still revolves around marriage as a union of a man and a woman, thus remaining unchanged.

4. DEMYSTIFICATION OF THE CONSTITUTION

Legal normativism and, in general, hard positivism have been and continue to be employed to expel the non-legal elements from the law [Kelsen 1967]. Politics, especially in Georgia, represents one of the most significant non-legal categories in relation to law. It is always a combination of policy-makers' and executives' political views. Law often becomes the legislator's preference and a mechanism in a specific group's hands. This is especially noticeable when a purely technical law issue becomes a subject for political discussion.

As a result of the constitutional reform of 2017-2018, the revised Constitution incorporated a modified marriage-related provision that reads as follows: 'Marriage, as a union of a woman and a man for the purpose of founding a family, shall be based on the equality of rights and the free will of spouses'[27]. The issue of marriage 'constitutionalization' was regarded as a red line regarding constitutional reform and a pivotal factor in the parliamentary election preceding this reform. It is worth mentioning that the case mentioned above was disputed in the Constitutional Court during this period.[28] Moreover, before the parliamentary elections in 2016, several political groups focused on existing "threats" to the institution of marriage and called for a constitutional interpretation of marriage. As a result, signatures for the referendum were collected [Gegenava 2020, 130]. Unsurprisingly, the religious aspect was tied to marriage, and in fact, it outweighed all the critical social or other issues that became popular in the pre-election campaign. The primary reason for the 'constitutionalization' of marriage was to protect marriage as a sacred and essential institution at the constitutional level; therefore, the narrow definition of marriage, with the primary focus on marriage as a union of a man and a woman, was explained to be protecting the welfare of the majority in society [ibid.]. In Georgia, a country with unending constitutional reforms [Gegenava 2017, 106-24]. Arguments in favor of something that requires constitutional protection have no practical

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[26] Ibid., II-8.

[27] Constitution of Georgia, 24 August 1995, Art. 30(1).

[28] Citizen of Georgia Giorgi Tatishvili v. Parliament of Georgia, Judgment N2/11/714 of the Constitutional Court of Georgia, 29 December 2016, I.

power. The Constitution of Georgia experiences changes more often than marriage-related issues in the Georgian Civil Code.

The main purpose of law should be to protect a person's autonomy from encroachment by other persons [Herring 2010, 258]. The idea of personal autonomy lies in the fact that an individual, within the realm of feasibility, can shape their destiny and make choices that pertain to their own lives [Raz 1986, 369]. The state should refrain from interfering in private life as much as possible because all this still threatens the most important thing – freedom. Moreover, it is entirely illogical to intervene artificially in such a matter and regulate the issue with the Constitution, which is already regulated by the existing legislation. As a counterweight to this, it is impossible to motivate the constitutional protection of something because whether there is a change in the legislation or the Constitution, it needs the legitimacy of the majority of the people. Proposed constitutional or legislative amendments ought to seek majority consensus and approval. Otherwise, the established provision will be a defined rule of conduct without practical effectiveness. Failure to consider the social effect of law often brings catastrophic results.

The 'Constitutionalization' of marriage should not have serious legal consequences under contemporary law. This can be explained for numerous reasons; however, the most fundamental is a perception of the role of the Constitution; considering and understanding it as a mere legal instrument without a political component is, in fact, equivalent to changing its essence and status. In such circumstances, the 'Constitutionalization' of marriage is not only bringing life matters to the fore and publicity 'undressing' them but, to a certain extent, an attempt to make the Constitution mundane. The fundamental law of the state has essential legal, political, and social functions [Barak 2005, 370], and its significance is essentially undermined when its regulatory scope is restricted solely to the current legislative framework. The first republican motivation for defining marriage at the constitutional level no longer exists in modern Georgia; additionally, the structure and content of the Constitution have been entirely changed, establishing the scope of marriage, and determining the eligibility criteria for prospective spouses is not only inappropriate but also unaesthetic and unnatural. This discolors the face of the fundamental law and reduces its status.

CONCLUSION

The legal definition of marriage has evolved over time; however, even in modern times, the traditional understanding of marriage – a union of one man and one woman – prevails. The Contemporary era brought new challenges and pertinent matters necessitating immediate attention

and comprehensive resolution. Of course, this has led to significant changes; logically, its continuing effect will result in further developments. The question of who should be entitled to the right to marry requires an entirely different, more in-depth study. It is a distinct subject independent of research on the necessity to 'constitutionalize' marriage as an institution at the constitutional level.

Each state and its people have or should have the autonomy to determine their destiny, future and development path. There are priorities, legal techniques, and rational mechanisms for implementing these decisions. An objective assessment suggests that there is no legal basis for the existence of marriage in the constitution of the modern world. Alongside many other family law institutions, it falls under the purview of current legislation, and should remain within its scope. Otherwise, its artificial activation could lead to meaningless results.

Keeping the institution of marriage within the confines of constitutional regulation and later, during the 2017-2018 reforms, amending the prevision and specifying who should be entitled to the right to marry was a purely populist decision, and it was strategically aligned with the voters' surface-level sentiments. Eventually, it accomplished its assigned tasks and overshadowed many topics and challenging constitutional reform issues. The state's insistence on regulating marriage on a constitutional level lacks a logical justification. It cannot be justified even for the purpose of providing stability, because even the country's fundamental legislation has not yet achieved stability. The legislator's actions demean the constitution, transforming it into a document regulating everyday matters rather than dealing with the state's significant challenges, including establishing the major developmental policies and limiting the government's inappropriate or abusive use of authority.

Much can be argued about preferences and legal technique, but marriage has no place in the modern constitutions. Traditionally, it should be regulated by civil legislation, with the utmost respect for personal autonomy.

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LOCAL TAXES IN THE JURISPRUDENCE OF LOCAL GOVERNMENT BODIES*

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Abstract. This article explores the role of local taxes within the jurisdiction of the local government bodies. It first highlights the significance of local taxes and their two-fold expression of territorial and material sovereignty. The authors delve into the concept of local taxes, its legal definitions, and the scope of taxes that local government units have authority over. The paper discusses the functions of local taxes. Furthermore, it emphasizes the importance of proper income division between the state and local governments to ensure effective decentralization of administration and public finances. The article explores the entities responsible for administering local taxes and their roles in establishing tax liabilities, granting reliefs and collecting revenues. It outlines the decisions made by local authorities regarding taxes, distinguishing between declaratory and constitutive decisions based on how tax liabilities are incurred. It then delves into the impact of tax relief on local government budgets, discussing the criteria used to grant such relief and how it relates to the economic circumstances of taxpayers. The text also addresses relief measures introduced during the COVID-19 pandemic and their implications for local authorities. Lastly, the paper discusses the roles of local government bodies as creditors in enforcement proceedings, particularly in cases where tax liabilities need to be enforced. It outlines the conditions under which local authorities act as enforcement bodies.

Keywords: real estate tax; local budget revenues; tax reliefs; local taxes

INTRODUCTION

Local taxes and fees are the only source of revenues for local government units, with which their bodies can exercise tax authority and attempt

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to conduct their fiscal policy. Tax power as an expression of sovereignty can be considered in two aspects: territorial and material. The first means that it is implemented in a specific territory, and it is not permissible to extend it beyond the territorial scope of operation of a given public law entity. The second aspect consists of the right to introduce taxes, collect benefits from taxes, and administer them [Glumińska-Pawlic 2011, 119; Tegler 1997, 376]. Competences to administer taxes are expressed in the fact that the relevant local government bodies carry out tax control activities, as well as tax assessment and collection and the enforcement of tax receivables. Tax authorities also have the power to refrain from collecting taxes, write off tax arrears, postpone payment deadlines, and pay in installments. Therefore, it is about carrying out the tasks of the tax authority by the relevant provisions of substantive and procedural tax law [Borodo 2000, 20]. The concept of tax authority also includes the statutorily defined scope of authority to make decisions in individual tax matters that shape the content of the obligation relationship.

1. THE CONCEPT OF LOCAL TAXES

The concept of local taxes has not been defined in law. However, the legislator uses it several times in legal acts of various ranks. In Article 167(2) of the Constitution of the Republic of Poland,[1] the income of local government units was divided into own income (but not mentioning benefits that should be included in this category), general subsidy, and targeted subsidies from the state budget. Even so, in Article 168 it was stated that these units have the right to determine the amount of local taxes and fees within the scope specified in the Act. In the Act on the revenues of local government units[2] the legislator indicated that the sources of the commune's revenues are from specific taxes listed in Article 4(1).

However, districts and voivodeships were deprived of any tax revenues. It should be noted, that the legislator included in the category of own income revenues not only local taxes and fees referred in the Act of 12 January 1991 on local taxes and fees,[3] i.e., from real estate tax and tax on means of transport but also from taxes: agricultural,[4] forest,[5] personal income

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

[2] Act of 13 November 2003 on the income of local government units, Journal of Laws of 2022, item 2267 as amended.

[3] Act of 12 January 1991 on local taxes and fees, Journal of Laws of 2023, item 70 as amended.

[4] Act of 15 November 1984 on agricultural tax, Journal of Laws of 2020, item 333 as amended.

[5] Act of 30 October 2002 on forest tax, Journal of Laws of 2019, item 888 as amended.

paid in the form of a tax card,[6] inheritance and donation taxes[7] and civil law transactions.[8] Moreover, within the meaning of Article 3(2) of the Act – the own income of communes, districts, and voivodeships also includes shares in the revenues from personal income tax[9] and corporate income tax.[10] It is difficult to assume that all taxes mentioned in the Act, especially shares in (state) income taxes, are local in nature and that the local government has any tax power over these levies. The fundamental feature of local taxes, apart from the nature of the budget they support, is the right to determine their amount. The above doubts can also be raised concerning taxes on inheritance and donations, on civil law transactions, and the tax card because although these levies contribute to the budgets of municipalities, the rules of assessment and collection have been precisely defined in laws, and tax proceedings are conducted by the heads of tax offices, transferring the collected revenues to the accounts of the relevant municipalities. The only power for the executive bodies of municipalities is provided for in Article 18(2) and (3) of the Act on revenues of local government unites, which states that in the case of taxes and fees collected by the tax office and constituting the entire income of local government units, the head of this office may write off, postpone the payment deadline or divide the amounts into installments and release the payer from the obligation to collect or limit the collection of receivables only with the consent of the chairman of the management board of the local government unit. There is no right to appeal against the decision on reliefs, but an appeal against the decision of the head of the tax office may be submitted to the director of the tax administration chamber. Finally, it should be noted that districts and voivodeships, apart from shares in state taxes, do not have any income tax sources. Therefore, it is challenging to consider that their income is differentiated if a significant part of it comes from the state budget.

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[6] Act of 20 November 1998 on flat-rate income tax on certain income earned by natural persons, Journal of Laws of 2022, item 2540 as amended.

[7] Act of 28 July 1983 on inheritance and donation tax, Journal of Laws of 2021, item 1043 as amended.

[8] Act of 9 September 2000 on tax on civil law transactions, Journal of Laws of 2023, item 170 as amended.

[9] Act of 26 July 1991 on personal income tax, Journal of Laws of 2022, item 2647 as amended.

[10] Act of 15 February 1992 on corporate income tax, Journal of Laws of 2022, item 2587 as amended.

2. FUNCTIONS OF LOCAL TAXES AND THEIR ROLE IN THE STRUCTURE OF COMMUNE BUDGET REVENUES

According to Article 51(1) of the Act on Municipal Self-Government,[11] the commune independently conducts financial management based on a budget resolution, which is an annual plan of income and expenses as well as revenues and expenses of this unit, adopted for a calendar year in the form of a budget resolution, constituting the basis for its financial management in a year. The budget includes revenues, constituting forecasts of their amounts, and expenses and expenditures, constituting an unsurpassable limit. The forward-looking nature of the income and revenues included in budgets and financial plans does not relieve the bodies creating them from the obligation to estimate them and reliably plan and implement them realistically. The proper division of income between the state and local government and its levels is essential for the functioning of the local economy, mainly due to the diversified nature of local government units and the disproportions in their development.

To implement the entrusted tasks, it is necessary to provide local government units with appropriate financial resources, and therefore, they should be guaranteed an appropriate share in public revenues, and the other hand, the stability of the sources of these revenues should be ensured and a prohibition on modifying them, eliminating the appropriateness of this share[12] [Ruśkowski 2008, 30ff]. The correct division of public funds between individual sectors (government and local government) becomes vital in decentralizing administration and public finances, understood as the transfer of tasks, competencies, tools, and instruments for their implementation. The literature emphasizes that the practice of regulating financial management issues in ordinary laws, which are usually subject to frequent changes, is based on erroneous assumptions, which are accused of being fragmentary, generic, and fragmenting a uniform subject matter between many laws and some sub-statutory acts [Małecki 1991, 37ff; Drwiłło and Gliniecka 1995, 88ff; Glumińska-Pawlic 2003, 98ff; Borodo 2011, 63-64].

The primary function of local taxes is the fiscal function. However, these taxes are unique in nature, as the revenues may vary significantly depending on the type of commune, its size, and the degree of industrialization. The real estate tax is significant in the income structure of highly industrialized communes, although it constitutes a small percentage in rural communes. Local taxes also have a stimulating function because,

[11] Act of 8 March 1990 on municipal self-government, Journal of Laws of 2023, item 40 as amended.

[12] See judgment of the Constitutional Tribunal of 23 October 1996, ref. no. K 1/96; judgment of the Constitutional Tribunal of 27 June 2000, ref. no. K 20/99.

by differentiating tax rates and introducing exemptions and reliefs, they can influence the specific behavior of taxpayers [Pahl 2017, 50-54]. However, as a rule, these taxes are separate from many municipalities' fundamental core of budget revenues. Statistically, these taxes (together with local fees) take up to 20% of the total income generated. This does not apply to cities with district rights and the capital city of Warsaw, where these revenues are several percentage points higher.[13]

Considering that the Polish legislator granted only commune revenues from certain taxes, further considerations should be limited only to this level of local government.

3. BODIES OF LOCAL GOVERNMENT UNITS AS TAX AUTHORITIES

The concept of authority is associated with a legal structure consisting of specific rights and obligations and, simultaneously, with the person or group of people to whom these rights and obligations are or will be granted. The Act on Municipal Self-Government in Article 11 mentions the commune council and the commune head (mayor, city president) as the executive body. However, in Article 39, it is indicated that the commune head is authorized to issue administrative decisions in individual matters in public administration. It should be emphasized that the authority always makes decision, not its holder [Martysz 2000, 43ff].

The first-instance tax authorities in the field of taxes and fees constituting the revenues of municipal budgets are commune heads (mayors/city presidents) – according to Article 13(1)(1) of the Tax Ordinance[14] in connection with the Article 39(1) of the Act on Municipal Self-Government and Article 4(1)(1-2) of the Act on the revenues of local government units. These authorities issue individual decisions regarding establishing or determining tax obligations, reliefs, and exemptions regarding real estate tax, agricultural tax, forestry tax, and tax on means of transport. As of 1 January 1999, the powers of tax authorities are also vested, to a limited extent, with head of the district and voivodeship marshals, provided, however, that districts and voivodeships will be granted revenues falling within the scope of the Tax Ordinance, which may include taxes, fees and non-tax budgetary receivables. Decisions of first-instance bodies may be appealed to local government appeal boards, which are competent in particular to consider appeals and complaints against decisions, reminders, requests to resume proceedings, or to declare decisions invalid. Local government appeal boards

[13] See Collective financial reports of municipalities published on the website of the National Council of Audit Chambers, https://rio.gov.pl [accessed: 29.09.2023].

[14] Act of 29 August 1997, the Tax Ordinance, Journal of Laws of 2022, item 2651 as amended.

are state budgetary units that operate based on the provisions of the Act of 12 October 1994[15] and are higher-level bodies than the bodies of local government units. The general competence of the board is therefore related to the verification of decisions and resolutions of local government bodies of the first instance during the instance and extraordinary modes of tax proceedings.

The scope of the colleges' powers changed in 2000 in connection with the change in the content of Article 233(3) of the Tax Ordinance, specifying the powers of appeal bodies in matters resolved by local government bodies. The new wording of this provision limited the ability of colleges to issue reform decisions only to situations in which the law does not leave the method of resolving the matter to the discretion of the local government body. Therefore, in the case of discretionary decisions, the colleges, recognizing the validity of the appeal, can only repeal the contested decision. However, taking into account the content of Article 234 of the Tax Ordinance, it must be stated that such a solution will not always be possible. The cited provision states that the appellate body cannot issue a decision to the detriment of the appellant. In this situation, the board – even if it decides that the taxpayer's arrears should be divided into five installments instead of three (as done by the commune mayor) – is obliged to maintain the decision in force because its repeal will deprive the taxpayer of the relief granted to him.

4. TYPES OF DECISIONS ISSUED IN TAX MATTERS BY MUNICIPAL AUTHORITIES

As part of the tax authority of municipalities, their executive bodies issue decisions in tax matters by which they establish or determine the amount of tax liability. These decisions are declaratory or constitutive depending on how the tax liability is incurred. The legal basis for the distinction mentioned above is Article 21 of the Tax Ordinance, which indicates two possible ways of creating a tax liability: on the date of the occurrence of the event to which the tax law relates the creation of such an obligation or on the date of delivery of the decision of the tax authority determining the amount of this obligation. In both cases, taxpayers must submit a tax return and provide correct and complete data regarding taxation.

In the field of real estate tax, agricultural tax, and forestry tax, a similar solution has been applied regarding the moment when the tax liability arises – in the case of natural persons, it is the date of delivery of the decision

[15] Act of 12 October 1994 on local government appeal boards, Journal of Laws of 2018, item 570.

determining the amount of the tax liability (constitutive decision), while in the case of legal persons, organizational units and companies without legal personality – the first day of the month following the month in which the event giving rise to a tax obligation occurred (if it does not exist from the beginning of the year) or at the beginning of the tax year [Dowgier, Etel, Liszewski, et al. 2021].

In the case of natural persons, issuing an assessment decision is the responsibility of the tax authority, and failure to do so results in no tax liability arising. Its amount is determined by the data contained in the tax declaration unless, during the proceedings, it is found that the data contained in the declaration, which may affect the amount of the tax liability, is inconsistent with the actual situation. However, legal persons, organizational units, and companies without legal personality – if, despite their obligation, they have not paid all or part of the tax, have not submitted a declaration, or the correct amount of the tax liability turned out to be different from that indicated in the declaration, or the resulting liability has not been demonstrated – the tax authority issues a decision specifying the amount of the tax liability (declaratory decision). Therefore, it does not create a new tax liability but only states the correct amount it should be calculated and indicates the date and method of payment [Etel 2023a].

In the tax on means of transport, the tax liability arises on the date of occurrence of a specific event, which in this case means the first day of the month following the month in which the means of transport was registered in the territory of Poland, and in the case of purchasing a registered means of transport – from the first day of the month following the month in which the means of transport was purchased. Therefore, the tax authority may only issue a decision determining the amount of the tax liability if it detects irregularities.

In addition to the decisions indicated so far, the executive bodies of municipalities also issue rulings regarding applying tax reliefs listed in Article 67a of the Tax Ordinance will be discussed later in the article.

5. RELIEFS IN THE REPAYMENT OF TAX LIABILITIES AND THEIR CONSEQUENCES FOR THE BUDGETS OF LOCAL GOVERNMENT UNITS

Although by Article 84 of the Constitution, everyone is obliged to bear public burdens and benefits, including taxes specified in acts; the taxpayer can apply for relief in the repayment of tax liabilities provided for in tax acts. This exception to the principle of universality of taxation may be applied if the taxpayer submits an application to the tax authority according

to Article 67a et seq. of the Tax Ordinance. The act provides for three types of relief in the repayment of tax liabilities: 1) deferring the tax payment deadline or paying the tax in installments; 2) deferring or spreading into installments the payment of tax arrears together with interest for late payment or interest on unpaid tax advances; 3) cancellation of tax arrears, late payment interest, or extension fee in whole or in part.

Postponing the tax payment deadline constitutes a temporary waiver of the obligation to pay it, taking into account exceptional circumstances that temporarily impede the provision of this public service. It is possible until the tax payment deadline expires and takes place by way of a decision of the competent tax authority [Szadkowska 2017, 7-13], which expires by operation of law when the tax is paid, or the deferred deadline has expired, and the tax liability has still not been paid [Etel 2023b]. A similar institution is the deferral of payment of tax arrears and interest for late payment. It occurs when the primary tax payment deadline has expired. Failure to meet the deferred deadline results in restoring the statutory tax payment deadline [Dauter 2019]. Another possible relief is to divide the payment of tax or tax arrears and interest into installments. The case law of administrative courts indicates that the competent tax authority can freely shape them. However, it should consider the actual circumstances of the case and the taxpayer's capabilities.[16] The write-off of tax arrears, late payment interest, or extension fee, according to Article 67a(1)(3) of the Tax Ordinance are unique institutions. It aims to improve the economic situation of the taxpayer.[17] It covers the scope marked explicitly in the tax authority's decision on the write-off of tax arrears [Dzwonkowski and Kurzac 2020].

In Article 67a(1) of the Tax Ordinance, two conditions have been indicated that may constitute the basis for a favorable consideration of the application – important interest of the taxpayer or public interest. They are autonomous and independent. These are general clauses, i.e., vague concepts not defined in the act. Thus, in practice, some problems arise related to assessing individual factual situations regarding the occurrence of the premises mentioned above. The tax authority has some freedom both in the interpretation of these concepts and in the assessment of the taxpayer's situation.[18] These premises should take an objective approach, consistent with the hierarchy

[16] See judgment of the Supreme Administrative Court of 29 June 2005, ref. no. I FSK 44/05; judgment of the Supreme Administrative Court in Warsaw of 1 March 2000, ref. no. III SA 1546/99; judgment of the Provincial Administrative Court in Szczecin of 29 October 2015, ref. no. I SA/Sz 676/15.

[17] See judgment of the Supreme Administrative Court in Łódź of 18 April 1995, ref. no. SA/Łd 2424/94.

[18] See judgment of the Supreme Administrative Court of 31 October 2012, ref. no. II FSK 510/11.

of values generally applicable in society, and not only by the subjective feelings of the taxpayer [Linka 2019, 46-47]. The tax authorities must conduct evidentiary proceedings in this respect, comprehensively explaining the factual circumstances [Żołnierczyk 2020, 657-58].

A compelling interest exists when exceptional circumstances exist in a particular taxpayer's life or economic situation. They cannot be caused by the behavior or omission of the party but by events objectively beyond his control, which would have occurred even if he had exercised due diligence [Wołowiec 2016, 17-21]. However, this condition cannot be limited only to extraordinary situations and random events. A vital interest of the taxpayer is also related to the existence of special reasons on his part, which means that complete and timely tax payment may undermine the basis of the taxpayer or people dependent on him.[19] In this sense, the concept's scope also includes the usual situation of a party, which, however, prevents it from covering expenses related to the living needs or health care of immediate family members.[20]

The second condition that allows for relief in the repayment of tax liabilities is the public interest. This concept is also vague and has a wide range of meanings. It will occur primarily when following a refusal to grant a natural person one of the reliefs indicated in Article 67a(1) of the Tax Ordinance, the burden of maintaining the taxpayer would be transferred to the budget of the state or local government unit – for example, due to the need to use social assistance benefits. In the case of legal persons and entrepreneurs, the potential liquidation of jobs should be considered a manifestation of implementing the discussed condition [Radzikowski 2006, 156-57]. Therefore, the premise of public interest is a directive to respect values common to the entire society, such as justice, security, trust in public authorities, and the efficiency of the state apparatus[21] [Gomułowicz and Mączyński 2016]. Examining the existence of the public interest condition requires weighing the situation in two aspects – the principle of equality and universality of taxation and the related timely payment of taxes in total amount,[22] and the exception to it – i.e., the application of an individual tax relief. Therefore, the authority has to determine a more favorable solution from the point of view of the public interest, the protection of which

[19] See judgment of the Supreme Administrative Court of 2 October 2020, ref. no. II FSK 1679/18.

[20] See judgment of the Supreme Administrative Court of 10 March 2010, ref. no. I FSK 31/08.

[21] See judgment of the Supreme Administrative Court of 8 November 2019, ref. no. I GSK 1403/18.

[22] However, the examination of public interest cannot be limited solely to the need to implement these principles – the facts must always be subject to a thorough analysis. See judgment of the Supreme Administrative Court of 9 May 2019, ref. no. II FSK 1421/18.

not only means ensuring the priority payment of given receivables but also minimizing public expenses arising as a result of the need for the obligated person to settle tax receivables.[23]

The crisis caused by the economic and social consequences of the COVID-19 pandemic was also a reason that could justify the application of relief in the repayment of tax liabilities on general principles. There was also a need to create new solutions to support entrepreneurs whose financial liquidity had deteriorated due to the pandemic's negative economic consequences. An example of such action was the possibility of exemption from real estate tax or extension of the deadlines for payment of real estate tax installments based on a resolution of the relevant commune council in the manner specified in Article 15p and 15q of the Act of 2 March 2020 on unique solutions for preventing, counteracting, and combating COVID-19, other infectious diseases, and crises caused by them.[24] Under the provisions mentioned above, municipal councils could, by way of resolution: 1) for part of 2020 and for selected months of the first half of 2021, exempt from real estate tax: land, buildings, and structures related to running a business;[25] 2) extend the payment deadlines for real estate tax installments payable in April, May, and June 2020, no longer than until 30 September 2020, and payable in selected months of the first half of 2021, no longer than until 31 December 2021;[26] 3) designated groups of entrepreneurs whose financial liquidity has deteriorated due to suffering negative economic consequences due to COVID-19. The purpose of this regulation was to enable municipalities, within their tax autonomy, to apply solutions whose task was to have a positive impact on the economic situation of taxpayers conducting business activity and those particularly affected by the effects of the pandemic, as well as contributing to the improvement of their financial liquidity.[27]

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[23] See judgment of the Supreme Administrative Court of 30 June 2020, ref. no. II FSK 486/18.

[24] Journal of Laws of 2023, item 1327 as amended [hereinafter: the Covid Act].

[25] Resolutions issued pursuant to Article 15p were adopted, among others: in Sosnowiec (Resolution No. 642/XXXVI/2021 of the City Council in Sosnowiec of 19 January 2021, Journal of Laws of the Silesian Voivodeship of 2021, No. 539) or in the Popów Commune (Resolution No. 183/XXIX/2021 of the Popów Commune Council of 13 January 2021, Journal of Laws of the Silesian Voivodeship of 2021, No. 519).

[26] Resolutions issued pursuant to art. 15q were adopted, among others: in Polanica-Zdrój (Resolution Number XII/119/2020 of the City Council in Polanica-Zdrój of 30 December 2020, Journal of Laws of the Lower Silesian Voivodeship of 2021, item 284), in the Bukina Tatrzańska Commune (Resolution No. XXVII/240/2021 of the Bukowina Tatrzańska Commune Council of 15 January 2021, Journal of Laws of the Małopolska Province of 2021, item 458).

[27] See Justification for the government draft act amending the act on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them, and certain other acts, Sejm form no. 299, http://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299 [accessed: 29.09.2023].

The indicated resolutions of municipal councils contained detailed information related to the application of relief for entrepreneurs in connection with COVID-19, including: 1) specific definition of the groups of entities that are entitled to the described reliefs; 2) explaining the concept of deterioration of financial liquidity due to the negative economic consequences of COVID-19; 3) indication of how to document the deterioration of financial liquidity; 4) specifying the taxation subject to real estate tax relief – as it may be only land, buildings, or structures related to a specific business activity or all land, buildings, or structures of specific groups of entrepreneurs.

The crisis caused by the SARS-CoV-2 pandemic required action by the legislators – including increasing support for entrepreneurs. However, the solutions introduced by the Covid Act did not constitute comprehensive assistance, leaving municipalities free to make decisions. In turn, municipalities were also in a difficult financial situation due to reduced revenues and were reluctant to adopt resolutions on real estate tax exemptions. Granting the described reliefs to specific groups of entrepreneurs could result in difficulties in financing the implementation of municipalities' tasks. From the point of view of municipal budgets and fiscal policy pursued by local governments under their financial authority, this solution could have been more favorable. The COVID Act did not provide for compensation for municipalities that decided to introduce optional real estate tax relief.

Moreover, due to restrictions on the possibility of running a business due to the epidemic threat, local government units' income from their share in personal and legal income tax has decreased. The losses of local governments were also significant, caused by restrictions on the use of local public transport or other services offered by their subordinate units. All this meant that municipal councils rarely decided to adopt resolutions exempting certain groups of entrepreneurs from real estate tax.[28]

6. BODIES OF LOCAL GOVERNMENT UNITS AS CREDITORS IN ENFORCEMENT PROCEEDINGS AND ENFORCEMENT BODIES

According to Article 19(2) of the Act of 17 June 1966 on enforcement proceedings in administration,[29] the executive body of a commune with the status of a city (mayor, president of the city) and the capital city of Warsaw – are enforcement authorities and perform tasks in the field of enforcement of monetary receivables, for which the determination or determination

[28] For example, in the Silesian Voivodeship, as at the date of writing this article, only 53 out of 167 communes decided to adopt at least one resolution temporarily exempting entrepreneurs from real estate tax.

[29] Journal of Laws of 2022, item 479 as amended.

and collection are appropriate, i.e., in terms of local taxes and fees. They have the authority to apply all enforcement measures, except enforcement against real estate. Enforcement proceedings in administration are intended to force the obligated party to fulfill his obligations or to create conditions facilitating future enforcement. The use of coercive enforcement is the primary way in which the administration responds to the disobedience of administered entities. It is only possible in cases where the addressee of the administrative act is obliged to implement it, i.e., to take actions aimed at subordinating the actual state of affairs to the norm of substantive law specified in the administrative act [Przybysz 2023; Pietrasz 2015].

The executive bodies of municipalities with the status of a city and the capital city of Warsaw may act in the process of implementing monetary benefits, including levy obligations, in three roles: 1) as a tax authority in tax proceedings in which a monetary obligation is established or determined – and in such a case, it has the status of a creditor; 2) as an entity of a material tax-law relationship; 3) as an enforcement authority that is also a creditor – which usually happens when the enforcement concerns receivables determined or determined and collected by this authority [Pietrasz 2015].

The commune body with the status of a city becomes the enforcement body in the administrative enforcement of monetary receivables only within the scope of its tasks. Enforcement proceedings are dependent proceedings which, as a rule, concern the execution of an act issued in another administrative (tax) proceeding or court proceedings. Therefore, the subject of this proceeding is independent because it is determined by the content of an administrative act issued in another proceeding and, in some cases, by a court decision.[30]

The discussed bodies, therefore, become enforcement authorities for monetary receivables if two conditions are met: the commune authority is authorized to establish or determine monetary receivables, and this authority is authorized to collect them.[31] Consequently, the position that the commune authority is the enforcement authority in the enforcement of monetary receivables collected exclusively by this authority, which, however, does not establish or determine them, may raise doubts.

In the administrative enforcement of monetary receivables for which the executive body of a commune with the status of a city is competent to establish or determine and collect, this body is not defined in the act as solely the competent enforcement authority. Based on Article 19 in connection

[30] See decision of the Supreme Administrative Court of 30 December 2013, ref. no. I OW 192/13.

[31] See decision of the Supreme Administrative Court of 25 June 2008, ref. no. II FW 2/08.

with Article 22(2) and (3) of the act to carry out administrative enforcement of such receivables in a situation where the obligor resides or has its registered office or the obligor's assets known before the initiation of enforcement, or a significant part of them are located in the area of operation of a commune other than the local government unit that established or determined the claimed receivable; the competent enforcement authority is the head of the tax office.[32]

Concerning other (rural) communes, in the scope of monetary receivables, including taxes and fees for which the commune body is competent to establish or determine and collect them, the enforcement authority is the head of the tax office. In such a case, the commune authority must issue an enforcement title and send it immediately to the locally competent head of the tax office and participate in the enforcement proceedings as a creditor [Klat-Wertelecka 2005, 34; Madej 2013; Wołowiec 2021, 27-34]. However, an exception in this respect results from Article 6qa of the Act of 13 September 1996 on maintaining cleanliness and order in municipalities,[33] according to which the competent authority of the municipality to which Article 19(2) of the act. (i.e., the commune head) may perform tasks related to the administrative enforcement of monetary receivables for municipal waste management fees based on an agreement with the head of the tax office. However, it cannot concern the enforcement of monetary receivables from real estate.

It is worth noting that concerning taxes constituting the income of municipalities and implemented by the heads of tax offices (such as inheritance and donation tax and tax on civil law transactions), the competent authority of the municipality that is the beneficiary of these receivables is not the enforcement authority. Moreover, the commune itself is not a creditor in enforcement proceedings. The creditor's rights in these proceedings are exercised by the tax authority (head of the tax office) determining or determining the receivables mentioned above [Pietrasz 2015].

CONCLUSIONS

Local taxes and fees should constitute one of the most stable sources of income for municipal budgets, which will allow them to become financially independent from external factors, especially the political situation in the country, which directly affects the level of funds transferred from the state budget and may limit their acquisition from extra-budgetary

[32] See resolution of the Supreme Administrative Court of 8 December 2014, ref. no. II FPS 5/14.

[33] Journal of Laws of 2023, item 1469 as amended.

sources. Their share in the total budget reflects not only the financial condition of the commune but is also a measure of its self-sufficiency, economic potential, and investment capacity.

In implementing the constitutional obligation of universal taxation, municipal authorities must pursue a rational tax policy, which should be reflected not only in the right to claim budget receivables together with late payment interest but also in the application of relief in the repayment of tax liabilities. Municipal tax authorities should perform their tasks using the statutorily defined scope of powers to make decisions in individual tax matters, shaping the content of the obligation relationship. Reliefs in the repayment of tax liabilities are often treated as tax privileges. However, it should be remembered that they are also an incentive to engage capital, regulate demand and supply, develop economically backward regions, promote employment, and alleviate income disproportions. The most frequently mentioned functions that they have to fulfill include economic and social functions, which include supporting investment activities, supporting desired business activities, correcting tax assessments due to circumstances that weaken the payment capacity of a specific taxpayer, and the nature of the activity performed by him (economic functions), as well as supporting specific groups of taxpayers due to the nature of the activity conducted, the obligation to protect persons disabled people, improving the professional qualifications of taxpayers or pursuing a pro-family policy by the state (social functions).

The scope of independence of municipalities depends on what attributes of tax authority are transferred to their authorities and what limitations result from the applicable regulations. By pursuing a rational tax policy and consciously and skillfully using available financial instruments, local government tax authorities should guarantee the provision of planned budget revenues to implement tasks and ensure sustainable development, considering residents' needs.

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LEGAL CULTURE IN THE EUROPEAN UNION IN THE LIGHT OF EU CONSTITUTIONALISM

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Abstract. The aim of the article was to assess the legal culture in the European Union during the crises plaguing Europe in the 21st century. It focuses on a case study of the Covid-19 pandemic crisis. Although legal culture develops over a long period of time, it seems that in recent years the process of its change has accelerated, which is very clearly visible on the example of EU constitutionalism. The assessment of legal culture during the pandemic crisis was thus analyzed in relation to EU constitutionalism. The most important research questions included: (i) Have the most important constitutional values of the EU been transformed due to the crisis? (ii) Have the procedures for changing constitutional law been maintained?, (iii) Has appropriate democratic control and accountability been maintained throughout the process of these changes?, and finally (iv) What was the role of politics in the processes of EU constitutionalism?

Keywords: EU constitutionalism; legal culture; Covid-19 crisis; centralization; federalization

"If there is no demos, there cannot be a well-functioning democracy"
[Weiler 1997, 115]

INTRODUCTION

Legal culture is defined as the totality of habits and values related to the acceptance, evaluation, criticism and implementation of applicable law [Podgórecki 1966, 179-80]. The above-mentioned definition emphasizes the perception of law in society, as well as its application, i.e. compliance with legal norms, which can also be referred to as the rule of law. Another aspect of legal culture is legislating and thus changing legal norms. Here, the key importance is, among others: whether such changes are carried out in accordance with existing procedures, i.e. in a lawful manner, or in violation of existing rules. Respect for constitutional norms and procedures is particularly important. The issue of basic values, which are most often found in basic laws, is also extremely important for legal culture.

The article will focus on the most important constitutional norms and values in the European Union (EU). I ask whether they are changing,

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especially under the influence of subsequent crises plaguing this organization. The next research question concerns the preservation of existing procedures for amending constitutional law, and thus whether the entire process can be considered lawful. The next question concerns the role of democratic values in the processes of shaping EU constitutionalism. Is there adequate democratic control and accountability over the process of changing constitutional norms? Politics is also of key importance for legal culture. Therefore, in the study I raise the issue of the institutions responsible for constitutional changes in the EU, their methods and scope of politicization, as well as other manifestations of the influence of politics on the entire process. In research on legal culture, there is often a distinction between the systems of civil law and common law. Hence, the next question concerns the role of these two legal cultures in EU constitutionalism. Finally, the issue of changes to the most important constitutional norms in the EU will be analyzed. By asking all these questions and research issues, I hope to obtain a lot of information about the legal culture functioning in the European Union in the 21st century.

The main research problem concerns changes in the legal culture in the EU as a result of crises. I hypothesize that although legal culture develops over a long period of time, in recent years the process of changing this culture has accelerated, which is very clearly visible in the example of EU constitutionalism. The research methodology is based on an analysis of the literature on EU constitutionalism and then an assessment of a case study of the functioning of this constitutionalism during the Covid-19 pandemic crisis. The theoretical basis of the study will be institutional theory [Dacin, Goodstein, and Scott 2002, 45-56; Faundez 2016, 373-19], which not only focuses on changes in institutions or legal norms, but also on the dominant values of legal culture. This theory will be complemented by concepts regarding the functioning of political and legal systems in emergency situations (so-called emergency politics) [Schmidt 2022, 979-93].

1. EU CONSTITUTIONALISM

European constitutionalism – or to be more precise constitutionalism in the European Union – can be divided into two currents. The first is the national, which embraces the constitutional systems of the Member States. The second is EU constitutionalism, meaning that which has a supranational and federalist tendency in the EU [Stein 1981].

Until now a fundamental dimension of EU constitutionalism has been the creation of European treaties, that is, law that is of a constitutional character for the EU. This took place through unanimous decision by all Member States, which meant the decision not only of governments, but also

of national parliaments, in accordance with the countries' ratification procedures. In some countries, consent for a new treaty had to be granted directly by the electorate through a referendum. Such a thorough procedure for approving new treaties, even if they were only agreements of a revisionary nature, resulted from the necessity for national democratic communities and sovereign states to transfer new competences to the EU. After all, the European Union should not exercise power in areas that have not been transferred to it by sovereign political communities, meaning all the Member States. This is precisely why the "Masters of the Treaties" are the states, which have to agree unanimously on the constitutional norms in the EU. Therefore the supremacy of European constitutional law thus understood over national law applies solely and exclusively to those powers transferred to the EU. In this view, European institutions are not authorised to expand their authority by themselves beyond the powers granted to them. Therefore, they cannot go beyond the competences transferred to them by the Member States.

At the same time EU constitutionalism – in this classic understanding – did not in principle embrace the supremacy of European Union law over national constitutions or over the rulings of national constitutional courts. After all, that which had a constitutional dimension for the EU itself did not carry the same meaning or supremacy over the constitutional systems in Member States. This was clear from the wording of Article 4 of the Treaty on European Union (TEU), in which the EU was obliged to respect the fundamental political and constitutional structures of Member States. Such a stance was expressed by at least a few national constitutional courts, including that of Germany, the constitutional courts of France, and also those in Italy, Poland, Romania and Hungary.

The most important example of EU constitutionalism in its traditional guise was the pursuit of passing the Treaty establishing a Constitution for Europe in 2004 [Christiansen and Reh 2009, 14]. This was supposed to be a breakthrough in many respects. Above all it meant the introduction of a European constitution by name, thus paving the way for a European federation. Because of this, the adoption of this treaty was described by academics as a "constitutional moment" in Europe [Nicolaidis 2019, 41-50]. In addition, the intention was to explicitly include the supremacy of EU law over national law in the said treaty; that could have led to acknowledging the supremacy of the EU constitution over the basic laws of Member States.

As we know, the "constitutional moment" in the EU collapsed due to referendums held for ratifying the treaty in the Netherlands and in France (in 2005) failing to deliver. This came as a genuine shock to the political elites aspiring for a European federation. The attempt to base the European Union's constitutionalism on the traditional treaty procedure, passed through unanimous decision by all Member States, had failed. And this

failure became an impetus for seeking new forms of accomplishing the political ideas connected to the EU's centralisation and federalisation, as expressed in the shaping of an alternative formula for EU constitutionalism. Creative ways of establishing constitutional rules in the EU were sought, meaning a departure from the traditional revision of treaties through the unanimous consent of Member States.

It is worth drawing attention to the fact that EU constitutionalism referred not only to the treaties as constitutional law, but also to the jurisprudence of the EU courts, treated as constitutional courts in the European Union. In this second iteration, constitutionalism in a way dethroned the Member States as the sole "Masters of the Treaties", and established European judges as the final instance in the resolving of constitutional disputes and the interpretation of the treaties [Alter 1998]. This kind of constitutionalism placed the emphasis not so much on the treaties themselves as constitutional law as it did on the jurisprudence of the Court of Justice of the European Union (CJEU) being the chief source of constitutionalism [Rasmussen 1986; Weiler 1997, 100, 112; Stein 1981]. This enabled continuation of the processes of integration in Europe even without the consent of all Member States. It constituted the basis of an alternative approach to constitutionalism, and was therefore extraneous to the traditional formula used for Member States to enact treaties. As an example, the activism of EU judges introduced such important constitutional principles as the doctrine of direct effect and the supremacy of European law. Such an approach gave rise to multiple disputes, including on the scope of jurisdiction of the CJEU (for example, whether it embraced only competences that had been transferred, or also all other matters), as well as the reach of the principle of supremacy (whether it should also cover national constitutions or not).

The crux of the dispute between national constitutional courts and the EU Commission and the CJEU was whether the EU was a union of sovereign states, and thus whether European institutions should respect their constitutional orders or not [Grimm 2020, 945]. If so, there could be no talk of the supremacy of EU law over national constitutions, or in relation to competences that had not been transferred to the EU. This is precisely why the national constitutional courts took the position that they had the right to determine whether EU law complied with their basic laws. Moreover, they could also ascertain whether the activities of EU institutions overstepped the treaties, that is, went beyond the powers transferred to them by the Member States. Germany's constitutional court had kept a check on these restrictions to the EU's powers since the famous *Kompetenz-Kompetenz*[1] ruling of 1993, concerning the Maastricht Treaty [Weiler 1997,

[1] Verlautbarung der Pressestelle des Bundesverfassungsgerichts, Pressemitteilung No. 39/1993 vom 12. Oktober 1993, Urteil vom 12. Oktober 1993 – 2 BvR 2134/92, 2 BvR 2159/92.

124-25]. In this particularly ruling, the German court recognised the European Union as a community of sovereign states (in German: *Staatenverbund*), which acts solely on the basis of competences expressly provided for in the treaties, and whose democratic legitimacy rests with the Member States, through their national parliaments.

The ruling of the German court of 5 May 2020 was also in this vein. The Karlsruhe court then found that the CJEU could not authorise the actions of the European Central Bank (ECB) in one of its Sovereign Bond Purchase Programs, since both institutions were operating outside of their treaty-given powers (*ultra vires* in Latin).[2] Poland's Constitutional Tribunal later ruled in a similar fashion.[3] The European Commission (EC) initiated the procedure used for violation of EU law in regard to the rulings by both the above national courts, although in Germany's case the request to the CJEU was withdrawn after some time. This example proves that officials in Brussels applied standards of one kind in relation to the process of defending constitutional autonomy in Germany, and of another kind for Poland. The latter has, since 2015, been used as the "scapegoat" of EU rule of law, or the narrative meant to legitimise the changes taking place in the European Union's systemic structure. In addition, the above example indicates that European constitutionalism was hammered out in the rivalry between expansive EU institutions and national courts defending their own powers [Weiler 1997, 107-108]. EU constitutionalism was also created in constant tension between the culture of common law and the culture of civil law.

The aim of this paper is to examine the political culture in the EU on the example of the development of EU constitutionalism during the first decades of the 21st century, that is, following the fiasco of the Treaty establishing a Constitution for Europe, and during the period of permanent

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[2] The Federal Constitutional Court found that the CJEU had exceeded its competences because it has not taken all significant factors into account in its analysis of proportionality, and applied too lenient a standard of review over the ECB's activities. The Court also argued that the Public Sector Purchase Programme violated the EU treaties, because the ECB had not justified it sufficiently. Cf. BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15, paras. 1-237, http://www.bverfg.de/e/rs20200505_2bvr085915en.html [accessed: 27.05.2023].

[3] Poland's Constitutional Tribunal stated that if EU bodies act beyond the limits of the competences transferred to them by the Republic of Poland in the treaties, and in addition question the Constitution as the supreme law of the Republic of Poland, with priority in legitimacy and application, this is incompatible with Articles 2, 8 and 90(1) of the Constitution of the Republic of Poland. Cf. *Ocena zgodności z Konstytucją RP wybranych przepisów Traktatu o Unii Europejskiej*, Constitutional Tribunal, case no. K 3/21, 7 October 2021, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [accessed: 27.05.2023].

crises afflicting the EU. It departed from the traditional formula of treaties being passed by the unanimous consent of Member States, and relied instead on alternative methods for creating new constitutional principles in Europe. The research goal is therefore to show both these alternative methods and the new constitutional principles, as well as the directions in the European Union's systemic makeup. They were of key importance for the evolution of legal culture in the EU.

2. NEW TRENDS IN EU CONSTITUTIONALISM

According to some scholars, the failure of the constitutional treaty meant in practice that it was impossible to establish a constitution in the EU. Thus it should have been acknowledged that this organisation had created a political system without formal constitutional authority (*pouvoir constituent* in French) [Grimm 2015; Craig 2001; Kumm 2006]. However, constitutional politics abhors a vacuum. Faced with the difficulties of enacting EU treaties, there was an intensification of the process of alternative constitutional lawmaking in the EU, meaning without the formal amendment of treaties by the Member States, which pursuant to their democratic procedures could entrust the EU with certain powers. This alternative process was based on arbitrary actions of EU institutions, especially the European Commission and the European Parliament, as well as on the judicial activism of the CJEU. It stemmed from the guiding principle behind European integration, meaning the aspiration for an ever closer union between the nations of Europe, originating from as far back as the preamble to the Treaty of Rome (1957). Such powerful historical roots of the aforementioned aspirations not only legitimised the process of increasing integration, but also encouraged decision-makers to make out-of-the-box attempts to go deeper, especially when national governments showed no will to revise the treaties. Therefore the constitutional tendencies outlined here were not entirely new developments in the history of integration [Grosse 2019]. Nevertheless, following the failure of the constitutional treaty, the appetite for seeking alternative paths for the development of EU constitutionalism – versus the traditional method of passing treaties – distinctly increased. This was also due to the "incomplete" or "unfinished" process of shaping the European Union's political system.

This is why political scholars name the structural setup of this organisation an "open political system" or a system "under construction" [McNamara 2018], while lawyers refer to it with the term "underconstitutionalism" [Kassim 2023; Delledonne 2014]. Its principal feature was the numerous systemic dysfunctions such as the imbalance between specific EU institutions, the insufficient formal powers that certain institutions had in relation to their

political mandate (an example being the relatively small Treaty-based powers of the European Council and the European Parliament). Another problem was the absence of a clear division between the legislative, executive and judicial powers, as well as an insufficient system of accountability and review over the power of EU institutions. An example of the latter tendency is the far-reaching arbitrariness of proceedings by the Commission, but also by the CJEU. Topping all this was the growing politicisation of EU institutions, including both technocratic and judicial. In other words, the political system following the Lisbon Treaty was in many respects dysfunctional, out of balance, or ineffective – and especially so in urgent situations.

And it is precisely successive crises that have constituted another factor for constitutional change. They have been exceptional situations frequently demanding rapid and non-standard action, breaking with the procedures or division of powers existing formally. In a way, the crises justified EU institutions overstepping their mandate (and the powers entrusted to them by Member States). This is precisely why the almost permanent period of crisis in the EU, which began with the eurozone problems after 2010, became a special opportunity for EU constitutionalism [Voltolini, Natorski, and Hay 2020]. It was accompanied by the practice of taking measures defined by academics as "emergency rule" [Goetz 2014]. The extraordinary situation facilitated the phenomenon of "competence creep", a slow but steady expansion of powers, in EU institutions [Garben 2019]. And this constituted an opportunity for the violation of national constitutions and the hitherto binding treaty arrangements.

This was why scholars recognised that a time of crisis is conducive to undermining rule of law in Europe [Scicluna 2014, 546], above all through the violation of treaty principles, and as such the constitutional order of the EU [Auer and Scicluna 2021]. This was also related to an erosion of the previously binding standards of democracy, especially in accountability and review over the EU executive [White 2015b]. Some scholars added that the European Union was developing based to an ever greater degree on fear and the whip of necessity [Wilkinson 2013, 528]. The crisis period was also referred to as a state of exception, signifying a departure from the legal order functioning during normal times, an increase in the discretionary and arbitrary action of the technocracy, and the suspension of democratic rights and freedoms [Kilpatrick 2015; Scheppele 2010]. For this reason, scholars have come more and more often to recognise that crisis management in the EU resembles authoritarian rule, and even that this is becoming a permanent systemic feature of this organisation [Kreuder-Sonnen 2016; Joerges 2014b; Somek 2015]; a feature that could even be described as constitutional, that is, possessing very significant and overriding practical importance [Kreuder-Sonnen and Zangl 2015]. The frequency

of crises thus led to a recurrence of "emergency rule", together with its departure from rule of law, and with authoritarianism. Simultaneously the crises became an opportunity for applying a specific method of advancing integration, including the modification of its most important constitutional principles.

The authoritarianism of EU institutions consisted not only in the violation of the rule of law, but even more so in the curtailing of national constitutionalism, which – as opposed to that of the EU – was based on real democracy. In keeping with the words of Joseph Weiler – if there is no *demos* (i.e. no political nation), there can be no operating democracy [Weiler 1997, 115]. This is why EU constitutionalism has displayed an inherently undemocratic tendency. All the more reason why it should not seek methods for transferring powers from Member States to the EU that are an alternative to the democratic ways. Neither should it restrict constitutional systems in national democracies.

Lacking a *demos*, the European Union had no constitutionality for defining which political values were constitutional (that is, fundamental to the EU) other than unanimous decision by its Member States. Judicial protection of fundamental rights in the EU should therefore apply in principle only to values thus established. Thus the judges did not have adequate authorisation to broaden or narrow, with their judgments, the normative choices of the EU's members.[4] This is of enormous legitimising importance, since the expansion of the CJEU's constitutional power was based precisely on the fundamental rights and values, supposed, as it were, to offset the democratic deficit of the "alternative" EU constitutionalism.

All this led to steadily increasing tension between formal and traditional constitutionalism, based on treaties, and the political practice of EU institutions and European elites (both supranational and those originating mainly from the largest countries of Western Europe) [Auer and Scicluna 2021, 24]. These were tensions between the culture of civil law and the culture of common law, between democratic culture and the culture of technocratic order and judocracy. EU judges and officials created successive precedents, oftentimes justified by the necessity to react to crises. This was a challenge for traditional EU constitutionalism, understood as adherence to the treaties and the rule of law [Kreuder-Sonnen and White 2022, 956; Scicluna and Auer 2019; Scicluna 2018; Kreuder-Sonnen 2016; Joerges 2014a; White 2015a]. At the same time it laid the foundations for a different type of constitutionalism, one forged through practice and under the influence of political

[4] Another consequence of the lack of a *demos* was that the EU's intergovernmental institutions should not apply majority voting for taking decisions, since the democratic outvoting of minorities can only take place within a particular political nation. Cf. Weiler 1997, 117.

rivalry, since new interpretations of constitutional principles had been introduced, or power had in fact been redistributed between specific EU institutions, as well as between the European Union and Member States. In the latter case the biggest countries of Western Europe maintained and sometimes even increased their influence, while all other countries tended to lose their ability to influence European politics.

This meant in practice that a feature of the alternative constitutionalism was the extraordinary activeness of EU institutions, which were overstepping their own powers or even the treaties, in doing so shaping a new structural quality in European integration. The de facto amendment of the treaties as a result of political practice or judicial interpretation was therefore not perceived as violating the rule of law; it was valued positively, because it was acknowledged to be activity furthering the resolution of crises and the advancement of integration.

An important feature of non-traditional constitutionalism was how the activities of individual institutions were based on far-reaching discretion and politicisation. It was related to these institutions' own political vision of the development of integration, a vision most often inextricably linked to granting themselves further powers, and thereby greater authority in the European Union. Another aspect of the politicisation was the shaping of the narrative intended to justify unconventional measures, including the broadening of their own powers. The next dimension of this politicisation was the pursuit of public opinion and the preferences of the most influential countries in Western Europe [Blauberger, Heindlmaier, Kramer, et al. 2018]. This was particularly true of the behaviour of the European Commission and the CJEU. The processes in question led to the gradual centralisation of power, or the competence creep in the European Union. The latter was also the result of the blurred division of tasks between the EU level and member-state level, exemplified by the so-called shared competences. This was conducive to the EU systematically encroaching into the domain of the Member States, thereby violating in an ongoing manner the said states' constitutional order, while also restricting their national democracy.

The alternative method for furthering integration was therefore not only politicised and forged through inter-institutional rivalry; it was also, by its very nature, unlawful, and at the same time not very democratic, not to say authoritarian [White 2019, 199-202]. As I have mentioned, it was based on fundamental values, above all on human rights [Williams 2007]. It referred directly to the constitutional role of fundamental rights in the political system, rights that were supposed to legitimise the EU constitutionalism among experts as well as the nations of Europe.

It is worth noting that this was also born from the stance taken by the national constitutional courts, and was therefore a result of dialogue

or even rivalry with national institutions. Back in 1974, Germany's constitutional court ruled in the Solange I case that the legal acts of the European Communities and the case law of the European Court of Justice had to be assessed for their compatibility with German provisions on fundamental rights for as long as there was no effective system for the protection of these rights at the European level.[5] As such, the judgment suggested to EU judges that they give a greater role to the protection of fundamental citizen rights if they want to avoid disputes with national constitutional courts.

At the same time, interpretation of the aforementioned rights by EU courts was quite flexible and depended on the political requirements of Western Europe's largest countries. This was so in the case of growing economic pressure being put on Western Europe by the citizens of new Member States after 2004, as well as the economic crises post 2010, and resulted in the reduced significance of fundamental rights in the social sphere and in employment [Grosse 2020; Everson 2015, 480; Beck 2014, 540-50]. Bearing in mind the instrumental treatment of fundamental rights by EU institutions, as well as the systemic violation of the treaties at times of crisis, the promotion of EU constitutionalism in the second decade of the 21st century was all the more surprising in regard to the rule of law, allegedly violated by certain states of Central Europe.

As I wrote earlier, an additional aspect of EU constitutionalism was the activism of European judges. A key objective was the pursuit of establishing the supremacy of European law and CJEU judgments over national constitutions and the rulings of national constitutional courts. The CJEU was not an impartial court in this matter, and neither was it apolitical [Grosse 2022b]. It was neither upholding the treaties nor protecting, in particular, the treaty-based division between EU and national competences. It was interested rather in extending its own authority and in the federalisation of the legal system in the EU, and as such was guided by its political vision of the European Union's ultimate system, based on legal federalism in the EU. It was a party actively engaged in increasing the powers of EU institutions, and by doing so legitimised the competence creep as well as all other informal attempts by the EU to appropriate national competences [Scicluna 2018; Grimm 2020]. It was most definitely not an advocate of the treaty principle of respecting Member States' constitutional order, since it was de facto seeking to dismantle national constitutional systems and subordinate these states' judicial systems to the supremacy of EU law.

[5] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, 29 May 1974.

3. EU CONSTITUTIONALISM IN PRACTICE

The Covid-19 pandemic was a period when "emergency rule" was put into practice. It was also an opportunity for developing alternative constitutionalism in the EU, the most prominent example of which was the establishing of the European Reconstruction Fund, later named Next Generation EU (NGEU). Although its designers referred to the existing treaties, they were highly flexible in the way they did so. It was a rather creative expansion of the treaty basis for establishing a fund based on joint debt. After all, Article 122 of the Treaty on the Functioning of the European Union (TFEU) concerning financial solidarity, and Article 175 of the TFEU laying down the rules for cohesion policy, were made use of. Apart from the above, Article 311 concerning the EU's own resources, and Article 312 of the TFEU on multiannual financial frameworks, were also referred to [Fabbrini 2022, 194]. These provisions do not mention the possibility of the European Commission incurring debt guaranteed by Member States and the EU multiannual financial framework. Neither do they address the option of introducing a non-budgetary special fund created solely for a defined period and which can be financed from new taxes and payments that increase the EU's so-called own resources.

Another aspect of the NGEU's introduction was the consent of all Member States to the new financial arrangements, together with ratification by national parliaments of the EU's new own resources. The procedure resembled the approval of new treaties, and was intended to ensure political legitimacy for ground-breaking changes leading in the direction of fiscal federalism, changes de facto implemented without the respective revision of treaty law.

Another important element accompanying the NGEU was the introduction of an elaborate system of conditionality, making the receipt of funds conditional on the fulfilment by national governments of numerous conditions set by the European Commission. With over 3,500 "milestones" presented for Member States to fulfil, the powers, discretionary authority, and arbitrariness of EU officials' activity were significantly broadened. In many cases it was an elaborate process of competence creep, the European Commission encroaching into the domain of national powers [Baraggia and Bonelli 2022, 151]. It was also a systemic violation of national constitutionalism. After all, funds could be blocked if governments were to violate European rule of law, including through challenging CJEU rulings or the principle of supremacy of EU law over national constitutions.

As a result, the EU's system was modified in a non-treaty yet simultaneously fundamental way, since the growth of fiscal federalism as well as a radical centralisation of power in the EU was thereby sanctioned.

A manifestation of this systemic trend was the strengthening of the European Commission's authority over certain Member States, especially those with less influence in the EU or politically stigmatised due to the alleged violation of EU values or the rule of law. This narrative, defending so-called European values, was aimed at legitimising the systematic encroachment by the EC into national competences, i.e. the competence creep. A number of other systemic rules were also brought into political practice, led by the supremacy of EU law and CJEU rulings over national constitutions and the jurisprudence of national constitutional courts.

The alternative EU constitutionalism thus practiced violated the hitherto treaty principles of the European Union, thereby altering earlier systemic norms. After all, in practice the Next Generation EU instrument was a departure from the principle of equality of Member States under Article 4 TEU, as net contributor states were treated differently to beneficiaries of EU funds [Bieber and Maiani 2014, 1057, 1073]. Sanctions resulting from non-compliance with the Commission's expectations could be much more severe for beneficiaries than for net contributors who, by paying surplus funds into the EU budget, tended to have a greater informal say in the actions taken by EU officials. As such, they did not have to be so worried about the European Commission withholding their funding, and could even persuade the EC to place greater importance on holding other countries to account. The EC's growing discretion and arbitrariness, linked to its ever greater politicisation, thereby created informal opportunities of influence primarily for the richest countries. They were able to use their resources to influence, via the European Commission, poorer countries or those in greater need of EU support.

This exacerbated the differences between EU states, especially the largest countries of Western Europe and the beneficiaries of EU funds in Central Europe. Another element increasing this disparity was that the European Commission was able to withhold cohesion policy funds allocated for countries and regions experiencing weaker development. In other words, the EC was able to push countries not developing as well "up against the wall" more effectively, taking advantage of their more difficult economic situation, and thus increasing their economic distance behind the richest and more highly developed countries.

It is hard to understand how all this corresponded with the treaty norms that were invoked during the introduction of the NGEU, meaning Article 122 TFEU on solidarity, and Article 175 TFEU on cohesion policy. The extensive conditionality introduced by the NGEU reinforced the hierarchy of power between the central and peripheral states of the EU [Baraggia and Bonelli 2022, 151] more than the solidarity between them. It was

a departure from both the goals of the cohesion policy and from the treaty principle of equality between Member States.

According to Antonio Baraggia and Matteo Bonelli [2022, 153] a change in the constitutional culture of the EU was taking place. Hitherto treaty norms, such as the principles of loyalty, solidarity, equality of Member States and mutual trust between them, were losing their relevance. As a result of the NGEU, the culture of conditionality was gaining ground, while "coercive Europeanisation" was also being practiced increasingly against smaller and politically weaker states, based on financial sanctions [Biermann 2014]. Thus the hierarchy of central states in Western Europe over the peripheral states (in economic and political terms) was becoming the supreme principle of constitutionalism. It was, in essence, power of the net contributors to the EU budget over its beneficiaries. As a result, mutual distrust within the EU has also grown.

The change in constitutional culture paved the way for centralisation of the political system and fiscal federalisation, while simultaneously making technocratic and judicial institutions increasingly subject to politicisation, or in other words informal influence exerted by the largest countries of Western Europe. This did not resemble a democratic federation, but rather had more and more of the systemic features of technocracy and judocracy. At the same time the European Union was drifting towards an asymmetric organisation, with a very sharply defined hierarchy of power between the dominating states of Western Europe and the rest. The supranational structure, or institutions of a technocratic and judicial super-state, served largely to further the exercising in practice of this hierarchy of power between the central states and those under this domination, to a large degree deprived of their own sovereignty. This dominance also enabled the realization of ambitions and interests of the supranational elite concentrated in Brussels.

The preference for new political values in the EU, viewed as constitutional values and the most important human rights, was related to the change in constitutional culture. This referred nominally to Article 2 TUE and the Charter of Fundamental Rights of the European Union, but in political practice was to an ever greater degree based on left-wing and even Marxist axiology [Grosse 2022a]. The ideological foundations of EU constitutionalism were of great significance, since they revised the main systemic principles, in particular concerning democratic order in the EU. The leftist interpretation of values rejected political pluralism in practice and the axiology of other political trends (for example conservatism and that of the Christian Democrats). This was a major deviation from the standards of democracy hitherto practised in the Member States. Moreover, left-wing politicians and officials at the EU level largely questioned

or at least limited the democratic community of citizens at the national level. Sometimes they treated it as a threat to European integration, and particularly so when parties with political values or views differing from the liberal or left-wing majority among the supranational elites came to power. Essentially, such governments and their electoral bases were a threat to the alternative EU constitutionalism that, as I outlined above, had been growing rapidly particularly since the fiasco of the constitutional treaty.

A growing number of voters and elites in the Member States were perceiving the excessive centralisation and competence creep as a threat. In addition, EU constitutionalism in its new guise was recognised as a threat to nation states and their constitutional systems. In other words, there was a deepening mutual hostility and distrust between the two political camps in the European Union. On the one hand there were the supranational elites, politicians and voters with left-wing and liberal leanings, as well as supporters of the centralisation of the EU's system harking from the largest countries of Western Europe. On the other was the right-wing and conservative electorate, as well as a large portion of the national elites, demanding greater respect for state sovereignty and the self-determination of national democracies, usually from smaller or less influential EU countries. This latter social group seemed to be acquiring ever greater importance in the EU, but it was divided internally, and in addition weakened or corrupted by Brussels. Financial sanctions were the main instrument of coercion or bribery. Another tool of pressure was the stigmatising rhetoric, accusing political opponents of being anti-European, of not abiding by the rule of law, of populism and authoritarianism.

CONCLUSIONS

We can notice two legal cultures in relation to EU constitutionalism. One is related to the civil law culture, i.e. the unanimous consent of Member States to revise treaties, and the other refers to the common law culture, i.e. it mainly refers to judicial activism and judicial interpretation of treaties or even the creation of new constitutional norms. When Member States found it difficult to agree on the revision of treaties, the common law culture gained in importance. However, unlike in the Member States, the practice of developing case law at the EU level did not have adequate democratic legitimacy.

Development of the common law culture was additionally strengthened by subsequent crises affecting the EU, which were also an opportunity for the expansion of EU competences in accordance with the concept of competence creep. During crises, both EU judicial and technocratic institutions, but even the European Parliament, exceeded their own powers

or the political mandate resulting from treaty law. Therefore, the legal culture of the EU during the crises became less and less law-abiding. This phenomenon was manifested in particular by EU institutions encroaching on the competences of Member States, which not only deviated from the applicable treaty provisions, i.e. EU constitutional norms, but could also violate constitutions in Member States and reduce the prerogatives of national democracies.

Under the influence of the crises, democratic control and accountability over EU decision-makers introducing an alternative formula of EU constitutionalism were also weakening. In other words, the process of constitutional change in the EU has become less and less democratic. This created an incentive for increasing arbitrariness among decision-makers in the EU, as well as flexible and discretionary application of legal norms depending on political needs. One may even be tempted to conclude that the EU legal culture increasingly accepted the politicized application of law, depending not only on the crisis situation, but above all on the political will of EU decision-makers. This group includes EU officials and judges, as well as influential politicians from the European Parliament and the largest Western European countries. Constitutional law in the EU ceased to be a framework for the political game, and increasingly became an instrument for achieving political goals and was quite instrumentally subordinated to political power.

It is therefore hardly surprising that legal relativism in the EU was increasing, including with regard to the most important constitutional norms, and at the same time, the leading constitutional values and principles in this organization were changing more and more rapidly. This included, among others: moving away from the principle of equality of states towards hierarchical relations between central and peripheral countries in the EU political system. Previous constitutional values, such as solidarity and loyalty of Member States, were disappearing. However, the culture of conditionality, legal and financial coercion in the EU was becoming stronger, which resulted directly from the hierarchization of relations between Member States. In such a situation, distrust between them also grew. Additionally, left-wing values or the interpretation of existing EU constitutional norms in line with left-wing axiology became increasingly dominant. All this had a huge impact on the legal culture in the EU.

To sum up, EU constitutionalism in times of crises was based increasingly on systemic changes introduced without an appropriate revision of the treaties by a unanimous decision of the Member States. It involved the centralization of power by EU institutions, fiscal and legal federalism, as well as the appropriation of national competences that were not transferred to the EU (i.e. the phenomenon of competence creep). This was done with the support of the largest Western European countries.

The above-mentioned changes were legalized most often by the judgments of the CJEU and the pro-European narrative of supporters of such legal culture.

Therefore, a crisis of this constitutionalism seems inevitable in the long run. There must be a conflict between the possessive constitutionalism of European judges and the defense of constitutional orders in the Member States. As EU constitutionalism has increasingly targeted national democracies, it is likely that they too may rebel against non-treaty political changes occurring in the EU. All the more so because scholars emphasized that the EU was far from a democratically constitutionalized community to exercise such great power over European nations [Auer and Scicluna 2021, 29].

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LEGAL AND POLITICAL SCIENCE PERSPECTIVES ON THE ANALYTICAL ELEMENTS OF POWER LEGITIMACY: DIMENSIONS AND CATEGORIES. PRELIMINARY ANALYSIS

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Abstract. The primary objective of this paper is to examine the intricacies surrounding power legitimacy, identifying its multifaceted aspects in various categories. The authors discuss key factors necessary to determine power's legitimacy and meticulously elaborate on the pertinent dimensions encompassing it. The article focuses on the factors that threaten the maintenance of unchallenged power, specifically the spectre of illegitimacy, and those that reinforce its consolidation. By concentrating exclusively on two key pillars – dimensions and categories – the article aims to establish a theoretical framework for investigating the legitimisation of political authority. This endeavour is crucial in comprehending the intricate interplay between society and power. It also has a clear research objective, i.e. to identify the specific area, scope, and pivotal junctures in the legitimisation process where dimensions and categories exert their most profound and immediate impact. Consequently, the reader gains a thorough understanding of the complex and diverse processes involved in legitimisation, encompassing legal, political, and societal dynamics.

Keywords: law; power; legitimacy; efficiency; political structure

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INTRODUCTION

Legitimacy assumes a complex nature, intricately intertwining three essential components: legality, normative justification, and the acceptance of authority. This intricate interplay has garnered the attention of political scientists and sociologists, who acknowledge the multifaceted nature of political power legitimacy. This nuanced approach to assessing the legitimacy of authority finds increasing resonance among scholars dedicated to the study of power's legitimacy. The legitimization of political authority exerts a substantial influence on the dynamics of power and the political apparatus, and this article undertakes an exhaustive analysis from the dual perspectives of jurisprudence and political science. The significance of both these vantage points is paramount in this context, as legitimacy stands as a multifaceted construct that amalgamates diverse facets, encompassing legality (the legal dimension), normative rationale (the legal dimension), and a degree of power acceptance (the political dimension). In the realm of political theory, a frequently embraced stance posits that political authority achieves legitimacy when: a) its acquisition and exercise adhere to established norms and rules; b) the underpinnings of its authority, including norms and the objectives and principles guiding its exercise, can be justified in accordance with widely accepted societal beliefs; c) the position of authority garners explicit support, acquiescence, and recognition from other sources of authority.

1. THE DIMENTIONS OF POWER LEGITIMACY

The dimensions of power legitimacy can be scrutinized from two distinct vantage points: firstly, within the framework of qualities inherent to the concept of power legitimacy, which either emanate from its definition or pertain to political structures such as the state, encompassing its constitutional values, principles, and the governmental apparatus comprising individuals entrusted with ministerial and political responsibilities [Beetham 1991, 15-25; Sokół 1997, 64-67].

Let us direct our attention to the initial facet of our inquiry. In accordance with the most comprehensive delineation of power legitimacy, it encompasses a triad of constituent elements that, when interwoven, confer upon authority its full legitimacy. These constituent elements are as follows.

A) Adherence to established norms and regulations in both the acquisition and exercise of power. These norms, often termed as *the rules of power*, may, in established democracies, exist in unwritten traditions rooted in mutual trust between the governing entities and society. Nonetheless,

to preclude practical complications, most societies opt for a more explicit articulation of these rules, typically enshrined in detailed legal codes. Predominantly, the bedrock of these rules resides in the constitutional framework. It is not uncommon for such rules to age over time, leading governments to contemplate amendments to their constitutions, often sparking contentious debates within parliamentary chambers among competing political factions.

When power is acquired and wielded in strict adherence to these rules, it garners legitimacy. In such cases, those in positions of power tend to enjoy popularity and enhance their prospects for subsequent terms, potentially extending their influence onto the international stage. However, there are instances where the acquisition of power aligns with established norms, but its subsequent exercise deviates. Frequently, two principal actors within the political milieu emerge as adversaries to such rulers: opposition party representatives and certain media outlets. To safeguard their legitimacy, those in power might adjust their policies to some extent in order to appease their critics. In the contemporary world, the measure of legitimacy can be quantified through society's support, gauged through opinion polls. If those in power are mindful of their political careers, aiming to secure their prospects in forthcoming elections, they may endeavor to align their policies with societal expectations, thereby ameliorating their standing. In the gravest of scenarios, leaders who exhibit a lack of concern for their future political fortunes simply conclude their terms and relinquish their positions.

Circumstances may arise wherein power is procured in disregard of established norms and wielded in a manner that transgresses their boundaries. In such a scenario, the resulting power is inherently bereft of legitimacy. The illegitimacy arising from this transgression, particularly concerning the acquisition of power, elicits widespread disapproval within societies. This is because it invariably engenders a manifestly illegal situation that defies explication through recourse to established legal norms. The unlawful seizure of authority, commonly referred to as *usurpation*, stands in stark contrast to the principled exercise of power in accordance with established rules. It is indeed a challenge to envision usurpation of power coexisting harmoniously with the conscientious adherence to established norms. Invariably, the usurper, having illicitly appropriated power, finds themselves eventually divested of their ill-gotten authority.

In summary, it is imperative to underscore that power legitimacy attains its zenith when authority is acquired through lawful means and its subsequent exercise adheres diligently to established regulations. This phenomenon is predominantly observed in contemporary democratic nations, where the rule of law and adherence to prescribed norms prevail. Conversely, a more prevalent scenario emerges when the acquisition of power duly aligns

with established norms, yet its exercise exceeds the confines set by these norms. In such instances, the legitimacy of such power becomes tenuous, and it may even teeter on the precipice of illegitimacy. The durability of this power hinges upon the prevailing political framework within a given country. Generally, the more democratic the nation, the swifter the erosion of such power, and this phenomenon finds a typical manifestation in the so-called *illiberal democracies*. These states, while ostensibly possessing democratic institutions, exhibit a distinct modus operandi in the exercise of power, deviating markedly from the practices observed in fully democratic nations.

B) Turning our attention to the second facet, the dimension of legitimacy becomes intimately intertwined with the justification of the governing rules. According to Beetham [1991], mere legal validity alone proves insufficient to underpin legitimacy, for the very rules themselves demand substantiation. Thus, the legitimacy of power is intrinsically contingent upon the extent to which these rules governing power can be justified from the perspective of shared beliefs held in common by both the powerful and the subordinate factions.

Legitimacy bestows its imprimatur upon power when several criteria are met: 1) authority derives from a legitimate source, 2) the attributes of those entrusted with wielding power align with the requisites stipulated within the rules of power, and 3) the structure of power dutifully serves the collective interests rather than the parochial interests of the powerful. These justifications are intricately bound to the prevailing societal beliefs concerning a range of critical facets, including the rightful fount of authority, the requisite qualities necessary for the judicious exercise of power, and the methods employed by individuals to attain these qualities. Additionally, these beliefs extend to encompass a broader conceptualization of common interests, benefits, and needs that a given power system purports to fulfill.

However, it is essential to acknowledge that beliefs are far from uniform across societies; indeed, variations in belief systems manifest not only between the powerful and the subordinate but also within the ranks of the subordinate population itself. Consequently, there arises a pressing need for a foundational set of shared beliefs to serve as the bedrock upon which the justification of power's rules can be predicated.

Should the rules of power fail to find resonance within the realm of shared beliefs, they are inevitably divested of legitimacy to a certain extent. This predicament can be attributed to several underlying factors: 1) the absence of a consensus in a given society's belief systems, 2) the erosion of the foundational underpinnings of power's rules due to shifts in prevailing beliefs (e.g., diminished faith in certain pivotal qualities and values), or 3) the frailty of existing justifications buttressing these rules. The aforementioned line

of reasoning underscores the possibility of power's rules bearing a feeble veneer of legitimacy or, in some instances, encountering a legitimacy deficit of varying degrees.

C) In the context of the third dimension, legitimacy hinges on the consent of those subordinate individuals who, by and large, find themselves subject to power dynamics predominantly shaped by the powerful entities. This consent assumes tangible form through actions such as negotiating agreements with the powerful, pledging allegiance, and participating in electoral processes. These actions effectively signify consent, irrespective of the underlying motives that impel the subordinate individuals to engage in them. Moreover, participants in these actions invariably undertake a moral commitment to affirm their endorsement of the positions held by the powerful. Consequently, these actions metamorphose into public expressions that confirm the legitimacy of those in power. The wielders of authority can strategically leverage these expressions when interacting with other groups that have refrained from partaking in such actions or have abstained from endorsing power in any form.

The specific nature of the consent requisite for the acknowledgment of the powerful as legitimate is subject to the prevailing political culture, which is typically rooted in the customary practices of a given society. Nonetheless, it is imperative to underscore that, universally, when bestowing legitimacy upon authority, at the very least, the most influential faction among the subordinate populace – usually their elite – must manifest their consent through actions or public ceremonies. This consent is construed as a solemn obligation of the subordinate segment towards those in power and serves as conclusive proof of the legitimacy conferred upon the powerful. Most crucially, it is solely through the public actions of the subordinate individuals who articulate their consent that the process of legitimizing power unfolds in its authentic form. In contrast, other scenarios may entail instances of propaganda or public relations campaigns, which, while contributing to the semblance of legitimacy, do not capture its intrinsic essence. Importantly, the renunciation or denial of consent constitutes a pivotal factor in the erosion of legitimacy. The magnitude of this erosion is contingent upon the number of individuals embroiled in the process of delegitimizing power.

Within the domain of social science, the concept of legitimacy as it relates to political structures has garnered the attention of scholars such as Almond, Powell , Strøm, et al. [2008]. These political structures, akin to all wielders of power, inherently necessitate legitimacy. From this vantage point, Easton has thoughtfully delineated, within the realm of politics, three distinct objects that crave societal validation:1) society, connoting the state in its broader interpretation; 2) regime, encapsulating the prevailing

dominant ideological values, constitutional principles, administrative structures, and the prescribed rules of political engagement; 3) government, encompassing the governing body itself and other individuals occupying formal political roles [Easton 1979, 270].

It is worth noting that these enumerated objects may vary in their capacity to secure social support. For instance, during the 19th century in France, various political factions ardently endeavored to undermine one another and the exercise of authority, yet none ventured to impugn the legitimacy of the French state itself. In a more generalized context, one may infer that the legitimacy of a political system seldom serves as the root cause of significant issues. Instead, it is often nationalism that emerges as the pivotal factor underpinning the legitimacy of modern nation-states [Sokół 1997, 64].

In recent decades, the Western world has been confronted with discernible indicators of delegitimization directed towards the state [Rychard and Domański 2010]. These manifestations manifest as anti-state nationalism or separatist movements, often articulated by certain segments of society within liberal democracies. These groups express their convictions not only through peaceful means but also resort to criminal activities, exemplified by the Basques in Spain or the Irish in Northern Ireland, a constituent part of the United Kingdom. The impetus behind these political phenomena often derives from ethnic, linguistic, or occasionally religious motivations. Similar tendencies have surfaced in Quebec, one of Canada's provinces, and are currently witnessed in Belgium, where the Flemish and Walloon communities contend for greater political influence. Likewise, such dynamics have unfolded in Georgia, situated on the eastern coast of the Black Sea, where two regions, Abkhazia and South Ossetia, have been recognized as independent states by Russia.

The indications of delegitimization manifest as crisis scenarios intertwined with the intricate matter of national identity, posing profound challenges for resolution. Nations grappling with such crises commonly endeavor to address their predicaments through several avenues: a) cultivating robust nationalism, often personified by a charismatic leader; b) contemplating the partitioning of the national state into distinct entities, as witnessed in historical instances like Pakistan and Bangladesh; c) pursuing a nuanced approach characterized by limited pluralism, moderated coercion, and the incorporation of acceptable state symbols [Sokół 1997, 65].

In democratic societies, the underpinning of legal legitimacy is intricately tied to the principle of popular sovereignty. This foundational principle harmonizes with various other convictions concerning the rightful sources of authority. Consequently, within constitutional monarchies, deep-seated beliefs in tradition and hereditary succession persist, casting power as a pivotal and unifying force that mitigates ethnic schisms. This perspective sheds

light on the preponderance of Western stable democracies adopting monarchical structures, encompassing nations such as Great Britain, Sweden, Norway, Denmark, the Netherlands, Belgium, Luxembourg, Australia, Canada, and New Zealand [ibid.].

In well-established democracies, the influence of traditionalism and traditional legitimacy extends to the realm of ritualism, which, in its political guise, finds expression in a society during national holidays. These occasions and the accompanying symbols serve to mold the political culture of a society and cultivate an atmosphere of legitimacy.

Two distinct models of political culture can be delineated concerning their impact on legitimacy: a homogeneous or uniform model and a heterogeneous or diverse one. For instance, the United States has forged a common, homogeneous culture rooted in the veneration of the republic's founding fathers, such as Abraham Lincoln and Theodore Roosevelt. However, in some European nations characterized by a heterogeneous model of political culture, disparate sets of symbols and national heroes find recognition, typically aligned with left-wing or right-wing political factions. This divergence is a consequence of the prevailing political system, where political parties find it challenging to unite people under a common set of national symbols and heroes due to the acceptance of disparate traditions within each political orientation. Consequently, in a pluralistic political landscape, great emphasis is placed on election strategies and techniques designed to garner support for specific political entities. The legitimacy of these entities can only be achieved through the process of legitimization.

In the domain of international relations, the governmental dimension of legitimacy has been elucidated by J. d'Aspremont. This scholar posits that states, in legal terms, act through their respective governments. However, governments themselves exist for finite durations, contingent primarily on the political system's form and the internal stability of the state. According to d'Aspremont, the frequent turnovers in government personnel necessitate the formulation of criteria to determine who possesses the authority to represent and act on behalf of the state. In his perspective, "the imperative to designate each state's representative in the international arena is at the core of the concept of legitimacy in international relations" [d'Aspremont 2005, 878]. Only a legitimate (authorized) authority, typically a government, is endowed with the lawful capacity to speak and act in the name of the state. Importantly, d'Aspremont contends that there are no objective criteria for ascertaining governmental legitimacy, as it emerges from the subjective evaluation of relevant stakeholders [ibid., 878-79].

On one hand, this entails that each sovereign state retains the prerogative to acknowledge the authority claimed by an entity purporting to represent another state, especially within the framework of bilateral relations.

Conversely, every state reserves the right to assess the legitimacy of a foreign government based on the criteria it deems pertinent. Consequently, this dichotomy gives rise to contentious debates surrounding the legitimacy of governments, a particularly salient issue when an elected government fails to uphold the essential tenets of democracy. Such states with governments of this nature are often classified as illiberal democracies.

Illiberal democracies have endured over extended periods and, following the conclusion of the Cold War, were often tolerated in the realm of international relations. Many observers believed that these states, by neglecting key democratic principles, were undergoing a transitional phase, and with time, would ultimately embrace the necessary democratic norms [d'Aspremont 2005, 879]. While some illiberal democracies have indeed made the transition to full-fledged democracies, others have persisted and even consolidated their illiberal practices. Additionally, new instances of illiberal democracies have emerged, particularly in the Middle East, exemplified by countries such as Iran, Pakistan, Palestine, Libya, Tunisia, and Egypt.

The latter two nations, Tunisia and Egypt, witnessed popular uprisings in the initial quarter of 2011, leading to the ousting of their ruling regimes. Subsequent developments in these countries will determine the nature of their future governance. In the realm of international relations, it is not uncommon for a particular government to be recognized as legitimate by some states while being deemed illegitimate by others. Illiberal democracies exhibit certain democratic characteristics since their governments typically undergo electoral processes. However, they fall short of being recognized as fully legitimate entities due to their failure to adhere to essential democratic principles.

As elucidated in the preceding deliberations, the legitimacy of governments is poised to assume an increasingly pivotal role in the contemporary global landscape, characterized by the close cooperation among nations across diverse realms of political, economic, and cultural endeavors.

2. ALTERNATIVE DIMENSIONS OF POWER LEGITIMACY

The formula for legitimization stands as a foundational concept, irrespective of its constituents. It hinges upon citizens perceiving it as justifiable, a perception that necessitates a certain degree of freedom and belief in its legitimacy. A consensus among the majority of researchers suggests that legitimacy emerges from a standardized consent to the fundamental principles that shape the social order [Sokół 1997, 97].

For instance, there is a perspective that contends the communist system was capable of attaining legitimacy [ibid., 98]. Despite any negative verdict

regarding the legal validity of the communist system, it prompts inquiries into several facets: 1) To what extent did the system reconstruct its structural identity and stability, thereby establishing the foundation for power legitimation? 2) How did the system manage to foster its development while invoking the doctrine of Marxism-Leninism, a process that commenced in 1917 within the Soviet Union? 3) Why does such a system exhibit a dearth of political structural legitimacy? Scholars also posit that within the communist system, the absence of a shared foundation for legitimacy hindered the establishment of an accord between ruling groups and subordinate entities concerning the values and essential norms governing the social order [Bellina, Darbon, Eriksen, et al. 2009].

3. THE OBJECTS OF LEGITIMIZATION

The divergence of opinion regarding the entities that constitute, or should constitute, the focal points of legitimation becomes evident within the realm of legitimizing theories. Two distinct approaches to the legitimization process emerge: a narrower perspective, primarily prevalent in political science, and a broader one, frequently encountered in sociology. Within the expanded conception of legitimacy, it is postulated that "everything, every institution, every form of social initiative can be the subject of a legitimizing relationship" [Biernat 2000, 85]. Broadly speaking, political power or the political system represents objects of legitimation. However, from a more specific vantage point, legitimacy extends to various domains of social existence [Karpiński 2010, 135-55].

One can also examine the objects of legitimation from a human-centric viewpoint (who, which individuals are subject to legitimation) and from a subject-oriented perspective (what system, structure, authority, organization, public or legal institution serves as the subject of legitimation). In the narrower framework, Biernat discerns six elements that form the foundations of political order and, by extension, serve as the objects of power legitimation [Biernat 2000, 38]: 1) macro-structural organizations, primarily the State and highly integrated ethnic groups; 2) power institutions, encompassing the scope of their dominion; 3) standard systems and subsystems that regulate political relationships, including the normative systems governing the creation of authority, such as political and legal norms; 4) political action, comprising the methods and forms of power exercise – both adhering to norms and transgressing the rules prescribed by standard systems; 5) modes and forms of communication inherent to a political system; 6) the political class, signifying individuals or groups engaged in political action, whether as wielders of authority, aspirants vying for power, or even those asserting the right to belong to one of the aforementioned categories.

4. THE RATIONALE FOR LEGITIMIZATION

In essence, these legitimizing arguments primarily pertain to the objects of legitimation, the titles to rule, and the agendas or political visions embraced by those in power. In practice, the most frequently invoked arguments revolve around the exercise of power through democratic procedures and the symbolism inherent in political rituals. Authorities often endeavor to manifest a reality that necessitates improvement – a state of affairs aligned with the expectations of the governed, offering the promise of better fulfillment of their diverse needs. Such arguments are strategically employed to garner public support for the ruling entity, often embodied by the ruling political party.

Here, we present a set of multi-faceted arguments that substantiate claims to authority [Sokół 1997, 32-34].

4.1. The origin of power

1) Power emanates from superior authority, whether the sovereign, which can be the monarch or the people in contemporary times, whose will designates a specific individual or political party to wield power.
2) The foundation of power may rest upon a contract forged among the most significant societal groups.

4.2. The attributes of power

1) Power adheres to a rational interpretation of the natural order, challenging it is considered counterintuitive and potentially perilous.
2) Power aligns with age-old traditions that permeate all facets of life.
3) The source and exercise of power are underpinned by binding legal norms.
4) In the absence of a viable alternative to authority, recognizing it may become a pragmatic necessity, even if it lacks widespread societal support.
5) Noble objectives, ideals, and values espoused by authority are expected to ensure success and garner elite support.
6) Intellectual and informational assets at the disposal of authority are employed to substantiate the validity of its objectives, thereby rendering opposition to power as irrational.
7) The advantage of the present regime over its predecessor is attributed to the knowledge and experience gained from past political systems.
8) Past successes of the ruling entity can be invoked to overshadow current failures, promising a brighter future.

4.3. The vision of benevolent power

1) A positive outlook for the future is often tied to a change in leadership and governance approaches, especially during times of systemic transformation.
2) Demonstrated achievements in socioeconomic goals serve as persuasive arguments for recognizing an authority. Typically, such achievements highlight elements that are perceivable or palpable to society. In cases where certain spheres of state activity lack success, authorities tend to bypass these areas in their propaganda efforts and may resort to disinformation regarding the state of affairs in other countries.
3) The alignment of the interests of the governing authorities with those of the most influential social groups serves as the foundation for engaging these societal factions. By fostering a sense of identification with the ruling entities, this alignment offers social recognition and contributes to stability.

The entirety of endeavors aimed at legitimization serves as an adjunct to a legitimization framework for a political system. Legitimizing procedures encompass legal mechanisms that ensure the binding nature of decisions made by the State. These procedures can be categorized into three distinct types: electoral procedures, which secure a political consensus of opinion; legislative procedures, governing the transformation of established plans into binding programs, typically in the form of laws; and judicial procedures, serving as a means to absorb social dissatisfaction in isolated instances.

According to Luhmann, the proponent of legitimacy through procedures, the existence of such procedures liberates politically motivated decisions from the need for continuous justification [Baumann and Krücken 2019]. Moreover, procedures facilitate the prior approval of strategies aimed at realizing predetermined objectives. According to Luhmann, the legitimacy achieved through procedures is contingent upon the presence of a democratic societal structure, as only in a democratic framework can representatives of various social groups be appointed and held accountable to the public for their decisions and their subsequent implementation [Luhmann 1990; Shulman 2023].

Functioning procedures within a democratic system can also serve as sources of legitimizing arguments. For instance, the fundamental role of an electoral procedure is to bestow legitimacy upon the exercise of power by the victor in an election. This often compels political parties to amend electoral procedures to align them with their electoral strategies.

Legitimizing symbols, on the other hand, serve a role akin to arguments and legitimizing procedures, complementing the overall legitimization framework of a system. These symbols encompass state and national

emblems, holidays, commemorations (whether national, regional, professional, or customary), and are integral components of the political system's ritual. In some instances, these celebrations are even likened to a *secular religion*.

For example, within the communist system, May 1st (Labour Day) was a distinctive public holiday marked by massive worker marches in the presence of state leaders. This political ritual typically manifested in two dimensions: the veneration of communist ideologies and symbols, serving as a reaffirmation of the communist sacred; and a display of animosity towards adversaries of communism, effectively negating the communist profane aspects of society.

Legitimizing claims represent the assertions put forth by political authorities to establish their legitimacy. These claims encompass what the ruling entities seek to legitimize and to what extent. They are underpinned by a combination of arguments, actions, procedures, and symbols employed in the process of legitimation. Consequently, the concept of legitimizing claims bears a semantic proximity to the legitimizing objects. In essence, legitimizing claims revolve around the utilization of arguments, actions, procedures, and legitimizing symbols to persuade that the authority, as the object of legitimation, is indeed legitimate.

In more straightforward terms, the legitimizing claims made by those in power aim to induce recognition among the governed that the authority's rule is legally binding and hence legitimate. These claims presuppose that the ruling entities aspire to establish power relationships with the governed in which they assert the right – due to their advantageous position within these relationships – to determine both the content and form of their governance. In this endeavor, the authorities seek to substantiate their advantage and delineate the scope of their legitimacy. Consequently, they articulate legitimizing claims bolstered by valid arguments. Notably, it was Max Weber who first introduced the concept of legitimation to encompass both the assertion of power (in the sense of rule) and the approval of this claim to power (legitimizing belief, belief in legitimacy) [Weber 1922; Idem 1968].

The target audience of these legitimizing claims, as posited by Weber, is society as a whole. Weber also underscored the unique role played by bureaucracy in this context. Nevertheless, Weber's central contention revolved around the notion that a social order is deemed legitimate if, at the very least, a portion of society – especially the ruling elite –recognizes it as such. This viewpoint aligns with the perspective shared by numerous scholars, emphasizing the strategic significance of elites and dominant social groups in legitimizing power. Conversely, the loss of legitimacy among the elites poses a more severe threat to authority than a decrease in legitimacy among the general population.

Legitimizing techniques encompass specialized methods and approaches employed by governing authorities with the explicit goal of securing legitimacy. In the context of a particular political system, those in power may deploy a range of legitimizing techniques that are distinct to that system. For instance, pragmatic legitimacy can be pursued through strategies such as the manipulation of public sentiment and the provision of financial incentives [Mueller 1973, 135]. Within the behavioral framework of legitimation, legitimacy is often attained through the practice of co-optation. Additionally, the utilization of symbols is classified as one of these legitimizing techniques. In the case of the communist system, as outlined by Lamentowicz, various techniques for legitimization included revolutionary raison d'état, doctrinal dissemination, historical narratives, party member morale, and sociological formulations [Lamentowicz 1983, 20-39].

Legitimizing techniques manifest themselves in actions primarily within the realm of public opinion management. This entails the implementation of information policies, with propaganda playing a central role. Within a broader context, these actions encompass several dimensions [Notkowski 1987, 8]: 1) Development of a Distinct Information and Argumentative Language: Crafting and employing a specialized lexicon of information and arguments to shape public discourse; 2) Control of Mass Media: Seizing influence over the mass media by appointing individuals aligned with the government's political stance to managerial positions; 3) Restrictions on Competitive Communication Agencies: Imposing limitations on organizations that offer alternative channels of social communication; 4) Attitude and Behavior Shaping: Influencing public attitudes and social behaviors through diverse techniques, including persuasion and manipulation.

These legitimizing techniques constitute the strategies that authorities employ to gain and maintain legitimacy within their respective political systems.

The concept of the legitimizing belief finds its origins in the theories of Max Weber, who introduced phrases such as "belief in legal validity," "belief in the significance of legal institutionalized power," "belief in authority," and "belief in the extraordinary qualities of a leader [Biernat 2000, 102]. According to Weber, a belief in legal validity constitutes the bedrock of a system of governance, a pivotal component of its legal authority, and the seed from which a structure of legitimacy sprouts [Weber 1922; Idem 1968]. However, it's crucial to recognize that within power dynamics, loyalty and obedience to those in authority may also stem from various other motivations aside from the legitimizing belief. Weber identified factors such as the fear of retribution, the prospect of rewards, and a range of individual interests as additional drivers of obedience among the governed.

In the intellectual lineage of Weber, the legitimizing belief has been portrayed as a means to attain legitimacy. For certain scholars, it is considered an indispensable component of legitimacy itself. Almond and Powell, for instance, elucidate the foundation of power legitimacy through the legitimizing belief. From their perspective, "Political power is legitimized when citizens obey laws established and enacted by authorities not out of fear of punishment for disobedience but because they believe that such obedience is justified." [Almond and Powell 1988, 55]. They argue that if the majority of citizens believe in the legal authority of the government, the enforcement of laws becomes a less resource-intensive endeavor. Furthermore, a solid basis of legitimation provides authorities with the flexibility and time to address complex economic and social challenges effectively, especially in demanding circumstances.

The underlying principle of this argument is that it is considerably simpler to secure subordination and compliance when both the citizenry and elite classes have faith in the legitimacy of the governing authority. This conviction holds true even in cases where governments employ coercive and forceful tactics. Governments, regardless of their nature, make concerted efforts to persuade citizens to believe that adherence to political principles is necessary, and that authorities possess valid grounds for applying force to implement these principles. As stated by Almond and Powell [1988, 55], "The relationship emphasized in the aforementioned description between power and the legal validity of power underscores that the legitimizing belief is an indispensable element of legitimacy." This assertion is grounded in several key premises: 1) the legitimizing belief bolsters the ease of governance when prevalent among the majority of citizens, 2) it enhances the effectiveness of authority with fewer resource expenditures, and 3) in times of governance challenges, the legitimizing belief exerts a stabilizing influence on the political system.

T. H. Rigby expresses a similar viewpoint, asserting that the extent to which a system attains legitimacy is contingent upon the belief held by those being governed. Specifically, it hinges on the belief that the foundation upon which the system's demands are constructed is morally sound. This suggests that such a belief need not be uniform across society; it can vary depending on the group, individual, or specific issue [Rigby 1980, 10]. This definition underscores the relative nature of the legitimizing belief and its capacity to fluctuate in intensity.

W. Wesołowski has also explored the concept of the legitimizing belief in the context of reflective action [Wesołowski 1988].

Polish scholars J. Tarkowski and T. Biernat acknowledge that defining and pinpointing the notion of belief is a complex endeavor [Biernat 2000, 106]. Consequently, the study of beliefs presents methodological challenges,

which are even more pronounced when investigating beliefs in the context of legitimacy. Nevertheless, Biernat contends that employing the concept of belief to elucidate a legitimizing relationship is warranted. Firstly, discussions about beliefs as the underpinning of legitimation often employ related terms such as convictions, ideas, attitudes, approaches, and perspectives. Secondly, belief, as a facet of consciousness, manifests in various iterations within legitimizing relationships based on the foundations of social order and the associated value systems [ibid., 106-108].

When delving into the intricate realm of power legitimacy, it becomes imperative to expound upon the potential perils that could encroach upon this pivotal political and legal institution. Among these perils, one salient concern pertains to informational challenges that encompass both the substance of legitimacy and its legal establishment. This issue assumes paramount significance, particularly when scrutinizing how society perceives power legitimacy and comprehends its nuances.

Primarily, the practical application and the doctrinal interpretation of the law in this domain appear to be somewhat nebulous and inadequately defined. The concept of information, in particular, has yet to receive a universally accepted and meticulously delineated definition. Moreover, there lacks a single comprehensive term that universally encapsulates the multifaceted dimensions of information across diverse fields [Kurek Vel Kokocińska 2004, 11].

This predicament is concurred with by scholars hailing from a myriad of scientific disciplines [Barański 2017, 19-22]. In the realm of doctrine, J. Janowski's [Janowski 2009] stance holds prominence. He contends that within the current landscape of perception, a precise overarching definition of information remains elusive. Consequently, he proposes three distinct methodologies for effectively employing this term.

The first approach, termed *the descriptive variant*, entails employing the term *information* by elucidating its inherent characteristics or functions. The second methodology, characterized as *the intuitive approach*, represents a more abstract form of comprehension, wherein information is perceived as an indistinct concept understood intuitively, yet it still enables the formulation of more intricate definitions. The third method, known as *the systemic approach*, entails deploying the term *information* based on pre-existing definitions but restricts its application to specific domains or contexts [ibid., 71].

The dichotomy between objective and subjective models of information comprehension, as elucidated by Wessel [1976, 69], has garnered recognition. It is, however, imperative to avoid conflating this dichotomy with the concepts of subjective and objective information. According to Wessel, the absolute comprehension of a principle or fact, even when grounded

in scientific validation, remains an elusive pursuit. What we may scrutinize, nonetheless, is the conveyance of an observation, which may either align with absolute truth or diverge from it. The objective or subjective character of the communicated observation hinges on its potential utility and may undergo a metamorphosis contingent upon the manner of application [Wessel 1976, 69]. Even within the exclusive realm of legality, a parallel discourse unfolds. Herein, the term *information* assumes an enigmatic quality, susceptible to multifarious interpretations [Cisek, Jezioro, and Wiebe 2005, 18]. In accordance with a certain proposition, information's nexus transcends the confines of specific legal actions, instead manifesting profound relevance within any legal sphere [Goralczyk 2006].

Furthermore, a pivotal distinction must be drawn between the notions of data and information. Data do not equate to information; they constitute mere constituent elements from which information may be forged, premised on the presumption that the mode of presenting identical information may exhibit variations [Dobrzeniecki 2008, 27]. Dobrzeniecki espouses the "infological theory of information," endowing this concept with the definition of the meaning ascribed to data through the prism of appropriate conventions, all the while considering psychosociological, linguistic, and semantic factors [ibid., 27-28].

From the perspective of legal discourse, the term *information* permeates various branches of law. Its intricate nature is duly acknowledged, notably by the judiciary, which accentuates its labyrinthine character.[1] As astutely observed, the relentless progression of society, converging toward an *information society*, coupled with technological advancements, has engendered hypotheses and perspectives striving to delineate the conceptual ambit of information within the legal domain. This phenomenon assumes conspicuous proportions not only in the domain of criminal law, as elucidated in this discourse, but perhaps principally in civil law. Consequently, the adoption of precise legal provisions exerts indubitable implications upon the legal edifice concerning the safeguarding of information and the legal constructs in which information assumes a pivotal role, irrespective of the specific legal discipline. This assertion is substantiated within the domain of doctrine, where the ambiguity enveloping information in the legal context perpetually garners emphasis, alongside its detachment from any single legal branch, while retaining its pertinence across the entire legal spectrum.[2]

Furthermore, the intricate nature of information is the root cause behind its conspicuous absence from the statutory framework of the Polish legal

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1 Supreme Court Resolution of 22 January 2003, ref. no. I KZP 43/02, OSNKW 2003, No. 1, item 17.

2 Act of 6 September 2011 on access to public information, Journal of Laws of 2022, item 902.

system. Instead, it assumes its rightful place within the category of *key civilization concepts*, akin to terms such as *matter*, *culture*, and *light*. Attempts have been undertaken, albeit with limited success, to furnish a comprehensive definition, or at the very least, a determination of information applicable across all legal disciplines, thereby necessitating a degree of standardization. This proclivity steers toward the repudiation of intuitive and cybernetic-formal models of information, favoring instead the adoption of a semantic model. Under the purview of the semantic model, information is portrayed as a specific content, conveyed through linguistic symbols transmitted by the sender in the form of a message [Dobrzeniecki 2008, 26]. The doctrinal deliberations concerning these aspects are poised to endure indefinitely.

Another pivotal aspect deserving our attention pertains to the concept of the *information society*. Much like the term *information* itself, this notion is relatively nascent, making its public debut after World War II, although it was initially introduced in 1937 by economist Frederick von Hayek within the context of information as a tangible commodity [Boettke, Schaeffer, and Snow 2010, 69-86]. The conclusion of World War II signified a profound inflection point as the ensuing political ramifications prompted endeavors to redefine a society forged in the crucible of warfare, notably the last of the world wars, during the industrial era. This undertaking became imperative in light of the global realization that society could no longer be neatly compartmentalized into the two antagonistic political systems of capitalism and socialism. Consequently, there arose an initiative to architect an entirely novel societal model, one fundamentally distinct from the prism of political categorization, founded instead upon functional underpinnings. It is worth noting that this shift was in no small part undergirded by the dynamic advancements in various academic disciplines, including game theory, operations research, cryptography, and information theory. A veritable watershed moment occurred on American soil in 1960 with the establishment of the Commission of the Year 2000, tasked with the prescient mission of prognosticating the economic trajectory and enduring sociocultural and structural transformations.

The terminology *Information Society* made its inaugural appearance in 1963, introduced by ethnologist Tadeo Umesao in his formulation of a society premised on information processing. This paradigm subsequently gained traction through the endeavors of media theorist Kenichi Koyama, who leveraged the concept in his 1968 dissertation titled "Introduction to Information Theory" [Goban-Klas 2005, 2] A pivotal milestone arrived in 1971 when the Japan Computer Usage Development Institute sanctioned a blueprint for the implementation of an information society in Japan, designating it as a national aspiration to be realized by the year 2000. Noteworthy among its architects was Yoneji Masuda, who delineated the steps requisite

for constructing such a society via targeted governmental initiatives, encompassing the establishment of a central data repository, a remotely operated medical system, and a workforce qualification framework. The ultimate ambition was to transform Japan into the vanguard of the world's inaugural information society.

Across the European landscape, the term *Information Society* gained prominence through the efforts of Alain Minc and Simna Nora, who deployed it in their 1978 report titled "L' Informatisation de la Societe," crafted in homage to the President of the French Republic.[3] The substantial contribution of Martin Bangemann, who held the role of EU Commissioner responsible for the development of telecommunications and information technology from 1993 to 1999, is conspicuously discernible in this report. Bangemann further authored the report "Europe and the Global Information Society: Recommendations to the European Council" [Mattelart 2004].

The delineation of the information society remains a nuanced subject, marked by a conspicuous absence of unanimous consensus, both in semantic and substantive terms, concerning its interpretation. Nonetheless, there is a concurrence among scholars regarding a fundamental facet: it signifies the emergence of a novel socio-economic structure. However, this unanimity dissipates when attempting to articulate its essence, as the specific constituents tend to vary. This variability stems from the disciplinary lens applied to its definition, whether it is scrutinized through the perspectives of sociology, economics, or law.

The seminal underpinnings of this definitional discourse were initially laid out by the Organization for Economic Cooperation and Development (OECD). The term was officially introduced within the OECD's purview in 1975, and a concerted effort was undertaken in 1977 to formulate a model that would classify member states along a continuum leading toward an information society. In 1988, a document that encapsulated the proceedings of the Committee for Information, Computer, and Communication Policy drew upon an analogy. It envisioned the forthcoming economy as one predicated on information, with society undergoing a progressive transformation into an information-centric entity. This prognosis implies that information will constitute the preeminent constituent of added value across a multitude of goods and services, while activities founded upon information will increasingly characterize both households and individual citizens.

H. Kubicek introduced a thought-provoking conceptualization of the information society [Kubicek and Noack 2010]. He characterized it as a socio-economic formation wherein the productive harnessing of the invaluable

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[3] See https://monoskop.org/images/1/11/Nora_Simon_Minc_Alain_The_Computerization_of_Society_1980.pdf [accessed: 01.09.2023].

resource known as information, coupled with knowledge-intensive production, assumes a paramount role. The term is employed to depict a society in which individuals – whether in their capacities as consumers or as employees – comprehensively leverage information.

The pivotal criterion in this context undeniably rests upon a profound level of technological advancement. Consequently, these criteria should not be narrowly restricted solely to processes within the IT sector; instead, they must encompass the broader continuum of technological progress. As we conclude this segment, it is imperative to illuminate an alternative definitional perspective, one articulated by the eminent Umberto Eco [Eco 1996, 15]. In accordance with Eco's framework, society stands to be categorized into three distinct social strata: the television proletariat, the dignitary, and the cognitariat. Within the television proletariat, we encounter individuals grappling with contemporary IT devices – comprising the elderly, denizens of nations with limited development, and those indifferent to emerging technologies, effectively ensconced within the bygone era of television. The dignitary faction consists of individuals proficient in the manipulation of modern devices, having attained mastery over the infosphere, computers, and the Internet, although they remain unengaged in contemplating their underlying mechanisms. At the zenith of the social hierarchy, we find the ICT specialists, the cognitariat, distinguished by their adeptness in orchestrating electronic devices, encompassing the formidable ability to program computers.

A comprehensive portrayal of the information society would be remiss without even a cursory acknowledgment of the totalitarian model that undeniably finds its zenith in the ongoing trials of Chin's Social Credit System, as delineated by Bartoszewicz [2020, 58-67]. The Social Credit System represents a governmental apparatus implemented in China, dedicated to the vigilant scrutiny and appraisal of citizens' comportment *vis-à-vis* their adherence to legal and societal conventions. Its operational bedrock hinges upon a network of databases fed by diverse sources, encompassing state registries, judicial tribunals, public administrative organs, urban surveillance mechanisms, and mobile applications.

At its core, the foundational intent underpinning the inception and perpetuation of the Chinese Social Credit System is the cultivation of a society characterized by an elevated echelon of trust, wherein both individuals and entities conscientiously adhere to not only the letter of the law but also the implicit norms governing social conduct. This endeavor entails the assignment of social ratings to individuals, predicated upon their behavior, with these ratings exerting tangible ramifications upon their quotidian existence. Elevated ratings afford seamless access to an extensive array of public amenities, while lower scores precipitate a forfeiture of social trust, thereby

encumbering access to welfare benefits, the housing market, or credit facilities. In the most extreme instances, a diminished rating could culminate in mobility constraints, even extending to international travel.

The expansive purview of the Social Credit System, perpetually evolving and refining its mechanisms, extends its surveillance and evaluative ambit beyond the individual sphere, encompassing corporate entities. Participation within this system is compulsory and extends its compass to encompass all companies, domestic and foreign, registered within the territorial confines of China. Corporate operations undergo ceaseless scrutiny, tasked with ensuring alignment with both the contours of established jurisprudence and the nebulous yet potent conventions of societal coexistence. A lack of acumen pertaining to the domains wherein a given entity must align with the system's prerequisites could imperil its standing in the realm of social trust, potentially leading to the ignominious designation on the so-called *blacklist*.

The multifaceted facets detailed above illuminate the modus operandi of a totalitarian paradigm within the information society. In this paradigm, information, in addition to its traditional roles encompassing economic, social, and civilization-shaping functions, emerges as an instrument of societal control. Importantly, this construct is not solely germane to autocratic regimes; it presents a plausible scenario even within democratic societies, especially as we consider the potential ascendancy of artificial intelligence (AI) in shaping decisions of sociopolitical import. Undoubtedly, this portends a matter of future significance, but it is incumbent upon us to acknowledge the incipient lack of legal preparedness to address these challenges, a lacuna extending beyond criminal law into the very heart of civil jurisprudence.

CONCLUSIONS

The multifaceted nature of power legitimation emanates from its intricate tripartite structure encompassing legality, normative justification, and the acceptance of power. Correspondingly, we can delineate three distinct dimensions: the governance's acquisition and exercise of power, the validation of governing rules, and the consensus of subordinates regarding power dynamics. Primarily, power legitimacy attains its zenith when authority is procured and wielded in strict accordance with legal precepts. Secondly, the governance's rules must be justified within the framework of convictions shared by both those in power and those subject to their authority. Thirdly, the public at large should not only acquiesce to authority but also publicly declare their consent.

As for indicators of illegitimacy, they encompass phenomena like anti-state nationalism and environmental separatism, which imperil national identity. Conversely, factors that bolster authority are often found in the traditions and rituals characteristic of constitutional monarchies and stable democracies. However, controversy abounds in the context of illiberal democracies, wherein governance fails to respect the essential tenets of democracy, leading to doubts about the maturity of their legitimacy. Furthermore, in international relations, the recognition of a government's legitimacy can vary, as different states adhere to diverse legitimacy criteria.

Furthermore, depending on an array of factors, including cultural nuances and political systems, governing authorities employ a myriad of techniques to legitimize their power, yielding distinct outcomes.

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THE PRESIDENT'S INFLUENCE ON THE FORMATION OF GOVERNMENTS: THE CASE OF THE REPUBLIC OF ITALY

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Abstract. The purpose of this study is to elucidate the legal, primarily constitutional, constraints that govern the formation of the government of the Italian Republic and the involvement and significance of the President of the Republic in this process. The study is conceived as a synthesis of legal and socio-political perspectives, aimed at examining this pivotal yet complex process for the state. Considering the constitutional foundations that underlie the government formation procedure, the study first examines the legal limitations on the actions and duties of the President in that process. The interaction between the exercise of the head of state's powers and their limitations, both by legal regulations and established constitutional precedents, is subjected to scrutiny. The role of the President, viewed through the lens of the boundaries of the authority of the office, is characterized, in conclusion, by the delicate balance between discretion and the legal and political-constitutional constraints on the President's actions. While the study mainly concerns the circumstances surrounding the establishment and ultimate selection of the Meloni cabinet, it can be viewed as a notable addition to the overall analysis of the President's influence on the formation of the government in politically fractured and divided Italy.

Keywords: Government; Prime Minister; Meloni; Italian President; Italian Constitution

1. INTRODUCTION AND METHODOLOGY

1.1. Background and significance

The historical context in which government formation occurs is a complex backdrop of political evolution and transformation. An examination of political history is essential to understand the President's role in this process, especially in consideration of the developments that have taken place in the last seventy years in Italy, starting from the post-war period and ending with the conclusion in the 90s of an important era for the Italian Republic and the subsequent advent of the government of Silvio Berlusconi which saw a key figure of Italian entrepreneurship filling the role of Prime Minister. Amid political change, government formation combines constitutional principles and political realities. Decisions made during this pivotal

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phase have wide-reaching implications, affection the nation and citizens' daily lives. The importance of this inquiry lies in its potential to provide a comprehensive understanding of the President's role in shaping the political landscape, particularly by scrutinizing the appointment of the Meloni government as a case study.

The role of Prime Minister Georgia Meloni in Italy is of particular importance not only because of the political faction of which she was for a long time the main representative but also because of the, equally important, fact that Giorgia Meloni is the first woman to hold the role of Prime Minister in Italy, an element that certainly implies a factor of innovation in the country.

The objective is to offer a nuanced perspective on the decision-making process, legal constraints, and real-world implications faced by the President. This analysis aims to explore the intersection of law, ethics, and the demands of the political sphere. Throughout this exploration, the approach adheres to precise legal acumen. The intention is to facilitate a profound exploration of government formation, one that acknowledges the inherent complexities of the process and the great importance of decisions affecting countless individuals.

1.2. Scope of the study

Within the scope of this study, a clear framework is established to delineate the boundaries within which the analysis operates. This delineation is imperative to provide a comprehensive understanding of the President's role in government formation during times of political transition and change. The study primarily concentrates on the constitutional and legal aspects inherent in government formation, with a specific focus on the 2023 appointment of the Meloni government in Italy, given its relevance and complexity in the context of political and historical transformation [Einaudi 1948, 661-67]. The analysis concerns therefore the legal framework underpinning government formation, encompassing pertinent constitutional provisions and legislative acts to show the legal parameters which serve as a guide for the President's actions in this process. Employing a primarily qualitative research methodology, the study involves a comprehensive analysis of legal texts, constitutional provisions, and historical records. Additionally, it critically examines relevant legal commentaries and the literature of political science to provide an interdisciplinary perspective. Although this study does not enter into the policy decisions or political negotiations shaping government formation, it does offer a legal and ethical lens for understanding the overarching process. Acknowledging the peculiar nature of government formation, especially in the Italian situation, the analysis underlines specific facets

related to the legal and constitutional dimensions to reach the ultimate goal, which is to facilitate an in-depth comprehension of the President's role, including its complexities, constraints, and implications.

1.3. Research methodology

In the context of this study, an accurate delineation of scope is instituted to establish the framework for subsequent analysis: such demarcation is imperative to define the boundaries within which this investigation operates, consequently delineating the extent and comprehensiveness of the inquiry. The primary focus of this study is directed towards an examination of the President's role in the process of government formation, especially during periods characterized by political transition and change. Despite the nature of government formation, which involves an array of elements such as political negotiations and policy decisions, this study is particularly focused on the constitutional and legal aspects that intervene in this process.

The geographical and temporal purview of this research encompasses the procedures involved in government formation within Italy, with specific emphasis on the appointment of the Meloni government in the year 2023. The selection of this particular case study is underpinned by considerations of relevance and intricacy, particularly in the context of comprehending the influence wielded by the President in the process of government formation during instances of political transformation [Einaudi 1948, 661-67].

This study undertakes a deep analysis of the legal framework that underpins government formation, encompassing relevant constitutional provisions and legislative acts. Its objective is to furnish an enhanced and comprehensive understanding of the legal parameters that govern the actions of the President within this process. Consequently, the research methodology that has been adopted predominantly aligns with qualitative methods, necessitating an exhaustive analysis of legal texts, constitutional provisions, and historical records. Although this study deliberately refrains from engaging in an intricate dissection of the complexities associated with policy decisions and political negotiations that significantly influence and shape government formation, it provides an objective, legal, and ethical framework for comprehending the overarching process. Against the backdrop of this extensive contextual framework, it is imperative to acknowledge the nature of government formation. As such, this analysis restricts its focus primarily to the legal and constitutional dimensions. The overarching goal is to facilitate a comprehensive understanding of the role played by the President in this process, elucidating its intricacies, limitations, and consequences within the Italian framework.

2. CONSTITUTIONAL FOUNDATIONS AND PRESIDENTIAL POWERS

2.1. Constitutional framework of government formation

At the core of government formation lie the constitutional prerequisites [Sabetti 1982, 65-84]. These prerequisites serve as the linchpin of the entire process, establishing the legal conditions and obligations that must be met before a government can take shape. By comprehending these prerequisites, it is possible to gain a thorough understanding of the legal and constitutional foundations upon which the President's actions are based.

An essential pillar within the architecture of government formation is the principle of the separation of powers [Merrill 1991, 226-60].

As explained in the constitution, the separation of powers serves as a fundamental safeguard against the consolidation of authority. The concept of the separation of powers is fundamental to the structure of government, with the aim of preventing any single branch from accumulating excessive authority. Instead, it establishes a system of checks and balances. In this framework the legislative branch is charged with the creation of laws and the allocation of financial resources for government operations, the executive branch is responsible for implementing and administering the public policies formulated and financed by the legislative branch, the judicial branch plays a pivotal role in interpreting the constitution and laws, applying these interpretations to resolve disputes brought before it.

In the context of government formation, this translates into a delicate balancing act among the executive, legislative, and judicial branches of government. This equilibrium is not merely a theoretical concept; it profoundly influences the very essence of how governments are constituted. The separation of powers ensures that no single branch of government can exercise unchecked authority in the formation process. Central to this constitutional principle is the distinct role of the legislative branch in government formation. The constitution typically designates the legislature with the pivotal responsibility of approving or endorsing the proposed government [Baumgartner and Case 2009, 148-63].

The legislative oversight plays a central role in maintaining the balance and checks within the government formation process, ensuring its alignment with the legislative representation of the people. The President's role must harmonize with legislative mandates, respecting the legal prerequisites established for government formation.

In the formation of a government,, the executive branch assumes a central position as the initiator of the process. The President, in accordance with constitutional principles, frequently exercises the authority to invite

a prospective Prime Minister or designate the leader of the majority party. Nevertheless, this executive initiative remains subject to the constitutional framework and the legal parameters that delineate the process [Cozzolino 2019, 336-52]. The separation of powers also extends to the judicial branch, which serves as the ultimate arbiter in cases involving legal disputes or constitutional issues that may arise during government formation. The judiciary, grounded in its independence, assumes indeed a pivotal role in interpreting and upholding the constitution's integrity throughout the process, also given the centrality and importance of the Constitution and its interpretation updated to the current situation. The formation of a government, influenced by the separation of powers, is therefore clearly based on a system of checks and balances and these mechanisms ensure that the substantial influence of the President remains subject to legal and constitutional constraints. The President's involvement in government formation becomes manifest within this complex interplay among the branches, firmly grounded in the democratic principles at the core of the constitution.

2.2. Presidential powers and obligations

The core of the President's involvement in government formation is rooted in the concept of executive privilege [Huff 2015, 396-415]. Executive privilege constitutes a fundamental pillar of presidential authority within this intricate process and, through this privilege, the President exercises the authority to initiate and direct the formation of governments. It is essential to emphasize that executive privilege does not operate in isolation; rather, it functions within a precise and defined framework of legal obligations and constitutional constraints. This privilege empowers the President with a substantial degree of discretionary authority in shaping the government, encompassing the designation of the Prime Minister and influencing critical appointments. This prerogative plays a central role in the functionality of democratic governance. However, it is crucial to recognize that the scope of executive privilege is not boundless, instead it operates within a network of legal obligations and constitutional parameters, ensuring that the President's actions remain aligned with the principles of the rule of law and constitutional integrity.

Beyond the two important legal and constitutional dimensions, government formation is intrinsically intertwined with ethical considerations [Campus and Pasquino 2006, 25-40]. The decisions made by the President in the process of shaping the government bear indeed profound moral implications: ethical considerations serve as a guiding compass, directing the President's actions to conform not only to legal soundness but also to ethical defensibility. This dual dimension of legal and ethical aspects

underscores the peculiar role and character of the President's responsibilities in government formation.

The President's role extends beyond mere legal interpretation considering his role in ethical discernment, thus reflecting the complex interplay of legal and ethical dimensions within the decision-making process. Historical precedents play a significant and unquestionable role as valuable guideposts in the search to understand presidential powers in government formation [Woolf 2022].

These precedents offer insights into the evolution of the President's authority over time and its intricate interactions with constitutional provisions. With the understanding and consideration of historical cases, it is possible to understand better and more valuable perspectives on the dynamic evolution of the President's role and the enduring influence of these precedents on contemporary government formation provide historical context but also underscore the lasting impact of presidential powers in shaping the government. They allow the reader to clearly understand how presidential authority has adapted in response to changing political landscapes and evolving legal interpretations, reinforcing the imperative of nuanced comprehension regarding the historical underpinnings of contemporary government formation. It is crucial to recognize that government formation does not take place freely. Rather, legal constraints operate as foundational checks and balances that govern the President's actions and these legal boundaries delineate the parameters within which the President operates, emphasizing the constraints and limitations that define the exercise of presidential powers. Legal constraints serve therefore a pivotal and absolute role in preserving the constitutional principles and upholding the rule of law throughout the government formation process.

In examining the dynamics of presidential powers and obligations within government formation, it is possible to better understand the intricate interplay between legal authority, ethical considerations, historical influences, and the indispensable role of legal constraints and see how this understanding is paramount for comprehending the nature of the President's influence in shaping the government.

3. THE ROLE OF THE PRESIDENT – THE MELONI GOVERNMENT CASE

3.1. Presidential authority in government formation in Italy

The Italian constitutional framework confers a distinct and constitutionally-mandated role upon the President in the process of government formation [Fusaro 1998, 45-74]. Within the Italian legal framework, the President

bears a specific constitutional mandate concerning government formation. This constitutionally-mandated role is of paramount significance in the appointment of a Prime Minister and the direction of government formation, as prescribed by the Italian Constitution.[1] Italy's unique political landscape involves the President's exercise of executive initiative, which encompasses the President's appointment of a designated Prime Minister, typically the leader of the political party or coalition holding a parliamentary majority.

This manifestation of executive privilege underscores the distinctiveness of the President's role within the Italian governmental framework. The Italian President's involvement in government formation is, in turn, governed by a set of well-defined legal parameters [Idem 2012, 78-98]. Constitutional provisions and legal requisites set forth the boundaries within which the President operates,[2] thereby delineating the scope and limitations of the President's participation in the formation of governments. The Government, as a constitutional body, represents an entity that acts directly and immediately in accordance with the Constitution, it exercises both a political guiding power and an administrative function; at the same time it relies on specific organs, such as the Prime Minister and the ministers, who together form the Council of Ministers.

An examination of historical precedents within the Italian context provides valuable contextual insights in understanding the contemporary role of the President in government formation [Campus and Pasquino 2006, 25-40]. Historical examples at the same time provide valuable insights into the dynamic and adaptive nature of presidential authority, showing appropriately how the role changed over time and its interaction with constitutional provisions. This historical perspective serves as a substantial contribution to the comprehension of the intricacies of presidential powers. Italy's political landscape, especially following 1992 and the judicial investigation that went down in history with the name of "Mani Pulite" which saw the collapse of the previous political system and the transition to a system profoundly influenced by the presence and a more capitalist vision, crystallized in the figure of Silvio Berlusconi. It appears today characterized by coalition governments and fluid political developments and presents a distinctive challenge for the President's role in government formation. It therefore appears decidedly crucial to understand these historical precedents to have

[1] Italian Constitution, Article 92: "Il Governo della Repubblica è composto del Presidente del Consiglio e dei ministri, che costituiscono insieme il Consiglio dei ministri. Il Presidente della Repubblica nomina il Presidente del Consiglio dei ministri e, su proposta di questo, i ministri."

[2] Italian Constitution, Article 93: "Il Presidente del Consiglio dei ministri e i ministri, prima di assumere le funzioni, prestano giuramento nelle mani del Presidente della Repubblica."

an overall and global vision of the Italian system and the reason why there was the emergence of a party which was certainly right-wing but which led, for the first time in Italian history, to the appointment of a female prime minister. To fully understand the complex political scenario that is present in Italy today, a deep understanding of evolving political dynamics is required and the capacity to facilitate the establishment of governments capable of governing efficiently in such a multifaceted environment.

3.2. Constitutional constraints on presidential discretion

Transitioning into the analysis of the constitutional constraints governing presidential discretion in Italy, it is possible to gain a comprehensive understanding of the intricate legal parameters that define the President's role in government formation.

Within Italy's legal framework, the delineation of the President's powers and responsibilities is exacting, particularly concerning government formation [Giannetti 2015, 108-130]. A salient constitutional constraint on presidential discretion emanates from the pivotal role accorded to Parliament in the government formation process.

The Italian Constitution[3] prominently underscores the imperative of parliamentary endorsement, accentuating the collaborative character of government formation and accentuating the President's duty to operate in collaboration with the legislative branch.[4] Moreover, the Italian Constitution underscores the significance of the President's role in appointing a Prime Minister who can secure a parliamentary majority. This constitutional prerequisite curtails presidential discretion by ensuring that the Prime Minister garners parliamentary support, functioning as a constitutional safeguard against the establishment of minority governments. It is clear that this process encompasses a multifaceted interplay involving constitutional authority, ethical considerations, and historical precedents and, undoubtedly, among the historical precedents the transition that led from the passage from the fascist dictatorship to the Italian Democratic Republic following the Second World War must be mentioned and from which the fundamental role of the President of the Republic as guarantor of the legality of the government derives.

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[3] Article 96 of the Italian Constitution: This article addresses a vote of no confidence in the Prime Minister. It states that the Prime Minister can be removed by the Parliament through a motion of no confidence.

[4] Article 97 of the Italian Constitution: This article regulates early elections. If the Prime Minister resigns or is removed through a vote of no confidence, the President of the Republic can dissolve the Parliament and call for new elections.

The President's influence is intricately circumscribed by executive privilege, which bestows discretionary power in the appointment of a Prime Minister within the confines of legal obligations and constitutional constraints. These constraints underscore the delicate balance between authority and legality, underscoring the pivotal role of the rule of law, especially constitutional law, in government formation. Moreover, Italy's political landscape, characterized by coalition governments and shifting dynamics, underscores the President's role as a neutral arbiter. It is in this political environment that the President's capacity to facilitate the formation of governments capable of achieving political stability assumes paramount importance, representing a critical facet of the President's influence.

3.3. The case of the Meloni government: decision-making

An analysis of the case of the Meloni government affords a unique opportunity for examining the President's influence on government formation in Italy, encompassing decision-making processes, legal rationale, and practical implications. The appointment of the Meloni Government occurred within the context of significant political change and realignment, offering insights into the intricacies of the President's decision-making process when tasked with government formation during a period of political transformation. The President's role in this process is exemplified through the exercise of executive initiative, wherein the President appoints a designated Prime Minister. This discretionary power reveals a pivotal dimension of the President's influence, shedding light on the intersection between presidential authority and the legal and constitutional frameworks. Indeed, the appointment of the parliamentarian Giorgia Meloni as head of the government appears to be of particular importance in the Italian political panorama: on the one hand it is the first time that a woman has held such an institutional position in Italy, while on the other hand it is undoubtedly one of the rare times in which the most extreme right appears to have come to power with a clear majority vote.

This situation therefore leads to a profound reflection on the changes that are taking place in the country and also to the climate of exasperation which sometimes takes the form of a, probably, not completely correct management of immigration policies and at the same time of a labor shortage that divides the entire nation in two parts. On the one hand, southern Italy is perpetually devoid of job demand and, on the other, northern Italy where job offers are certainly significantly greater in number. This situation therefore determines an internal migration which tends to move with an external migration and often exasperates the minds of citizens who tend to take refuge in often stereotyped but well known values. Certainly, an examination of the case of

the Meloni government reveals the different dimensions of the President's influence on government formation, encompassing decision-making processes, legal rationale, and practical implications relating to executive privilege, legal obligations, and political pragmatism, offering a comprehensive perspective on the President's role in shaping the government.

Basically, the President of the Italian Republic, in composing the Government, is obliged to listen to every political force present in parliament in order to evaluate the possibilities of each political force to obtain a majority. Obviously the president will listen to the political force first who appears to have gained the greatest number of votes and, in this context, Giorgia Meloni's political party, Fratelli d'Italia, was clearly the party which not only had received the most votes, but was also the only one capable of creating an alliance with other political forces such as to offer stability to the country. Therefore on the one hand there was the power of the President of the Republic to confer and appoint the prime minister, on the other however it is clear that this power was bound to the decision made by the people, which was expressed with the election of the parliamentarians from whom the government would then emerge.

Undoubtedly the Meloni government, although in full legality, has taken steps to provide what Italians appear to perceive as extremely lacking in the country, namely the guarantee of substantial security which is reflected, for example, in the values of family and homeland constantly exalted by the propaganda of the first minister. The prime minister's adherence to reality actually represents the element that has made it possible to overcome the natural distrust of the Italian population towards the extreme right and to place trust in this political faction through the use of the vote to restore the order that population perceives as missing in the country currently.

CONCLUSIONS

To conclude this analysis of the of the President's impact on government formation in Italy, undoubtedly numerous legal issues have emerged that deserve further investigation. The contents of this article can bring out the particular nature of government formation in Italy, a formation that is certainly affected by the democratic basis that the country decided to give itself following the events of the dictatorship and following the tragedy of the Second World War, showing the multifaceted nature of the President's role, encompassing decision-making processes, legal constraints, and real-world implications. The President's influence in government formation evidently derives from the fundamental concept of executive privilege. This privilege empowers the President to initiate and steer the formation

of governments but it is imperative to acknowledge that this authority is delimited by legal obligations and constitutional constraints.

This delicate and sometimes precarious balance between authority and legality underscores the paramount significance of the rule of law in the process. Italy's intricate political landscape, characterized by coalition governments and fluid political dynamics, further underscores the peculiar character of the President's influence. In examining these issues which can easily spill over from the legal sphere into the geopolitical sphere, we have to go beyond the simple barrier imposed by the legislation to get closer to an understanding of the reason why the role of the President of the Republic in Italy is so important but at the same time so particular in the exercise of its functions and powers. Ethical considerations play a pivotal role in this multifaceted process, serving as a guiding compass for responsible leadership. The President's decisions in shaping the government carry profound moral implications, ensuring alignment with broader ethical principles and moral imperatives. This ethical dimension constitutes a pivotal facet of the President's influence [Kanungo and Mendonca 1996]. In this context, which moves between elements of public law, constitutional law and, obviously, undeniable historical elements which provide a clear explanation of the reason why a specific legislation exists in the formation of the Italian government, the President's influence takes shape, offering a profound understanding of the essence of governance during transition.

The President's exercise of executive privilege is delimited by constitutional obligations, underscoring the overarching importance of the rule of law in government formation. Furthermore, the President's influence is closely intertwined with Italy's dynamic political landscape. The need to manage coalition governments and ever-changing political dynamics underscores the President's role as a neutral arbiter, *super partes*, ensuring the formation of governments capable of political stability. Ethical considerations are intrinsic to the President's role, guiding decision-making and upholding ethical principles and moral imperatives. Responsible leadership is not merely a legal obligation but a moral imperative that defines the President's role.

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STATUTORY REGULATION ON FINANCIAL MANAGEMENT IN THE SELF-GOVERNMENT OF ATTORNEYS-AT-LAW IN POLAND

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Abstract. The self-government of attorneys-at-law is a self-government associating persons exercising a profession of public trust. The Constitution of the Republic of Poland provides for the permissibility of the establishment of such self-governments and at the same time assigns functions to them. These functions are performed by means of tasks defined by law, including those of a public nature, in the performance of which the self-government of attorneys-at-law is independent. The essence of any normatively defined self-government is independence, including financial independence. The legal regulations on the financial management of attorneys-at-law are not extensive, but at the same time they are diverse. These regulations refer to several levels of financial management of such a self-government and concern: the basic sources of financing their activities, the competence of the self-government bodies to adopt internally binding normative acts, the adoption of budgets of the self-government of attorneys-at-law and the competence of the self-government bodies to carry out financial management in the broad sense, including its control. Financial management is carried out by the self-government of attorneys-at-law on the basis of regulations contained in the Act on Legal Attorneys-at-Law, which are not complete. They are supplemented by intra-authority legal acts issued, on the basis of statutory authorisations, by the self-government bodies operating at the national level. Bodies at the nationwide level are empowered in this respect, which has a unifying value.

Keywords: financial management; self-government of attorneys-at-law; public tasks; statutory regulations; law independence

INTRODUCTION

The self-government of attorneys-at-law is a professional self-government organization bringing together those who practice a profession of public trust, as defined in the Constitution of the Republic of Poland (Article 17(1)) established under the Act on attorneys-at-law.[1] An essential feature

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: the Polish Constitution] , and Act of 6 July 1982 on attorneys-at-law, Journal of Laws of 2022, item 1166 as amended [hereinafter: the Act on attorneys-at-law

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of self-government is independence shown in many areas. Concerning public trust profession self-government organizations, one should point to their ability to act in legal transactions, which is possible due to organisational units with legal personality and representative bodies appointed as a result of elections. Self-government organizations of this type perform tasks, including those of a public nature, thus contributing to the principle of decentralization, and have public-law authority, and their activities are also subject to auditing. An important manifestation of independence of self-government is financial management [Stahl 2011, 85ff; Kępa 2021, 894]. Financial management is pursued by the self-government of attorneys-at-law based on the normative framework contained in the Act on attorneys-at-law.

1. STATUTORILY DETERMINED SOURCES OF FINANCING THE OPERATION OF THE SELF-GOVERNMENT OF ATTORNEYS-AT-LAW

One of the fundamental provisions that governs the financial management of the self-government of attorneys-at-law is the provision listing the sources for financing its activities. The operation of that self-government are financed by two legally distinguished types of sources, which is reflected in the wording of the provision as two paragraphs.

First, the Act stipulates that the activity is financed with membership fees from attorneys-at-law and trainee attorneys-at-law, fees related to the procedure of registering in the list of attorneys-at-law and trainee attorneys-at-law, and from fines (Article 63(1) of the Act). This types of revenue must be classified as basic (organization's own) revenue. There are a few arguments behind this. The first, systematic one, is a linguistic interpretation of the content of the provision and the mutual relationship of its elements. Moreover, the self-government of attorneys-at-law has a statutorily-conferred right to determine the amount of the contributions and fees within that category by resolutions adopted by competent bodies. This is related to the existence of a distinct type of regulations relating to the self-government financial management in the area of powers to issue by-laws. The responsibilities of the National Bar Council of Attorneys-at-Law (KRRP), include setting the amount of the membership fee and the rules for its allocation, as well as the amount of fees related to fees related to the procedure of registering in the list of attorneys-at-law and trainee attorneys-at-law, and handling charges (Article 60(11) of the Act).[2] Pursuant to the Act, failure to pay

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or the Act].

[2] Presently, relevant provisions are contained in the following regulations: Resolution of KRRP No. 7/VIII/2010 of 10 December 2010 on the amount of membership fee and insurance premium, rules of their payment and allocation, Resolution no. 782/XI/2022 of the Board

membership fees for more than one year is a reason for being struck off the list of attorneys-at-law (Article 29(4a) of the Act).[3] The stipulation in the Act of the sanction in the form of being struck off the list and loss of licence to practice due to being struck off the list for non-payment of the membership fee confirms the importance of this obligation incumbent on members of the self-government. The obligation to pay membership fees to the self-government results directly from membership, while the culpable failure to pay them is also a ground for disciplinary liability.[4] Despite the emerging discrepancies, this obligation must be considered as having civil-law nature [Świstak 2018, 324].[5] The purpose of these proceeds is to provide financial resources for self-government operation The category of sources of funding the self-government comprises also fines. Proceeds from this category differ to some extent from those mentioned above, because apart from other functions they perform, the element of repression is crucial. Fines are connected with disciplinary liability of attorneys-at-law for any conduct that is contrary to the law, ethical principles or the dignity of the profession, or for any breach of professional duties (Article 64 of the Act).[6] Proceeds resulting from fines imposed by district disciplinary courts and the Higher Disciplinary Court (WSD), constitute a source of financing the activities of the self-government. The amount of the fine is determined by law, it has statutorily defined range and is charged in reference to the minimum salary. The fine shall be imposed between one-and-a-half and twelve times the minimum salary applicable on the date the disciplinary offence was committed (Article 65(2ba) of the Act).[7]

Irrespective of differences, the above-mentioned types of revenue to finance the self-government have significant common features that

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of the National Bar Council of 9 November 2022 on the publication of the consolidated text of the Resolution on the amount of membership fee and insurance premium, rules of their payment and allocation, https://biblioteka.kirp.pl/items/show/1361 [accessed: 20.05.2023] and Resolution of KRRP No. 144/VII/2010 of 17 September 2010 on the amount of fees related to the registration in the list of attorneys-at-law, list of trainee attorneys-at-law and list of foreign lawyers, https://biblioteka.kirp.pl/items/show/25 [accessed: 20.05.2023].

[3] Relevant acts are performed by a competent Regional Bar Council.

[4] Resolution of the Supreme Court (7 judges) of 26 April 1990, ref. no. III PZP 2/90, OSNC 1990/12/142.

[5] Resolution of the Supreme Court of 20 November 1987, ref. no. III PZP 42/87, OSNC 1989/7-8/115 and judgment of the Supreme Administrative Court of 12 April 2022, ref. no. II GSK 1837/18, Lex no. 3338550.

[6] According to Article 65(2) of the Act, the fine shall not be imposed on trainee attorneys-at-law.

[7] According to the Regulation of the Council of Ministers of 13 September 2022 on the amount of the minimum salary and the minimum hourly wage in 2023 (Journal of Laws item 1952), the minimum salary starting from 1 January 203 is PLN 3 490 (§ 1), and from 1 July 2023 is PLN 3 600 (§ 3).

make it reasonable to classify them as one group. These are revenues of an organization's own (internal) nature, as they come entirely from members of the self-governing community – attorneys-at-law and trainee attorneys-at-law. The Act itself uses the concept of own funds, although not quite strictly.[8] These types of proceeds constitute revenue of fundamental importance to the self-government also due to their size as compared with other proceeds. This relates in particular to membership fees paid by attorneys-at-law and trainee attorneys-at-law. This is a consequence of their compulsory nature, resulting in the possibility to claim and enforce their payment, which is another characteristic they have in common.

The Act provides that the activities of the self-government are also financed from other sources, in particular from grants and subsidies as well as donations and inheritances (Article 63(2) of the Act). Based on that regulation, there is no doubt about the open catalogue of sources of financing the activities of the self-government of attorneys-at-law. The linguistic and functional interpretation of the wording of the provision shows the secondary nature of such proceeds in relation to the first group. The Act clearly lists as income of this type, which can be described as complementary (external), the following: grants and subsidies, and donations and inheritances. This group is also internally heterogeneous.

The terms "grant" and "subsidy" have not been defined in the Act on attorneys-at-law, and they appear in particular in the Act on public finance as a category of state budget expenditure.[9] Grants under the Act on public finance are funds from the state budget, budgets of local government units and from state earmarked funds, allocated pursuant to the Act on public finance, separate legislation or international agreements, for financing or co-financing the implementation of public tasks (Article 126 of the of the Act on public finance). Grants are considered a form of financial assistance involving transfer of money from a higher level to a lower level, usually for the purposes of implementation of specific tasks [Głuchowski 2001, 66-67], while the subsidy is recognized as a form of non-returnable financial support for various entities related to their activities. Subsidies are most often associated with state financial aid for various entities, including local government ones [Owsiak 2001, 290]. Units of the self-government of attorneys-at-law, due to the kind of activities they pursue, including

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[8] Article 32^1(5) of the Act provides that where a resolution is adopted on exempting a trainee attorney-at-law from payment of the fee in whole or in part, the cost of training of that trainee attorney-at-law shall be paid, proportionally to the amount of the exemption, from own funds of the competent Regional Bar Council, which should be understood however as own funds of the Regional Bar Association.

[9] Article 124(1)(1) of the Act of 27 August 2009 on public finance, Journal of Laws of 2019, item 1634 as amended [hereinafter: Act on public finance].

the performance of public tasks, match the subjective and objective scopes of grants and subsidies, especially since the activity they carry out to a large extent is undoubtedly a form of substantive decentralization of public tasks [Fundowicz 2005, 230-31; Grzywacz 2022, 214-16].

A different category, expressly pointed out in the same provision, is proceeds from inheritance and donations. The admissibility of acquiring them by the self-government is a consequence of legal personality granted to the organisational units of the self-government – Regional Bar Associations of Attorneys-at-Law (OIRP) and the National Bar Association of Attorneys-at-Law (KIRP), i.e. the capability to acquire rights and assume obligations on their own behalf. The proceeds from these titles, of course, are of a voluntary nature and, given their specificities, only incidental, auxiliary. It should also be assumed that the size of such proceeds is marginal in relation to previously mentioned amounts and extent of expenditure.

A statutory category of income of self-government units, but defined in Chapter 4 of the Act concerning training and examination of trainee attorneys-at-law is the fees paid by trainee attorneys-at-law. The Act provides that the training is paid and the fees are payable to the competent Regional Bar Council, which is, however, to be regarded as a shortcut expression, since they in essence are paid in to the self-government unit which holds the training – the OIRP, not to its body. Pursuant to the Act, the training of trainee attorneys-at-law (understood as the cost of training) is covered by fees paid by trainees, which means that it is not permissible to spend these proceeds on other purposes.[10] Conducting the training is considered in the case-law and doctrine as an important element of the constitutional function of self-governments of the professions of public trust to ensure that the profession is practised correctly within the limits of the public interest and for its protection [Tabernacka 2007, 58; Karcz-Kaczmarek 2017, 82-89].[11] At the same time, the Act on attorneys-at-law clearly states that the annual fee for training of trainee attorneys-at-law shall be set by the Minister of Justice by way of a regulation. By setting it, the Minister must be guided by the need to ensure the appropriate quality of education for the trainees. The Act sets a maximum limit for the annual fee, which refers to the minimum salary: it must not be higher than six times the minimum salary. Although it is the self-government units that are statutorily entrusted with the task to conduct attorney-at-law training, it has only an opinion-giving voice about determining the annual fee for applications – the Minister of Justice issues the regulation having consulted the KRRP.[12]

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[10] See Article 32[1](1) and (2) of the Act on attorneys-at-law.

[11] Judgments of the Constitutional Tribunal: of 19 April 2006, ref. no. K 6/06,OTK-A 2006/4/45 and 8 November 2006, ref. no. K 30/06, OTK-A 2006/10/149.

[12] According to the currently applicable Regulation of the Minister of Justice of 14 December

2. STATUTORY COMPETENCE NORMS THAT CONSTITUTE GROUNDS FOR ISSUING INTERNALLY APPLICABLE NORMATIVE ACTS IN TERMS OF FINANCIAL MANAGEMENT

The issue of statutorily-defined competence to issue internally applicable normative acts for the bodies of the self-government of attorneys-at-law has already been generally mentioned earlier in this study. In order to run the financial management by the self-government of attorneys-at-law, it is necessary to have regulations that develop and detail the statutorily-defined aspects of financial activity. Therefore, the Act on attorneys-at-law comprises the rules of competence for the adoption of by-laws concerning the financial management of the self-government of attorneys-at-law. This is a fully appropriate solution, for at least two basic reasons. Firstly, as a rule, there is no need for a more detailed statutory regulation of the financial issues of self-government and the existing framework should be considered sufficient. Secondly, giving the self-government the discretion to determine detailed rules of its activities in general, including in financial matters, corresponds to the very essence of self-government, which consists of self-determination in matters relevant to the self-government

Fundamental to the financial management of the self-government are two legislative delegations. It is up to the National Assembly of Attorneys-at-Law (KZRP) to determine the basic principles of financial management of the self-government (Article 57(8) of the Act). To implement the above-mentioned legislative delegation, Resolution No 7/99 of the 6th National Assembly of Attorneys-at-Law of 6 November 1999 on determining the basic principles of financial management of the self-government of attorneys-at-law was adopted.[13] At the same time, under the Act on attorneys-at-law defining a closed catalogue of powers of another body – the National bar Council of Attorneys-at-Law – it is within its scope of activity to lay down the rules of financial management of the self-government (Article 60(10) of the Act). To implement this authorisation, the Resolution No. 65/VII/2009 of 6 June 2009 on the Rules of Financial Activities of the Self-Government of Attorneys-at-Law was adopted[14]. An issue that requires separate consideration, but going beyond the scope of this paper, is the question of which financial management principles have the character of fundamental principles, all the more so as both these acts are issued by bodies at the national level and cover the entire National Bar [Pawłowski 2009, 141, 144].

2020 on the amount of the annual fee for training of trainee attorneys-at-law (Journal of laws of 2020, item 2273), § 1, the fee is PLN 5850.

[13] Not published.

[14] See https://biblioteka.kirp.pl/items/show/1369 [accessed: 20.05.2023].

Regardless of the regulations concerning the power to determine the financial economy of the self-government, the Act also comprises provisions containing further delegations for the bodies of the self-government to adopt resolutions on financial management. One of the main sources of financing the operations of the self-government of attorneys-at-law is member fees paid by attorneys-at-law and trainee attorneys-at-law. The competence norm for the National Bar Council provides for the power to set the amount of the membership fee and the rules for its allocation, as well as the amount of fees related to the decision on registration in the list of attorneys-at-law and trainee attorneys-at-law, and handling charges (Article 60(11) of the Act). Regulations in this respect are contained in the aforementioned Resolution No. 7/VIII/2010 of the National Bar Council of Attorneys-at-Law of 10 December 2010 on the amount of membership fee and insurance premium, rules of their payment and allocation. Under the same provision, Resolution No. 144/VII/2010 of the National Bar Council of Attorneys-at-Law of 17 September 2010 on the amount of fees related to the registration in the list of attorneys-at-law, list of trainee attorneys-at-law and list of foreign lawyers was adopted.

Competence norms for self-government bodies to issue acts on financial management matters contained in the Act on attorneys-at-law include also further regulations which relate to specific aspects of self-government activities included in specific tasks. An important task falling within the scope of the duties of supervision over the proper practice of the profession of attorney-at-law is audits [Sołtys 2022, 337]. The Regional Bar Council has the power to review and assess how the profession is practised by an attorney-at-law registered in the list maintained by the Regional Bar Council concerned. The audit shall be carried out and assessed by inspectors appointed by the Council from among attorneys-at-law (Article 221 of the Act). The National Bar Council of Attorneys-at-Law adopts rules governing the scope, procedure and remuneration for the inspectors (Article 60(8)(b) of the Act). On this basis, Resolution 112/VII/2010 of the National Bar Council of Attorneys-at-Law of 30 January 2010 "Rules of the scope and procedure of operation and remuneration of inspectors"[15] was adopted. The resolution, defined in the Act as "Rules", comprehensively regulates organisation's internal matters related to the audits. Activities in this field entails the questions of remuneration of members of the Bar who act in the capacity of inspectors.

The performance of an important task forming part of the supervision by the self-government of attorneys-at-law, which is the exercise of disciplinary authority for disciplinary offences, entails the duty to conduct

[15] See https://biblioteka.kirp.pl/items/show/1286 [accessed: 20.05.2023].

disciplinary proceedings (Article 64(1) and (1a) of the Act) [Przybysz 1998, 68; Kozielewicz 2023, 404-405]. The adjudication of disciplinary cases of attorneys-at-law and trainee attorneys-at-law is entrusted to bodies of the self-government: the district disciplinary courts and the Higher Disciplinary Court (WSD). Pursuant to the Act, the costs of disciplinary proceedings are of a lump sum character (Article 706(1) of the Act). The National Bar Council of Attorneys-at-Law is responsible for setting the amount of the lump-sum costs of disciplinary proceedings, which are set considering the average costs of the proceedings (Article 60(9b) and Article 706(3)). On this basis, Resolution No. 86/IX/2015 of the National Bar Council of Attorneys-at-Law of 20 March 2015 on the determination of the lump-sum costs of disciplinary proceedings was adopted.[16]

In accordance with the Act on Attorneys-at-Law, the scope of the National Bar Council's activity includes adopting rules for exempting trainees from paying the annual fee in whole or in part, as well as deferring its payment or allowing its payment in instalments (Article 60(11a)). Based on the competence norm, Resolution No. 43/VIII/2011 of the National Bar Council of Attorneys-at-Law of 21 May 2011 on the principles of exempting trainee attorneys-at-law from all or part of the annual fee, deferring its payment and allowing its payment in instalments was adopted.[17] Pursuant to the Act and the aforementioned resolution, decisions are made that constitute the implementation of financial management, which have been classified into a different category.

3. STATUTORY REGULATION OF BUDGETARY RESOLUTIONS

Another group are statutory regulation governing the adoption of budgetary resolutions and related resolutions on the approval of reports on their implementation. Due to the lapse of time of the budget period and the expiry of the previous resolution, the need to adopt a new budgetary resolution arises. In particular, the Act provides for the need for cyclical adoption of budgetary resolutions, which results from their nature and essence. Budgetary resolutions cover the entirety of financial management of a given self-government unit, albeit on a closed, annual basis, including the activities of bodies and other entities involving actions that have effects as specified in the plan in a given budget period, which forms the basis of their operation [Scheffler 2022a, 780].

Powers in this area are conferred both on the national level body: the National Bar Council of Attorneys-at-Law, and regional bodies:

[16] See https://biblioteka.kirp.pl/items/show/1344 [accessed: 20.05.2023].

[17] See https://biblioteka.kirp.pl/items/show/137 [accessed: 20.05.2023].

assemblies of individual OIRPs (Article 60(4) and Article 50(4)(5) of the Act) [Świstak 2018, 373-75]. The above is a consequence of the two-tier structure of the self-government of attorneys-at-law and legal personality granted to entities located at the central and regional levels, together with specific tasks being entrusted to them in an exclusive manner to conduct independent financial management by these entities. As regards the statutory rules governing the adoption of budgets at central level, it is advisable to literally cite the relevant provision: "the responsibilities of the National Bar Council of Attorneys-at-Law include adopting the budget for the National Bar Council of Attorneys-at-Law". This wording is not quite correct and should be considered inaccurate: the National Bar Council is an organ of a unit of the self-government of attorneys-at-law, namely the National Bar Association of Attorneys-at-Law. The budget, as a financial plan, covers revenue and expenditure related to the activities of not only the National Bar Council, but other bodies at national level, including, for example, the Higher Disciplinary Court or the Higher Audit Committee (WKR), which act as statutory bodies for the performance of the tasks of the self-government of attorneys-at-law, i.e. the KIRP (National Bar Association of Attorneys-at-Law).

One of the important powers of the OIRP assemblies in financial matters is the adoption of the budgets of the OIRP and the approval of the reports of the Regional Bar Councils on their implementation (Article 50(4)(5) *in princ.* of the Act). The Assembly of OIRP is a body of regional level consisting, as a rule, of all member attorneys of a given Regional Bar Association. Where the number of members of an OIRP exceeds 300, the OIRP Assembly is composed of delegates elected at meetings in particular districts covered by the Bar Association concerned (Article 50(4)(5) and Article 50(1) and (2) of the Act). The conferral of the power to adopt the OIRP's budget on that body is fully justified, since the budget is a basic plan covering the whole of the financial management of the OIRP concerned and the assembly is the most representative, close to direct democracy, expression of the will of members of the Bar Association concerned.

Resolutions on the approval of the report on budget implementation, as linked in substantive terms with budgetary resolutions, are adopted pursuant to the legal basis specified in the same provision. Resolutions on the approval of the report on Regional Bar Council budget implementation are adopted by OIRP assemblies (Article 50(4)(5) of the Act). With regard to the approval of the national-level reports, the Act provides that a responsibility of the National Bar Council is to approve the reports on the implementation of the budget and examine the requests submitted by the Higher Audit Committee (WKR) (Article 60(4) of the Act). The Act does not specify the consequences of the approval or non-approval of the reports, which applies to both levels of the self-government.

4. SELF-GOVERNMENT BODIES PERFORMING THE ACTS OF FINANCIAL MANAGEMENT AND AUDITING THEIR IMPLEMENTATION

The last group is made up of statutory regulations governing aspects related to the implementation of financial management. Most of the bodies of the self-government of attorneys-at-law have competence in this respect, but of a diverse nature.[18] This is due to the detailed statutory catalogue of their duties and powers, further developed in the by-laws, which is related to the specific type of tasks they perform.

When considering this issue, it should be pointed out that some of the self-government bodies have been established solely for the purpose of performing activities related to its financial management. This category includes two bodies with auditing powers in financial matters. The responsibilities of regional audit committees includes auditing the financial activities of regional bar councils (Article 53 of the Act), while the scope of activity of the Higher Audit Committee includes auditing the financial activities of the National Bar Council (Article 61 of the Act). The audit committees are thus collective auditing bodies, but with a specialised scope of action, and this in a twofold sense. First, in the objective sense, as they audit the financial aspects of the activity. On the other hand, in the subjective sense, since the audit powers only cover the activities of regional bar councils and the National Bar Council respectively, but do not apply to the activities of other bodies, even if these are related to financial activities. Audit committees operating at both levels have, under the Act, a right, derivative from their audit powers. At the request of the Regional Audit Committee, the Regional Bar Council convenes the Extraordinary Assembly of the OIRP, while at the request of the Higher Audit Committee, the National Bar Council convenes the Extraordinary Assembly of Attorneys-at-Law.[19] Scholars in the field rightly assume that the request to convene is obligatory, and the agenda may include all matters within the competences of these bodies. This should be considered right, but as regards the scope of activity of the audit committees, which covers auditing financial activities of bar councils at both levels, it appears that the reason for the request to convene are the irregularities found in the course of audit [Scheffler 2022b, 814; Klatka 1999, 324].

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[18] According to Article 42(1) of the Act, bodies of the self-government of attorneys-at-law include: National Assembly of Attorneys-at-Law, National Bar Council of Attorneys-at-Law, Higher Audit Committee, Higher Disciplinary Court, Chief Disciplinary Commissioner, assembly of the regional bar association of attorneys-at-law, regional bar council of attorneys-at-law, regional audit committee, regional disciplinary court and disciplinary commissioner.

[19] Respectively: Article 51(1)(3) and Article 58(1)(2) of the Act.

With regard to other self-government bodies, activities related to financial management are not uniform, which is related to the scope of activities performed. At the regional level, the powers in financial matters are held in particular by regional bar councils. The regional bar councils manage the activities of individual OIRPs; this includes financial aspects of the activity of the bar associations (Article 52(1) of the Act)[20].The previously indicated category of proceeds received by individual OIRPs is related with the regulation of the competence of the Regional Bar Council to exempt trainee attorneys-at-law from paying the training fee in whole or in part and deferring its payment or spreading it in instalments (Article 32^1(4)). The basis for making decisions in this matter, which constitutes an act of applying the law, is the Act and the by-laws issued on its basis [Korybski 2001, 85]. The financial consequences of these decisions shall be borne by the unit of the self-government of attorneys-at-law, whose body made the decision on the exemption. Pursuant to the Act, if a resolution is adopted to exempt a trainee attorney-at-law from paying the fee in whole or in part, the training costs of that trainee are borne in proportion to the amount of the exemption, from the own funds of the Regional Bar Council concerned.[21] Due to the civil-law nature of the fees, decisions regarding that category do not constitute an individual administrative case [Świstak 2018, 317].[22]

At the national level, however, the KZRP has powers in the field of financial matters, for considering and approving the reports of the e.g. Higher Audit Committee (Article 57(6) of the Act). On the other hand, the National Bar Council represents the self-government before courts, state and local government bodies, institutions and organizations, which may have consequences in the financial sphere, and considers the requests of the Higher Audit Committee (Article 60(1) and (4) *in fine* of the Act).

Closing the question of the self-government bodies with financial management competence, it is worthwhile to point to the regional disciplinary courts and the Higher Disciplinary Court. These entities are appointed to rule on cases of disciplinary liability of self-government members. As part of their adjudicatory powers, as already indicated, they are entitled to impose a fine, which is a type of disciplinary penalty, the proceeds from which constitute one of the forms of financing the activities of the self-government. This also applies to the decision on the costs of disciplinary

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[20] An additional conformation of the competence of the councils to act in the wording of paragraph 3 of that Article, which, when defining the scope of activities of the councils, determines them only to a basic extent, but only in the form of providing an example, as evidenced by the phrase "…in particular…".

[21] Article 32^1(1) of the Act, actually the resources of OIRP.

[22] Diverging rulings appear in this context, but the presented opinion prevails, as in e.g. ref. no. VI SA 1230/12, VI SA/Wa 1518/11.

proceedings, which are lump-sum in nature (Article 70^6(1) of the Act on attorneys-at-law). In the event of sentencing, the costs of the proceedings are borne by the defendant, while the proceeds from that payment constitute one of the sources of financing the activities of the self-government; in other cases, the costs of the investigation and proceedings are borne by the respective unit of the self-government whose body conducted the proceedings – the OIRP in the case of proceedings before a regional disciplinary court or the KIRP in the case of proceedings before the Higher Disciplinary Court (Article 70^6(2) of the Act on attorneys-at-law). These actions therefore also have financial consequences for the self-government.

Pursuant to the Act, the above are related in objective terms to the entrustment of enforcement of disciplinary penalties, and therefore also of fines, which constitutes an element of financial management, to the Dean of the Regional Bar Council (Article 71(2) of the Act on attorneys-at-law). In enforcement proceedings aimed at enforcing a fine and the costs of proceedings, the actions attributable to the creditor are taken by the Dean of the Regional Bar Council of the bar association whose member was the defendant as of the date when the decision concerning the fine and the costs of disciplinary proceedings became final (Article 71(2b) of the Act). These actions, as well as decisions made by disciplinary courts concerning the fine and the costs of proceedings, constitute an element of financial management of the self-government, but should be regarded as secondary to the primary purpose and tasks performed by these bodies and persons. The Act also distinguishes, without explicitly ascribing competence to them, the function of treasurers; they are part of the Board of Regional Bar Council of the OIRP and the Board of National Bar Council (Article 52(2) and Article 59(2) of the Act on attorneys-at-law).

5. FINAL CONCLUSIONS

The following conclusions can be drawn based on the analysis carried out. They differ in nature and degree of detail, which is a result of the considerable diversification of statutory regulations governing the financial management in the self-government of attorneys-at-law. Firstly, the statutory regulations on financial management in the self-government of attorneys-at-law are not exhaustive but nonetheless should be considered appropriate. They provide a sufficient framework for the financial management of the self-government by identifying the main sources of its financing, the competence norms on the basis of which by-law acts are issued by competent self-government bodies and entities with powers and responsibilities to implement financial management.

Secondly, under authorisations contained in the Act, the bodies of the self-government of attorneys-at-law have the power to complete the statutory framework by lawmaking activity: the adoption of internal normative acts. This confirms the legislature's belief in the self-government's ability to self-regulate and fully corresponds to the idea of self-governance and considerable autonomy. This is a consequence of the fact that the self-government represents people practising a profession of public trust: attorneys-at-law, and the possession of such features and degree of institutionalisation so as to guarantee that the financial management regulations, related the fulfilment of tasks, will be properly regulated and remain within the limits of statutory regulation. The rule for all areas of self-government activity should be that the statutory framework for its activities be only determined to the extent as necessary in a democratic state ruled by law.

Thirdly, it is reasonable that the competences in the field of issuing internally applicable normative acts on financial management to the bodies of the self-government of attorneys-at-law are conferred on the national level. This is related to the fact that the Act delegates the performance of specific tasks, the implementation of which is related to financial aspects, to the self-government as such. Although these tasks are largely performed by individual self-government units, it is necessary to standardize the rules according to which they are carried out, which has the value of coordination [Świstak 2018, 319, 338].

Fourthly, self-government is a single normative category, by performing entrusted public tasks it implements the principle of decentralization, and the essence of decentralization is determined by autonomy specified by law [Starościak 1960, 10-11]. It should be pointed out that specifying the sources of financing the activities of the self-government of attorneys-at-law is not only unfavourable in comparison to local government, but also to other professional self-government organizations [Karcz-Kaczmarek 2017, 61-63; Idem 2011, 100-10]. Despite the fact that the self-government of attorneys-at-law carries out a number of activities within the public *imperium* entrusted to it, it is not subsidized from the state budget [Misiejuk 2019, 63-64]. Part of the tasks performed by the self-government is the fulfilment of the statutory tasks making up constitutionally defined functions, which are performed with a view on the public interest. This applies, for example, to the running of attorney-at-law training, the carrying out of audits or disciplinary justice. This justifies the public financing or co-financing of such tasks from the State budget. This conclusion is confirmed by a provision in the Act, according to which the activity of the self-government is also financed from revenue from other sources, and in particular from grants and subsidies. Here comes to mind a proposal for the law as it should stand regarding the rules

governing the transfer and settlement of such funds, which has its justification and origin in the currently applicable Act on attorneys-at-law.

Fifthly, it is advisable to introduce to the Act changes of an orderly and clarifying nature. This includes stating that the prerogative of the National Bar Council of Attorneys-at-Law is to adopt the budget of the National Bar Association of Attorneys-at-Law, not the National Bar Council of Attorneys-at-Law. It is also appropriate to make it more specific that the annual fees for attorney-at-law training paid to the OIRP, and the costs of training the trainee attorney-at-law who has been exempted from the fee, shall be covered in proportion to the amount of the exemption, from the own resources of the relevant OIRP (Regional Bar Association of Attorneys-at-Law), and not from the Regional Bar Council of Attorneys-at-Law

The last comment arising from the analysis is the need for further in-depth research into the regulations of financial management in the self-government of attorneys-at-law. Some issues have only been identified and noted in relation to a specific research area relating only to the statutory regulations. This is undoubtedly an important matter not only from the perspective of the self-government of attorneys-at-law itself, to which it directly refers, and its members, but also of the state and society. This is due to the fact that the self-government of attorneys-at-law independently carries out statutory tasks deriving from constitutional functions determined by the public interest, its limits and its protection. To carry out these tasks, financial resources are necessary, and thus one can notice the link between the financial management of the self-government of attorneys-at-law and its constitutional functions.

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KNOWLEDGE OF THE LAW AND PROFESSIONAL ADVANCEMENT OF CATHOLIC RELIGIOUS EDUCATION TEACHERS IN POLAND

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Abstract. In the 2022/2023 school year, changes were made to the education law in Poland, which affected the rules for the professional advancement of teachers, including those teaching Catholic religion and other religious denominations. Therefore, the aim of the article is to examine (i) to what extent have Catholic religious education teachers familiarised themselves with the education law in previous professional advancement procedures, and (ii) what formal-legal obligations and pedagogical challenges may arise when planning their professional development in the new procedure. Recent research shows that Catholic religious education teachers in Poland have extensive knowledge of education and religious law. There is a clear link between teachers' career paths and their knowledge of the law. Many good practices have been developed in cooperation between pedagogical supervision units and individual dioceses.

Keywords: education law; professional advancement of teachers; catholic religion teacher

INTRODUCTION

Ignorantia iuris nocet is not only a well-known legal maxim expressing one of the fundamental principles of law, derived from Roman law, but also a challenge for thousands of Catholic religious education teachers in Poland. They cannot claim ignorance of educational and religious law; instead, they must have a good understanding of it while working in schools. In the 2022/2023 school year, changes were made to the educational law in Poland, affecting the rules for the professional advancement of teachers, including those teaching Catholic religion and other religious denominations. The Chair of Catechetics and Contemporary Forms of Faith Communication at the Catholic University of Lublin (KUL) conducts research on the legal status of Catholic religious education in schools, building on the research conducted by Professor P. Stanisz from the Chair of Religious Law at KUL. The historical-legal perspective includes a detailed examination of the history of religious education in Poland [Kiciński 2005, 331-66], while the legal-pastoral perspective involves the study of contemporary

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normative acts related to Catholic religious education [Goliszek 2020, 177-95]. A specific area of research at the intersection of law and catechetics focuses on the goals and implementation of professional advancement for religious education teachers, developed based on empirical research [Kiciński 2008; Gałan 2012]. The state of research on the professional advancement of teachers in Poland has been the subject of various thematic reports, including those from the Supreme Audit Office (NIK),[1] the Educational Research Institute [Federowicz et al. 2013], and individual researchers such as A. Wiłkomirska [Wiłkomirska 2011], R. Skawiński [Skawiński 2020], and W. Janiga who focused on the professional advancement of Catholic religion teachers [Janiga 2003].

The realization of the research aim required appropriate research methods, which are interdisciplinary in nature. Interdisciplinarity is seen as a necessity in research related to educational law and pastoral theology, particularly catechetics, which is responsible for acquiring qualifications for the profession of religious education teacher in school and the concept of their further professional development. It is important to consider that the research is influenced by a specific socio-cultural and ecclesiastical context [Chmielewski, Nowak, Stanisz, et al. 2022, 11-14]. In the field of educational law, a dogmatic method was applied, involving logical-linguistic analysis and the interpretation of legal texts [Izdebski 2021]. In the catechetical field, a critical analysis of sources, both primary sources related to the mentioned doctoral work, which used diagnostic survey as a research technique, and secondary sources from available literature, was initially employed. Finally, commonly used methods, such as analysis and synthesis, were applied.

The main research hypothesis aimed to ascertain that Catholic religious education teachers in Polish schools, in conjunction with their professional advancement, gain a good understanding of educational law [h-1]. Subsequent hypotheses concerned the belief that by completing training periods for successive advancement stages, they also become acquainted with in-school regulations [h-2], but new rules may pose challenges in planning their own professional development [h-3]. Therefore, the aim of the article is to answer the following questions: to what extent have Catholic religion teachers become familiar with educational law in previous advancement procedures, and what formal-legal obligations and educational challenges may arise in planning their professional development in the new procedure?

[1] See Najwyższa Izba Kontroli, *Informacja o wynikach kontroli: System awansu zawodowego nauczycieli*, ref. no. KNO.430.005.2018, no. 113/2017/P/17/027/KNO, Warszawa 2018.

1. RECEPTION OF PROFESSIONAL ADVANCEMENT ASSUMPTIONS BY CATHOLIC RELIGIOUS EDUCATION TEACHERS AFTER THE FIRST DECADE IN LIGHT OF EMPIRICAL RESEARCH

Professional advancement stages for teachers were introduced in Poland in 2000.[2] The primary objective of implementing these advancement stages was the professional development of teachers, which involved acquiring increasingly higher qualifications, as well as pedagogical and organizational competencies. After the return of religious education to schools in Poland in 1990, Catholic religious education teachers and instructors made significant organizational and formative efforts to adapt their teaching and educational activities to the new educational and pedagogical reality. From the outset of the introduction of professional advancement stages, they fully engaged in this process of professional improvement. During this time, the teaching departments of various Polish dioceses ensured, to the best of their abilities, that teachers of Catholic religion could familiarize themselves with educational law and receive support for the development of their competencies through the organization of scientific symposia, training, and direct involvement of their employees to harmoniously align educational law with the Church's mission in this area.

Ten years after the introduction of the professional advancement procedure, empirical research was conducted among Catholic religious education teachers. The primary goal of this research was to answer questions regarding the extent to which the assumptions presented by the Ministry of National Education in the Teacher's Charter Act and in various regulations concerning professional advancement had the intended effect and how they were practically implemented by the teachers of religious education. The research covered Catholic religion teachers from randomly selected Polish dioceses: Elbląg, Kielce, Lublin, Tarnów, Siedlce, Rzeszów, and Zielona Góra-Gorzów. Pilot studies involved 98 teachers, while the main research included 533 individuals who completed surveys. After verification, 500 complete surveys were included in the calculations. The largest group consisted of lay women (72.6%), followed by lay men (13.0%), then religious sisters (9.0%), and priests (5.4%). Most of the teachers worked in primary schools (66.4%), followed by middle schools (26.8%), secondary schools (18.6%), kindergartens (6.4%) and special schools (4.0%). Their professional advancement levels during the research were as follows: probationary (2.6%), contractual (16.4%), appointed (16.4%), and certified (40.4%). The group was representative and intellectually stimulating. This was due to the fact that some

[2] Decree of the Minister of National Education of 3 August 2000 on the attainment of professional advancement stages for teachers, Journal of Laws No. 70, item 825.

of them received advancement by law and were able to observe the efforts of others from an external perspective. Additionally, the majority (74%) had over 10 years of work experience and had direct experience with the professional advancement procedure.

For this study, the opinion of Catholic religious education teachers regarding the impact of professional advancement on their knowledge of educational law was crucial, as expressed after the first decade of its implementation. In terms of their knowledge of educational law, they were asked to what extent their decision to pursue professional advancement deepened their understanding of these regulations. The answer to this question is presented in the following table:

Understanding of educational law	N	%
Definitely, as I did not know educational law before	69	13.8%
a lot, as I knew little about the law	166	33.2%
a little, despite a lack of knowledge of the law	41	8.2%
very much, even though I knew the legal regulations	30	6.0%
significantly, even though I knew the legal regulations	98	19.6%
not much, because I knew the law	29	5.8%
not at all	6	1.2%
not applicable	54	10.8%
no response	7	1.4%
total	500	100%

Firstly, in the opinion of 67.2% of the respondents, the professional advancement procedure significantly or definitely increased their knowledge of educational law. Secondly, even among those who declared prior knowledge of educational law (25.6%), professional advancement had an impact on deepening their understanding of the regulations. Thirdly, 47% of respondents delved deeper into educational law for the first time because either they did not know it at all or knew it only to a small extent. Fourthly, only 1.2% of those surveyed believed that pursuing professional advancement did not affect their knowledge of educational law, and 8.2% of teachers stated that the impact was very minimal.

The professional advancement procedure for Catholic religion teachers also had a significant impact on their knowledge of in-school regulations, especially for novice educators.

Understanding of in-school regulations	probationary N=13	contractual N=82	appointed N=203	certified N=202	total N=500
definitely, as I did not know the regulations before	30.8%	29.3%	9.9%	8.9%	13.2%
a lot, as I knew little about the regulations	46.2%	37.8%	22.7%	23.3%	26.0%
a little, despite a lack of knowledge of the regulations	-	7.3%	5.9%	5.0%	5.6%
very much, even though I knew the regulations	7.7%	2.4%	6.4%	12.4%	8.2%
Significantly, even though I knew the regulations	7.7%	18.3%	16.3%	25.2%	20.0%
a little, because I knew the regulations	-	4.9%	10.3%	22.8%	14.2%
not at all	7.7%	-	0.5%	1.5%	1.0%
not applicable	-	-	26.1%	0.5%	10.8%
no response	-	-	2.0%	0.5%	1.0%
total	100.0%	100.0%	100.0%	100.0%	100.0%

In the opinion of 92.3% of probationary teachers, they acquired knowledge of in-school regulations through the professional advancement procedure. Contract teachers also claimed the influence of this procedure in 87.8% of cases. Appointed teachers, who have extensive experience in education, noted a significant or minor impact in 65.6% of cases, while certified teachers did so in 73%. These high results regarding the understanding of school regulations fully confirm the reception of the assumptions of professional advancement by teachers after the first decade, based on the research of Catholic religious education teachers.

2. CHANGES IN THE TEACHER'S PROFESSIONAL ADVANCEMENT PROCEDURE

On September 1, 2022, new regulations regarding the professional advancement of teachers came into effect. The Ministry of Education and Science had previously emphasized the government's intention to simplify and reduce bureaucracy in the professional advancement system, as well

as to ensure higher salaries for teachers starting their careers in schools.[3] The number of professional advancement stages for teachers was reduced, and the nomenclature related to teachers commencing work in schools was changed. Changes in the procedures for the professional advancement of teachers, presented in tabular form, were developed for the years 2004 and 2022. This allows for a schematic comparison of the fundamental differences.

2004	2022
First stage: Automatically **probationary teacher** – 9 months of training	A beginner teacher does not have any degree; it is a period of preparation for the teaching profession. 3 years and 9 months. Associated with job assessment (mandatory).
Second stage: **Contract teacher**	
Begins training for the appointed teacher level after working for at least 2 years	–
Third stage: **Appointed teacher** – 2 years and 9 months of training	**Appointed teacher** – 3 years and 9 months
The next stage at least after one year of work	The next stage after working in the school for at least 5 years and 9 months from the date of becoming appointed teacher
Fourth stage: **Certified teacher** – 2 years and 9 months of training	**Certified teacher**

In 2022, The Ministry of Education and Science reduced the number of professional advancement stages.[4] The first two stages, probationary teacher and contract teacher, were eliminated. The professional development path was streamlined to two stages: appointed teacher and certified teacher. A new period of teacher preparation was introduced, which lasts

[3] Chancellery of the Prime Minister, Announcement on the adoption by the Council of Ministers of a draft law amending the Teacher's Charter Act and certain other laws, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy---karta-nauczyciela-oraz-niektorych-innych-ustaw [accessed: 19.07.2022]. Cf. Decree of the Minister of National Education of 23 August 2019 on the attainment of professional advancement stages for teachers, Journal of Laws, item 1650.

[4] Act of 28 July 2023 amending the Act – Teachers' Charter and certain other acts, Journal of Laws, item 1672. See also the related legal developments on teacher work evaluation: Decree of the Minister of Education and Science of 25 August 2022 on the evaluation of teachers' work, Journal of Laws, item 1822.

for a minimum of 4 years of work in a school. During this time, newly hired individuals are referred to as beginner teachers.

The main goal of this reform is to simplify the professional advancement path and reduce bureaucracy. Notably, the nomenclature of educational law now omits the terms "training" and "development plans," as well as reporting on their execution. The Ministry of Education and Science places a significant emphasis on acquiring practical teaching skills and ensuring the even development of teachers throughout the entire professional advancement path, rather than just during the probationary period. Formally, the process for attaining the stages of appointed teacher and certified teacher remains unchanged, conducted through administrative proceedings. The relevant authorities responsible for granting these stages also remain the same.

A novelty in the reform is the preparation of beginner teachers as a requirement for achieving the appointed teacher stage. Instead of a probation supervisor, the role of mentor is introduced to support beginner teachers in their professional development process. Mentors are selected by the school principal from appointed or certified teachers. The mentor's role typically lasts for 3 years and 9 months and includes a functional allowance. The mentor provides support during the preparation for the teaching profession, shares their knowledge and experience, allows the beginner teacher to observe their classes, discusses their own and others' classes, and helps in choosing appropriate forms of professional development. The mentor also plays a significant role in assessing the beginner teacher's work. The mentor will be present during the first assessment, conducted by the school principal, who seeks the opinions of the parents' council and may consult the student council. Upon the beginner teacher's request or by one's own initiative, the principal may request opinion from the mentor or methodological advisor. Failure to provide a written opinion within 14 days by the parents' council or mentor does not hinder the assessment process. Procedures for appealing a negative evaluation by the teacher are established. A teacher who receives a negative evaluation in the second year of their preparation for the teaching profession cannot be rehired at the same school until they attain the appointed teacher stage. Only a positive evaluation by a committee appointed by the school principal enables the teacher to proceed to the examination process for the appointed teacher stage.

New regulations also define the conditions for teachers applying for the certified teacher stage. A teacher must work in a school for at least 5 years and 9 months from the date of receiving the appointed teacher stage. The teacher does not undergo training, but in the last year before applying for the qualification procedure, they request an evaluation of their work from the school principal. Detailed criteria for this evaluation are prepared, covering the last 3 years of work. These criteria currently focus on improving

teaching techniques, knowledge-sharing abilities, the utilization of active teaching methods, and multimedia tools that facilitate the learning process. Teachers are expected to complete at least one of five tasks: mentoring, supervising pedagogical practices, or other tasks aimed at improving the school's quality, particularly for children and youth with special educational needs; developing and implementing teaching, educational, or instructional innovations; authoring a textbook or publishing an original article in a professional journal; conducting periodic training sessions; and conducting and analyzing educational research. Notably, the Minister of Education and Science's regulation concerning the assessment of teachers' work reintroduces the criteria set at the regulation level. However, it introduces a division into mandatory and additional criteria. The evaluation of teachers' work must consider all mandatory criteria and two additional criteria, one selected by the assessed teacher and one by the evaluating school principal.

The school principal determines the level of meeting all the criteria for work evaluation, which includes, for example, a score of 0 to 30 points for the substantive and methodological correctness of conducted teaching, educational, and care activities. What's essential in the end is the percentage, which reflects the rating:

distinction	from 90%
very good	75-89.99 %
good	55-74.99 %
negative	below 55%

One of the four conditions for granting a teacher the title of certified teacher is to achieve at least a very good rating for work performance in the last year before applying for the qualification process. Other conditions include meeting qualification requirements and working in a school for the required period. The fourth condition is obtaining the approval of the qualification committee, which, based on an analysis of the teacher's professional achievements and a conducted interview, assesses the teacher's compliance with the requirements regarding the implementation of educational tasks or actions for the benefit of education and their effects.

Other novelties are related to new criteria for assessing the work of school principals, professional advancement system for teachers in schools abroad, a reduction in training time for teachers with at least 10 years of experience, and an increase in teacher salaries. However, these aspects are not covered in this study but could certainly serve as a scientific basis for further research on the knowledge and understanding of educational law in the planning

of teacher advancement procedures, in which Catholic religious education teachers in Poland are actively involved.

3. DISCUSSION AND CONCLUSIONS

The reception of the assumptions of professional advancement system among teachers, as seen in the studies of Catholic religious education teachers and subject literature, has shown a significant increase in the knowledge of Catholic religious education teachers in Poland regarding educational law. It has also had an impact on the quality of professional development among teachers, particularly in the areas of teaching, education and care. Empirical research confirmed the first two research hypotheses (h-1, h-2) concerning the connection between knowledge of the law and the professional advancement of Catholic religious education teachers in Poland. In the initial years of implementing the system, Catholic religious education teachers declared that they had gained knowledge of educational law significantly (13.8%), a lot (33.2%), and substantially (19.6%), and only a few (1.2%) claimed that they did not acquire it. The second hypothesis also proved valid, confirming the logical assumption that most Catholic religious education teachers would become acquainted with internal school regulations during their probationary periods. Only a few teachers declared that they did not become familiar with school regulations during these periods: probationary teachers (7.7%), contract teachers (0%), appointed teachers (0.5%) and certified teachers (1.5%). The assumptions and implementation of professional advancement among Catholic religious education teachers greatly contributed to their understanding of educational law. It undoubtedly enabled a deep understanding of the organization, tasks, and principles of school functioning to achieve professional development and fulfill the teaching mission effectively in the school.

The third research hypothesis (h-3) concerning the new rules of professional advancement and the potential problems in planning one's professional development arises from the analysis of current practice and the use of a dogmatic method related to logical-linguistic analysis and the interpretation of legal texts. The assumed and desirable debureaucratization of the professional advancement path in education entails the abandonment of training period, development plans and reports. This can create difficulties for school principals and mentors. If a novice teacher does not plan something specific or plans and changes their decision, it will be challenging to later assess, for example, what teaching methods, work forms and required individualization of teaching they implemented, and where they may have improvised dangerously. The lack of any documentation could pose a problem for members of future evaluation committees. The regulation

states that, in the case of Catholic religious education teachers, they are legally guaranteed not to be evaluated on the merits of the teaching content, which falls under the competence of the designated Church authorities, and these authorities have trained personnel to verify the correctness of theological teaching and its alignment with the program for Catholic religious education.

With the departure from formalized but precisely defined sets of documents, the committee will need to focus mainly on evaluating at least 1 hour of observed classes. The director or secretary of the committee will then need to document that, during the teacher's preparation for the profession, the person being evaluated gained an understanding of the school's organization, tasks, and operating principles. Someone must prepare documented proof of the candidate's participation in activities related to the school's statutory teaching, educational and other tasks resulting from the school's needs and the local environment. The analysis of previous and current legal documents clearly shows that there is a shift from collecting documents confirming a teacher's development to a clear emphasis on the practical skills of teachers. From a formal-legal perspective, neither a development plan nor reports are necessary, but some best practices in this regard will undoubtedly be established. What is still highly anticipated is a document related to standardized external practical and theoretical examinations after the introduction to the profession. It is likely that ministry experts will be trained in this regard to focus on the required individualization of teaching and a teacher's skills, especially in adapting to changing situations during classes or the complex situation of non-verbal communication as understood by students. A full committee session in the last year of preparation for the teaching profession will be quite complex because after observation, there will be a discussion of classes, especially regarding the methods and forms of work applied, as well as individualization of teaching. Subsequently, the committee must review the mentor's opinion and the parents' council, conduct an interview with the candidate, and describe the fulfillment of all mandatory and selected additional criteria. All of this is time-consuming, and there is the possibility of appealing a negative evaluation by applying to the principle for a committee review, which may contribute to avoiding such an evaluation.

The problem of documenting the course of teacher evaluations is a recurring issue. The analysis of the new professional advancement path for teachers partly indicates that it is also a response to the findings of the Supreme Audit Office (NIK), which stated that the previous examination and qualification procedures for granting the professional advancement title of certified teacher were not conducted entirely fairly. Two reasons were identified. First, there was no guarantee that the committee included an expert who

taught the same subject or conducted the same type of classes as the teacher seeking advancement (18% of the cases studied). Second, the course of committee work was improperly documented (40.2% of the cases studied).[5]

During the research on Catholic religious education teachers, no objections were noted regarding the first issue, and only one Polish-language publication raised the issue of expert selection. W. Janiga noted that in individual cases, committees did not have experts of the same type and the same school as the teacher. He suggests that the advancement regulation should include a provision to ensure the involvement of experts in religious education appointed by the diocesan bishop. This would include supervisors or other representatives of religious education supervision units, as well as lecturers from higher seminaries [Janiga 2004, 151]. The main purpose of these proposals was later implemented, as the 2018 *Professional Advancement Regulation* introduced a provision stating that the authority appointing the examination committee or qualification committee for a teacher seeking advancement to the position of appointed teacher or certified teacher ensures the involvement of experts with qualifications for teaching in a school of the same type as the one where the teacher is employed, with at least one of them, as far as possible, teaching the same subject.[6] The current regulation mentions two experts from the ministry's list, and finding a solution for potential involvement of education supervisors from the Catholic Church or lecturers from higher seminaries will be necessary. The individuals who meet the conditions specified in the Teacher's Charter should apply to the Ministry of Education and Science. A person may be added to the list of experts if they hold a higher education degree and have been a certified teacher for at least 3 years. They must also successfully complete expert training. On the one hand, Catholic religious education teachers do not have any privileges to become experts, as they must go through the regular formal-legal procedure. On the other hand, it is necessary to monitor and report situations where an expert from another subject might want to challenge the content of Catholic religious education, as outlined in the Core Curriculum for Catholic Religious Education approved by the Education Commission of the Polish Episcopal Conference. It is important to note that "the evaluation of a teacher's work and that of the school director must not be influenced by the teacher's religious beliefs, political views, or refusal to carry out a work-related order when the refusal results from a legitimate belief that the order was contrary to the well-being of the student or the public interest" (Teacher's Charter Art. 6a.1g).[7] However, no docu-

[5] See Najwyższa Izba Kontroli, *Informacja o wynikach kontroli*…, p. 5.

[6] Decree of the Minister of National Education of 26 July 2018 on the attainment of professional promotion grades by teachers, Journal of Laws, item 1574.

[7] Act of 26 January 1982, the Teacher's Charter No. 3, item 19. Compiled on based on: Journal

ments are available to indicate non-compliance with this law in Poland in recent years.

It is worth noting that, in addition to the obvious benefits of increased salaries, Catholic religious education teachers were motivated by the appropriate church authorities to fully engage in the life of the school and students in the spirit of service to God and the homeland. In the opinions of Catholic religious education teachers, a religious motivation prevails in the mission they perform, and, of course, criticism of the previous bureaucratized professional advancement path. Therefore, it can be inferred that they are more inclined toward the current project, which emphasizes teaching practice.

CONCLUSIONS

Contemporary research shows that Catholic religious education teachers in Poland have extensive knowledge of educational and religious law. There is a clear connection between teachers' career paths and their knowledge of the law. Many good practices have been developed in cooperation between pedagogical supervision units and individual dioceses.

The significant majority of Catholic religious education teachers have advanced in their careers and hold the titles of appointed teacher and certified teacher, which has prepared them legally to serve as mentors to junior teachers. Many dioceses conducted so-called peer lessons, where each teacher learned how to discuss classes and improve the methods and forms of work used. The theological faculties in Poland, not only at the master's level, fully implement the legal requirements for pedagogical training. Additionally, through doctoral studies and academic conferences, they continuously prepare new personnel to understand and apply educational and religious law, ensuring that every Catholic religious education teacher has support for their professional development in every school or institution where they carry out the mission of the Catholic Church in Poland and abroad.

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FINANCING RESOLUTION OF BANKS – A GENERAL APPROACH

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Abstract. Since the initiation of the first compulsory restructuring, resolution comes to the fore as the BGF's primary responsibility. This intricate and long-term operation necessitates significant financial investment. Therefore, we emphasise that the goal of the research conducted for this study aims primarily to systematize legal measures that apply to financing resolution, with a particular focus on contributions paid to the BGF by obliged entities. Moreover, the aim of this research is to present the separate nature of this financial structure and its specific characteristics at the stage of building relevant funds. Due to the complexity of the presented subject matter, special focus is given to selected aspects of the adopted financing model. The discussion presented here refers only to resolution of banks. The primary research method applied in this study is an analysis of the currently applicable legislation. This study covers the legislation in force and relevant literature. The final section of the article presents a case study which showcases the BGF's practical approach to addressing resolution processes (including those that have been concluded).

Keywords: compulsory restructuring; contributions; funds; resolution

INTRODUCTION

The actions taken by the BGF are largely to ensure the operation of an obligatory deposit guarantee scheme and to carry out resolution of entities identified in the statute (i.a. banks). Detailed rules on conducting resolution are regulated in Chapter III of the Act on the Bank Guarantee Fund, Deposit Guarantee Scheme and Resolution.[1] It needs to be highlighted that resolution is a process of long-term, multi-faceted and continuous changes. There are statements in the literature that it is a comprehensive legal and operational mechanism based on preserving critical functions of the entity under restructuring and at the same time ensures protection of depositors of this entity [Iwańczuk-Kaliska 2016, 9]. These were the assumptions of Directive 2014/59/EU of the European Parliament

[1] Act of 10 June 2016 on the Bank Guarantee Fund, the Deposit Guarantee Scheme and Resolution, Journal of Laws of 2022, item 2253 as amended [hereinafter: BGF Act].

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and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.[2] Resolution is supposed to be a way to modify the results of banks and their creditors at the lowest cost possible and with minimal impact on the financial system [Kowalewska 2021, 210].

It needs to be highlighted that next to regulations that refer to the aim, principles, procedure and effects of carrying out resolution, the BGF act also accommodates provisions on financing the resolution process. Without an appropriately constructed system of financing, conducting such a complicated procedure, that is at the same time so essential from the point of view security and stability on the banking market, would be impossible. The BGF's performance of responsibilities referred to in the BGF Act should be secured with appropriate financial resources. Legal scholars and commentators noted that legal measures which specify sources of financing of the Fund determined the scope and conditions of implementation of goals that it realises [Góral 2011, 171]. The Fund is a unit of the public finances sector and protection of guaranteed funds and conducting resolutions are public responsibilities. By putting its tasks into effect the BGF fulfils the public interest. We must also note that the BGF is currently carrying out the following functions: guarantee, restructuring, information and inspection and stabilization [Kowalewska 2021, 63].

When it comes to the adopted model of financing resolution and the method used in it Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements[3] is also crucial. This regulation made a choice in the context of the constructed system of financing resolution by recognizing that it is to be based on *ex ante* contributions. A model of "advance funding" was thus established contrary to the model based on *ex post* contributions paid after a specific event occurs. The choice of such a model of financing is entirely justified, especially given the objective of the BGF's activity and systemic significance of resolution mechanisms. It must be highlighted that on the ground of the BGF Act the legislator stipulates various types of contributions, which triggers specific consequences.

The system of financing BGF activity is based on the following elements [Pawlikowski 2004, 13]: a) the time in which deposits are gathered, b) entities responsible for the guarantee system in the financial aspect, c)

[2] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014 [hereinafter: BRRD Directive].

[3] OJ L 11, 17.1.2015 [hereinafter: Regulation (EU) 2015/63].

construction of contributions, d) regulations pertaining to principles of investing the funds acquired by the system, e) procedures of payment of guaranteed sums.

Bearing in mind the content of the BGF Act we must point out unequivocally that the most important source of the BGF's incomes are contributions paid by obliged entities. Thanks to the contributions, the Fund is able to carry out the tasks vested in it. There are two types of contributions in the system of contributions paid by obliged entities: *ex ante* and *ex post*, which has been mentioned before. At the same time, it is worth emphasizing that the legislator has stipulated the order and requirements for launching individual financial responses [Kowalewska 2021, 208]. *Ex ante* contributions play the dominant and most important role. They are referred to as "regular contributions" to differentiate them from "extraordinary contributions", which are of the *ex post* kind. Extraordinary contributions are a special construct, paid in extraordinary and strictly defined situations. Alongside them, "contributions paid in the form of a payment commitment", stipulated in Article 303 of the BGF Act, are also a kind of an *ex post* contribution.

The regulations in force mean that there is a specific model of financing the BGF which is based on the following funds: 1) Statutory fund; 2) Guarantee fund of banks; 3) Guarantee fund of credit unions; 4) Resolution fund of banks; 5) Resolution fund of credit unions; 6) Restructuring fund of cooperative banks; 7) Revaluation Fund.

These are funds that have certain differences, a different personal scope, a different contribution calculation system and a different allocation of funds. Such a structure complies with the requirements of the BRRD Directive and the Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes[4] [Banaszczak-Soroka 2017, 462].

We must also point out that the BRRD Directive, which regulates the issues of ensuring the obligation to gather funds for financing resolution, identifies many sources for of such funds. Still, not all of them have been transplanted onto the ground of the BGF Act.

1. RESOLUTION – GENERAL COMMENTS

Resolution is regulated as out-of-court proceedings that may be initiated by the BGF [Szcześniak 2018, 18].

[4] OJ L 173, 12.6.2014, p. 149.

The starting point in the resolution procedure is an assumption that the legal instruments applied cannot cause systemic disturbances [Frydl and Quintyn 2006, 36]. According to the provisions of the BGF Act, the objectives of resolution are as follows: 1) maintaining financial stability, in particular through the protection of confidence in the financial sector and ensure market discipline; 2) limitation of the involvement of public funds or the likelihood of their exposure to the financial sector or its individual entities to achieve the objectives referred to in point 1 and 3-5; 3) ensuring the ongoing performance of the critical functions carried out by an entity; 4) protecting depositors and investors covered by the compensation system; 5) protecting funds entrusted to the company by its customers.

The Fund shall pursue these objectives by way of: developing plans for resolutions or group resolutions, including the determination of the minimum level of entities' own funds and liabilities subject to write down or conversion, writing down or conversion of capital instruments and carrying out resolution. By carrying out resolution, the BGF strives to reduce costs and to minimise the loss of the value of the company of the entity under restructuring [Ofiarski 2017, 564].

The relevant literature emphasizes that the BGF has a wide discretion in using mechanisms of resolution but its choices should aim to allow the application of the optimal solution in specific circumstances [Mikliński 2022, 119]. When launching resolution, the Fund has the following instruments at its disposal: 1) acquisition of undertaking; 2) bridge institution; 3) writing down or conversion of liabilities; 4) separation of property rights.

The initiation of resolution occurs on the date of service upon the entity of the Fund's decision. On that moment all consequences related to a selected instrument enter into force.

In any case, where carrying out of resolution involves the use of BGF measures, shares of the entity are written down in full on in part to cover losses, or debt instruments issued by this entity are converted into capital (if recapitalization is necessary). For this reason, the costs of resolution first put a burden on the entity's owners and creditors.[5]

Initiation of resolution is possible upon meeting the following conditions: a) an entity is at risk of bankruptcy, b) feasible supervisory measures or the measures of an entity will not be able to remove the threat of bankruptcy in due time, c) taking measures is required in view of the public interest.

These premises are assessed every time with regard to the entity towards which initiation of resolution is being considered. The third premise is worth

[5] Website: https://www.bfg.pl/przymusowa-restrukturyzacja/ [accessed: 13.09.2023].

looking at, where a vague phrase "in view of the public interest" is used, whereby there are no measurable factors that would allow an objective assessment. This means that the BGF is free in making it own assessment here.

2. SOURCES OF FINANCING THE ACTIVITY OF THE BANK GUARANTEE FUND IN TERMS OF RESOLUTION

The BGF Act stipulates the following sources of financing the Fund:

1) contributions referred to in Article 286(1) BGF Act, paid by the entities covered by the guarantee scheme and contributions referred to in Article 295(1) and (3) BGF Act, paid by domestic entities and branches of foreign banks – so called "regular contributions";
2) extraordinary contributions;
3) revenues from financial assets of the Fund, including loans and guarantees granted by the Fund;
4) funds received within non-returnable foreign assistance;
5) funds of subsidies granted at the request of the Fund, from the state budget on terms defined in the Act on Public Finance;[6]
6) funds from short-term credit granted by the National Bank of Poland;
7) funds from loans granted from the State Budget;
8) funds obtained from borrowings, credit and bond issues;
9) funds obtained from loans granted by officially recognised deposit guarantee schemes and entities that manage resolution funds from the Member States other than the Republic of Poland pursuant to relevant agreements;
10) funds referred to in Articles 236-238 BGF Act;
11) funds received as a result of settlement of claims of the Fund for the payment of guaranteed funds and support granted to an acquiring entity;
12) other revenues obtained by the Fund.

Contributions play the most important role among the sources of financing identified above. Both for financing deposit guarantees and resolution. By default, the legislator identifies two basic kids of contributions, that is regular contributions and extraordinary contributions. We must also add that contributions paid to the BGF are gathered in the following funds: 1) deposit guarantee fund: a) deposit guarantee fund of banks, b) deposit guarantee fund of cooperative savings and credit unions; 2) resolution fund: a) resolution fund of banks, b) resolution fund of credit unions.

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[6] Act of 27 August 2009 on the Public Finances, Journal of Laws No. 157, item 1240 as amended.

Considering the discussed fund of resolution of banks, we must emphasize that regular contributions paid to this fund are one-off, that is they are paid once a year. Pursuant to Article 299(1) of the BGF Act, where the funds for financing resolution of banks and investment firms are insufficient to finance resolution, the Fund Council, at the request of the Management Board of the Fund, may, by way of a resolution, commit banks, investment firms and branches of foreign banks to pay extraordinary contributions for the resolution fund of banks. The amount of such a contribution may not be greater than three times total contributions set for a given calendar year. Where the total amount of contributions is not set, the amount of the contributions must not exceed three times the total amount of contributions paid for the previous calendar year. The legislator also stipulates the possibility of paying contributions in the form of payment commitments. This applies to the *de facto* part of the so-called regular contribution. The BGF Act specifies special rules for paying such contributions, but such a model departs from the adopted rule based on *ex ante* contributions. The analysis of the content of the BGF Act lends itself to a conclusion that contributions in the form of payment commitments and also extraordinary contributions are *ex post* measures.

Entities obliged to pay contributions for the resolution fund of banks include: a) banks (joint-stock or cooperative), b) branches of foreign banks, c) investment firms.

At the same time, it is worth pointing out that the contributions referred to are not the only element of the resolution fund of banks. Pursuant to the BGF Act, this Fund is composed of the following elements: 1) funds from the liquidated stabilisation fund and reserve fund; 2) due contributions from banks, investment firms and branches of foreign banks; 3) due extraordinary contributions from banks, investment firms and branches of foreign banks; 4) net profit or profit for previous years in the part allocated by the decision of the BGF Council to increase this fund; 5) from amounts from the release of write-downs on assets financed from this fund; 6) from amounts which are deducted costs of resolution of banks, investment firms and branches of foreign banks; 7) from amounts obtained from bankruptcy estates of investment firms; 8) from funds allocated from the BGF's other own funds by the decision of the BGF Council.

Funds gathered in resolution funds of banks are used for tasks taken as part of resolution. They may also be used to cover net losses from previous years in the part specified by the decision of the BGF Council and the writing down on assets and they may be allocated for the BGF's other own funds.

3. SUMS ALLOCATED TO FINANCE RESOLUTION OF BANKS

When carrying out resolution, the BGF was obliged to do it in such a way as to reduce the associated costs. Moreover, if possible due to the objectives of resolution, the Fund should strive to limit the loss of company's value of the entity against which the resolution is being carried out.

Pursuant to Article 296 of the BGF Act, there are two types of the levels of measures to finance resolution of banks (and of investment firms): a) the minimum level – 1% of the amount of the guaranteed funds in banks, investment firms and branches of foreign banks, b) the target level – 1.2% of the amount of the guaranteed funds in these entities.

The discussed regulation shows that the legislator conditions the amount of funds for financing resolution on the amount of funds guaranteed in the identified entities. It needs to be noticed that guaranteed funds have been defined by statute and mean funds of the depositor gathered on his bank accounts maintained in a given bank, covered with guarantee protection up to the Polish zloty equivalent to EUR 100,000. A special condition follows from the content of Article 296 of the BGF Act. The amount of funds that make up the minimum and target level of financing resolution was conditioned on the amount of depositors' funds in bank accounts. By doing so, the two systems, that is the deposit guarantee scheme and the resolution system have been linked. On the other hand, taking into account the personal scope, doubts may arise here in the context of investment firms which are not covered by the deposit guarantee scheme. Pursuant to definitions adopted in the legislation, an investment firm means a brokerage house. This most probably follows from the fact that brokerage houses are maintained by banks, though without a doubt such an interrelation is a great simplification. We must note, for example, that brokerage houses do not maintain bank accounts, therefore brokerage houses do not keep depositors' funds in the understanding of the BGF Act.

One more problem comes to the fore in the context of the dependency identified above. There are deposits in banks that belong to entities that are not covered by the guarantee scheme or by the definition of depositor. They are deposits of local government units. The problem that arises here boils down to a question of whether the value of funds deposited by local government units is taken into account when specifying the amount of guaranteed deposits which determine the amount of funds affected by the resolution mechanism [Kowalewska 2021, 218-19].

We must also add that the national legislator prescribed 31 December 2024 and 31 December 2030 as dates on which the minimum level and the target level are to be achieved, respectively. At the same time,

Article 296(4-8) of the BGF Act allows for both those periods to be extended. It follows from the implementation of the BRRD Directive.

The competence for setting the total amount of contributions that should be paid to the resolution fund of banks is established by the BGF Council bay way of a resolution for a given year. It takes into account the current state of the fund and the projected path to achieving the target level. For example, the total amount of contributions for the resolution fund of banks in individual years in the period 2020-2023 and relevant resolutions of the BGF Council are presented in the table below.

Table 1. Compilation of total contributions for the resolution fund of banks

Total contributions for the resolution fund of banks	**Date of payment of contributions**	**Resolution of the BGF Council**
PLN 1,600,000,000 (one billion, six hundred million zlotys)	by 23 July 2020	Resolution no. 17/2020 of the BGF Council of 26 February 2020
PLN 1,230,000,000 (one billion, two hundred and thirty million zlotys)	by 22 July 2021	Resolution no. 11/2021 of the BGF Council of 17 February 2021
PLN 1,693,000,000 (one billion, six hundred and ninety-three million zlotys)	by 21 July 2022	Resolution no. 6/2022 of the BGF Council of 22 February 2022

Source: author's own compilation on the basis of Resolutions of the BGF Council listed in the table, available at: https://www.bfg.pl/strefa_dokumentow/uchwaly-rady-bfg/ [accessed: 19.09.2023].

The presented tables show that the total contributions in the 2020-2022 period varied with a noticeable low of total contributions in 2020. This was the result of the COVID-19 pandemic and the related legal and economic measures that affected the entire economy. Therefore, the decisions of the BGF Council took into consideration legal measures and economic determinants. Moreover, 2020 saw a lower financial results of banks compared to 2019, that is a drop by 45.3%.[7] We need to point here to elements that the BGF Council takes into consideration when determining the total contributions. These are: business cycle phases and the impact of contributions on the financial standing of banks, branches of foreign banks and investment firms, which means that the financial standing of these entities is taken into account.

[7] Source: https://stat.gov.pl/obszary-tematyczne/podmioty-gospodarcze-wyniki-finansowe/przedsiebiorstwa-finansowe/wyniki-finansowe-bankow-w-2020-roku,5,25.html [accessed: 12.09.2023].

4. CONTRIBUTIONS TO THE RESOLUTION FUND OF BANKS

The legislator has standardised the system for gathering finances in the resolution fund and distinguished the following categories: 1) Resolution fund of banks (also branches of foreign banks and investment firms); 2) Resolution fund of credit unions.

This division corresponds with the personal scope covered with resolution protection. These are mainly banks and credit unions. At the same time, the entities identified here are obliged to pay contributions to the BGF.

Contributions paid to the resolution fund of banks may be divided: 1) in terms of their nature – into regular and extraordinary contributions; 2) in terms of the entity obliged – into contributions paid by banks, investment firms and branches of foreign banks.

The legal basis for establishing the amounts of contributions paid and terms for their payment have been largely regulated in the BGF Act and in the Regulation of the Minister for Development and Finance on 25 January 2017 on detailed risks-based rules for setting contributions to finance resolution of branches of foreign banks.[8]

The literature emphasizes that ensuring sources of financing in the context of resolution is necessary to fulfil two fundamental tasks [Kerlin 2016, 181-212]: a) operational activity of the resolution body, b) possibility to use support instruments of the resolution procedure.

The former covers e.g. the process of planning resolution or carrying out feasibility assessment. The latter concerns granting subsidies or guarantees to cover losses or to ensure the initial capital of a bridge institution.

Pursuant to the BGF Act, funds gathered on the restructuring fund may be allocated to: a) grant loans or guarantees to an entity under restructuring, its subsidiaries, bridge institution, asset management vehicle and the acquiring entity and to acquire property rights of an entity under restructuring; b) establish a bridge institution and asset management vehicle and equip those entities with own funds needed due to the scale and results of activities; c) satisfy supplementary claims referred to in Article 242 of the BGF Act; d) exempt liabilities from write down or conversion of these liabilities; e) cover resolution costs and to cover potential losses of the Fund arising from resolution.

Pursuant to Article 298 of the BGF Act, the method for determining contributions to finance resolution is specified in Regulation (EU) 2015/63.

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[8] Regulation of the Minister of Development and Finance of 25 January 2017 on detailed risks-based rules for setting contributions to finance resolution of branches of foreign banks, Journal of Laws item 184.

Section 2 of this Regulation specifies, i.a., determination of annual contributions, risk adjustment to the basic annual contributions, risk pillars and risk indicators, annual contributions paid by the so-called small institutions and supervised institutions or the change of status and process for raising annual contributions. Therefore, the discussed method (referred to as methodology in the Regulation) is applied directly when determining contributions to finance resolution to be paid by banks and investment firms. On the other hand, contributions to finance resolution of branches of foreign banks are determined on the basis of a Regulation on detailed rules for determining contributions for resolution of branches of foreign banks. It is worth noting here that branches of foreign banks pay contributions to the same fund as banks do. The provisions are consistent here because the Regulation on detailed rules for determining contributions for resolution of branches of foreign banks refers to the methodology set out in Regulation (EU) 2015/63.

Contributions are determined with consideration to [Kowalewska 2021, 214-15]: a) the basis, that is total liabilities, by default reduced by own funds and guaranteed funds, thus the share of an entity's non-guaranteed liabilities in the total of its liabilities has a significant impact on the amount of contributions from each entity; b) investment risk profile that takes into account risk assessment in the areas of risk exposure, stability and diversity of sources of financing, the significance of the institution to the stability of the financial system or economy and additional indicators specified at the national level.

5. RESOLUTION IN PRACTICE – A CASE STUDY

The first resolution of the Podkarpacki Bank Spółdzielczy in Sanok was initiated under the decision of the BGF Management Board[9] on 17 January 2020. As a result of this, PLN 182,875,609 of the bank's capital was written down. Out of the resolution instruments referred to in the BGF Act, a bridge institution was the chosen method. Bank Nowy BFG S.A was established with the capital of PLN 100 million. The BGF initiated resolution because three conditions that oblige the Fund (pursuant to Article 101(7) BGF Act) to take such actions were met. Members' shares and bonds issued by the bank were written down to cover the bank losses, defined in the Preparatory assessment pursuant to the statutory requirement, which caused the drop of its own capital to (-) PLN 182.8 million.[10]

[9] Resolution of the Management Board of the Bank Guarantee Fund no. 25/DPR/2020 of 15 January 2020. The resolution commenced upon serving the decision.

[10] Website: https://www.bfg.pl/wp-content/uploads/informacja-o-przyczynach-i-skutkach-przymusowej-restrukturyzacji-pbs-final.pdf [accessed: 13.09.2023].

At the time of initiation of the resolution, Podkarpacki Bank Spółdzielczy in Sanok was the second largest cooperative bank in Poland. It had approximately 2.5 billion deposits. The BGF's decision to restructure the bank cost PLN 182 million in total, of which the cost of PLN 100 million was borne by holders of subordinated bonds (they were written down completely). The remaining cost, that is PLN 80 million, was borne by local governments (they lost 43% of the funds kept in the bank) and larger entrepreneurs (they also lost 43%, but of the funds that were an excess over EUR 100,000). When there is talk about resolution, we primarily focus on the situation of local government units. We must emphasize at the same time that if resolution was not carried out and the bank went bankrupt, then the funds gathered in it would be irretrievably lost.

The resolution of Podkarpacki Bank Spółdzielczy in Sanok raised various controversies, mainly because not only members' shares and subordinated bonds were written down, but also part of deposits of large companies and local governments. The bank's clients lost the total of approx. PLN 80 million. The losses of the Sanok bank were thus covered.

Resolution of Podkarpacki Bank Spółdzielczy in Sanok was finalised on 27 October 2021. The BGF sold 100% of shares of Bank Nowy BFG S.A. and thus reclaimed the entire amount allocated to create a bridge institution. The shares of Bank Nowy BFG S.A. were purchased by Wielkopolski Bank Spółdzielczy.

The second resolution involved Bank Spółdzielczy in Przemków. It was launched pursuant to the decision of 28 April 2020. The bank's assets were valued at PLN 111 million. The BGF decided to apply an instrument defined as acquisition of an undertaking and the bank that took it over was SGB-Bank S.A. with a registered seat in Poznań. On 2 May 2020 the company of Bank Spółdzielczy in Przemków and its liabilities were taken over by SGB-Bank S.A., to which clients' funds were transferred in full. In the opinion of the BGF and the Financial Supervision Authority, the resolution of Bank Spółdzielczy in Przemków allowed its customers to avoid insolvency and related potential negative effects. At the same time, according to the opinion of the Financial Supervision Authority, the taking over of Bank Spółdzielczy in Przemków by SGB-Bank S.A. did not affect the stability of its operation and thus the security of deposits placed in the bank.[11] All of the actions taken in this process are supported financially by the SGB Protection Scheme (Spółdzielczy System Ochrony SGB) alongside the BGF. In the process of resolution of Bank Spółdzielczy in Przemków deposits were not written down. The bank's equity was PLN 111.7 million.

[11] Website: https://www.bfg.pl/przymusowa-restrukturyzacja-banku-spoldzielczego-w-przemkowie-informacja-o-przyczynach-i-skutkach/ [accessed: 14.09.2023].

The shareholders and the European Fund of Development of the Polish Countryside lost their money. The former suffered a loss of about a dozen million zlotys, while the latter had previously given the bank a PLN 3 million subordinated loan.[12] SGB-Bank received a subsidy from the BGF to take over the organized part of the company. It needs to be mentioned that the resolution was initiated at the time of the outbreak of the COVID-19 pandemic. The premise to initiate it, defined as "public interest", was to maintain financial stability. The cost of the resolution was PLN 81.66 billion. The resolution was finalized on 29 January 2021 when the court announced the bankruptcy of BS in Przemków.

Another resolution was carried out against Idea Bank S.A. The BGF issued a decision on 30 December 2020. The equity of Idea Bank S.A. was PLN 482.8 million. Bonds and shares were written down. Acquisition of the undertaking was chosen as an instrument of the resolution and Bank Pekao S.A. was the acquiring entity. The acquisition took place on 1 January 2021. This resolution procedure stipulated an exclusion that covered claims related to the distribution of bonds of GetBeck and investment certificates issued by Trigon. The resolution of Idea Bank S.A. protected creditors' funds in the amount of PLN 0.8 billion, including funds belonging to depositors whose deposits exceeded the threshold of the BGF's guarantee. This also protected funds in the guarantee fund in the amount of PLN 1.5 billion. Should Idea Bank S.A. have gone bankrupt, which was an alternative to resolution, creditors would have lost their funds. Due to the applied exclusion this resolution inspires major discussions and controversies. We may even talk to a certain degree about a trend of decreasing trust in the banking sector.

The last resolution was carried out against Getin Noble Bank S.A. Writing down of shares and bonds allowed protection of clients' deposits in the amount of PLN 39.5, together with deposits worth PLN 3.5 billion. It needs to be emphasized here that some of these amounts would not have been paid out if the bank had announced bankruptcy, because they were funds of local government units. The resolution mechanism against Getin Noble Bank S.A. was initiated on 30 September 2022 and the instrument of a bridge institution was used. Velo Bank was created, owned by the BGF and 8 banks which co-financed this resolution, creating earlier the Commercial Banks' Protection System (System Ochrony Banków Komercyjnych (SOBK)). The cost of this resolution process was PLN 10.34 billion, of which PLN 6.87 billion came from the BGF and PLN 3.74 billion from the SOBK system. This resolution also involved exclusions and they covered

[12] Website: https://finanse.gazetaprawna.pl/artykuly/1474150,bankowy-fundusz-gwarancyjny-restrukturyzacja.html [accessed: 14.09.2023].

mortgages denominated and indexed in foreign currencies (CHF, EUR, USD, JPY). The "public interest" protected in this resolution was the stability of the banking sector.

CONCLUSIONS

Resolution of banks has recently gained significance as the BGF's responsibility. We need to bear in mind that banks subject to resolution, despite the threat of insolvency, still hold funds of their clients who placed them in a bank as a public trust institution. For this reason, the resolution process must be looked at from multiple perspectives through the prism of protection of depositors, ensuring security and stability of the entire banking market, or even financial market. We may conclude that activities taken by the Funds as part of resolution lead to a particular permeation of public law with private law and the resulting interference of public law norms with private law norms. Application of law at the level of resolution is without a doubt an element of the process of economisation of law.[13] For more on the law of the financial market and economisation of law see relevant literature [Nieborak 2016, 31-95].

Financing resolution of banks, constructed as a model of *ex ante* financing, was based on contributions paid by banks (branches of foreign banks and investment firms) to the BGF for the resolution fund of banks. This model is in line with the EU standards and the choice of such a model must be unequivocally given credit. It is difficult to give a clear answer to the question of whether this model is sufficient and rational. Even though it is defined as an *ex ante* model, we must note certain departures from this standard, such as for example extraordinary contributions or contributions paid in the form of payment commitments. Such a construction would not raise doubts if the fund did indeed reach for these contributions should the situation require so. As seen in the last resolution, the BGF relied on funds that came from the market. The amount that the BGF received from SOBK was 36,17% of all costs of the resolution of Getin Noble Bank S.A. We may suspect then that contributions which were at the Fund's disposal were insufficient. At the same time, it needs to be noted that the resolution process is complicated and without a doubt requires that extensive financial outlays be ensured.

Another issue that must be discussed is making the calculation of contributions for the resolution dependent on the sums of guaranteed funds in relation to investment firms, which are not covered with guarantee protection. Conditioning the amount of contributions paid by investment firms on how

[13] For more on the financial market law and economisation of law see: Nieborak 2016.

far deposits are guaranteed does not deserve approval. Therefore, we should specify what "the level of guaranteed funds" means and whether it includes funds of local government units. The answer to this question is important in the fact that these funds do not enjoy protection in the event of declaration of bankruptcy of a bank. It is also important in the context of keeping the possibility to use funds held in the restructuring fund in line with the realization of the obligation to guarantee deposits. Given the above, it should be considered whether the amounts held by local government units in a bank should be excluded when making such calculations.

This study focuses on selected aspects of implementing resolution, with the prime objective to systematise the area of its financing.

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TEMPORARY PROTECTION FOR THIRD-COUNTRY NATIONALS WHO ARRIVE TO POLAND FROM TERRITORY OF UKRAINE AS A RESULT OF RUSSIAN MILITARY AGGRESSION

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Abstract. The onset of the new phase of Russian aggression against Ukraine, that started on 24 February 2022, has resulted in massive influx of third-country nationals to EU member states, with Poland seeing the greatest impact. This unprecedented wave of migration triggered the first-ever use of the EU's temporary protection mechanism in recent history. Although the decision of the Council of the European Union has established categories of third-country nationals who qualified for temporary protection, the practice of Polish migration authorities demonstrate that there are still individuals who have fled from Ukrainian territory and require legal protection, yet are not qualified for temporary protection. These groups of third-country nationals must pursue other forms of protection, typically without success in obtaining it.

Keywords: temporary protection; international protection; refugee status; subsidiary protection; third-country national; decision of the Council of the European Union

INTRODUCTION

Invasion of Russian armed forces, with partial occupation of particular parts of Ukrainian sovereign territory, constitutes a crime of aggression in accordance with international law, especially UN General Assembly Resolution (1974), that provides for definition of aggression,[1] and Rome Statute of the International Criminal Court, that establishes its jurisdiction over four most severe international crimes, including crime of aggression.[2] Russian full-scale military aggression against Ukraine, that has started on 24

[1] United Nations General Assembly Resolution 3314 (XXIX), 1974, annex.
[2] Statute of the International Criminal Court, 2187 U.N.T.S. 90.

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February 2022,[3] provoked the unprecedented wave of third-country nationals[4] arriving to EU. First days of full-scale Russian military aggression against Ukraine caused two forms of migration flow: 1) the flow of internally displaced persons (IDP's) escaping from the Eastern, Southern and Northern parts of Ukraine to the Western regions, 2) unprecedented flow of people from all of Ukraine to European Union members states, mostly Poland, Slovakia and Romania. First month of Russian military aggression, was the time of a precedent, since an important number of third-country nationals coming from the territory Ukraine after 24 February 2022 were allowed to cross the EU's external border (in case of Poland and Slovakia also Schengen external border) not only without appropriate visa (if the period for non-visa regime had expired in particular individual case), but also without a valid international travel document (passport). Schengen borders code in Article 6 provides for entry conditions for third-country nationals that have to be met in order to enter Schengen Area.[5] However, responding to the high number of third-country nationals entering Poland during the first month after Russian military aggression Polish Border Guards allowed some third-country nationals to enter Poland without valid international travel document (passport), presenting only internal Ukrainian biometric ID or even internal Ukrainian passport in old paper format.[6] This migration flow *en masse*, that has started on 24 February 2022, has resulted in introducing the EU legal mechanism on qualifying this situation as a mass influx of displaced persons from third country and establishing minimum standards for temporary protection on the territory of EU member states.[7] It has to be noted that it was the first time in recent history that EU has implemented that mechanism.

[3] It is important to note that Russian military aggression against Ukraine actually has started in 2014 with transferring *de facto* its own soldiers to Crimean Peninsula, what enabled the following illegal annexation of that territory.

[4] The term "third-country nationals" is used in the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Official Journal of the European Union L77/1, 23.03.2016. According to the Article 2(6) of the Schengen Borders Code "third-country national" means any person who is not a Union citizen within the meaning of Article 20(1) TFEU and who is not covered by point 5 of this Article.

[5] The Schengen Area was introduced on the basis of the Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal of the European Communities L 239, 19-62, 22.09.2000.

[6] Ukrainian internal ID in paper format has only Ukrainian spelling of personal data – there is no English transliteration provided.

[7] Article 1 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of European Union L 212, 7.8.2001, p. 12.

Temporary protection had not been implemented when there was a mass migration of irregular migrants to EU member states (mostly to Greece and Italy) caused by military conflict in Libya or military conflict in Syria in 2011 [Deniz and Şirin 2019, 2]. Hence, it is essential to analyze if the EU mechanism of temporary protection, that has been introduced for the first time ever, covers all categories of third-country nationals that are in need of such protection.

In the first quarter of 2022 the EU witnessed an unprecedented situation on the Polish-Ukrainian border. It had been estimated that in the first two weeks after 24 February 2022 the number of third-country nationals that have entered Polish, and therefore EU's external border, fleeing Russian invasion reached 1 million [Klaus 2022, 21]. The statistics prepared by the Polish Border Guard Headquarters confirm that passenger traffic at the Polish and EU's external border amounted to 11 575 543 people.[8] This number surpassed twice the corresponding indicator for 2021, which amounted to 4 897 902 people. The largest group of third-country nationals who entered Poland in 2022 were citizens of Ukraine – 5 170 689 people. There was also an increase, although not as significant, in the number of applications for international protection submitted in 2022. In the first half of 2022 there were submitted 3 255 applications in Poland. These 3 255 applications included 4 874 people. If the trend is maintained in the second half of 2022, the sum of applications for international protection for 2022 will most likely be much higher than the number of 4 298 applications for 2021. Research presented in this study will provide the explanation, why in 2022 there was a noticeable increase in applications for international protection submitted in Poland.

Among third-country nationals fleeing territory of Ukraine after 24 February 2022 the following categories can be identifies: (a) Ukrainian citizens, (b) citizens of third countries, who are family members of Ukrainian citizens, (c) citizens of third countries, who received international or national protection in Ukraine or permanent resident permit, (d) citizens of third countries, who received temporary residence permit in Ukraine, (e) citizens of third countries, who applied for international protection in Ukraine, however they had not received any protection before fleeing Ukraine, (f) citizens of third countries, whose stay on the territory of Ukraine has been illegal (including stateless persons). The real legal challenge appeared when it has become clear that not all from the abovementioned categories are eligible under the so-called Polish special act from 12 March 2022[9] for temporary

[8] Statistical data related to the border traffic in first half of 2022 is presented in the following report: *Informacja statystyczna za I połowę 2022 r.*, Headquarters of Polish Border Guards, Warsaw, 2022, p. 4.

[9] Act of 12 March 2022 on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state, Journal of Laws item 583 [hereinafter: Polish special act].

protection and a proper legal solution should be provided out of the already existing forms, such as asylum, international protection (thus refugee status or subsidiary protection) or consent granted by the Commander of the Border Guards facility.[10]

The aim of this study is to discuss and present criteria for granting temporary protection in EU that have to be met by third-country nationals fleeing Ukraine after the full-scale military aggression has started on 24 February 2022. This study will enable to deduce those categories of people that do not qualify for temporary protection and subsequently remain in so called "legal limbo", having an obligation to opt for other forms of protection, which by definition apply only in particular circumstances established by law.

In order to accomplish the aforementioned aim of this article, the analysis of international agreements, EU's acts and Polish acts was based on legal and dogmatic method. An analysis of different legal acts, instruments and mechanisms was based on comparative legal method. Aforesaid methods enabled to conduct a holistic legal analysis of all forms of protection of third-country nationals available not only in theory, but also in accessible practice.

1. FORMS OF PROTECTION PROVIDED TO THIRD-COUNTRY NATIONALS IN POLAND

Poland as a member of EU is bound not only by international agreements, but also by European legal acts. Polish national law has to comply with EU legal acts and European mechanisms. According to Polish law a third-country nationals can be granted the following forms of protection: asylum,[11] refugee status (as enshrined in Convention relating to the status of refugees[12]), subsidiary protection (as defined in EU law[13]), temporary

[10] The Commander of the Border Guards Facility in Poland can grant a third-country national with a consent for a stay for humanitarian reasons or consent for a so-called tolerate stay.

[11] Article 90(1) of the Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, Journal of Laws No. 189, item 1472 [hereinafter: act on granting international protection].

[12] Convention relating to the status of refugees, U.N.T.S. vol. 189, p. 137.

[13] Article 15 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of European Union L 337/9-337/26; 20.12.2011.

protection (as provided in EU law[14]).[15] It has to be noted that additionally Polish authorities can grant a third-country national with a consent for stay for humanitarian reasons or tolerate stay.[16] The last two forms of protection result from Poland's international obligations, enshrined in such international agreements as Convention for the Protection of Human Rights and Fundamental Freedoms[17] or Convention on the Rights of the Child [Dąbrowski 2020, 690].[18] Consequently, these two forms of protection are provided to third-country nationals whose return may violate their right to private life, family life or children's rights to the extend, which may endanger their psychophysical development. Hence, the consent for stay for humanitarian reasons or consent for a so-called tolerate stay are not subject to this study, as these are forms of national protection and criteria for granting them are not enshrined in international law.

1.1. Asylum

Granting asylum is considered to be a general principle of international law and a prominent institution of international law that is well established in state practice [Gil-Bazo 2015, 3]. However, it is not defined neither in international nor in Polish law. Even though in 1928 American states signed Convention on asylum, it does not establish a definition of asylum or criteria to be met by asylum seeker.[19] According to Polish law a third-country national may, at his request, be granted asylum in Poland, when it is necessary to ensure his protection and when it is justified by an important national interest of Poland.[20] Practice shows that national interest of Poland in majority of cases prevails over the necessity to ensure somebody's protection. In terms of differences between application for asylum and application for international protection it is worth noting that application for asylum in Poland does not have to be submitted at the Polish Border (before the Polish Border Guards official) or in facility of Border Guards in particular Polish city,[21] as application for international protection. Application for asylum

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[14] Article 2(a) of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of European Union L 212, 7.8.2001, p. 12.

[15] Article 3 of act on granting international protection.

[16] Article 348, 351 of act of 12 December 2013 on foreigners, Journal of Laws of 2021, item 2354.

[17] Convention for the protection of human rights and fundamental freedoms, ETS No. 005.

[18] Convention on the rights of the child, U.N.T.S. vol. 1577, p. 3.

[19] Convention on asylum, OEA/Ser.X/I. Treaty Series 34.

[20] Ibid.

[21] In case of a third-country national, who is already on the territory of Poland.

may be submitted to the Chief of the Office for Foreigners in Poland via Polish Consul in practically any city in the world, where Poland has established its Consulate. It should be considered as an important facilitation, which is related to the fact that third-country nationals applying for asylum in Poland should prove that granting them asylum is in accordance with Polish national interest. It may happen that a third-country national seeking asylum in Poland due to a variety of reasons, usually related to personal security of a person concerned, can not travel till Polish Border and is obliged to apply for asylum in Poland via the Polish Consul in the country of his current residence. For instance, in case no. DPU.422.14.2019 the Applicant – third country national – was residing in one of the EU member states, where he had applied for international protection, thus he could not leave that country. However, bearing in mind that there is not much chance of issuing decision on granting international protection in that member state and previously cooperating with Polish government, he submitted the application for asylum via Polish Consul in that country.[22] The application for asylum was accepted and currently is under consideration.

1.2. Refugee status

Refugee status and subsidiary protection are two types of international protection provided to third-country national in EU.[23] Both forms of protection are defined in national and international law, including EU law. Refugee status is granted to third-country nationals who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[24] European Union and Polish law implemented the same definition, explaining additionally which acts constitute persecution.[25] The core of that definition is the "well-founded" fear, which is considered as a state of mind and a subjective condition that must be supported by an objective situation.[26] The term "wellfounded fear"

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[22] Case no. DPU.422.14.2019 before the Chief of the Office for Foreigners in Poland.

[23] Article 2(a) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of European Union L 337/9-337/26; 20.12.2011.

[24] Article 1(2) of the Convention relating to the status of refugees.

[25] Article 13-14 of act on granting international protection.

[26] United Nations High Commissioner for Refugees, Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees, Reissued edition 2019, p. 19.

contains a subjective and an objective element, and in determining whether wellfounded fear exists, both elements must be taken into consideration.[27] In order to be granted refugee status one does not have to prove that he had already suffered from persecution or violence due to any of the reasons provided in the abovementioned definition. What has to be proven however is that there are sufficient grounds, supported by an objective situation, for considering that when returning to his country of origin one will be persecuted.

The full-scale Russian military aggression has changed the tendency and the practice of granting of refugee status in Poland. As far as the situation of Ukrainian citizens is concerned, statistics on granting refugee status have remained as had been before. Nevertheless, the statistics on granting refugee status for Russian citizens have completely changed, especially due to the fact that after February 24th, 2022 Russian authorities have introduced a number of legal acts that establish criminal responsibility for any public statement on so-called "discreditation" of Russian army,[28] therefore naming so-called Russian special operation in Ukraine as a "war" or "military aggression" in public or informing about crimes committed by Russian army in Ukraine constitutes a "crime" under Russian Criminal Code and one risks sentence up to 10 years of deprivation of liberty.[29] Consequently, for a Russian citizens to be granted a refugee status in Poland it is essential to prove one of the following: being member of opposition party or organization in Russia (or proving cooperation with such party), making public statements (including posts in social media) criticizing Putin's regime or explaining the truth about Russian aggression against Ukraine, taking part in demonstrations or protests against Putin's regime or Russian aggression or in any way supporting (including financially with transfers from bank accounts in Russian banks) Ukrainian organizations or Ukrainian citizens directly.[30] Applying for international protection in Poland by a Russian citizen, who fled his country of origin due to a fear of enrolling to the army and fighting on the territory of Ukraine, is not enough to be granted this

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[27] Ibid.

[28] See Ст. 207.3 Уголовного кодекса Российской Федерации от 13.06.1996, N 63-ФЗ (ред. от 18.03.2023).

[29] One of the most controversial cases of sentencing for imprisonment for "spreading false information" (in reality writing about crimes committed by Russian army on territory of Ukraine) was the case of Ilya Yashin, a prominent opposition leader, who publicly condemned atrocities committed by Russian army on civilians in Bucha and as a result was sentenced for 8,5 years of imprisonment.

[30] These were the reasons for granting refugee status by the Chief of the Office for Foreigners in Poland in the following cases: DPU.420.2302.2022, DPU.420.1926.2022, DPU.420.1273.2022, DPU.420.3108.2022, DPU.420.1271.2022, DPU.420.631.2022, DPU.420.1277.2022, DPU.420.3525.2022.

type of protection. Although, it should be underlined that it is not the case of regular enrollment to the national army on the basis of national laws, yet rather a case of forcibly enrolling a man to take part in military activities on foreign sovereign soil, which according to the international law constitute a crime of aggression and therefore one is becoming an accomplice in such crime. Nevertheless, Polish Chief of the Office for Foreigners does not consider such applicants as refugees or those who are granted subsidiary protection and issues a decision on denying any of the two forms of international protection.

1.3. Subsidiary protection

According to the EU and Polish law subsidiary protection is the second type of international protection that is granted to those third-country nationals who in case of return to the country of origin may experience serious harm as a result of: death penalty or execution; torture or inhuman or degrading treatment or punishment, indiscriminate violence in situations of international or internal armed conflict.[31] As the practice of EU members states has shown subsidiary protection effectively covers third-country nationals, who are not eligible to be granted refugee status, though still require protection [Di Marco 2015, 184]. For instance, when demonstrations broke out after falsified elections in Belarus in 2020 and Lukashenko's regime introduced harsh repressions on demonstrators, Polish authorities enabled Belarus citizens to easily apply for humanitarian visas till today have granted Belarus citizens, who applied for international protection in Poland, subsidiary protection as a rule.[32] In some cases of Belarus citizens, who provide evidence on risk of persecution in country of origin for the reasons enshrined in the refugee status definition, Chief of the Office for Foreigners in Poland issues the decision on granting refugee status. Such cases mostly concern political leaders or activists, NGO's workers, journalists or Belarussians who in their activity in any way criticize Lukashenko's regime. What concerns the beginning of the full-scale invasion of Ukraine on 24 February 2022 and its consequences in terms of Ukrainians seeking international protection in Poland, all Ukrainian citizens, who applied for international protection receive subsidiary protection without individually held interview or without any further consideration of individual circumstances in the case. The only

[31] Article 15 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of European Union L 337/9-337/26; 20.12.2011.

[32] That was the exact reason for granting the Applicant with subsidiary protection even without personal interview in the following case: DPU.420.1113.2021.

reason provided by the Chief of the Office for Foreigners in decisions granting Ukrainian citizens with subsidiary protection is that the whole territory of Ukraine is where the international military conflict is taking place as a result of military aggression or there is a risk of imminent military activities.[33] Additionally, Chief of the Office for Foreigners in Poland provides the argument that as a consequence of international military conflict on the territory of Ukraine civilian population may become a victim of widespread violence or direct military activities. As the practice of Polish Chief of the Office for Foreigners has shown, even though the full-scale military invasion that has threatened the whole territory of Ukraine has started on 24 February 2022, subsidiary protection is granted to all of Ukrainian citizens regardless of the date when they arrived to Poland or when they submitted the application for international protection on the territory of Poland.

In the light of the abovementioned it is crucial to explain, why was is necessary to introduce temporary protection for people fleeing military aggression against Ukraine, while all of Ukrainian citizens, irrespectively of the date of their entry to EU, are currently granted subsidiary protection, not only by Polish authorities, but also by other EU member states? There are at least three reasons that support the necessity of introducing temporary protection on the territory of all of EU member states. First of all, out of all categories of people that had fled territory of Ukraine only Ukrainian citizens fulfil the criteria for subsidiary protection, since its territory of their country of origin that is under constant threat of military activities. As a consequence, Ukraine is a potential country of origin (potential return) that is considered as such in proceedings on international protection. For instance, in case of citizens of other third-countries, that were residing in Ukraine on the basis of temporary resident permit, their application for international protection will be considered taking into account situation in their countries of origin, and therefore they may not meet the criteria for subsidiary protection, since situation in their respective countries of origin may be stable and safe. Consequently, temporary protection apart from Ukrainian citizens and their family members covers more categories of people that had fled territory of Ukraine and are in need of legal protection on the territory of EU – for example citizens of other countries than Ukraine, whom Ukrainian authorities granted permanent residence in Ukraine. Second of all, the procedure of submitting application for international protection lasts from 3-4 hours and requires the presence of the interpreter, use of Border Guards facility with the access to database system fingerprinting equipment. Therefore, submitting an application for international protection can

[33] The following justification was provided in decisions on granting subsidiary protection in the following cases: DPU.420.3130.2022, DPU.420.813.2021, DPU.420.211.2022, DPU.420.1868.2022.

not be considered as a solution in the situation of massive wave (thousands of third-country nationals crossing the border a day) of third-country nationals to the EU, including Poland, as each Border Guard facility in Poland can accept from 3-5 applications daily.[34] Currently, there are 8 border crossing points at the Polish-Ukrainian border,[35] where applications for international protection should be submitted when a third-country national entering Poland does not poses a valid document allowing to enter Poland (and thus EU and Schengen Zone), for instance visa, has no days left within so-called non-visa regime,[36] does not possess a biometric travel document (passport) or does not possess a valid travel document (passport) at all.[37] Thirdly, those third-country nationals who qualify for temporary protection are entitled to work from the very first day after the arrival. This right helps them to support themselves financially. While being in the procedure for international protection one does not have a right to work, unless 6 months after submitting the application had passed and decision in the case has not been issued yet, then the Applicant has a right to receive a special work permit, which is valid until the final decision in the procedure.[38] Consequently, in case of a massive influx of third-country nationals to EU due to military activities in a third country, those third-country nationals would not be able to maintain themselves or their families.

For the abovementioned reasons, regardless of the prospect on receiving subsidiary protection, temporary protection mechanism had to be launched and this type of protection had to be provided to hundreds of thousands of third-country nationals, mostly Ukrainian citizens, escaping military activities on the territory of Ukraine.

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[34] It has to be underlined that one application for international protection does not necessarily mean one person. Application is submitted by the "Applicant", however if the Applicant has a wife and 4 children, who arrived together with him, then his application includes six people instead of one. All six people have to be present during submission of the application. Border Guard officer has to take fingerprints and photos of all of them. As a result, submission of an application from an Applicant and his five family members may take much longer then submission from one person.

[35] Information available on the following website: https://granica.gov.pl/index_wait.php?p=u&v=pl&k=w [accessed: 28.09.2023].

[36] Ukrainian citizens, who hold biometric passports, will be able to travel visa-free to Schengen Area countries for up to 90 days within a 180-day period. Respective agreement between EU-Ukraine was signed on June 2017.

[37] Due to force majeure situation Polish Border Guards allowed to enter third-country nationals without possessing valid travel document (passport). Those were required to contact their Consul on territory of Poland as soon as possible after entering Poland in order to apply for the document.

[38] Article 35 of act on granting international protection.

1.4. Temporary protection

Temporary protection is the last type of protection provided to third-country nationals by the EU member states. Temporary protections is not defined in international law, since there is no international agreement that represents international consensus over this issue and over the categories of people that are eligible to apply for temporary protection [Ineli-Ciger 2016, 281-82]. Moreover, the most important circumstance that has to occur in order for temporary protection mechanism to be introduced is a massive influx of third-country nationals. Consequently, temporary protection is considered to be the most flexible form of protection, whose implementation depends on the decision of particular states. In case of EU application of temporary protection by member states depends on the Council of the European Union's[39] decision that defines specific categories of third-country nationals eligible for temporary protection and the date on which the temporary protection will take effect. On 4 March 2022 the Council issued the decision on establishing the existence of a mass influx of displaced persons from Ukraine, who had to flee this country as a consequence of armed conflict.[40] According to Article 2 of this decision it was established that temporary protection applies to the following categories of people: a) Ukrainian nationals residing in Ukraine before 24 February 2022, b) stateless persons and national of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022, c) family members of the persons referred to in points (a) and (b). Furthermore, the Decision provides that temporary protection applies to stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin. It has to be underlined that the Decision correspondingly provided that Member States may also apply this Decision to other persons, including to stateless persons and to nationals of third countries other than Ukraine, who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin. However, the practice shows that for instance third-country nationals who possessed temporary residence permit in Ukraine before 24 February 2022 unfortunately do not qualify for temporary protection. It is therefore evident, that the idea of the Council

[39] Hereinafter: the Council.

[40] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Official Journal of the European Union L 71/1, 4.3.2022.

was to cover with temporary protection as many groups of third-country nationals as possible, nevertheless, the practice of EU member states may differ, what eventually results in significant legal gaps.

2. TEMPORARY PROTECTION IN POLAND – WHO FALLS WITHIN THE SCOPE OF THE COUNCIL'S DECISION AND POLISH SPECIAL ACT?

As a consequence of the Council Decision adopted on 4 March 2022 EU member states had an obligation to implement that decision and adopt laws that will provide for the specific period of legal stay of those categories of third-country nationals that were established in the Decision and their rights (especially right to work) while benefiting from temporary protection on the territory of the EU.

The first legal basis for providing temporary protection on the territory of Poland is the act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state (special Polish act), adopted on 12 March 2022. The act is the form of implementing the Council's Decision from 4 March 2022 and establishes two categories of people that are eligible for temporary protection in Poland: Ukrainian citizens, who arrived to EU after 24 February 2022 and citizens of third countries, who are spouse of Ukrainian citizens and arrived together with their Ukrainian spouse after 24 February 2022.[41] It has to be noted that special Polish act very narrowly determines who is a family member of Ukrainian citizen, qualifying only spouse as a person to whom the temporary protection applies. As a result, children of Ukrainian citizen, who do not possess Ukrainian citizenship, will not qualify for temporary protection under Polish special act [Klaus 2022, 23]. Nevertheless, minor unmarried children of Ukrainian citizens, as defined in the Council's Decision from 4 March 2022, can benefit from temporary protection in Poland and on the basis of the Council's Decision itself can apply for temporary protection. As defined in Polish special act, applying for temporary protection consists of receiving a national identification number in Poland (PESEL number), which proves that their stay is considered to be legal up to 18 months from the day they arrived to EU. This period may be prolonged. Additionally, those who qualify for temporary protection under special Polish act have an unlimited right to work and right to apply for social benefits.

The second legal basis for providing temporary protection on the territory of Poland is a direct implementation of the Council's Decision from 4 March 2022, since the Polish special act does not provide for temporary

[41] Article 1(2-3) of the Polish special act.

protection for nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022 and does not provide for temporary protection for stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law. Consequently, these three categories of people and minor unmarried children of Ukrainian citizens have a right to apply to the Polish Chief of the Office for Foreigners for a certificate that confirms they were granted temporary protection in Poland. The certificate is issued by the Head of the Office for Foreigners at the request of the person concerned. The certificate includes the third-country national's personal data, the legal basis for temporary protection (both article 106 of the Act on granting protection and the Council's Decision of 4 March 2022) and the period of validity of the certificate. As a consequence, in situations where the national legal instruments of EU member states do not cover all categories of third-country nationals as defined in the Council's Decision, the Council's Decision itself is still considered to be the legal basis for temporary protection in EU member states.

After adopting the Council's Decision on 4 March 2022 and consequently Polish special act on 12 March 2022 it has become evident that not all of third-country nationals fleeing Russian military aggression, who are in need of legal protection, qualify for this form of protection in the EU. The practice has shown that the following categories of third-country nationals fleeing Ukraine do not fall neither within Council Decision from 4 March 2022 nor Polish special act: a) nationals of third countries other than Ukraine, who applied for international protection in Ukraine, however they had not receive any protection before fleeing Ukraine; b) nationals of third countries other than Ukraine, whose stay on the territory of Ukraine has been illegal (including stateless persons). Additionally, there exists a category of nationals of third countries other than Ukraine who received temporary residence permit in Ukraine. Chief of the Office for Foreigners refuses however to issue a certificate on temporary protection to third-country nationals who have invalid residence permits issued by the Ukrainian authorities (whose expiry date had passed) and had not managed to obtain new ones before leaving Ukraine after 24 February 2022. In such cases, it does not always mean that these third-country nationals were staying in Ukraine illegally. Their stay could be legal, nevertheless there was a need to obtain a new (another) document, which ultimately only confirms the legality of their stay.[42]

[42] This is the case of nationals of third countries other than Ukraine, who held permanent residence permit in Ukraine.

Abovementioned categories of third-country nationals facing no opportunity to apply for temporary protection have the obligation to apply for other forms of protection, otherwise their stay will be illegal and they may be subject to deportation procedure to the country of their origin.[43] In practice all of the third-country nationals that had fled Russian military aggression and arrived to EU, who do not qualify for temporary protection, have no other choice than submitting an application for international protection in Poland. This situation constitutes a direct cause for an abrupt increase in the number of applications for international protection in Poland that was presented in the statistical evaluation of Polish Border Guards Headquarters. The most problematic legal issue is whether third-country nationals who had fled Russian military aggression against Ukraine and entered Poland as a measure of last resort fulfill the criteria to be granted refugee status or subsidiary protection? The practice has shown that not all of third-country nationals fleeing Russian military aggression on territory of Ukraine, who applied for international protection, meet the criteria established by the definition of refugee or person that should be granted subsidiary protection. It has to be underlined that in case of not fulfilling the criteria for international protection, the Applicant receives negative decision, which, if upheld by the higher administrative authority in Poland (Council for Refugees), may led to initiating procedure on deportation by Polish Border Guards authority.

According to Article 288 of the act on foreigners, a third-country nationals during his stay on the territory of the Republic of Poland is obliged to have a valid travel document and documents entitling him to stay on the territory of the Republic of Poland, if required.[44] In the case of temporary protection in Poland, a third-country national has a notification confirming the assignment of a PESEL number, which includes an annotation indicating temporary protection under the Special Act or a certificate on temporary protection based on the Council Decision of March 4, 2022 issued by the Chief of the Office for Foreigners. Taking into account the aforementioned, if a third-country national had not been granted temporary protection had not possessed an appropriate document confirming this circumstance, then, as a rule, he would have no other alternative but to submit an application for international protection on the territory of Poland

[43] In procedure on grating international protection a country of origin constitutes country of citizenship or country of last residence, if it is not possible to identify the country of citizenship.

[44] The phrase "if required" refers to those third-country nationals who are allowed to stay on the territory of EU on the basis on free visa agreement and therefore they do not require any additional document entitling them to stay, if their stay does not succeed 90 days during the 180 days period.

in case of not willing to return to his country of origin. While the application is under the consideration by the Chief of the Office for Foreigners in the course of administrative proceedings his stay in Poland is considered legal and a Temporary Foreigner's Identity Certificate is issued accordingly for the duration of the proceedings. If an application for international protection is not submitted, then the stay of a third-country national is illegal and in the event of an inspection of the legality of stay by Border Guard or Police officers, the competent Commander of the Border Guard Facility must initiate proceedings on the obligation to return. Thus, third-country nationals, who fled Ukraine due to military activities on its territory, yet do not qualify for temporary protection, need to apply for international protection on the territory of Poland. The abovementioned is a direct cause for the rapid increase of the number of applications for international protection in Poland in the first half of 2022 according to statistical data presented by Border Guard Headquarters.

The most problematic legal issue is whether third-country nationals, who fled Russian military aggression against Ukraine, arrived in Poland after 24 February 2022 and had to submit application for international protection, since they do not qualify for temporary protection, meet the requirements for refugee status or subsidiary protection? Practice shows that not many third-country nationals fleeing territory of Ukraine, who apply for international protection in Poland, meet the criteria set out in the definition of a refugee or a person granted subsidiary protection. It is worth noting that in the event of failure to meet the criteria for granting international protection, third-country nationals applying for international protection receive a refusal on granting both forms of international protection, which, if upheld, may lead to the initiation of proceedings for third-country nationals to return.

3. FINAL REMARKS

The previous most numerous wave of third-country nationals that entered EU in recent years is the one that has started in 2015 when more than one million of third-country nationals entered EU mostly from the Mediterranean region [Kugiel 2016, 41]. Nevertheless, EU authorities had not decided to initiate the mechanism on temporary protection. Clearly that wave of migration (usually called "irregular migration") can not be compared to the one that was caused by the Russian military aggression, as the previous one included third-country nationals that were coming from different countries, often for entirely different reasons and a large number of those migrants did not possess proper travel documents. Therefore, in that situation was either no imminent threat of military activities or irregular

migrants had entered "safe country" before entering EU, and as a result they could have stayed in that safe country (e.g. Turkey). The most recent example of applying the institution of temporary protection in European region, however outside the EU, is Turkey, which has been granting this form of protection to Syrian refugees that had fled Syria after the military conflict has started [Ilcan, Rygiel, and Baban 2018, 58]. Introducing the temporary protection mechanism by the EU in 2022 is perhaps the second most significant example of applying this form of protection to third-country nationals, as a direct consequence and response to undoubtedly the most challenging mass influx of third-country nationals to EU.

Not all of those third-country nationals, who happened to be in need of legal protection after the Russian military aggression, qualify for temporary protection in EU. The following categories of third-country nationals fleeing Ukraine do not fall neither within Council Decision from 4 March 2022, nor Polish special act: a) nationals of third countries other than Ukraine, who applied for international protection in Ukraine, however they had not receive any protection before fleeing Ukraine; b) nationals of third countries other than Ukraine, whose stay on the territory of Ukraine has been illegal (including stateless persons); c) nationals of third countries other than Ukraine who received temporary residence permit in Ukraine; d) third-country nationals who have invalid residence permits issued by the Ukrainian authorities (whose expiry date had passed) and had not managed to obtain new ones before leaving Ukraine after 24 February 2022. Even if third-country nationals from abovementioned categories submit application for international protection due to exceptional *ad hoc* circumstances, therefore fleeing Russian military aggression, their applications are subject to verification and consideration under the applicable definitions of refugee status and subsidiary protection, what in majority of cases will definitely lead to a decision on refusing to grant both forms of international protection. Subsequently, their legal status in EU may eventually became illegal and thus they may face deportation procedure, which is aimed at deporting them to the country of their origin.

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CRIMINAL LIABILITY FOR ACTS LEADING TO THE SPREAD OF INFECTIOUS DISEASES IN THE REGULATIONS OF THE PENAL CODES OF SELECTED EUROPEAN COUNTRIES

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Abstract. Counteracting the spread of infectious diseases poses a challenge for the efficient running of a state. The most common aspect of this issue concerns the establishment of appropriate legal regulations aimed at protecting human life and health against the spread of biological pathogens causing infectious diseases. In recent years, this issue has taken on a particular importance with the SARS-CoV-2 pandemic. National legislators have taken a number of legislative initiatives as a response to the emerging threat. However, in some cases, the existing regulations were considered sufficient. Legal scholars consider these issues primarily from the perspective of general administrative law. These include administrative law sanctions for non-compliance with prohibitions established within this field of law. However, the problem addressed in the title may also be considered from the perspective of criminal law, in particular in relation to the protection of human life and health. The central point of consideration is the protection of these values (individually and collectively) against the transmission of infectious diseases due to human negligence.

Keywords: infectious diseases; criminal law; health; life

INTRODUCTION

The proliferation of biological pathogens that cause certain infectious diseases is a worldwide phenomenon. For centuries, populations have contracted a variety of diseases, particularly infectious diseases, which have often decimated entire populations [Nelson and Master-Williams 2014, 3-18; Berger 2001, 11-17; Dobson and Carper 1996, 115-26; Anderson, May 1991, 1-26]. Developments in medical science have significantly reduced mortality from many known infectious diseases, primarily through the introduction

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of widespread immunization as well as effective drugs. This has significantly reduced the risks to human life and health arising in particular from measles, rubella, polio and tuberculosis. However, HIV and other new varieties of infectious diseases still remain a challenge. It is worth mentioning that biological pathogens are constantly mutating, thus posing a constant threat to the population [Antia, Regoes, Koella, et al 2003, 658-61; Giesecke 2017, 1-30, 205-20].

In addition to medical science, a significant contribution to the reduction in epidemic threats has been made by a number of regulations of a general sanitary and anti-epidemic law, and above all by national legislation of an administrative and legal nature. One example of such a regulation in the Polish legal order is the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans[1] together with numerous implementing acts.[2] In addition to national regulations, a significant part of the anti-epidemic legislation can be seen in supranational regulations. In particular, one should note the numerous acts issued by the World Health Organisation (WHO) as well as the European Union (EU). Among those that have been selected, the eradication programmes for certain infectious diseases such as polio, rubella and measles are among the most important. These documents constitute specific *soft law* directives. They can be described as strategic plans for the containment of certain infectious diseases.[3] In EU law there are also soft law regulations constituting recommendations to the Member States to counter the spread of infectious diseases.[4]

The development of the current anti-epidemic regulations was largely influenced by the SARS-CoV-2 pandemic, which prompted legislators to modify them [Coglianese and Mahboubi 2021, 1-18; Kubiak, Serwach, and Wrona 2020, 153-62; Urbanovics, Sasvàri, and Teleki 2021, 645-57]. National regulations are mainly secured by sanctions of an administrative and legal nature (administrative fines, as well as direct and indirect coercion sanctions

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[1] Journal of Laws of 2022, item 1657 as amended.

[2] See e.g.: Ordinance of the Minister of Health of 23 February 2023 on respiratory syncytial virus (RSV) infections (Journal of Laws item 354); Decree of the Council of Ministers of 25 March 2022 on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic emergency (Journal of Laws item 679 as amended).

[3] See e.g.: https://www.euro.who.int/_data/assets/pdf_file/0009/247356/Eliminating-measles-and-rubella-Framework-for-the-verification-process-in-the-WHO-European-Region.pdf [accessed: 10.02.2023]; https://polioeradication.org/wp-content/uploads/2016/07/PEESP_EN_A4.pdf [accessed: 10.02.2023].

[4] See e.g.: Recommendations for a common EU approach regarding vaccination policies for monkeypox outbreak response), as well as binding legal acts that are directly applicable or have to be implemented in national law (Regulation (EU) 2022/2371 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU).

applied on the basis of the Act of 17 June 1966 on enforcement proceedings in administration[5]). National legislation should be consistent with EU law and aim to implement the objectives of WHO. It is important that national laws form a certain whole in a certain region. This can effectively counteract the spread of infectious diseases across borders.

Compared to administrative law, criminal law regulations constitute only a small fraction of the system of anti-epidemic regulations. However, they are of fundamental importance, as sometimes, through human actions, there is at least a threat to the most important legal goods, which are life and health, both at the individual and supra-individual levels. These regulations should meet the current and future needs for the criminalisation of behaviour which may cause or causes the spread of infectious diseases. They should therefore cover such behaviour, such as: exposing people to an infection, causing damage to health through infection with a biological pathogen causing a specific infectious disease and exposing the life or health of many people to such an infection through an act or omission resulting in the spread of an infectious disease or causing an epidemiological threat.

1. LIFE AND HEALTH AS PROTECTED GOODS UNDER CRIMINAL LAW – INDIVIDUAL AND SUPRA-INDIVIDUAL LEVELS

Life and health are the most important values protected by various branches of law. These goods are in particular protected by criminal law. The necessity of their protection at every level of law stems from the regulations of international law and the provisions of national constitutions.[6] First of all, reference should be made to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[7] which states that everyone's right to life shall be protected by law. A similar message is echoed in Article 2 of the Charter of Fundamental Rights of the European Union,[8] according to which everyone has the right to life.

The right to health, alongside the right to life, is a universally recognised human right, belonging to everyone due to their dignity [Riedel 2009,

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[5] Journal of Laws of 2022, item 479 as amended.

[6] In Polish law, the protection of these values has also been elevated to constitutional status. Indeed, according to Article 38 of the Polish Constitution, the Republic of Poland provides everyone with the legal protection of life. In turn, Article 68(1) of the Polish Constitution stipulates that everyone has the right to health protection.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).

[8] OJ EU C 326/391.

21-23]. Article 14 of the Universal Declaration on Bioethics and Human Rights[9] explicitly normalizes that health is essential to life itself and should be regarded as a social and human good. The relationship between the right to life and the right to health [Garlicki 2018, 211-20] is also justifiably identified. These two legal goods form a coherent correlate. It can thus be considered that without life there is no health, and that the loss of health can lead to the loss of life [Tyszkiewicz 2021, 210]. This also has significance in criminal law. It is not without reason that the Polish legislator combines these two legal goods in the title of Chapter XIX of the Penal Code. In this context, life and health should be seen as a set of the most important goods of an individual and of the society organised into a state [Zoll 2017, 255].

The criminal law protection of life does not raise any interpretative doubts. Criminal law doctrine identifies that it is a good of the highest rank, and that the level of its protection is a measure of "culture and humanity of a given society" [Pikulski 2012, 8]. It is further argued that "without life there is no man, and without man everything that is human loses its meaning on the principle of *contradicto in adiecto*. Human life is therefore an overriding value in the humanistic sense and the same rank must be given to it in the hierarchy of goods as objects of protection in the sphere of criminal law" [Cieślak 1989, 288]. On the other hand, as far as the protection of health in criminal law is concerned, it can be understood as a state of normal functioning of the body, which is characterised by the proper course of physiological processes ensuring a person's ability to live activity and perform social functions [Kokot 2020, 1002; Michalski 2012, 203].

Under Polish criminal law, health and life appear in two configurations. Firstly, as generic goods, protected by criminal law (Chapter XIX of the Penal Code), and secondly, as individual goods, occurring alongside the generic good (certain provisions of Chapter XIX of the Penal Code, e.g. Article 163 of the Penal Code and Article 165 of the Penal Code). The indicated legal goods also exist on two levels: individual (health and life of a person) and supra-individual (health and life of many persons). Also on the basis of criminal law, these goods in most cases remain in close correlation.

From the individual point of view, health is protected in most provisions of Chapter XIX of the Penal Code; e.g.: causing grievous bodily harm (Article 156 of the Penal Code) and exposure to infection with an infectious disease (Article 161(1-2) of the Penal Code). On the other hand, in supra-individual terms, it is mainly contained in Chapter XX of the Penal Code; e.g. causing danger to the health of many persons (Article 165(1) of the Penal Code), but also in Chapter XIX of the Penal Code in the case of the qualified type of offence of exposing many persons to infection with

[9] See https://unesdoc.unesco.org/ark:/48223/pf0000146180_pol [accessed: 10.02.2023].

an infectious disease (Article 161(3) of the Penal Code). Meanwhile, life as a legal good is protected primarily in Chapter XIX of the Penal Code (e.g. the offence of murder, the offence of infanticide). Life as a legal good also appears in Chapter XX of the Penal Code, alongside health, for example in Article 163 of the Penal Code and Article 165 of the Penal Code. However, it is worth noting that both Articles 163 of the Penal Code and 165 of the Penal Code treat health supra-individually (the health of many persons), and life both supra-individually (Articles 163(1) of the Penal Code and 165(1) of the Penal Code) and individually (Articles 163(3) of the Penal Code and 165(3) of the Penal Code, in which the qualifying feature is the death of a human being, and therefore of a single person).

2. MODEL OF CRIMINAL LAW GUARANTEES THE PROTECTION OF HUMAN LIFE AND HEALTH AGAINST THE SPREAD OF INFECTIOUS DISEASES IN POLAND

When reconstructing the model of criminal law protection of human life and health against the spread of infectious diseases in Polish criminal law, it is necessary to focus on Chapter XIX and Chapter XX of the Penal Code. In this respect, the acts stipulated in Article 156 of the Penal Code, Article 157 of the Penal Code, Article 161 of the Penal Code and Article 165 of the Penal Code would be of interest. In addition, Article 168 of the Penal Code and Article 169 of the Penal Code should be taken into account.

From the analysis of the indicated provisions of the Penal Code in terms of criminal liability for prohibited acts related to the spread of infectious diseases, it follows that the Polish legislator has provided for the punishability of both intentional acts (Article 156(1)(2) of the Penal Code, Article 157(1-2) of the Penal Code, Article 161(1-3) of the Penal Code, Article 163(1) of the Penal Code and Article 165(1)(1) of the Penal Code), as well as unintentional ones (Article 156(2) of the Penal Code, Article 157(3) of the Penal Code, Article 163(2) of the Penal Code and Article 165(2) of the Penal Code). In addition, the behaviours together with possible additional consequences resulting from intentional-unintentional acts (Article 156(3) of the Penal Code, Article 163(3) of the Penal Code and Article 165(3) of the Penal Code) as well as unintentional-unintentional acts (Article 163(4) of the Penal Code and Article 165(4) of the Penal Code) are punishable. Therefore, it can be considered that these regulations express the intention of the national legislator to guarantee the possibility of imposing criminal liability on a wide group of potential perpetrators of acts causing damage to the health or exposing to possible health hazards as a result of behaviour related to the spread of infectious diseases.

In the Polish legal order, behaviours causing grievous bodily harm in the form of causing a serious incurable or long-term disease or a real life-threatening disease, as well as causing other bodily harm, including that lasting up to 7 days, are punishable. It may thus be the causing of an infectious disease that will cause an injury to the health in a particular person other than that specified in Article 156 of the Penal Code. It is also worth noting that incurability of a disease is determined according to current medical knowledge. The feature is fulfilled when, according to this knowledge and medical experience, there are no methods which would allow for a cure. Infection with an infectious disease can also result in a serious long-term disease. In such a case, although the patient is likely to improve or even be cured, the condition persists for a relatively long time. In Polish jurisprudence, one can encounter the view that this is a period of at least 6 months.[10] There is also a more flexible view, which does not refer to a specific time limit, but leaves it to the discretion of the court. Therefore, periods of a few weeks[11] or even a few days are considered possible (if during that time "there was a real threat to life, i.e. there was a serious disturbance of the basic functions of the organs essential for the maintenance of life, due to which death may occur at any moment"[12]). Long-term therefore means that the life-threatening condition must persist over an extended period of time, rather than be fleeting. The duration of the disease and its 'term' are therefore related to the period of dysfunction of the human body [Jurek 2010, 50-56]. In this view, the causing of an infectious disease in the victim may, in certain situations, correspond to the feature in question. On the other hand, the feature "real life-threatening disease" is fulfilled if death is imminent, although such a disease does not necessarily have to be serious or long-term. Such a view is shared in the judicature. The Supreme Court noted that "the reality of the threat of losing life does not depend in any simple way on the time of occurrence of such a condition – but it is always characterised by a significant degree of harm caused by the perpetrator causing a disease, the course of which may lead to the death of the victim at any time." He also added that "a real life-threatening disease is a consequence of a bodily harm or a health disorder which, even in the event of prompt and intensive medical treatment, may as a rule and at any time lead to death."[13] The judicature emphasises the element of the "reality" of the threat. It must

[10] Judgement of the Court of Appeal in Kraków of 21 June 2005, ref. no. II AKa 91/05, KZS 2005, No. 7-8, item 81.

[11] Judgement of the Court of Appeal in Lublin of 31 May 2004, ref. no. II AKa 98/04, "Prokuratura i Prawo" – wkł. 2005/3/17.

[12] Judgement of the Court of Appeal in Kraków of 16 September 2003, ref. no. II AKa 151/03, OSA 2004, No. 11, item 81.

[13] Court Order of 21 April 2005, ref. no. IV KO 19/05, "Orzecznictwo Sądu Najwyższego w Sprawach Karnych" 2005, No. 1, item 824.

be referred to a specific person and their condition, and not to some abstract statistic (as was the case under Article 155 of the Penal Code of 1969, in which the legislator used the term "usually" life-threatening disease). It is therefore necessary to assess *in concreto* whether the injury or disorder in question constitutes a real threat to the patient's life. It is therefore possible to fulfil this feature by contracting an infectious disease, the course of which is so dynamic as to result in a real threat to the life of the victim within a short period of time.

With regard to causing damage to health, it should be noted that each individual is characterised by a different level of health. It is therefore difficult to assume abstractly that any infectious disease is always going to be a serious long-term disease[14] or a real threat to life. This thesis is relevant to the determination of the subject of the offence in question, and in particular to the determination of the intellectual element of intention. It may happen that the victim is not vaccinated against tuberculosis for medical reasons, but is infected by it through the intentional action of the perpetrator. Compared to a potential victim who would have been vaccinated against the disease, the unvaccinated victim would have experienced more severe clinical symptoms of tuberculosis than the vaccinated victim. However, the perpetrator may not plead a lack of knowledge of the victim's potential inoculation, which could lead to exemption from liability for an intentional act on the grounds of a mistake regarding the circumstance constituting the feature of a prohibited act (Article 28(1) of the Penal Code). This implies that from the perspective of a criminal law valuation, it is sufficient to assume the general intention of the perpetrator connected by a causal link to the criminal effect, which would be the induction of a specific disease in the victim.

When analysing the statutory threat of punishment, it should be noted that the individually defined effect of contracting a specific disease, as well as the duration of this effect, determine the possibility of incurring criminal liability for both a misdemeanour and a crime. If the perpetrator's behaviour results in meeting the legal definition of a crime described in Article 156(1) (2) of the Penal Code, the statutory sentence ranges from 3 to 20 years' imprisonment. If an additional consequence of causing a specific disease is the victim's death, the perpetrator may be sentenced from 5 to 30 years' imprisonment or life imprisonment. On the other hand, if the perpetrator caused the disease unintentionally, then the statutory sentence ranges from 1 month to 3 years' imprisonment. If the effect in the form of a specific disease does not correspond to the features of Article 156 of the Penal Code,

[14] Judgment of the District Court in Sieradz of 16 December 2013, ref. no. II K 35/12, Lex no. 1716843.

the perpetrator may be liable under Article 157(1) of the Penal Code. In this situation, they face a penalty of imprisonment lasting 3 months to 5 years. If the effect in the form of a disease lasts for less than 7 days, they may be liable for the misdemeanour stipulated in Article 157(2) of the Penal Code, punishable by a fine, restriction of personal liberty or imprisonment for up to 2 years. It may thus be noted that the scope of criminalisation for causing damage to the health in the form of causing a specific infectious disease is very broad. Depending on the facts, the perpetrator may even face life imprisonment.

The Polish Penal Code also provides for the possibility of criminal liability for a perpetrator who, knowing that they are infected with a specific infectious disease, exposes another person to such infection. The legislator in the features of the criminal act stipulated in Article 161 of the Penal Code points to: HIV, an infectious disease, a venereal disease, a serious incurable disease and a life-threatening disease. The analysed type of prohibited act provides for the criminalisation of behaviour leading to the exposure to infection of one person (Article 161(1-2) of the Penal Code) and many people (Article 161(3) of the Penal Code), if the perpetrator is a transmitter of a venereal or infectious disease, or the HIV virus. The modified type, described in Article 161(3) of the Penal Code, was introduced during the SARS-CoV-2 pandemic [Kubiak 2020, 113-33]. The typification of this prohibited act is considered overly casuistic, and the protection of health prior to its violation in this aspect makes this provision of low practical utility [Daszkiewicz 2000, 399; Banasik 2009, 56-58; Derlatka 2013, 165-66; Łukuć 2018, 76-87; Kubiak, Serwach, and Wrona 2020, 153-62]. Particularly controversial is the addition of the mentioned qualified type to the provision in question. Firstly, the legislator used the evaluative feature "many" people in the description of this act. In the doctrine and judicature there is no consensus as to its interpretation. You may encounter a position indicating specific numerical values (e.g. 6 people [Buchała 1997, 50-51], 10 people [Stefański 2020, 1062-1063]), or suggesting making an evaluation *in concreto*. Such a view was expressed by the Supreme Court in its ruling of 11 January 2017,[15] in which it stated that "it is impossible […] to indicate *in abstracto* one, invariable, minimum number of objects fulfilling *in genere* the feature «many» in the Polish criminal legislation" and further "since the term «many» has not been specified in criminal law, it should not be specified in terms of interpretation, leaving the evaluation of meeting the given feature to the discretionary decision of the judicial authority in the practice of issuing rulings." This issue is of major importance not only for the attribution of the features in terms of the object, but also the subject. Given that

[15] Ref. no. III KK 196/16, OSP 2018, No. 3, item 26.

this misdemeanour is intentional and that the legislator has not provided for its unintentional counterpart, an error as to the quantitative feature may lead to a lack of liability in general. Therefore, it seems that the understanding of the analysed feature should be sought not so much in grammatical interpretation, but in the context of the object of protection and teleological interpretation. Considering that the presented regulation safeguards life and health, it can be assumed that the feature is fulfilled if the perpetrator causes a state of danger to an unspecified number of people, a wider group.[16] In practice, however, this regulation may present difficulties. Secondly, the introduction of the discussed qualified type has caused problems in determining the relationship with the offence criminalised under Article 165(1)(1) of the Penal Code, which will be discussed later.

The misdemeanour described in Article 161 is punishable by imprisonment from 3 months to 5 years with regard to the basic type, while in the qualified type by imprisonment from 1 to 10 years.

The Polish Penal Code also provides for criminal liability arising from the exposure of health to the threat of its loss, as a result of behaviour manifested by causing an epidemiological threat or the spread of an infectious disease or an animal or plant disease (Article 165(1)(1) of the Penal Code). It is a misdemeanour against public safety, and the individually protected legal goods are life, health of many people and property of great magnitude. The resulting danger should be real and not abstract[17] [Stefański 2013, 205]. It is worth noting, however, that this danger does not have to be immediate [Marek 2000, 464]. The perpetrator should by their conduct cause the spread of an infectious disease or an animal or plant disease. Among the features, there is also a criminalised causing of an epidemiological threat, which may be defined as a state of increased and relatively permanent threat to public safety, in the form of epidemic outbreaks or epidemics, caused by at least an unintentional human act or omission [Czechowicz 2023, 44].

The regulations in force in the Polish Penal Code relating to the protection of human life and health against the spread of infectious diseases cover a broad spectrum of criminalisation. However, it may be noted that when constructing the provisions of the Penal Code related to the title issue, the Polish legislator did not fully think through the substance of Article 161 of the Penal Code with the amendments that were introduced in 2020.

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[16] Such views in the context of bringing about a catastrophe in communications were already presented under the 1969 Criminal Code. Indeed, in its judgment of 20 June 1972 (ref. no. V KRN 209/72, OSNKW 1972, No. 10, item 158), the Supreme Court explained that "it must therefore be an event of this kind, which [...] causes damage that has the characteristics of universality, that is, in size and scope unforeseeable."

[17] See e.g.: judgement of the Court of Appeal in Szczecin of 11 October 2012, ref. no. II AKa 165/12, Lex no. 1237928.

In fact, one may notice many common features of the type from Article 165(1)(1) of the Penal Code with Article 161(3) of the Penal Code. Above all, both provisions refer to the exposure of a large number of people to the loss of health by creating a situation related to exposure to infection. Therefore, doubts may arise in legal practice regarding the legal classification of the act in question due to the unclear distinction between the two offences. The distinction between the two can be found in the feature "spreading". Linguistically, it means "to spread, to extend more widely and further, to increase in size, to expand, to increase, to intensify, to escalate" [Dubisz 2018, 684]. The literature explains that this term should be understood as "the uncontrolled spread of a disease entity." At the same time, it is argued that in order for this feature to be fulfilled, the mere threat of such a disease is not sufficient, but it must have already occurred (even if only in a few cases) for it to then "spread". It is therefore a certain process that can lead to the damage to people's health [Stefański 2004, 444]. It is added that "the threat to some extent must already have been updated" [Bogdan 2013, 453]. The issue is viewed similarly in case law. For example, the Court of Appeal in its judgment of 23 May 2014[18] considered that "spread" is the occurrence of a significant number of cases in short intervals'. Therefore, it can be concluded from these statements that the act described in Article 161(3) of the Penal Code would in a way precede the occurrence of the condition referred to in Article 165(1)(1) of the Penal Code. This is because the perpetrator first exposes a number of people to infection and then, when such an infection occurs, may further distribute the disease by spreading it. It would be possible to therefore resolve the concurrence of these offences by means of the rule of prior joint conviction (apparent concurrence). In this way the perpetrator would be punished for the offence stipulated in Article 165(1)(1) of the Penal Code. However, the application of this rule is based on the assumption that the act committed jointly by several people is characterised by a lower degree of social harmfulness in relation to the act for which the perpetrator is convicted on their own. The measure of this degree is to a certain extent the statutory penalty for these acts (in the case of an act committed jointly by several people, the penalty should be lighter). In the analysed relationship of offences, this rule is disturbed. The act specified in Article 161(3) of the Penal Code is punishable from one to 10 years, while the misdemeanour described in Article 165(1)(1) of the Penal Code is threatened with imprisonment from 6 months to 8 years – a lighter penalty. From a dogmatic point of view, the reduction in criminal-law assessments by means of the rule in question would be questionable. The incoherence between these provisions and the problems occurring against this background result from the lack of reflection of the drafters with regard to the coherence

[18] Ref. no. I ACa 1531/13, Lex no. 1477192.

of the Penal Code and the introduction of ad hoc and selective modifications. Apart from these doubts, it seems that the Polish legislator should generally rethink the further existence of Article 161 in the Penal Code. All the more so as it has little use in practice.[19]

3. THE MODEL OF CRIMINAL LAW GUARANTEES THE PROTECTION OF HUMAN LIFE AND HEALTH AGAINST THE SPREAD OF INFECTIOUS DISEASES IN THE CZECH PENAL CODE

At the beginning of the analysis of the current Czech Penal Code,[20] a remark should be made about the changes occurring in Czech criminal law in recent years. The Penal Code in the Czech Republic underwent transformations much later than in Poland. Until the end of 2009, the Czechoslovak Penal Code of 29 November 1961 remained in force, which had been amended several times over the years. It was not until 2009 that a new Penal Code was enacted, which entered into force on 1 January 2010 [Radecki 2009, 186-89]. This is also where the differences in the systematics of the law should be seen, as compared to the Polish Penal Code, its Czech counterpart was enacted almost 12 years later. It was this way for 8 years after Poland and the Czech Republic had joined the European Union, and several years after Poland and the Czech Republic had acceded to a number of multilateral international agreements (including human rights agreements and conventions). The Czech Penal Code of 2009 is therefore characterised by a more contemporary approach.

The Czech Penal Code has a relatively different structure in the special part, which is divided into Chapters (*Hlava*). There are two divisions in Chapter I, which will be useful for the analysis of the title issue. These are: Division 2 – Criminal Offences against Health and Division 3 – Criminal Offences Endangering Life or Health. In addition, for the analysis of the model of criminal law regulations against the spread of infectious diseases, Chapter VII, entitled 'Generally dangerous criminal acts', which is the Polish equivalent of crimes against public safety, remains relevant. It should also be noted that the structure of the Czech Penal Code is divided into paragraphs, as editorial units, where individual types of generic prohibited acts are described.

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[19] The number of crimes found between 1999 and 2020 ranges from 5 to 20 cases. Only in 2009 were 51 such crimes found. See more: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63436,Narazenie-na-chorobe-wywolana-wirusem-HIV-zakazna-lub-weneryczna-art-161.html [accessed: 20.05.2023].

[20] Zakon č. 40/2009 Sb., trestni zakonik.

The Czech Penal Code criminalises acts of bodily harm. These are: grievous bodily harm (§ 145 of the Czech Penal Code), bodily harm (§ 146 of the Czech Penal Code), grievous bodily harm out of negligence (§ 147 of the Czech Penal Code) and bodily harm through negligence (§ 148 of the Czech Penal Code). These are acts with criminal consequences. In order to be criminalised, the perpetrator's act of causing the victim to be infected with an infectious disease should result in the victim contracting a specific infectious disease. As a side note, it should be noted that the Czech Penal Code does not criminalise the *sui generis* offence of exposure to infection, as is the case in the Polish Penal Code (Article 161 of the Penal Code).

When analysing the indicated offences, it should be noted that the described types of prohibited acts are extensive and casuistic. In § 145 of the Czech Penal Code, the criminalised act consists in the intentional infliction of grievous bodily harm, as defined in § 122(2). It lists, for instance, mutilation, loss or substantial impairment of the ability to work, paralysis of a limb, loss or substantial impairment of sensory functions, damage to an important organ and long-term damage to health [Jelínek et al. 2016a, 548]. The basic type of offence in question in the Czech Penal Code is § 145(1), consisting of intentionally causing grievous bodily harm to another person, which is punishable by 3 to 10 years' imprisonment. It is worth noting that, in contrast to the Polish Penal Code, the Czech criminal law explicitly indicates the feature of intentionality in the types of prohibited acts with this subjective side. Also, in the Polish Penal Code, separate substantive types relating to a different subjective side are created by indicating the feature of unintentionality. The Czech Penal Code, on the other hand, contains the feature of negligence, which denotes an unintentional form of guilt (e.g. § 147 of the Czech Penal Code and § 148 of the Czech Penal Code).

The entire § 145 of the Czech Penal Code is one of those with elaborate features. Paragraph 2 indicates the various qualifying features, the fulfilment of which has the effect of aggravating the criminal law response. According to this provision, the perpetrator is liable to a term of imprisonment of between five and twelve years if they commit the act referred to in paragraph 1, including: on two or more individuals or out of a condemnable motive. These two circumstances may correspond to the title issue and the possibility of applying criminal liability to a perpetrator who intentionally causes infection by a biological pathogen to two or more people or to one person, but in connection with a condemnable motive, for example out of a desire for revenge. It is worth pointing out an interesting use of the feature, which is the counterpart of the Polish feature "many people", which has been formulated very precisely and therefore does not give rise to the same interpretative doubts as under national legislation. The measure under the Czech Penal Code should therefore be assessed positively. Another qualifying

feature is death. However, the number of injured people is not indicated. It can therefore be the death of one person, but also "two or more people". This leads to a broad criminalisation of the additional consequence which is an intentional-unintentional type. Thanks to this formulation, it is not necessary to distinguish another type of prohibited act of causing the death of multiple people. According to the wording of § 145(3) of the Czech Penal Code, the perpetrator faces a penalty of 8 to 16 years' imprisonment.

It is worth noting that the Czech Penal Code criminalises preparation to cause grievous bodily harm (§ 145(4) of the Czech Penal Code). This significantly broadens the scope of criminalisation, but evidentially proving the fulfilment of these features under the conditions of the title issue is extremely difficult to achieve on practical grounds. There can be far-reaching doubts as to whether a person who is HIV-positive and plans to infect another person can be held responsible for preparation. Even the establishment of such an intention does not result in the fulfilment of the features of preparation, as it is not possible *in abstracto* to determine whether this virus is likely to cause a particular person grievous harm. A similar situation arises in the case of making preparations to infect another person through the possession of a biological pathogenic agent e.g. in a test tube.

The Czech criminal law also distinguishes the type of prohibited act consisting in grievous bodily harm done as a result of negligence. In Czech criminal law, negligence is understood as the perpetrator's failure to exercise due care to cause an unintended criminal consequence, which is assessed through the prism of the culpability of the "average person" [Navotny, Vanduchova, Šámal, et. al. 2010, 234]. This is another difference from the Polish Penal Code, in which such a feature does not appear. In the Polish Penal Code, there is an unintentional form of causing grievous bodily harm (Article 156(2) of the Penal Code). In contrast, in the Czech Criminal Act of 2009, it is a feature that must be fulfilled in order for the perpetrator to incur criminal liability.

The Czech Penal Code also criminalises bodily harm (§ 146 of the Czech Penal Code). This act is punishable by 6 months to 3 years of imprisonment. Interestingly, this act has a qualified type, which consists in the additional consequence of grievous bodily harm. The perpetrator is then punishable by 2 to 8 years' imprisonment. The Czech legislator uses the same terms referring to causing grievous bodily harm [Jelínek et al. 2016b, 179]. Hence, two situations must be distinguished. The first was pointed out when discussing § 145 of the Czech Penal Code – the perpetrator causing a specific infectious disease and causing grievous bodily harm. The second is more complex, as in order for the perpetrator to be liable under § 146 of the Czech Penal Code, the disease should first cause bodily harm and then cause a condition in a particular victim that qualifies for the higher punishment under

this provision, which is that the disease will lead to grievous bodily harm. If, on the other hand, the final effect is the death of the victim as a result of this disease, then the perpetrator would be subject to criminal liability under § 146(4) of the Czech Penal Code, which provides for criminal liability for causing death as a result of the fulfilment of the features stipulated in § 146(1) of the Czech Penal Code.

4. MODEL OF CRIMINAL LAW GUARANTEES FOR THE PROTECTION OF HUMAN LIFE AND HEALTH AGAINST THE SPREAD OF INFECTIOUS DISEASES IN THE ITALIAN PENAL CODE

The Italian Penal Code (*Codice Penale Italiano*[21]) has been in force – after numerous amendments – since 1930 and consists of three books [Lattanzi and Lupo 2015, 3-5]. In terms of analysing the regulations adopted in Italy with regard to incurring criminal liability for acts related to the spread of infectious diseases, two titles of Book II of the Italian Penal Code will be relevant: Title 6, which describes offences against public security, and Title 12, which contains types of offences against a person.

The discussed generic types of offences stipulated in the Italian Penal Code prima facie suggest an assessment that they more comprehensively address the issue of countering the spread of infectious diseases than in the Czech criminal law. In contrast to the Czech law, the Italian Penal Code criminalises causing an epidemic. It is a general offence with criminal consequences. The criminalised offence consists of the spread of biological pathogens (referred to as "pathogenic germs"), with the consequence of causing an epidemic. For this act, the Italian Penal Code provides for life imprisonment. The same penalty is imposed if at least one person dies as a result of the resulting epidemic. In addition, in the event of a conviction for an offence stipulated in Article 438 of the Italian Penal Code, the additional penalty provided for under Article 448 of the Italian Penal Code is publication of the judgment. Compared to Article 165(1)(1) of the Penal Code, the criminal sanction provided for in Italian criminal law must be assessed as severe.

The regulation contained in Article 452 of the Italian Penal Code, which provides for the modification of the punishment for offences against public health, should also be considered interesting, from the perspective of the discussed issue. It should be noted that the Italian Penal Code distinguishes this collective legal good, which is not distinguished by the Polish and Czech Penal Codes. According to this provision, if the perpetrator of the act defined in Article 438 of the Italian Penal Code commits it

[21] Hereafter: Italian Penal Code.

due to negligence, they shall be punished by 1 to 5 years of imprisonment. As in the analysis of the Czech criminal law regulations, it should be noted that in the Italian criminal law doctrine, negligence is understood in the same way as in the Czech doctrine or in the Polish normative comprehensive theory of guilt [Castronuovo 2009, 32-35].

The Italian Penal Code also criminalises behaviour resulting in bodily harm (Article 582 of the Italian Penal Code). This act is punishable by 3 months to 4 years' imprisonment. The penalty is aggravated as a result of the occurrence of the qualifying features set out in Article 583 of the Italian Penal Code. This provision allows for a sentence of 3 to 7 years' imprisonment if the consequence of the harm caused is the contracting of a life-threatening disease. The second situation envisaged by this provision allows for the imposition of a sentence of 6 to 12 years' imprisonment if the consequence of the act referred to in Article 582 of the Italian Penal Code is the contracting of an incurable or probably incurable disease, which is established by a respective expert medical opinion. If, on the other hand, the final consequence of contracting an infectious disease is the death of a human being, then, on the basis of Article 584 of the Italian Penal Code, the perpetrator faces a penalty of 10 to 18 years' imprisonment.

The Italian model of regulations is based on a smaller number of types of offences than in the Czech legislation. It can be pointed out that it is more similar to the Polish regulations, but with a higher statutory punishment. Of note is the criminalisation of acts *stricte* related to the spread of infectious diseases, such as causing an epidemic. In addition, Italian legislation provides for features defining the consequences of contracting a disease, which is largely ignored in Czech law.

5. CONCLUSIONS AND *DE LEGE FERENDA* PROPOSALS FOR CHANGES IN THE NATIONAL REGULATIONS OF THE PENAL CODE ON THE BASIS OF THE PRESENTED SOLUTIONS OF SELECTED EUROPEAN COUNTRIES

There is no doubt that human life and health are the most valuable legal goods, also protected by criminal law. They may be threatened or damaged as a result of infection with an infectious disease. Legislative actions are therefore taken at both international and national levels to prevent and combat such diseases. This is mainly achieved through administrative law regulations, but due to the importance of these goods, criminal law instruments are also used. The consequence of the perpetrator's conduct may be either to endanger the life or health of one person or a larger group of people, or to cause damage to these goods. Therefore, the laws of individual states criminalise separately acts of endangering and causing damage

to these goods. However, different ways of incriminating them are used. *Sui generis* types are introduced, or such acts are variants of the offence of damage to health. The degree of casuistry in the description of these acts also varies. The statutory penalties for these offences are also different. Under Polish criminal law, such acts are placed in the chapter of offences against life and health (Chapter XIX of the Penal Code) and in the chapter of offences against public safety (Chapter XX of the Penal Code). This distinction suggests separate protection of human health and life as an individual good and collectively. However, this distinction was disturbed by the introduction, following the 2020 amendment, of the qualified type of misdemeanour criminalised in Article 161 of the Penal Code, i.e. exposure to infection of multiple persons (§ 3). This has led to doubts as to the relationship of this provision with Article 165(1)(1) of the Penal Code, which provides for, among other things, causing an epidemiological threat or the spread of an infectious disease. Additionally, the mentioned Article 161 also raises other controversies, e.g. with regard to its excessive casuistry (e.g. isolating the HIV virus), as well as its subjective scope. It is therefore arguable that such an extensive regulation is necessary. It is worth considering the introduction of more synthetic provisions, e.g. an appropriate modification of Article 160 of the Penal Code, which criminalises the misdemeanour of exposing persons to a direct risk of losing their life or serious injury to health. Perhaps it would be sufficient to supplement this provision with an additional paragraph dedicated to causing such a danger (not necessarily direct and grave) through exposure of a person to an infectious disease. The effect of such a move would also be to eliminate the problems of establishing the relationship with Article 165(1)(1) of the Penal Code. This is because Article 161(3) of the Penal Code, which appears to be redundant and its introduction dictated by an immediate need related to the SarS-CoV-2 pandemic, would be deregulated. Protection of health in supra-individual terms would therefore follow by means of Article 165(1)(1) of the Penal Code, which, due to its placement in the chapter describing offences against public safety, seems more appropriate in this regard. The repeal of Article 161 of the Penal Code would also remove other doubts, e.g. concerning a subject who may be the perpetrator of this act and the relationship of this provision to Article 160 of the Penal Code. It also appears that such a move would not prejudice the protection of human health and life that would be provided under the other provisions mentioned.

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THE ABSOLUTE CAPACITY TO BE KILLED AND THE RIGHT TO LIFE AS EXEMPLIFIED BY THE EUROPEAN CONVENTION

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Abstract. The state remains the main arena of human existence and action. Woven from a dense network of political, economic, social and cultural connections, it dictates the conditions in which people are born, function and die. The decision whether individuals or their entire groups will live or die remains at the discretion of the *arcana imperii*. One of its manifestations is the use of the death penalty. The right to life, being the most important of the numerous catalogue of human rights, represents an institutional attempt to limit the powers of the state in this regard, an attempt which he has proven to be successful in the European space.

Keywords: absolute capacity to be killed, the right to life, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

INTRODUCTION

The book "Homo Sacer, Sovereign Power and Bare Life"[1] by Gorgio Agamben opens with a terminological distinction between *zoē* and *bios*, at the very beginning emphasizing and focusing reader's thoughts on the ambiguity of the concept of *life*. Created as early as by the Greek civilization, they have laid the foundations for the understanding of a system generated by mutual relations between the state, its tools and individuals. If *zoē* is to be perceived as a fundamental dimension of life, more specifically life itself, life as such, then *bios* is to be viewed as its derivative – typical of a given person's, or persons' model of life on the biological level – that can typify and classify, organizing individuals in this or other manner in line with the exigencies of a situation and development stage. *Zoē* is as much as *bios* an autonomous value. Such distinction does not disqualify one value against the other; at least it is assumed not to hierarchize them. Instead, through a linguistic attempt to dissociate or contrast, it gives salience to their correlative functions. Life may go on for life itself. Tying life so understood with *bios* is

[1] See Agamben 2008.

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nothing else than navigating it to a specific destination, making it a process aiming at the implementation of more or less complex set of objectives that may, often radically, alter their quality, if not their essence. This happens so, perhaps not with an immediate effect, or unfolds not instantaneously, since the upsides are more visible than downsides when *bios* assumes the shape of or crystalizes into the state. Then, it is *zoē* that in this ratio seems to be a constant, regardless of any changes that accompany the man, to become and preserve nature which is subject to biological laws with their invariability and inevitability. It is difficult to see political *bios* as *constans* since it grows on too many variables (e.g. economic, social, cultural) that undergo an intensified fluctuation, with its attaching laws falling subject to commensurate fluctuations. One thing, however, seems certain. Since *bios* feeds on life, it will generate an increasingly complex politics that will address the question of nothing else but its effective i.e. good cultivation and development, not necessarily from the perspective of *zoē*. The expansion of state structures in the process of historical development, primarily in the sense of the extension of competences makes the character of feedback between *zoē* and *bios* evolve for the latter to become not so much secondary, ectypal and of value to the former as dominant, but still not primary, and parasitic till the lines between them become blurred. The change in the nature of relationship results in rejecting the concepts of Greek democracy as they fall useless no longer reflecting the root of the matter, and in replacing them with the concepts from Latin culture. Extreme politicization of life leads to its defenselessness (becoming bare), delimiting in their mutual relationship the stage when it is not the man that creates politics, but politics that creates the man (*homo sacer*). Totalization of statehood does not exclude the application of maverick practices that make people live in the conviction that they are preserving their independence of the state and of others, which may in general render it likely for the bare life to subsume them. In every epoch and in line with its existing conditions, life undertakes actions that allow freeing from the shadow of statehood structures and escaping the entrapment in the indistinguishability through the manifestation of one's autonomy by applying to this end measures such as human rights that politics relies upon.

1. BIOPOLITICS AND LAW

One of the central tools of biopolitics is law in its objective sense understood as a set of norms governing selected areas of reality. It coalesces with the idea of state to such an extent that what the science of law does is not separate but combine the concepts (e.g. the theory of state and law) so as to underline their inherent relationship to such an extent that parodying

Roman formula of marriage, one might say: where you – the state – a e, there will also I – the law – be. In fact, law sanctions the essence of the state construct which nothing else but sovereignty is. It is through sanction that a sovereign allows law to operate in its structures, bringing it out of the grey sphere as an unsatisfying incomplete construct in the form of traditions, customs, morality or religion. Law builds the framework and foundations for the state, thereby organizing bare life. Yet it is a sovereign that decides what is right and what is wrong (behaviors socially desirable and non-desirable from the state's perspective) for the bare life, rewarding for the former and punishing for the latter, also in the form of lawmaking. The most essential in this context, from the perspective of bare life, remains the sovereign's competence to decide on its life or death in reliance upon law mechanisms. In a broader sense, it may attach to all situations of disposing of life in the interest of or for the reasons concerning the state, e.g. making sacrificial offerings to gods by the Aztecs, drafting recruits in armed conflicts or the duty to perform work potentially hazardous due to any danger or natural disaster. Nevertheless, in a stricter sense, it is associated with the admissibility of death penalty, sentencing and execution. Philosophers, sociologists, religion and culture anthropologists, who set and maintain current trend in this area, share the opinion that you cannot call the blood dripping from scaffold as justice (you should denote it more precisely: administration of justice). Indeed, an expert in law or a law practitioner can understand that sanctioning death penalty evokes so prevalent and growing an abomination. Lawyer, however, cannot disregard the fact that the law in this very case is not made merely to blindfold oneself and use sword in the name and interest of a sovereign. On the contrary, its duty is to not let the situation happen when the Queen of Hearts in Alice in Wonderland irreversibly eliminates everybody for any cause with a succinct order: "Behead her or him" [Carroll 2015]. If the king embodies the state as one of the most famous and historical *bon mots* reads, then by introducing substantive and procedural restrictions to capital punishment sentencing, the law does nothing else but also control the absolutism of its phantom body [Sowa 2011] in this respect.

2. THE STATE'S RIGHT TO PUNISH

Ius puniendi has evolved together with the concept of sovereignty and with a set of its constituent prerogatives accordingly. It could even be argued that the transformation of the sovereign's image, not of a type of status, but of the scope of this status or subjectivity has triggered changes in its right to punish. Paradoxically, given the nature of life, only at the end of times which are to bring together a lion and a lamb, a child and a cobra, will the sovereign be deprived of the attribute of prosecution

and punishment of the ones that do not abide by its law, for the state will lose *raison d'etre* since we will reach an originally desired effect: order without law, and harmony in place of chaos. Regardless of how and when such life reaches said stage, one cannot escape noting cultural orderliness and relaxation of law on punishment, its constant civilization-driven polishing which had the iron maiden sent to the museum of forensic science and the executioner sent on retirement. This, understandably, does not look likewise everywhere. Here, it seems very unlikely to compare totalitarian China and any West European country, where the former sees human rights as a fantasy of the latter and as the evidence of political expansion against each other through (an alleged) appropriation of sovereignty that consists in interfering with the other country's home affairs. Departing, however, far enough from the humanitarianism of the Hammurabi Code manifested in its promulgation, hardly anyone will seriously question the right to punish, including finally, at least in extreme situations with death, as long as they love their life. Alongside *ius puniendi*, which went through different stages, assuming manifold forms, applying a wide array of strategies, not exclusive of such which from the perspective of currently applicable systems of law are perceived as degenerate and hence unacceptable, there were and are situations when the state kills people, whether citizens or foreigners, not relying on any rules of law, acting beyond its limits, beyond its legitimacy. In such instances, resort is had to establishing new social categories that exhibit and justify uselessness or social harm, hence unfavourable, if not hostile existence of groups of people. In communist countries, it was, for instance, the people's enemy. If a sovereign is methodical and always needs to have legal grounds for its actions, it enacts law such as the Nuremberg Laws, and then what guarantees survival is the criterion raised by law, e.g. Aryan blood purity back to the seventh generation. In the occupied countries, including Poland, German occupier protected life that was in demand by granting it a special status and including its compatriots (*Volksdeutch*) in the nation. In the USA, homeland to eugenics, the life burdened with genetic disorders, specifically with mental deficiency, was viewed as not worth living. Life in all of such types of and in similar situations was or may not only be deemed redundant or unnecessary, but also requires elimination, extermination as something, not as somebody because it is not somebody, as it does not qualify as a prey for dragon for the simple reason that it has lost the attribute that the monster desires. Life which then becomes absolutely sensitive and defenseless to the extreme cannot defend itself with law, since it is no longer applicable. Man in such situations is not punished but eliminated. *Ius puniendi* does not apply to a sacred man, which additionally accentuates an exceptional bareness of his life. From the perspective of law, *homo sacer*, is even no longer entitled to death penalty; nor is he subject to law whatsoever. Today, there is one exception

– human rights – created and subsidiarily implemented by international community, relativized to an individual, not to this or that status, in it, being or not a national of a given country. Notwithstanding the fact that law comes to the forefront in the assessment of a situation of bare life, the exclusion from the ranks of Leviathan and by virtue of its decision, albeit not necessarily within the meaning of law or with its contravention, it does have a broader context since it pertains to every sphere i.e. politics, economy, culture, to name the most essential, in which the state and an individual operate, as well as to their mutual relation. Convicted without sentence, deprived of everything, in a situation of a permanent risk of death, the man becomes a living nonbeing marginalized to the dimension of ghetto in every possible sense and committed finally to being consumed and digested by *anus mundi* [Kielar 2004], regardless of the form it assumes, whether it be gas chambers of KL Sachsenhausen or ditches of Katyń.

3. BIOPOLITICAL PARADIGM OF THE CAMP AND HUMAN RIGHTS

Depersonalization, objectification and consequently ordination of *homini sacer* from the life of other members of community, which resulted and will result at least in isolation and probably in less or more violent extermination preceded or not by biological exploitation, has affected and, as there is nothing more vicious than the circle of history, will potentially affect not only those who have tied citizenship knot with a given country (Turkish Ormians), but also nationals of foreign countries (Poles allegedly standing in the German nationals' way of developing their *lebensraum*). The existence or exercise of sovereignty over specific category of people was not and is not a priority to recognise any life as not worth living. The life was and is necessary to be sustained in the condition short of kosherness and to be exterminated. There may be a multitude of reasons, which may either repeat or give way to new ones, for seeing man's life as unworthy and embedding it within the framework of a biopolitical paradigm of camp. What painful experiences of millions of people, mostly of those who suffered Gehenna of the World War II, have shown is that it is no coincidence that their catalogue corresponds with the anti-discriminatory clauses on the exercise of human rights of the contemporarily passed international acts of law on human rights protection. They consist of two parts: specific and general. Among standard prerequisites of a diverse prohibited treatment of specific nature, there are: sex, race, colour, language, religion, political and other opinions, nationality or social background, membership of a national minority, property, birth or disability.[2] Majority of binding or non-binding

[2] E.g. Convention on the Rights of the Child of 1989, Article 2(1).

international acts either reflects the foregoing formula or modifies it in compliance with the subject-matter of regulation.[3] The Universal Declaration of Human Rights (UDHR) of 1948 stands out as an exception. Here, the anti-discrimination clause was extended by the prohibition of distinquishing people in reliance upon political, legal or international status, the territory (country, area) they reside in, and current degree of sovereignty (Article 2). The UDHR is interesting inasmuch as it acknowledges not only the criteria of discrimination based on people's individual features, but also the ones that result from the current but multifactorial situation of a person that an individual recognizes or would like to recognize as a sovereign and a person which cannot exercise sovereign powers of the state or exercises them to a limited extent (occupied territories, colonies, mandate territories, failed states). Furthermore, international acts of law on human rights of general type supplement prerequisites, in particular the aggregate one which by expressing awareness of the states' extraordinary ingenuity that propels *perpetuum mobile* of persecutions regardless of times and circumstances comes down to the prohibition of discrimination for any other cause than mentioned so far, by extension to its admissibility in generality.[4] Anti-discrimination clauses strengthen other types of stipulated provisions,[5] including such that set forth a specific jurisdiction concept[6] and allow or not limitations in the exercise of human rights.[7] Alternatively, they permit an extension of their application in substantive aspect[8] and provide for the sets of guarantees of a formal type.[9]

4. AGAINST DISCRIMINATION

Prohibition of discrimination and other protection mechanisms are linked to the catalogue of rights and freedoms differing in respect of the objectives pursued by the states devising a specific international act of law. International agreements show significant similarities in this regard, and it is merely the context of a given act of law that allows their differentiation

[3] E.g. International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, Article II.

[4] E.g. The American Convention on Human Rights of 1969, Article1(1).

[5] In other sources of international law such mechanisms do not exist (e.g. non-binding resolutions of international organizations), or they are decoded otherwise (e.g. custom). Thus, I focus on the treaty law.

[6] E.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Article 2.

[7] E.g. The Convention on Cybercrime of 2001, Article 15(2).

[8] E.g. The European Social Charter of 1961, Article 19(6).

[9] E.g. International Convention on the Elimination of All Forms of Discrimination of 1966, Article 11-4.

and an in-depth qualification. In the International Covenant on Civil and Political Rights of 1966 (Article 6), it is a human right of the first generation. However, in its twin International Covenant on Economic, Social and Cultural Rights of the same year, it holds a status of a human right of the next generation (Article 11). Under the construction of a political right, life is safeguarded against its arbitrary deprivation. On a social dimension, protection of life consists in ensuring that it reaches an adequate level. As history has demonstrably shown, depriving man of not only the first, but also of the second type of safeguards may render the life bare. This may also be very well exemplified by guillotining political enemies during the French Revolution of 1789, causing death of allied soldiers in Japanese prison camps in the World War II by meagre food rations, or even "sentencing" people to death by starvation practised in German extermination camps for crimes against their rules.[10] This is very well reflected by the Convention on the Prevention and Punishment for the Crime of Genocide (1948) which uses this concept to denote murder of the group members and a deliberate creation of life conditions meant to cause their entire or partial physical deterioration (Article II a and c). A representative example of the application of said mechanism is the politics of extermination pursued by Nazi Germany against subhumans (a possible synonym of *homines sacri*, since man is seen as "no good" for different reasons), primarily Jews. There are also situations when not only for political reasons, but also concurrently due to an adopted economic policy, the whole nation starts living a bare life, either in labor camps or dying of hunger in the aftermath of an artificially provoked famine, respectively, e.g. Ukrainian *hlodomor* as repression for no social consent to the introduction of communism. Against this backdrop, quite different, at least *prima facie*, seems to be the case of death of hunger of not strictly determined up till now, yet even in its lowest dimension, of an overwhelming number of the Chinese due to the secondary effect of the great leap forward. In this situation, a sovereign did not act under *ius puniendi.* Also, no one was found different, nor worse. Yet, the scale of experiment affected the whole country and its effects were suffered by the whole population, with a deliberately withheld for years and ineffective rescue operation. Undoubtedly, its life became bare. Perhaps the camp reality may manifest itself in this manner, not exclusively in the classic version of the Gulag archipelago. Most certainly, no general or master treaty on human rights will fall short of an explicitly established right to life, since it has been a right of the rights or a primeval right because before it came into existence life had already been there. Human rights provided for by international acts of law of specialized nature will to a lesser or greater degree evoke its emanation. The right to life is, in consequence, ahead of other

[10] For instance, Father Maksymilian Maria Kolbe died in this way.

human rights, a foundation, upon which all the remaining rights build up to finally assist in this or that way in its retention (e.g. the right to food[11]) or maintenance of its quality, style (e.g. the right to access cultural goods[12]). In the European Convention,[13] such nature of the right to life is expressed through its position. It opens in Article 2 a catalogue of conventional rights and of those which transpire from Additional Protocols. Despite their formal equality, it is the essence, nature and functions of the right to life that affect the relations with other rights and freedoms, including their construction and context of application. In case law, Article 2 belongs to the most fundamental democratic values of communities of the Member States jointly forming the Council of Europe.[14] Accordingly, all exceptions to the right to life must be interpreted narrowly.[15] However, actions for the benefit of life protection within the meaning of Article 2 are to be feasible and effective.[16] Specific status of the right to life in a treaty confirms that it is inadmissible for the State to evade the performance of pertinent obligations even during the war or other social risks threatening the nation's life,[17]e.g. flu epidemic in Hongkong.

5. CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

European Convention is an agreement on human rights of the first generation. The right to life is distinguished from other rights and freedoms envisaged by the Convention in the context of the status of political and civil rights. Its overriding priority is to protect life against sovereign's arbitrariness and abuse of power, as well as to retain clearly delimited borderlines

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[11] E.g. Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights of 1988, Article 12.

[12] Ibid., Article 14.

[13] In view of quite a good number of international treaties laying down the right to life, I have limited my study to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention). Not only does the rationale of my choice transpire from the effectiveness of the system, but also from political and economic experience of its several members (invasions and appropriation of other countries' sovereignty through colonialism), which offers clear overview of subsequent types of clauses applied in the human rights protection praxis. Furthermore, it is unfortunately from the cultural circles of said countries that the world's largest totalitarisms have derived so far.

[14] E.g. ECHR, *Lopes de Sousa Fernandes v Portugal*, 56080/13, judgment of 20 September 2017, § 164.

[15] E.g. ECHR, *Bubbins v the UK*, 50196/99, judgment of 17 March 2005, § 134.

[16] E.g. ECHR, *Mocanu and others v Romania*, 10865/09, judgment of 17 September 2014, § 312.

[17] Article 15(2) European Convention. See, e.g. ECHR, *Velikova v Bulgaria*, 41488/98, judgment, § 68.

of exercising *ius puniendi* for the man not to be brought down to the level of *homo sacer* in this very aspect. However, broader literal understanding of the right to life encourages more freedom in the interpretation. The first sentence of Article 2(2) provides that every man's life is subject to protection by virtue of law. Not only does the concept of the right to life encompass a negative obligation to refrain from a deliberate and unlawful deprivation of life[18] (e.g. murdering political enemies in the torture chambers of secret police), but also a positive obligation to undertake measures aimed at its continuation[19] (e.g. implementing programs to prevent cardiovascular diseases). Protection of life following from the first sentence of Article 2(1) requires, in the first instance, that the State devise institutional, legal, administrative frameworks oriented towards prevention, prosecution and punishment of crimes against human life,[20] which primarily comes down to making good law, including criminal law, and ensuring efficient and effective administration of justice in its broadest sense. Even if contemporary democracies, upon going through the current stage of media festival, pupate entirely into one ideology system or end up as anarchies, then human rights and shaping criminal regimes in line with the right to life do remain their acquis. Law must clearly and precisely enough define what is deemed and construed as crime against life, premises of liability for specific types of prohibited acts and the level of penalty.[21] If it is to substantively fulfil the assigned functions of preventing offences against life, it must be accessible, legible and severe enough. In the situations of a concrete enough threat of criminal nature to an individual's life caused by another person (not only the state official), it is the duty of state authorities to undertake operational measures for its protection.[22] It does not mean that the state has to penalize every conduct that may result in the loss of life, e.g. implementation of a general obligation to undertake an instant rescue operation and punishment for inaction.[23] There are no obstacles, and it is rather viewed as normal and justifiable to build legal systems to allow under circumstances, which are stipulated and already standard in the practice of criminal law, not only an exclusion of guilt or liability, but also an essentially balanced and rational use of and derogation from the application of the penalty mechanism. Granting amnesty to the convicted for murder does not amount to a breach of the Article 2.[24] Violations of international law, specifically crimes against

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[18] See e.g. ECHR, *Association X v the UK*, 7154/75, decision on admissibility of 12 July 1978.

[19] See e.g. ECHR, *Kılıç v Turkey*, 22492/93, judgment of 28 March 2000, § 62.

[20] ECHR, *Makaratzis v Greece*, 50385/99, judgment of 20 December 2004, § 57.

[21] On the concept of law: see e.g. ECHR *Sunday Times v the UK*, judgment of 26 April 1979.

[22] E.g. ECHR, *Osman v ZK*, 50385/99, judgment of 28 October 1998, § 115.

[23] European Commission of Human Rights (EComHR), *Hughes v the UK*, 11590/85, Decision on admissibility of 18 July1986.

[24] EComHR, *Dujardin v France*, 16734/90, decision on admissibility of 2 September1991.

humanity might fall subject to a different assessment. Civil liability may be found sufficient.[25] The state is not required to react to any type of a life threat.[26] It seems unlikely to foresee all risks or monitor all people's conducts unless we decide to introduce modern society surveillance technologies modelled on Chinese solutions that tap into new technologies and reject the idea of human rights in this or other respect. Meanwhile, the Member States of the Council of Europe interpret the right to life in its entirety and in line with the objective and subject-matter of the European Convention.[27] Public authorities may look to or have regard to established priorities and correspondingly to available funds. The obligation to act is to be met when the threat is real and direct.[28] Law is to set forth the principles on which an activity that threatens man's life may be carried out, whether it be the use of gun by the police,[29] or running the city waste dump.[30] Pending the interpretation of the right to life, there will arise problems that reflect pertinent questions not governed up till now or not sufficiently governed by domestic law.[31] These are abortion,[32] right to death[33] and euthanasia.[34] Viewing the right to life from a social perspective, as a human right

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[25] E.g. ECHR, *Calvelli and Ciglio v Italy*, 32967/96, judgment of 17 January 2002, § 53.

[26] E.g. EComHR, *Widmer v Switzerland*, 20527/92, decision on admissibility 10 February1993.

[27] E.g. ECHR, *Yaşa v Turkey*, 22495/93, judgment of 2 September 1998, § 64.

[28] E.g. ECHR, *Mastromatteo v Italy*, 37703/97, judgment of 24 October 2002, § 68.

[29] E.g. ECHR, *Nachova and others v Bulgaria*, 43577/98, judgment of 6 July 2005, § 96.

[30] E.g. ECHR, *Öneryıldız v Turkey*, 48939/99, judgment of 30 November 2004, § 73.

[31] Brief mention only due to excessively comprehensive material for the limits imposed on the text.

[32] Voluntary abortion under certain circumstances does not amount to a breach of Article 2. See e.g. EComHR, *H. v Norway*, 17004/90, decision on admissibility of 19 May1992; ECHR, *Boso v Italy*, 50490/99, decision on admissibility of 5 September 2002. Even in the case of an involuntary abortion, the Court resigned from determining whether *nasciturius* is a person (subject/an individual) within the meaning of the right to life and assessed the case from the perspective of a would-be mother's situation and protection of her rights. Taking also account of the whole case law, the manner such protection is granted points to the fact that the unborn are not protected within the meaning of Article 2 of the European Convention, since they are not separate individuals and thus they are not human beings. Hence it is not far from a consent to eugenic practices. See e.g. ECHR, *Vo v France*, 53924/00, judgment of 8 July 2004.

[33] The right to death as a counterweight or a flipside to the right to life does not exist in the European Convention. See: ECHR, *Pretty v the UK*, 2346/02, judgment of 29 April 2002.

[34] The incidents of depriving comatose people of their lives have been publicized by at least some media, which evokes fear if euthanasia will be used on a regular basis in this respect. The thing is, such people cannot freely express their will. Due to (as termed in case law) a high degree of complexity and the nature of the issue (moral, medical, legal questions), the states are given a wide leeway in this aspect. There are very few residual decisions (e.g. *Sanles Sanles v Spain*, 48335/99, decision on admissibility of 26 October 2000). In one judgment so far which sums up and gathers previous acquis of the European Convention control authorities on euthanasia, the Court examined the case from the angle of ensuring

of the second generation, mainly in the context of health protection, with hospitals not being so expensive that one might be better off dying[35] is another strand of interpretation.

6. PROTECTION OF LIFE IN SUBSTANTIVE RESPECT

The state's construction of a life protection system within the meaning of the European Convention should involve preventive measures. Provided that loss of life may result from any activity, whether public or other, prevention from life risks must correspond to the type of such risks and entail reasonable grounds in actual circumstances. Running activity, by definition, dangerous, in particular economic one must be first regulated, having regard to its specificity and the risk it poses to human life. It is necessary for the law to provide for every stage of undertaking a given type of activity, inclusive of the control and surveillance principles. Further, devised rules should be applied where effective and protective measures are to be implemented for the benefit of persons whose life is threatened by running a potentially hazardous activity. Public right to information on existing risk[36] is one of such preventive measures. If there is no relation between an alleged exposure to life risk and the facts, the state is under no obligation to act.[37] The approach is similar in the event of no factual and direct danger to human life or man's physical integrity.[38] Prevention is perceived as a broad

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procedural guaranties transpiring from Article 2 and did not find any breach. The judgment disappoints as it circumvents the essence of the problem. It is trite, showing that if remedies have been ensured, the state abides by its obligations. Such remedies are in the country, against which the complaint has been launched since the times of Napoleon. Conclusions are nothing but surprising, then. It is a pity that the Court assumed the axiom that another person may in fact express consent on behalf of an ill person in such a condition, and on such issue. Meanwhile, it may be agreed that an institution of the power of attorney might apply here even if it has already existed. Absence of any reaction to the fact that a multiday dying of hunger and dehydration may be called a good death is inconceivable. See: ECHR, *Lambert and others v France*, 46043/14, judgment of 5 June 2015. This case shows that bareness of life may not only underlie the state – individual relationship, but also exhibit horizontal nature.

35 A paraphrase of the poem "Born into this" by Charles Bukowski. The question is beyond this article research area. On that issue see Łasak 2013.

36 E.g. ECHR, *Öneryıldız v Turkey*, 48939/99, §§ 71 and 90.

37 In the event when nuclear weapons are tested and reports indicate that radiation has not reached the level dangerous to the soldier present in the proximity, however, not involved in the tests at any stage, the state is not held liable for leukemia his child, born after said tests, is diagnosed with. Otherwise, child's parents should be informed of an existing risk to its health and, probably, life or adequate steps towards child itself should be taken. ECHR, *L.C.B. v the UK*, 23413/94, judgment of 9 June 1998, §§ 36-41.

38 See e.g. ECHR, *Fadeyeva v Russia*, 55723/00, decision on admissibility of 16 October 2003; establishing wide enough sanitary sectors around smelter plants to protect local people

concept that also embraces the state's objectives in the area of public health protection such as prevention of smoking-related diseases, prevention of alcoholism, leaving here, however, a wide leeway.[39] Most often, however, this term pertains to the protection of a man from deprivation of life due to other person's crime, e.g. murder of a co-prisoner perpetrated by a prisoner[40] or suffocation of the detained due to incapacitation methods used by the police.[41] Prevention, also in this sense, embraces the whole community, which may require an application of rational and effective penal policy.[42] Setting preventive mechanisms in motion is to be effected with the observance of human rights and proportionality of costs incurred by public authorities.[43] Yet the selection and financing of priorities cannot result in the refusal or withholding of assistance in a situation of a real threat to life.[44] Inaction of judicial authorities in the implementation of the rights to life through the application of preventive measures is very well observed when the state through the use of all possible methods fights against, connives or gives tacit consent to the fight against those who it sees as unwelcome or undesired for the system due to dissimilar politics or publicizing inconvenient truth. Hence, inter alia, the life of many journalists in Ukraine under the rule of the president Kuczma, as well as that of the persons of Kurdish origin peacefully protesting against politics in the south-eastern region of Turkey has become bare. Such situations usually lead to the ascertainment of negligence in the protection of life, and thereby to the breach of Article 2 in substantive aspect.[45]

7. PROTECTION OF LIFE IN PROCEDURAL RESPECT

Protection of life in substantive respect is supplemented in the European Convention with guaranties of procedural nature developed to establish and explain reasons for and circumstances of every incident of people's death

from pollution.

[39] See e.g. EComHR, *Wöckel v Germany*, 32165/96, decision on admissibility of 16 April 1998; *Barrett v the UK*, 30402/96, decision on admissibility of 9 April 1997.

[40] ECHR, *Paul and Audrey Edwards v the UK*, 46477/99, judgment of 14 March 2002.

[41] ECHR, *Saoud v France*, 9375/02, judgment of 9 October 2007.

[42] Example: careful and balanced application of a parole for a person concerned to not commit further offences, not excluding crimes against life. See ECHR, *Mastromatteo v Italy*, 37703/97.

[43] See e.g. ECHR, *Branko Tomašić v Croatia*, 46598/06, judgment of 15 January 2009, § 51; *Mikayil Mammadov v Azerbaijan*, 4762/05, 17 December 2009, § 99.

[44] ECHR, *Kontrová v Slovakia*, 7510/04, judgment of 31 May 2007, the case of a mentally ill man, which police had knowledge of. He killed his own children and then himself.

[45] ECHR, *Gongadze v Ukraine*, 34056/02, judgment of 8 November 2005, §§ 169 and 180; *Akkoç v Turkey*, 22947-8/93, judgment of 10 October 2000, § 94.

insofar as it follows from any reasons other than natural ones. It is the only avenue to take to effectively ensure the right to life to everybody who is subject to the state's jurisdiction. Therefore, provisions that envisage relevant procedures, which will allow to examine what in fact has taken place in a given case, to find the perpetrator and eventually to hold him responsible, must complement the part of law that sets forth substantive grounds for human life protection. Methodology and type of said procedure to be set in motion should correspond with the nature of death circumstances. It is not always required that penal proceedings be instituted. Nonetheless, when it comes to a homicide, formal investigation proceeding is required as this act invariably leads to criminal responsibility.[46] Furthermore, in some cases, especially when it comes to the use of force which causes death, it may be started with the knowledge of the state officials.[47] This principle is applied to all other types of deaths, also to situations when death occurs as a result of a hazardous activity, or in the aftermath of negligence on the part of public authorities. When it has been established that they did nothing whatsoever to prevent life risk and that the indictment was not brought against the guilty of omissions, then potentially, such situation is deemed as breach of Article 2 regardless of other legal measures, whether civil, administrative or disciplinary, used by the parties concerned.[48] The obligation of the enforcement of procedural aspect of the right to life also arises when death has not been ascertained or is unascertainable as is often the case with missing persons, when a person was detained by the police or by other state officials and since that time their fate remains unknown.[49] Article 2, so construed, is to secure both an effective implementation of domestic law pertinent to the right to life and performance of duties by competent entities.[50] The state is not discharged from holding investigation proceedings due to exceptional circumstances which justify introducing the state of emergency.[51] Even when the European Convention does not allow evading the protection of the right to life. The duty to act arises at the moment knowledge is acquired on the case that requires examination. The mode of proceeding largely depends on the state's legal tradition and the type of act. It must, however, from the perspective of strict compliance with Article 2, satisfy the prerequisite of effectiveness.[52] Effective proceeding is

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[46] ECHR, *Caraher v the UK*, 24520/94, decision on admissibility of 10 November 2000.

[47] ECHR, *McCann and others v the UK*, judgment of 27 September 1995, §§ 157-64.

[48] ECHR, *Öneryıldız v Turkey*, 48939/99, §§ 92-3.

[49] Turkey was found guilty of a violation of this obligation after its attack on Northern Cyprus in 1974 due to its failure to investigate the case of nearly 1500 missing civilians. ECHR, Cyprus v Turkey, 25781/94, judgment of 10 May 2001, § 132.

[50] See e.g. ECHR, *Anguelova v Bulgaria*, 38361/97, judgment of 13 June 2002, § 137.

[51] See e.g. ECHR, *Tanrikulu v Turkey*, 23763/94, judgment of 8 July1999, § 110.

[52] E.g. ECHR, *Nachova and others v Bulgaria*, 43577/98, § 111.

run by independent and sovereign, within the meaning of law and practice, institutions,[53] in reasonable time,[54] and ensures that factual circumstances of death are established, perpetrator found and prospective decision-making triggered in respect of punishing said perpetrator.[55] The necessity of the implementation of the right to life in procedural dimension is very well illustrated by the cases where political conflicts constitute the very foundation, as in the case of Northern Ireland or Turkey.[56] The absence of an objective examination and explanation of matters of this type was or is conducive to the escalation of tension and inability to break the vicious circle of the use of force, because notwithstanding the exclusivity of the State to use duress or coercive measures (the use of force), the second party, unwilling to be treated as *homini sacer*, reacts likewise.

8. THE CATALOGUE OF EXCEPTIONS

Life protection as set forth in the European Convention is of no absolute nature. Under Article 2, human life may be taken in four ways. The fact that the catalogue of exceptions is deemed closed, every one of them with attaching conditions of the use of force, does not change the crux of the matter, namely, that it is admissible in general. Deprivation of life under Article 2(1) pertains to the cases of enforcing the conviction for an offence statutorily punishable by death. Death penalty may be as much a sovereign's decision as such was its intention in making the law in the highest hierarchically form. Theoretically, every crime might be punishable by death penalty. In the aftermath of the development of the criminal law, which is undoubtedly under the influence of the law that safeguards human rights, it is assumed that the highest of admissible sanctions should pertain in compliance with the principle of proportionality to the most serious ones.[57] The society should be aware that specific acts are punishable by death, which means that law in this respect must be accessible and understandable.[58] In view of the risk that the administration of justice might be extended to pursue unlawful aims and thereby death penalty used instrumentally, it is argued that adjudication in this respect belongs exclusively to courts, institutions presumed to be impartial and independent in accordance with Article 6

[53] See e.g. ECHR, *Kelly and others v the UK*, 30045/96, judgment of 4 May 2001, §§ 95 and 114.
[54] See e.g. ECHR, *Armani da Silva v Z the UK K*, 5878/08, judgment of 30 March 2016, § 237.
[55] See e.g. ECHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, 47848/08, judgment of 17 July 2014, § 145.
[56] See e.g. ECHR, *Hugh Jordan v the UK*, 24746/94, judgment of 4 May 2001; *Kaya and others v Turkey*, 56370/00, judgment of 20 November 2007.
[57] ECHR, *Soering v the UK*, 14038/88, judgment of 7 July 1989, § 104.
[58] See e.g. ECHR, *Amann v Switzerland*, 27798/95, judgment of 16 February 2000, § 56.

of the European Convention. Non-observance of procedural rules transpiring from Article 6 and 7 in the course of ruling on death penalty may result in the ascertainment of the infringement of Article 2.[59] Abolitionist tendencies in the Member States of the Council of Europe led in 1983 to the adoption of the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of death penalty (P-6), by virtue of which death penalty has been abolished. Nobody is to receive such sentence, nor must it be carried out.[60] P-6, however, still admits death penalty for acts committed in times of war or of imminent threat of war. Yet this option is excluded by the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of death penalty (P-13) of 2002. Out of 47 Member States of the Council of Europe, 46 ones agreed to be bound by P-6 and 44 are concurrently parties to P-13. Russia merely signed the first of said treaties.[61] However, in view of the conditions of membership for the new countries, Russia had to introduce moratorium on death penalty in the time of peace. Also, neither Armenia nor Azerbaijan are the parties to P-13.[62]

9. KILLING A MAN IN ANOTHER PERSON'S DEFENSE AGAINST UNLAWFUL VIOLENCE

Three following situations where deprivation of life is not construed inflicted in contravention of the right to life are envisaged by Article 2(2). These are: killing a man in another person's defense against unlawful violence, lawful arrest or preventing the escape of a lawfully detained person, and quelling riots or insurrections. It is not deemed in conflict with the right to life to kill a person in another person's defense against unlawful violence in compliance with law and if absolutely necessary. Vast majority of the cases in this area of the European Convention application concerns real fight (e.g. IRA's activity) or alleged fight (e.g. war to create an independent country of Chechnya[63]) against terrorism or situation when the fight for political independence in a specific dimension involves acts of terror (e.g. Turkish issues[64]). The Court has also been confronted with the cases

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[59] See e.g. ECHR, *Nicolae Virgiliu Tănase v Romania*, 41720/13, judgment of 25 June 2019, §§ 172-182, *Öcalan v Turkey (no 2)*, 24069/03, judgment of 18 March 2014, §§ 177-89.

[60] Article 1.

[61] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=PHgqOdNr [accessed: 27.07.2020].

[62] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=PHgqOdNr [accessed: 27.07.2020].

[63] See e.g. ECHR, *Khamila Isayeva v Russia*, 6846/02, judgment of 15 November 2007.

[64] See e.g. ECHR, *Gül v Turkey*, 22676/93, judgment of 14 December 2000.

resultant from the involvement of the parties to the European Convention in international antiterrorist coalitions that implied stationing of their armed forces in the country (e.g. Iraq) that exhibits such problems. Soldiers of said coalitions so located at military bases must repeatedly decide on the use of force in self – or other army unit members' defense, or even more broadly, defending those people they are responsible for.[65] It is against the backdrop of such cases that the direction of interpretation of Article 2(2)(a) and thereby the fundamental elements of proper implementation have been shaped. Compliance with law means that the state officials act in accordance with domestic law and the European Convention. Domestic legislator does not need to copy or repeat the provisions of Article 2. Yet it is necessary to preserve their essence. If there happens to appear a literal disparity between said acts of law, then the methodology of domestic law interpretation and application is verified from the perspective of compliance with the European Convention. When domestic courts have regard for the need to comply with the standards following from Article 2, then it is not construed as infringed.[66] The force that is likely to result in an individual's death may be used solely to reach the aim set forth in Article 2(2)(a). Nevertheless, the absolute necessity test is applied differently, conditional upon whether and to what extent the state authorities control the situation, and upon difficulties that usually accompany decision-making in such a sensitive sphere.[67] Prior knowledge or its absence on the crime that poses threat to citizens' life has been viewed as one of the differentiating elements.[68] It is assumed in the case-law that political choices made in connection with defeating terrorism and similar phenomena are not subject to assessment pending the control of the European Convention implementation.[69]

10. LAWFUL ARREST OR PREVENTING THE ESCAPE OF A LAWFULLY DETAINED PERSON

The use of force is also permitted within the meaning of the European Convention, Article 2(2)(b), insofar as it is lawful and absolutely necessary to detain or prevent escape of a person lawfully deprived of liberty. The conditions of absolute necessity and legality of the use of force subject to exception under Article 2(2)(b) correlate strictly and tightly. The use of force is

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65 See e.g. ECHR, *Jaloud v Holland*, 47708/08, judgment of 20 November 2014.

66 See e.g. ECHR, *McCann and others v the UK*, judgment of 27 September 1995, §§ 152-153.

67 See e.g. ECHR, *Tagayeva and others v Russia*, 26562/07, judgment of 13 April 2017, § 481.

68 See e.g. ECHR, *Choreftakis and Choreftaki v Greece*, 46846/08, judgment of 17 January 2012, §§ 48-49.

69 See e.g. ECHR, *Finogenov and others v Russia*, 18299/03 and 27311/03, judgment of 4 June 2012, §§ 212-213.

deemed lawful when the person lawfully detained is either arrested or prevented from escaping only when it is absolutely necessary in a specific situation. Given the nature of a protected interest under Article 2, said criteria are construed narrowly. The use of force by the state officials to effect arrest or prevent the escape of a person lawfully detained may, however, be also justified when reliance on the reasonableness of such actions proves unjust and contrary to original judgment and assessment of situation.[70] An alternative way of thinking might cripple the law enforcement regime with prejudice to the entire community and would expose its officials to unjustifiable risk in performing duties assigned to them.[71] Concurrently, it is presumed that there is no necessity to use force if the person to be arrested does not pose any risk to life and limb and is not likely to commit any aggravated assault. Correspondingly, the state official should not use force even if s/he did not complete a task.[72] Notwithstanding the fact that the European Convention and its Article 2(2)(b) permit an action consisting in the use of force, which may finally lead to the death of an individual against whom it has been used, the state officials do not exercise unlimited discretion in decision making and implementing in respect of arrest or detention. Mitigation of life risk is deemed a primary guideline in this field.[73]

11. QUELLING RIOTS AND INSURRECTIONS

In various national legislations and implementation praxes, the concepts such as riots and insurrections may differ. The case-law pertinent to Article 2(2)(c) of the European Convention treats them as autonomous terms, taking account of acquis of the states concerned and having regard to the context of the treaty and methodology of its implementation. Presumably, there is no single exhaustive definition of riots. A gathering of 150 people hurling bangers at a patrol of soldiers with a risk of a bodily injury is an example of riots.[74] The appearance of analogous elements, albeit markedly intensified in a specific case, gave grounds to believe that riots had broken out in that country, which allowed lawful use of force.[75] Given the circumstance of a concrete case, riots may trigger or lead to an uprising. Said approach

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[70] ECHR, *Andreou v Turkey*, 45653/99, judgment of 27 October 2009, § 50.

[71] See e.g. ECHR, *McCann and others v the UK*, judgment of 27 September 1995, § 200.

[72] ECHR, *Nachova and others v Bulgaria*, 43577/98, § 95.

[73] See e.g. ECHR, *Wasilewska and Kałucka v Poland*, 28975/04 and 33406/04, judgment of 23 February 2010, § 48.

[74] ECHR, *Stewart v ZK*, 10044/82, decision on admissibility of 10 July 1984.

[75] ECHR, *Güleç v Turkey*, report of 27 July 1998, § 232. The Court accepted EComHR findings as correct. Also: ECHR, *Şimşek and others v Turkey*, 35072/97 and 37194/97, judgment of 26 July 2005.

is illustrated by riots sparked by detainees against prison regimes.[76] This type of case-law reveals how much in fact the concepts of what an insurrection may be in the European Convention differ from the way it is captured in the national legal systems, where it also refers to, but is not limited to, prisoners' revolt, or it constitutes a patriotic uprising against the invader. Historically, it has only been Chechen cases that may be examined from that very perspective. In determining said cases, the Court referred to such wordings as: illegal armed insurgency or attacks by illegal armed groups. Russia insisted that determination of such cases be pursued from the perspective of implementation of Article 2(2)(a), and not paragraph c. Finally, the Court spoke in general on the issue of the application of Article 2(2) and held that the right to life had been infringed. It is worth noting that Russia did not disclose a complete documentation, hence the Court, in all probability, intended to preserve impartiality in the assessment of the situation.[77] The trend the construction exhibits is that a similar approach pertains to both riots and insurrections. In the first instance, what transpires directly from the substance of Article 2(2)(c) is that the use of force in such situations must be lawful, which means that it cannot become to constitute, for example, an administration of justice by the army and its members without the court's decision on the case.[78] Furthermore, the use of force is to take place subject to the conditions of an absolute necessity and proportionality. Thus armed forces warned of meeting an illegal Communist Party of Maoists, and in fact not attacked, could have arrested them instead of opening fire and slaughtering with shrapnels.[79]

CONCLUSIONS

Recently, the President of USA, Donald Trump, after talks with the leader of China, Xi Jinping, has admitted with a disarming frankness that he did not introduce any sanctions against this country in view of important trade negotiations. It may therefore be presumed that he will undertake talks with everybody who like the Chinese will offer 250 bn dollars worth of investments that will support the economy of his country. Not only had he been expected to raise the issues of the persecution and repressions of the Uighurs and of Islamic minorities in China, but also to impose sanctions on China. As he added, tariffs, which he imposed on Beijing, were

[76] See e.g. ECHR, *Leyla Alpand others v Turkey*, 29675/02, judgment of 10 December 2013, § 84.

[77] See e.g. ECHR, *Isayeva v Russia*, 57950/00, judgment of 25 February 2005, §§ 179-200.

[78] See e.g. ECHR, *Khashiyev and Akayeva v Russia*, 57942/00 and 57945/00, judgment of 24 February 2005, §§ 136-147.

[79] See e.g. ECHR, *Cangöz and others v Turkey*, 7469/06, judgment of 29 March 2016, §§ 105-149.

"significantly worse than any sanctions you could imagine." Perhaps he was right and economic arguments are certainly not entirely devoid of rationality. Beijing has been accused by human rights organizations of aiming at "cultural genocide" of Muslim minority, closing up hundreds of thousands Uighurs in re-education camps, running mass surveillance and suppressing religion and traditions.[80] The Old Continent is not entitled to come up with any criticism because it has developed its economic cooperation with China to such an extent that it even established ASEM, a formal forum for dialogue with this country modelled on the EU structure, three pillars of which hide the problem of Uighurs and of the observance of human rights in China in general. China loudly reiterates that human rights are nothing else than a philosophy of European conquistadors, those who largely showed to the Chinese and other nations what bare life had meant before this notion even saw the light of science. Thus, watch your yard or mind your own business. But, do we mind our own business? Since the end of World War II, Europe has been taking actions to eliminate institutions, mechanisms, phenomena which are the nerve center of bare life areas where a sovereign's competence to serve death penalty is most pivotal. In this sense, thanks to the efforts undertaken by the Member States of the Council of Europe, Europe has become the only region in the world free from any tribute in the form of an absolute likelihood of being killed that the state systems have been imposing on people since the dawn of their existence. This is an indisputable, rational and tangible effect that deserves recognition. It has been achieved through making law termed human rights, undoubtedly subordinated to sovereign's will, but also having regard to its commitment to protecting a human being from descending into *homo sacer*. European countries have selected an international agreement model. The USA, reluctant to be bound by treaties on human rights, prefer to apply their own law, however only externally, an example of which is the global Magnitsky Act, by virtue of which sanctions could have been imposed on China in respect of the Uighurs case. What is essential is not the formula itself as it hinges on a specific legal tradition, but a feeling of an urgent need to adopt and effectively implement it. Whether it will prove so depends, however, not on law, but on those who apply it as has been demonstrated on the one hand by Russia and China, and on the other by European countries and the USA. Human rights are not panacea but only one of potential remedies. Murder is Easy, quoting the title of one of Agatha Christie's bestsellers,[81] especially when committed by the state, and whoever was successful may feel tempted to try again. It is not the nature of the state but of a man who participates,

[80] See https://www.radiomaryja.pl/informacje/d-trump-nie-wprowadzilem-sankcji-przeciwko-chinom-z-uwagi-na-negocjacje-handlowe/2June2020 [accessed: 21.06.2023].

[81] London: Pan Books Ltd., 1951.

establishes and constitutes it. Assumedly, law should operate as monk's hair shirt to prevent a sovereign from immoderation in squandering human life. If necessity was long ago univocally recognized as the mother of invention, then human rights were devised at the right time. Times along with communities have been changing undeniably fast. Human rights may prove insufficient to follow structural transformation of the states and communities, and then they will have to be replaced with other institutions better adapted to the existing state of affairs. Before-the-law status had not meant lawlessness but only until Cain killed Abel. From that very moment on, to combat negative social phenomena, all state systems invented themselves a goddess termed law, with her cult most likely to last until their very end. Her significance to the protection of a man has been variable, because it has not been entirely dependent on her.

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CRIMES AGAINST PEACE, HUMANITY AND WAR CRIMES AS OFFENCES OF TERRORIST CHARACTER UNDER ARTICLE 115(20) OF POLISH CRIMINAL CODE

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Abstract. The article analyses crimes against peace, crimes against humanity and war crimes from the perspective of the construction of a terrorist offence under Article 115(20) of the Polish Penal Code. The author discusses the concept of state terrorism in social sciences, such as criminology and political science, and points out the controversies surrounding this concept. This is followed by an analysis of the terrorist offence in the Criminal Code and the arguments supporting the view that the offences in Chapter XVI of the Criminal Code can be regarded as fulfilling the conditions of a terrorist offence. Such a solution implies the application to the perpetrators of such offences of stricter rules for the imposition of punishment and probation measures in accordance with the provisions of Article 65(1) of the Criminal Code.

Keywords: terrorism; state terrorism; terrorist offences

INTRODUCTION

During almost 25 years that the 1997 Criminal Code was in force, Chapter XVI of this legal act, grouping offences against peace, humanity and war crimes, may have appeared as that part of the penal act which was introduced in order to fulfil Poland's international obligations in this area, however, in practice, the significance of these regulations was (fortunately) insignificant, and the few rulings of Polish courts concerning the provisions of this chapter referred either to violations of the law by Polish soldiers participating in foreign military operations[1] or to quite minor offences (in comparison with other crimes) such as praising the commission of an offence described in Article 126a of the Criminal Code,[2] or use

[1] See judgment of the Supreme Court of 14 March 2012, ref. no. WA 39/11, Legalis.

[2] As an example of a conviction for an action under Article 126a, one can point to the verdict of the Court of Appeal in Wrocław of 21 August 2019, ref. no. II AKa 196/19, KZS 2019 No. 12, item 80. In turn, the verdict issued by the same court on 12 June 2014, ref. no. II AKa 149/14 (Legalis) refers to a factual situation in which the perpetrator was accused

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of violence or unlawful threats against a group of persons or an individual because of his/her national, ethnic, racial, political or religious affiliation or because of his/her irreligiousness (Article 119(1) CC).[3]

The aggression of the Russian Federation against Ukraine and the war taking place just across our border, affecting Poland in various ways, has made everyone realise how unjustified the sense of security in which we have lived until recently can be. Certainly, the events of the war also make one realise how important the regulations relating to crimes against peace, humanity and war crimes grouped in Chapter XVI of the Criminal Code are. Of course, it is difficult to hope that these legal solutions can play a greater role in deterring acts of violence and aggression, especially when a state is behind such attacks and, moreover, acting with a sense of impunity resulting from its de facto international position. The regulations in question are therefore of little practical deterrent value, especially for the most serious crimes, but they are of great importance in terms of their potential for a criminal response to the crimes they describe, should such a response become possible.

The following considerations are aimed at juxtaposing the regulations of Chapter XVI of the Criminal Code and the construction of an offence of terrorist character (Article 115(20) of the Criminal Code), and the aim of the analysis is to answer the question to what extent the individual crimes against peace, humanity and war crimes may constitute terrorist offences at the same time, and what conditions must be met for such a charge to be brought against their perpetrators.

1. STATE TERRORISM IN SOCIAL SCIENCES

Referring to this problem, it is worth noting that, for example, in the resolution of the Sejm of the Republic of Poland of 14 December 2022

of committing an offence under article 126a, and the court found that his conduct fulfilled the statutory features of an offence under Article 255(3) of the Criminal Code.

[3] As examples of judgments in which the perpetrator has been convicted of committing a misdemeanour under Article 119 of the Criminal Code, the following may be indicated: the judgment of the Court of Appeal in Poznań of 18 June 2020, ref. no. II AKa 14/20 (Legalis), upholding the judgment of the District Court in Poznań of 7 November 2019, ref. no. III K 294/19; judgment of the Court of Appeal in Lublin of 29 October 2019, ref. no. II AKa 198/19, KZS 2019 no. 12, item 53 or judgment of the Court of Appeal in Szczecin of 22 August 2019, ref. no. II AKa 132/19 (Legalis), judgment of the Court of Appeal in Wrocław of 11 July 2019, ref. no. II AKa 223/19 (Legalis). In turn, the judgment of the Court of Appeal in Wrocław of 7 November 2019, ref. no. II AKa 317/19 (Legalis), for example, may be indicated as an example of a factual situation in which the charge of committing an offence under Article 119 of the Criminal Code was not ultimately upheld.

on the recognition of the Russian Federation as a state supporting terrorism,[4] the Polish Parliament did not decide to call Russia's activities against Ukrainian citizens explicitly terrorist activities, but accepted that "forms of terror used by Russia against Ukrainian citizens are a crime against humanity and genocide", and at the same time there was a recognition of the Russian Federation "as a state supporting terrorism and using terrorist means". On the other hand, more far-reaching formulations were used in the somewhat earlier Resolution of the Senate of the Republic of Poland of 26 October 2022 on the recognition of the authorities of the Russian Federation as a terrorist regime,[5] the content of which drew attention to the fact that Russia was committing state terrorism. In turn, in the European Parliament resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism[6] the following terms are used: "a state sponsor of terrorism", "acts of terror", "to terrorise the population", "state terrorism" (this term, interestingly enough, was used explicitly with regard to Belarus, while with regard to Russia it was cited as a quotation from a statement by Minister Zbigniew Rau in his capacity as President of the Organisation for Security and Cooperation in Europe), and in the conclusions of the resolution Russia has been recognised "as a state sponsor of terrorism and as a state which uses means of terrorism."[7]

The terminological mosaic indicated above makes it worthwhile to attempt some ordering of the terms that should be applied to the war taking place in Ukraine, as well as to look at them from the perspective of the binding Polish criminal law. At the outset, it should be noted that in other social sciences, such as political science or criminology, crimes against humanity, peace and war crimes committed by a specific state are rather rarely described as manifestations of terrorism. While there is a concept of state terrorism in these sciences, it raises some questions and controversies. In the older literature on the subject, state terrorism is sometimes equated with state-supported/sponsored terrorism (this is how "state terrorism" is perceived by the acknowledged authority on the phenomenon, Walter Laqueur [Laqueur 1999, 156-83]), and in those studies that distinguish between the two concepts, various types of totalitarian or authoritarian regimes that intimidate their own citizens are most often cited as examples of state terrorism As noted by B. Hoffman, who defines terrorism in a way

4 "Monitor Polski" 2022, item 1253.

5 "Monitor Polski" 2022, item 1043.

6 2022/2896 (RSP).

7 However, this rather cautious use of the term 'terrorism' in the context under discussion may be justified by the disputes surrounding this concept and the reluctance to regulate it directly at the international level (where legal acts on selected aspects of terrorism prevail). For more on terrorism in terms of international law, see: Wiak 2009, 89-161.

that essentially excludes state terrorism from the term, a more appropriate term for state action is "terror". The author points to Nazi or Stalinist terror as examples of this phenomenon, clearly indicating that in the case of regular warfare, one should not speak of terrorism [Hoffman 2006, 20-42]. In turn, e.g. K. Wiak, as examples of state terrorism, points to cases of intrinsically terrorist actions undertaken by state secret services [Wiak 2009, 64].

However, the term "state terrorism" itself now also has quite a number of adherents,[8] but, as with terrorism as such, it is difficult to find a universal definition of the phenomenon. As an example one can point to the proposal formulated by Ruth Blakeley, who identifies the following four characteristics of state terrorism: "(a) there must be a deliberate act of violence against individuals that the state has a duty to protect, or a threat of such an act if a climate of fear has already been established through preceding acts of state violence; (b) the act must be perpetrated by actors on behalf of or in conjunction with the state, including paramilitaries and private security agents; (c) the act or threat of violence is intended to induce extreme fear in some target observers who identify with that victim; and (d) the target audience is forced to consider changing their behaviour in some way" [Blakeley 2009, 15]. It is worth emphasising the constitutive element of state terrorism, as indicated by this author, in the form of attacks on persons that the state is obliged to protect, and, importantly, in accordance with international law, such persons should also be considered to be those in respect of whom the state's obligations also arise from its international obligations, such as prisoners of war or civilians in an already occupied area, or even just an area under attack. Therefore, the above-mentioned understanding of state terrorism may also include warfare carried out in the course of an ongoing armed conflict, although the question remains open, for example asked by the above-mentioned W. Laqueur, as to whether it is appropriate to analyse state terrorism together with 'traditional' terrorism, which is characterised by the activity of other actors. As this author notes: "There are basic differences in motives, function and effect between oppression by the state (or society or religion) and political terrorism. To equate them, to obliterate them is to spread confusion" [Laqueur 1986, 89].

[8] The literature even indicates that state terrorism can be seen as a primary term and synonymous with terrorism [Aliozi 2012-2013, 54-69]. There is now quite a substantial literature on the concept of state terrorism [Wilkinson 1981; Mitchell, Stohl, Carleton, et al. 1986, 1-26; Stohl 1988, 155-205; Idem 2008, 4-10; Idem 2006, 1-26; Westra 2012, 1-243; Wilson 2019].

2. THE CONSTRUCTION OF AN OFFENCE OF TERRORIST CHARACTER IN THE CRIMINAL CODE

While this issue remains unresolved in political science, an analysis of the Criminal Code regulations leads to the conclusion that, at least prima facie, there is no reason to exclude the assumption of a terrorist character by individual crimes of war, against peace and humanity, with all the legal consequences that this entails. Such a conclusion follows from the very manner in which the offence of terrorist character is framed in Polish criminal law.

This construction was introduced into Polish criminal law in 2004[9] in connection with the accession of the Republic of Poland to the European Union. The Polish legislator, implementing the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA),[10] adopted its own concept of regulating responsibility for the most serious terrorist acts. It was done by introducing into Article 115 of the Criminal Code (as a new § 20) a definition of an offence of terrorist character with the simultaneous linking of responsibility for the commission of such an offence with the principles of punishment and probationary measures provided for multi-recidivists (Article 65(1) CC in connection with Article 64(2) CC). It follows from this definition that a common offence may become a terrorist offence if the formal and material criteria described in Article 115(20) CC are met.

The formal criterion concerns the severity of the statutory punishment. According to this provision, in order for an offence to assume a terrorist character it must be punishable by imprisonment of at least 5 years. The analysis of the criminal sanctions provided for offences from Chapter XVI of the Criminal Code clearly demonstrates that this condition is fulfilled by almost all offences grouped in this chapter (only offences specified in Article 126(1) and (2) CC[11] and – as it results from Article 126c(3)

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9 This was the Act of 16 April 2004 amending the Act, the Criminal Code and certain other acts (Journal of Laws No. 03, item 889).

10 OJ L 164, 22.6.2002, p. 3-7 (no longer valid, in 2017 it was repealed and replaced by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA).

11 These are the offences of using the mark of the Red Cross or Red Crescent (§ 1) during hostilities in violation of international law, or of using the mark of protection for cultural property or another mark protected by international law during hostilities in violation of international law, or of using the state flag or military badge of the enemy, a neutral state or an international organisation or commission.

CC[12] – preparatory acts to the offences specified in Article 124(1)[13] or Article 125 CC[14] cannot have a terrorist character due to insufficient sanctions for them).

As regards the material criterion for recognising an offence as an act of a terrorist character, the decisive factor is the intention of the perpetrator, who must commit the offence for one of the three alternatively indicated purposes, i.e. to seriously intimidate a large number of people, to force a public authority of the Republic of Poland or another state or an authority of an international organisation to take or to refrain from taking certain actions or to cause serious disturbances to the political system or economy of the Republic of Poland, another state or an international organisation. A threat to commit such an act is also considered an offence of terrorist character, though the construction of the "terrorist threat" may raise some interpretation doubts [Michalska-Warias 2019, 41-50]. Thus, any offence that meets the requirement of a sufficiently severe penalty may assume a terrorist character if the perpetrator is motivated by an purpose described in Article 115(20), which may be briefly referred to as a 'terrorist purpose'.

3. CRIMES AGAINST PEACE, HUMANITY AND WAR CRIMES AS OFFENCES OF TERRORIST CHARACTER

A juxtaposition of this definition with the offences in Chapter XVI of the Criminal Code (punishable by sufficiently severe punishment) leads to the conclusion that many of these offences may be committed for terrorist purposes within the meaning of the code. In the case of many of them, the occurrence of such a motivation even seems quite natural and therefore highly probable. By their very nature, as it were, the most serious offences described in the chapter under review may be aimed at simultaneously intimidating persons who are not their direct victims, but who are the intended addressees of the offence in question.

As an example, the felony of Article 118a(3) of the Criminal Code may be quoted. The offence is committed when the perpetrator – who is taking part in a mass attack or at least in one of the repeated attacks against a group of people undertaken in order to implement or support the policy of a state or organisation – in violation of international law, forces persons

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[12] This provision provides for the punishment of making preparations for an offence specified in Article 124(1) or Article 125 CC.

[13] Article 124 §(1) CC defines the offence of, inter alia, forcing certain categories of persons protected by international law to serve in an enemy army.

[14] Article 125 CC refers to behaviour against cultural property undertaken in an occupied, seized or armed area.

to change their lawful place of residence or commits serious persecution of a group of people for reasons deemed unacceptable under international law, in particular political, racial, national, ethnic, cultural, religious or because of irreligiousness, philosophical belief or gender, thus causing deprivation of fundamental rights.

It is not difficult to imagine that, for example, forcing people to change their lawful place of residence can be done in such a way as to simultaneously cause serious intimidation to a number of other persons belonging to the same group and thus make them 'voluntarily' leave the territory. In such a case, all the criteria for considering such behaviour as an offence of terrorist character will be met.

It appears that of the offences specified in the chapter under discussion, the terrorist purpose within the meaning of Article 115(20) will not, for example, be attributable to offences under Article 121 CC[15], Article 125 CC[16] or Article 126.[17] For obvious reasons, the terrorist purpose will also not yet be attributable to perpetrators who only undertake criminal preparatory actions for individual crimes (Article 126c(1) and (2) CC).

Whether or not a given offence from the group of crimes against peace, humanity and war crimes at the same time fulfils the conditions for recognition as an offence of terrorist character seems to be important in view of the legal consequences connected with the latter construction. As it follows from Article 65(1) CC, the provisions on the imposition of punishment, penal measures and measures related to putting the perpetrator on probation provided for the perpetrator defined in Article 64(2) CC (i.e. the multi-recidivist) shall apply to the perpetrator of an offence of terrorist character. With regard to the imposition of the punishment relating to multi-recidivists, for the time being this regulation does not appear to be particularly severe, due to the fact that the provisions of Article 64(2) CC only provide for the necessity of imposing a custodial sentence provided for a given offence above the minimum statutory punishment (thus, the minimum punishment is increased by only one month in each case) and the possibility of imposing a sentence above the maximum punishment increased by half, which, however, does not apply to felonies.

Thus, in the case of all the offences set out in Chapter XVI of the Criminal Code, the determination of their terrorist character leads only to the above-mentioned symbolic increase in the minimum

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[15] This provision makes it an offence for an individual to manufacture, collect, acquire, dispose of, store, transport or transmit means of mass destruction or means of warfare or to conduct research with a view to the manufacture or use of such means, contrary to the prohibitions of international law or the provisions of the law.

[16] See reference no. 14.

[17] See reference no. 11.

punishment. However, it is worth noting that in accordance with the already enacted amendment to Article 64(2) CC, which is to enter into force as of 1 October 2023,[18] the principles of punishment for multirecidivists, and thus also for perpetrators of terrorist crimes shall become more severe. Pursuant to the adopted new wording of Article 64(2) CC, such perpetrators are to be given a custodial sentence for the offence ascribed to them ranging from the minimum punishment increased by half to the maximum one also increased by half (still, however, the increase of the upper limit is not to apply to felonies). This change implies a clear increase in the possible minimum sentence to be imposed, especially for already severely punishable Chapter XVI felonies insofar as they are of a terrorist character. For example, the felony described in Article 118(1) CC (genocide) committed for terrorist purposes as of 1 October 2023 will be punishable by a minimum sentence of 18 years' imprisonment,[19] and e.g. an offence under Article 118(2) CC, the perpetrator of which was motivated by a terrorist purpose will be punishable by seven years and six months' imprisonment.[20]

However, when considering the possibility of the terrorist character of crimes against peace, humanity and war crimes, it should be borne in mind that the terrorist purpose within the meaning of Article 115(20) CC guiding the perpetrator is in fact an additional statutory feature of the mens res and therefore, like all statutory features, requires proof (this possible difficulty in proving the terrorist purpose is noticed in the literature [e.g. Michalska-Warias 2016, 323; Zawłocki 2021, thesis no. 9]). This, in turn, means that it will not always be possible to convict a perpetrator committing an offence under Chapter XVI of the Criminal Code for an act which simultaneously displays a terrorist character. In the case of direct perpetrators of the felonies and misdemeanours in question, the required terrorist motivation may in fact not be present at all – a soldier carrying out orders or "only" an incentive to loot a given area, drive civilians from their homes, commit acts of sexual violence or kill or torture need not be aware of the fact that those issuing the relevant orders or only allowing behaviour contrary to international law may in fact be motivated by the purpose of influencing individuals other than those directly affected by violence and threats from the armed forces.

Moreover, even if it is established that the soldier directly committing this type of offence was aware that his behaviour could cause, for example, serious intimidation of a large number of people, it does not yet mean that he himself was certainly motivated by such an aim. Thus, proving the terrorist

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[18] Act of 7 July 2022 amending the Act, the Criminal Code and certain other acts (Journal of Laws item 2600).

[19] The new sanction is to be imprisonment from 12 to 30 years or life imprisonment.

[20] The new sanction is to be imprisonment from 5 to 25 years.

character of offences committed by soldiers or mercenaries may be difficult, and often impossible, in practice. While in the case of "regular terrorists" it is not uncommon for them to declare what their objectives are, in the reality of an open armed conflict such declarations are unlikely to be made explicitly and the perpetrators of war crimes generally deny their responsibility for them. This, in turn, makes the elements of the mens rea necessary to attribute the terrorist character to an offence difficult to prove.

Thus, it seems more likely to attribute a terrorist character to offences committed by those giving orders and directing armed actions (since such persons have a broader view of reality and, in general, the desire to break the morale of the enemy and thus seriously intimidate many people is an almost self-evident element of much warfare), although, in these cases too, establishing the required elements of the mens rea may, depending on the specific facts, may pose greater or lesser difficulties.

At the end of these considerations, it is also worth asking whether it would not be reasonable to assume that the offences grouped in Chapter XVI of the Criminal Code are, by their very nature, committed for the terrorist purposes listed in Article 115(20) of the Criminal Code. In the case of the conducting of hostilities against the military and civilian population of another state, it is, after all, inherent in the very nature of most of these actions to both seriously intimidate the entire attacked community and to cause serious disruptions in the political system and economy of such a state, as well as to force public authorities to behave in accordance with the will of the aggressor. The adoption of such an interpretation could lead to the exclusion of a formal determination of the terrorist character of these offences, in accordance with the generally accepted principle that the same circumstance cannot work twice to the disadvantage of the perpetrator.[21] However, such an interpretation would not seem to be correct. The felonies and misdemeanours grouped in Chapter XVI are often offences characterised from the point of view of mens rea by a clearly specified purpose of the offender, but these features never explicitly include terrorist purposes as described in Article 115(20) of the Criminal Code. Furthermore, as indicated above, while it can be said that such offences seen as a certain

[21] It is assumed, for example, that if the professional commission of certain offences constitutes an aggravating feature then the aggravation of punishment provided for in Article 65(1) of the Criminal Code in conjunction with Article 64(2) of the Criminal Code should no longer apply to the professional offender. An example can be the regulation of Article 116(3) of the Copyright Act (Journal of Laws of 2022, item 2509), in which making a regular source of income is indicated as an aggravating feature of the offence of distributing, without authorisation or in violation of the terms and conditions of the authorisation, somebody else's work in the original version or in the form of a compilation, artistic performance, phonogram, videogram or broadcast [Sakowicz 2021, thesis no. 7; Raglewski 2017, thesis no. 97; Łabuda 2021, thesis no. 9].

whole do indeed always serve to achieve terrorist aims, their perpetrators need not always be guided by such a motivation. And this supports the view that there is no reason whatsoever to exclude from the group of offences whose terrorist character can be established in specific factual situations any offences grouped under Chapter XVI of the Criminal Code. Possibly some doubts as to the correctness of such an interpretation could be considered valid in the case of the offence of initiating and waging an attacking war under Article 117(1) CC – this felony can, according to the accepted interpretation, only be committed by persons occupying the relevant positions in the state structure (such a view is unanimously accepted in the literature, regardless of whether the offence is considered to be individual as to the subject [Wiak 2021, thesis no. 3] or a common one [Giezek 2021, thesis no. 5; Rams and Szewczyk 2017, thesis no. 7; Budyn-Kulik 2023, thesis no. 6]) and thus, in these cases, the terrorist purpose – if only in the form of forcing the authorities of a foreign state to behave in a desired manner – seems indeed to be inscribed in the very structure of this offence, albeit in an implicit manner.

CONCLUSION

In conclusion, it should be stated that in the light of the current regulations of the Criminal Code, crimes against peace, humanity and war crimes may – if the conditions set out in Article 115(20) of the Criminal Code are fulfilled – be recognised as offences of terrorist character, and thus their perpetrators should then be treated more severely with regard to their punishment and the application of probation measures, in accordance with the solutions of Article 65(1) of the Criminal Code.

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THE FINANCIAL AND LEGAL NATURE OF QUASI-GRANTS TRANSFERRED TO POLISH LOCAL GOVERNMENT UNITS FROM STATE GOVERNMENT EARMARKED FUNDS*

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Abstract. In the field of public finance, earmarked funds are regarded as a versatile instrument for funding public tasks, and an important complement to the traditional budgetary system. They were deliberately and extensively implemented in Poland during the COVID-19 pandemic crisis in 2020, as well as the refugee crisis in 2022. The funds earmarked by the state government, which were created at Bank Gospodarstwa Krajowego at that time, proved to be an efficient and prompt approach in tackling the crisis and promoting local development. These funds were directed towards local investments by local governments, who were amongst their beneficiaries. This development was aided by allocating part of the COVID-19 Response Fund to investment expenses as freely designated by local authorities. Given their prior experience with using European Union funds, Polish local governments efficiently and promptly adjusted their financial management from the budget economy to the fund economy. Local governments have obtained earmarked funds which have become a significant source for funding local investments. However, these funds lack unambiguous regulation in Polish public finance law. This paper aims to illustrate the role of state government earmarked funds, which are established outside the public finance sector in Poland, in creating the budget economy for local governments. An additional aim is to determine the legal and financial characteristics of the resources within these funds in the light of the regulations outlined in the Polish public finance law.

Keywords: local government; legal regulations; public finance; special means

INTRODUCTION

The global COVID-19 pandemic that swept Europe in 2020 initiated revolutionary changes not only in social and economic relations, but also significantly changed the role, structure and instruments of public finance. As a result of the pandemic crisis, as well as subsequent crises (refugee,

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energy), the Keynesian theory returned with double power in the public finances of European countries, justifying the use of numerous transfers of public funds to the economy in times of crisis, even at the expense of an increase in public debt. John Maynard Keynes's theory of public finance, applied after the great economic crisis of 1929-1933, is referred to in the literature as the "Keynesian revolution" [Owsiak 1997, 39-41; Chojna-Duch 2002, 21; Ziółkowska 2000, 33]. This revolution basically continues to this day, and the pandemic crisis (2020) and the refugee crisis (2022) that took place in Poland again confirmed the positive dimension of the theory of state interventionism. The quick and decisive reaction of the state authorities to these crises in the form of central transfers was in fact the realization of the theory of J.M. Keynes, who has repeatedly warned that "a fall in employment and income, once started, might proceed to extreme lengths" [Keynes 1936]. The above warning from Keynes was, among others, the basis for the large-scale use of financial transfers by the Polish central government, not only to entities from the enterprise sector, but also to units of the local government sector, which in fact did not lead to a decrease in employment and income. However, while the almost immediate use of financial intervention instruments should be assessed positively (which was not necessarily the case in the last century), separate assessments and analyzes require new legal forms of transferring crisis public funds to various entities, including local government units (LGU).

Both in the first year of the epidemic (2020) and in the following years, in the income structure of Polish LGUs, apart from the classic and hitherto existing transfer income, such as the general subsidy and earmarked grants, the so-called "financial resources" began to appear on a larger scale. The legal status of these "financial resources" remains ambiguous under public finance law to this day. This ambiguous status is possessed by the "financial resources" from the COVID-19 Response Fund and the Ukraine Aid Fund. Despite being legally included in the budgets of local government units, and a positive impact on the result of the implementation of these budgets due to their significant amounts, they "escape" the definition of public resources and thus the rigors of managing these funds specified in the public finance law. The legislator did not regulate the legal status of these "financial resources", both in terms of revenues and budgetary expenditures of local governments, which meant that the main interpretations in this respect were made by regional accounting chambers and the Ministry of Finance.

The aim of the article is to answer the following two research questions – Q1: What is the legal and financial nature of special-purpose funds created by the Polish legislator at Bank Gospodarstwa Krajowego?; Q2: What is the legal, financial and budgetary nature of the revenues of Polish local

government units defined as the so-called "financial resources" or "co-financing", received by them from earmarked funds of Bank Gospodarstwa Krajowego?

The analysis providing answers to the two above research questions will strive to prove the following research hypothesis – H: The quasi-grant forms of financing local government units used in Poland during the pandemic and refugee crises, although they are an effective instrument for improving the economic condition of local government budgets, are not anchored in international and national regulations of local government budget management. In the future, however, these forms may become a new mechanism of reducing the revenue independence of local governments, which will lead to the definition of a completely new role and function that the local government will perform in the sphere of public tasks.

The analysis leading to the proof of the above hypothesis was carried out on the example of "financial resources" transferred to Polish local government units from special-purpose funds located at Bank Gospodarstwa Krajowego during the pandemic crisis in 2020 and during the refugee crisis in 2022.

These "financial resources" are referred to in the article as "quasi-grants" in order to compare them with the earmarked grants that are classic type of revenue of local governments in every democratic state ruled by law. Verification of the above research hypothesis was carried out using the dogmatic and historical method, based on French, English and Polish literature on public and local government finance. The analysis also uses the comparative-legal method consisting in comparing the features of the above quasi-grants with the features of a classic earmarked grants, which is a standard source of revenue for local government units.

1. ORIGIN AND ESSENCE OF SUBSIDY TRANSFERS

The evolution of the nature and terminology used to designate subsidy and grant transfers is an important issue in the light of the contemporary increase in the popularity of these transfers as sources of financing the tasks of local government units. The etymological meaning of the term "grant" does not correspond to the current nature of this budgetary instrument. In medieval Latin, the word *dotatio* meant providing someone with material goods, a dowry, making someone rich and dowry [Menge and Kopia 1988, 173; Kopaliński 1983, 103]. When we observe the current prevalence of grant in the public finance system, it may seem surprising that this word is etymologically related to private law rather than public law. It was only further semantic development of this word that led to its association primarily with

financial support for given entities from public funds, and nowadays also with a commonly used instrument for making budget expenditures within the public finance sector, as well as outside this sector.

According to the dictionary of the Polish language, a "subsidy" ("grant") is a non-returnable financial aid granted to an institution, organization, enterprise (less often a person) in order to support a specific activity [Szymczak 1978, 438]. The dictionary definition of a "subsidy" ("grant"), emphasizing its aid nature, turns out to be similar to the state aid regime currently prevailing in the European Union Member States, which applies to some subsidies (if they are granted to enterprises). A quite accurate element of this definition is also the indication that the subsidy is granted to support a specific activity, although this feature was most fully implemented by public subsidies used in previous epochs. For example, in Spain and Venice in the 15th century, subsidies were given to ship owners. In the 17th and 18th centuries, subsidies were known in England to finance the cultivation of cereals and the fishing of whales and herring. In the countries of the German-speaking zone, subsidies were often used to stimulate the development of crafts [Chojna-Duch 1988, 16]. A certain analogy to this type of subsidy can be found in the subsidies used in Poland during the communist regime until the early 1990s, which were a form of "state subsidy to the prices of goods and services" provided by state and cooperative enterprises [Kurowski 1982, 99-101].

The contemporary universality and diversity of subsidies and quasi-subsidies in the structure of public finance coincides with the views of the doctrine of financial law, which assign these transfers an important role among public financial instruments. As L. Kurowski pointed out in 1982, "expenditures providing a subsidized entity with funds to cover its expenses appear in practice under very different names – subsidies, grants, allowances, financial support etc. Different names usually hide the same content. It's better not to be fooled and use only the name grant" [ibid.].

With regard to subsidy and granting forms of financing local governments, the literature emphasizes that these forms significantly affect the economic status of local governments. The central government can influence the economy by transferring public funds to local governments. The level of central government transfers determines the type of statutory duties assigned to the local authorities. Proportion of government transfers in the budgets of Polish municipalities continued to increase in recent years. The observed increase constitutes a complex problem. Higher government subsidies resulted from legislative factors as well as the economic status of municipalities [Wichowska 2022, 133-48]. Income from grants and subsidies is also considered in the light of decentralization of public finances. The debate on fiscal decentralization is usually revived at times of economic

hardship because the consequences of some economic crises are first experienced at the local level, and they are transferred to the central level over time [Oates 2008].

In addition, subsidies and grants transferred to local government units from state earmarked funds located in Bank Gospodarstwa Krajowego do not fit into the assumptions of most public finance theories, with the exception of the Keynesian theory of state interventionism. Guided, for example, by the normative theory of public goods, the premise for the introduction of further subsidies should be the existence of *market failures*, becoming an argument for the economic legitimacy of the state to publicly provide specific public goods. According to this theory, the type of provision of public goods should be decided by its consumers, because they "know best" what they need [Buchanan and Musgrave 2005, 126-27]. On the other hand, according to public choice theory, very often political decisions emerge from something other than market failures. Public choice is an explanation of the reasons for state activity and, at the same time, it is a theory of government failures [Kargol-Wasiluk 2011, 289-91; Buchanan 1984, 11]. In the sphere of Polish public subsidies, there are indeed other (than market failures) reasons for introducing public subsidy. However, in the case of the discussed quasi-grants used in crisis periods in significant amounts by the state for the benefit of local government units, it should have been stated that this public choice was made by the state (legislator), as it was required by the crisis situation.

In modern public finance systems, however, transfers, which do not have the character of a classic public special-purpose subsidy are more and more often used, despite the fact that their source of financing is in fact public funds originating most often from public debt titles. An example is the "financial sources" (quasi-grants) transferred to Polish local government units from statutory earmarked funds located in Bank Gospodarstwa Krajowego. It is also characteristic that the above-mentioned quasi-grants quite often are not of a competitive nature, are not subject to the classical rules of public subsidy settlement, and are also granted to local governments for a generally formulated purpose, for example for investment expenditures. It should be noted that, to some extent, the above features of quasi-grants derive from the theory of non-equivalence (free of charge) of subsidies, which was promoted in the science of public finance.

In the Polish public finance literature, it was indicated that "the benefits associated with the transfer of subsidies are not material in nature. They may consist in a whole range of behaviors of third parties, which behaviors are desirable from the point of view of the public interest represented by the subsidizing or subsidizing entity, but they do not lead to mutual financial gain" [Dębowska-Romanowska 1993, 44]. The above

(non-equivalent) perception of subsidies in the study of financial law was influenced not only by the conditions of the previous communist system, but also by the adoption of French solutions in many areas of Polish public finance. It was in the French public finance science that it was proclaimed that most subsidies granted from public funds are not equivalent. For example, P.J. Gaudemet and J. Molinier pointed out that "subsidies given to the municipality for water supply, family and unemployment benefits, cinematography grants or financial assistance to the government of another country are expenses in the form of a 'gift', unrelated to any direct benefit from the recipient to the spender. Often, however, the granting of a subsidy is conditional on the fulfillment of certain economic, administrative or political requirements that result in the dependence of the entity receiving the subsidy on the authority making the donation; then there is an indirect mutual performance" [Gaudemet and Molinier 2000, 58].

At the same time, the French public finance theoreticians mentioned above emphasized that the open, ostentatious nature of the donation act may be an inconvenience. So often the course of action is chosen in such a way that expenses require reciprocal performance. They further point out that this mutual exchange is often not immediate and explicit, but merely political. An interesting example of 'avoiding' the equivalence of public spending and simultaneously achieving political and economic goals, cited by these authors, is the case of the red dye in the trousers of French soldiers. "Even the red color of the trousers of French soldiers at the beginning of the century was not dictated by military considerations, but by the desire to keep the production of garance red dye in the south of France" [ibid.]. Thus, despite the lack of a clear mutual benefit, public expenditure (including subsidies) is always made in order to achieve the political and economic objectives of the state or local government, and therefore they are always equivalent in general terms.

However, in the case of contemporary quasi-grants transferred to Polish local government units from earmarked funds located outside the state budget system (outside the public finance system), a significant problem is primarily that these transfers are not subject to the regulations of public finance law, which is justified to some extent in crisis periods, but should not assume a permanent and standard character.

2. QUASI-GRANTS IN LOCAL GOVERNMENT FINANCIAL LAW

Subsidy transfers as a form of financing local government are regulated both in international law and in the Constitution of Poland of 2 April 1997. Article 9(7) of the European Charter of Local Self-Government states: "As far as possible, grants to local authorities shall not be earmarked

for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction."[1] In the official commentary to the Charter, its signatories explain that from the point of view of the independence of local communities, the preferred form of supporting these communities is a general grant, or even a sector-specific grant, rather than grants earmarked for specific projects, specific project grants.[2] The regulation of the Polish Constitution, providing for subsidies and grants as a forms of revenue for local government units, does not, however, formulate the above preference for general subsidies. Article 167(2) of the Constitution of the Republic of Poland states: The revenues of units of local government shall consist of their own revenues as well as general subsidies and specific grants from the State Budget.[3]

Therefore, the provisions of the above acts do not provide for funds similar to subsidies or grants (quasi-grants) in the catalog of revenues of local government units. However, the Polish Constitution also provides that the sources of revenues for units of local self-government shall be specified by statute, which means that other revenues (including quasi-grants) may appear in the catalog of local government revenues, provided that the legislator so decides.

In addition, the Polish Constitution does not indicate proportions in the structure of income of local government units, which means that it is the legislator who decides which of the elements of this structure (own income, general subsidy or earmarked grants) will prevail over the others. To a certain extent, giving the legislator the power to determine the sources of local government revenue is consistent with the global tendency to reduce the decentralization of public finance through various forms and instruments. Instruments that influence both the expenditures and revenues of local governments have been implemented in European and global economic practice. Some governments have intervened directly by changing the level of transfers from the central budget to local budgets or by forcing territorial governments to rely on their own revenues to cover the costs of their statutory operations [Nelson 2012, 44S–63S].

Polish legislation providing for transferring grants and subsidies from public budgets or public funds is not terminologically consistent. Public

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[1] European Charter of Local Self-Government, Strasbourg, 15.10.1985, Council of Europe, European Treaty Series No. 122, https://rm.coe.int/168007a088 [accessed: 18.09.2023].

[2] Explanatory Report to the European Charter of Local Self-Government, Strasbourg, 15.10.1985, Council of Europe, European Treaty Series No. 122, p. 9, https://rm.coe.int/16800ca437 [accessed: 18.09.2023].

[3] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

Finance Act of 29 August 2009 (PFA) defines the concept of public grants and regulates the basic principles of granting from the state budget and from the budgets of other entities of the public finance sector. However, the legislator quite often provides for the possibility of transferring to local governments the so-called "financial resources" and does not use the term "subsidy" or "grant", but ambiguous terms, i.e.: "financial resources", "co-financing", "financial support", "financial assistance". This terminological inconsistency of the legislator is not a new phenomenon [Robaczyński and Gryska 2006, 116], because the term "financial resources" instead of "subsidy" (or "grant") in statutory regulations concerning both income and expenditure of the local government budget has been used almost since the beginning of its introduction in Poland (in 1990). These local governments carry out many commissioned tasks in the field of government administration or their own tasks, which are financed from the so-called "resources" transferred from state earmarked funds.

An example of this is the Labor Fund's resources, which since 2005 have been transferred annually by the minister responsible for labor matters to a separate bank account, to voivodeship and poviat self-governments for financing tasks implemented in the voivodship. Already in 2006, the literature criticized the mechanism of transferring the above-mentioned funds to separate bank accounts, operating outside the budgetary economy of the poviat, which makes it impossible to control them by its authorities and by regional accounting chambers. However, such control would be advisable, taking into account the general problem of supervision over the resources of state special-purpose funds [Chojna-Duch 2002, 90-91], as well as the significant amounts transferred by these funds to the poviat level (e.g. for salaries employees of the poviat employment office). It was pointed out that this argument supports the acceptance of the postulate to include these funds in the poviat budget, or at least include them in the budget resolution, so that significant amounts of Labor Fund resources at the disposal of poviat labor offices could be controlled by poviat authorities [Ostrowska 2006, 184].

Still, the above-mentioned Labor Fund resources received by poviat self-governments have an off-budget and non-subsidy character (they are not a subsidy), despite the fact that they meet all the features of a grant defined in Article 123 of the Public Finance Act. Still, in most self-governments of poviats, the above funds are recorded outside the budget on a separate bank account, and therefore do not constitute budgetary revenues of these self-governments.

The funds of the State Fund for Rehabilitation of Persons with Disabilities (PFRON) are of a similar, off-budget and non-grant nature, transferred by the President of the Management Board of PFRON to a separate

bank account to poviat self-governments for the implementation of specific tasks. According to the regional accounting chambers (Polish institution supervising the finance of LGU), the above funds do not constitute a source of income for the poviat budget, and consequently, these funds, transferred on the basis of the concluded agreement(s), cannot also constitute a source of income for the local government unit budget and should be transferred to a separate bank account, operating outside the budgetary economy of a given LGU.[4]

While formulating the above position, it was pointed out that the interpretation direction chosen in this way coincides with the general essence of the operation of special-purpose funds, which are independent of the state budget in terms of managing financial resources [Misiąg 2019, 39-44]. It should be noted, however, that both the Labor Fund and PFRON are state earmarked funds belonging to the public finance sector (hereinafter: PFS), which is not present in the case of earmarked funds established at Bank Gospodarstwa Krajowego.

Noteworthy is the above-mentioned direction emphasizing the independence of the special-purpose fund in terms of managing financial resources. This direction is somewhat convergent with the character of "means" transferred to LGUs adopted by the legislator from the COVID-19 Response Fund (CRF) during the pandemic crisis and from the Ukraine Aid Fund (UAF) during the refugee crisis. In these cases, regional accounting chambers, guided by the explanations of the Ministry of Finance (in the absence of a statutory regulation in this scope), unequivocally accepted that the funds received by LGUs from the above Funds are of a budgetary nature (they are the revenues of the local government unit budget) and should be included in the budget while maintaining their separation under the specific rules for implementing the budget of the local government unit.

Taking into account the location of the COVID-19 Response Fund and the Ukraine Aid Fund in Bank Gospodarstwa Krajowego (BGK), i.e. outside the public finance sector, the adopted "budgetary" nature of the above quasi-subsidies was surprising due to the fact that similar quasi-subsidies received by LGUs from state earmarked funds (such as the Labor Fund and PFRON) for almost 20 years have been in practice "de-budgeted" and operate outside the budget of the local government unit.

According to Article 126 of the Public Finance Act, grants are – resources from the state budget, the budget of LGUs and from state earmarked funds allocated on the basis of PFA, separate acts or international

[4] See https://riogdansk.archiwum.bip.net.pl/pliki/10284/Dopuszczalno%C5%9B%C4%87_ujmowania_%C5%9Brodk%C3%B3w_z_PFRON_w_bud%C5%BCecie_miasta.pdf [accessed: 18.09.2023].

agreements, for financing or co-financing the implementation of public tasks. The above statutory definition indicates that a grant is funds (resources) that meet all of the following characteristics: 1) they come from the state budget, the budget of the local government unit or from the state special purpose fund; 2) are subject to specific accounting rules; 3) their purpose is specified in the Public Finance Act, separate Parliamentary acts or international agreements; 4) are intended for financing or subsidizing public tasks.

The statutory definition of public grant is universal and broad, which could apply to many categories of "financial resources" that meet the above four characteristics. It would also be appropriate to say that all measures that meet the above characteristics should be defined as grants, and unfortunately this is not the case. Both in the provisions of separate acts, as well as in judicial and supervisory jurisprudence, the category of "public grant" is clearly separated from other categories such as "means", "co-financing" or "support". This is particularly reflected in the case-law on public grants. This jurisprudence emphasized that the grant expenditure instrument may be used only when a given act allows for this form of expenditure (the word "grant" is used), because the statutory basis for granting is clearly indicated by its definition in Article 126 of PFA.

Therefore, if a given act uses the term "resources", they cannot be transferred in the form of a grant, even though they meet all the definitional features of grant. It should be noted, however, that this interpretation leads to the exclusion of these "resources" from the obligation to apply to them the provisions of the PFA, as well as the provisions of the Act on Liability for Violation of Public Finance Discipline of 17 December 2004. They will also not be subject to penal and fiscal liability incurred on the basis of Article 82 of the Fiscal Penal Code of 10 September 1999.

Legal definitions, such as the definition of a grant from Article 126 of PFA, are extremely strong directives for the interpretation of law, imposed normatively by the legislator himself. They are norms that require certain persons applying the law to give certain words or expressions appearing in legal provisions the appropriate meaning. The rules of law interpretation indicate that an unambiguously formulated legal definition "is not broken even if the linguistic content of this definition undermines the assumptions about a rational legislator" [Zieliński 2010, 215]. Considering the above, a restrictive interpretation prohibiting the use of the form of public grant in a situation where the act does not use the term "grant" should be accepted. However, in view of the more and more frequent statutory regulations providing for the transfer to the budgets of local government units so-called "means", "co-financing", "support" or "financial resources" (instead of grant), there is an urgent need to regulate their legal status under public finance law.

3. EARMARKED FUNDS OF *BANK GOSPODARSTWA KRAJOWEGO*

Legal status of earmarked funds received by LGUs is particularly complicated when these funds are transferred by entities/funds located outside the public finance sector and do not constitute state earmarked funds in the light of their statutory definition. Such situations occurred during the COVID-19 pandemic and the refugee crisis, during which special purpose funds established at BGK – the COVID-19 Response Fund and the Assistance Fund – were transferred to through the regional governors (voivodes) of the so-called "financial resources" (co-financing, support) which are neither targeted subsidies from the state budget nor subsidies from state earmarked funds.

In 2020, under the Government Local Investment Programme (which is a "sub-fund" and an auxiliary account of the COVID-19 Response Fund), PLN 10.3 billion was transferred to local government units through voivodes.[5] The budgets of local government units (despite the pandemic) ended with a budget surplus of PLN 5.7 billion (against the planned deficit of PLN 21.1 billion). Undoubtedly, this state of affairs was influenced by the realization of income from the funds obtained from the Local Government Roads Fund and the Local Government Investment Fund operated by BGK, which could be used in the next three budget years.[6]

It should be noted that the legislator's use of the special-purpose fund in the above crisis periods was a somewhat natural choice, taking into account the shortcomings of the classic budgetary economy and the need to react quickly to the effects of the crisis. As S. Owsiak points out, "next to the budget there are currently and have been in the past, and in the distant past, public earmarked funds as an alternative to the budget as an organizational form of collecting and spending public funds. We encounter the existence of targeted public funds already in ancient Greece, where there was, for example, a military fund and an entertainment fund. Therefore, the hypothesis that public earmarked funds were developed earlier than budgets in the form known to us today, the so-called as general purpose funds. […] in contemporary public finance systems, earmarked funds were created as a certain response to the weaknesses of the budget collection and spending of public funds" [Owsiak 1997, 115].

However, while public earmarked funds certainly include state earmarked funds, the basic principles of which are defined in Article 29 of PFA, the features of a public special-purpose fund cannot be fully attributed

[5] See https://www.nik.gov.pl/plik/id,24240.pdf [accessed: 18.09.2023].

[6] See https://rio.gov.pl/download/attachment/96/sprawozdanie_za_2020_r.pdf [accessed: 18.09.2023].

to special-purpose funds located in BGK, such as the COVID-19 Response Fund and the Ukraine Aid Fund. However, their public nature is indicated by some statutory revenues (i.e. payments from the state budget, European funds, receipts from Treasury bonds), as well as the public status of tasks financed from their funds.

It should also be noted that although according to Polish regulations on public finance these funds are not included in the public finance sector, they do belong to this sector according to the EU methodology (they are included in the general government sector). It should be expected that in the future BGK funds will be included in the catalog of entities belonging to the public finance sector defined in Article 9 of PFA in order to make this catalog compatible with the EU GG sector. Meanwhile, they remain in the private finance sector, which also means that the principle of transparency of public finances does not fully apply to them.[7]

The legal and financial features of the researched special-purpose funds (earmarked funds) are presented in the table below.

Table 1. Features of BGK earmarked funds (COVID-19 Response Fund and Ukraine Aid Fund)

the legal basis for the creation of the fund and the redistribution of funds	the funds were established on the basis of statutory provisions – Article 65 of COVID-19 Act* and Article 14 of Ukraine Act**
fund operator	Bank Gospodarstwa Krajowego
fund administrator	The Prime Minister, who may authorize the administrator of the budget part (voivode) or the minister to submit instructions for payment from the Fund
affiliation of the fund to the public finance sector	they do not belong to the public finance sector according to national regulations (because they are not listed in the catalog definition of the SFP under Article 9 of the Public Finance Act); however, they are included in the EU general government sector (GG)
legal personality	they do not have legal personality
features of the fund	they have statutorily assigned revenues and purposes for their use, which means that they are special purpose funds (they are also called flow funds); they are not state earmarked funds, because the act establishing them does not provide so.

* Act of 31 march 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them, and some other acts, Journal of Laws item 568 as amended.

[7] See https://www.gov.pl/web/finanse/strategie-zarzadzania-dlugiem [accessed: 18.09.2023].

** Act of 12 March 2022 on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this country, Journal of Laws od 2023, item 103 as amended.

Source: author's own scheme based on the provisions of the laws regulating the examined funds.

The quasi-grants transferred from BGK funds in a special way "disturbed" the legal order of the budgetary economy of the local government units. The legislator did not regulate the legal status of these quasi-grants, both on the side of revenues and budget expenditures of local government units, which meant that the main interpretations in this respect were made by regional accounting chambers and the Ministry of Finance.

A breakthrough interpretation in this matter was expressed by the Department of Finance of the Local Government of the Ministry of Finance in a letter of October 21, 2020.[8] In this paper it was clearly confirmed, in the face of earlier doubts, that quasi-grants received by LGU form COVID-19 Response Fund are of a budgetary nature and should be included in the budget of the local government unit, while maintaining their separation under the specific rules for implementing the budget of the local government unit. Consequently, an analogous character was given to the funds transferred to LGUs. also from other BGK funds, including the Ukraine Aid Fund established to finance or subsidize the implementation of tasks to help Ukraine, in particular to Ukrainian citizens affected by the armed conflict on the territory of Ukraine.

Thus, from the legal regulations and from subsequent explanations of the supervisory and control authorities over the local government units common features of quasi-grants transferred to LGUs from the so-called crisis funds of BGK, can be derived. These features are presented in the table below.

Table 2. Legal and financial features of quasi-grants transferred from BGK earmarked funds to local government units

statutory "proper name"	"financing", "co-financing", "supports" (which are not grants or subsidies) transferred to LGU by voivodes authorized by the Prime Minister for the implementation of tasks indicated in the act
the manner and form of transferring quasi-grants	funds are granted at the request of local government units submitted after the announcement of the call for proposals or without the need to submit an application, calculated on the basis of data reported by local government units in the IT system; funds are transferred non-contractually in the form of a transfer of funds

[8] See https://samorzad.pap.pl/kategoria/aktualnosci/mf-o-klasyfikacji-srodkow-rfil-niewykorzystane-w-tym-przechodza-na-rok-2021 [accessed: 18.09.2023].

the place where quasi-grants are collected by the beneficiary	state budgetary units and local government units accumulate quasi-grants from the Fund on a separate income account (SIA) and allocate them for expenses related to the implementation of tasks indicated in the Act as part of the financial plan of this account (structure analogous to the existing SIA of educational budgetary units – Article 223 of the PFA)
administrator of quasi-grants transferred to local government units	the commune head (mayor, president of the city), the poviat board and the voivodship board have and administer funds and develop a financial plan for a separate income account (SIA), where these funds are accumulated
the body supervising the SIA financial plan	voivode (the statutory scope of supervisory competences of regional accounting chambers does not cover the financial plans in question, therefore it was decided that voivodes should supervise them)
reporting obligations	Local government units submit to the competent voivode, through the electronic inbox, annual or quarterly information on the use of funds according to the formula specified in the resolution of the Council of Ministers
rules for the return of quasi-grant	lack of specific rules for the return of unused funds or funds used contrary to their intended purpose; however, Prime Minister may issue an instruction to a local government unit to pay (return) unused funds to a separate account of the Assistance Fund (FP)
the method of including quasi-grants in the budget and budget resolution of local government units	no indication of the legislator in this respect; As a result of the interpretation of the Ministry of Finance, it was decided that in the year of receiving the funds, they are included in the local government budget as own revenues and expenditures of the local government budget. In the following financial year, the unused part of the funds is recognized as revenue from unused cash in the current account of the budget, resulting from the settlement of revenues and expenses financed with them related to the specific principles of budget implementation set out in separate acts (Article 217(2)(8) of the PFA), becoming one of the sources of financing the local government budget deficit.

Source: author's own scheme based on the provisions of the laws regulating the examined funds.

The features of quasi-grants received by LGUs indicated in the above list from the BGK's special purpose funds prove that these quasi-grants have a special legal nature, which does not allow for their unambiguous and simple placement in the local government budgetary economy. The literature indicates that "although the mechanism of their redistribution is similar to the redistribution of funds from the EU budget, it should be assumed

that they will be of an exceptional and temporary nature, related to emerging crisis situations" [Dziedziak, Ostrowska, and Witalec 2022, 476].

Systemically assessing the regulations governing both of the above funds and their quasi-grants transferred to local government units it should have been assumed that the legislator did not intend to give these funds a budgetary character, as evidenced by the obligation to develop a financial plan of a separate income account (SIA) and granting executive bodies of LGUs the right to dispose of these funds. In the absence of an unambiguous statutory indication in this regard, it was the interpretations and explanations issued by the Ministry of Finance and regional accounting chambers that determined the role and location of the above funds in the budgetary economy of LGUs.

CONCLUSIONS

It should be pointed out that the mechanism of quick and flexible redistribution of quasi-grants from earmarked funds deposited in Bank Gospodarstwa Krajowego, applied by Polish legislator, undoubtedly turned out to be effective in practice, as it prevented the occurrence of negative effects of crises in the budgetary economies of local government units. In 2020-2021, the budgets of local government units (despite the pandemic crisis) ended with high budget surpluses. Establishment of the Ukraine Aid Fund in 2022, from which LGUs were paid funds to cover expenses related to the refugee crisis also had a similar positive effect on local government budgets 2022.

Considering the significant amount of funds transferred to LGUs from the above-mentioned special-purpose funds of BGK, however, the maintenance of their still ambiguous legal nature should not be accepted, as it causes significant difficulties in their supervision and control. The status of earmarked funds operated by BGK cannot be explained on the basis of the provisions of the Public Finance Act, and the legislator characterized the support in question by the concept of quasi-grants, most likely in order to escape the subsidy/grant transfer regime in this regard [Walczak 2022, 42].

In addition, the fact that the legal status of the above measures, due to the lack of statutory regulations in this respect, is determined by way of explanations issued by the Ministry of Finance, cannot be positively assessed. In this way, it was decided on the budget nature of these quasi-grants, despite the fact that they are not included in both the constitutional and statutory catalog of revenues of LGUs. In this way, it was also decided that the unused part of these quasi-grants in a given budget year, in the following year, will be transformed into the category of revenues

related to the specific rules of budget execution, despite the fact that they do not meet the characteristics of funds settled under the so-called specific budget implementation rules. Quasi-grants transferred to local government units are not of a permanent and systematic nature, which is required for the so-called specific budget implementation rules. They are of an irregular and purposeful nature, which brings the transferred funds closer to subsidy and grant transfers.

The research hypothesis put forward in the article has been positively verified. The analysis of both legal regulations and the views of representatives of public finance science proved that: quasi-grants transferred to Polish local government units from state earmarked funds located in Bank Gospodarstwa Krajowego, although they are an effective instrument for improving the economic condition of local government budgets, are not anchored in international and national regulations of local government budget management.

Taking into account the advantages of the mechanisms used to transfer quasi-grants to local governments from BGK earmarked funds, urgent amendments to the acts regulating the financial management of local governments should be postulated, as a result of which a systemic regulation of the funds (that are not subsidies or grants) received by local government units would take place.

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THE NEW HORIZONS OF TAX LAW BETWEEN ENERGY POLICIES AND ECOLOGICAL TRANSITION: THE CASE OF ENERGY COMMUNITIES

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Abstract. In view of the objectives of environmental sustainability and climate neutrality, advocated by the Paris Agreement and the "European green deal", energy taxation represents a fundamental tool for the gradual replacement of traditional fossil fuels with renewable ecological sources in a cost-saving manner. Moreover, it enables us to rethink energy supply models. The reflection considers measures developed at both EU and domestic levels, examining tools, mechanisms and tax incentives designed to facilitate an environmentally-friendly energy transition. Particular focus is given to energy communities – a form of energy system democratization allowing users to become producers, consumers and managers simultaneously, transforming the energy market, still reliant on fossil fuels and organized around centralized production and distribution networks, from a "green" perspective.

Keywords: new horizons of tax law; energy policies; ecological transition; energy communities

1. ENERGY TAXATION BETWEEN THE EUROPEAN GREEN DEAL AND THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT

In view of the objectives of environmental sustainability and climate neutrality [Gratani 2014, 535; Carducci 2021, 51; Comelli 2021a, 1969], advocated by the Paris Agreement [Nespor 2016, 81; Savaresi 2016, 16; Ari and Sari 2017, 175; Aristei 2017, 73; Klein, Carazo, Doelle, et al. 2017; Tomoaki 2018, 42; Blasizza 2021, 642] and the "European green deal" [Claeys, Tagliapietra, and Zachmann 2019; Rosembuj 2019, 1; Majocchi 2020a, 203; Padoa-Schioppa and Iozzo 2020, 3; Comelli 2021b, 44], energy taxation represents a fundamental tool for the gradual replacement of renewable ecological sources to traditional fossil fuels [Chomsky and Pollin 2020, 100], also in order to achieve cost savings and rethink energy supply models in a promotional dimension of the tax authorities [Uricchio 2015, 19], to progressively reduce greenhouse gas emissions through the use of renewable and environmentally friendly energy sources [Moratti 2020, 439].

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The strategy – adopted within the EU with the "Clean energy package" (set of measures consisting of four regulations and four directives approved between 2018 and 2019) and implemented by the domestic laws of the Member States – intends to transform the economic system according to a circular [Soncini 2019, 325; Cocconi 2020, 1; Greggi 2020, 25; De Leonardis 2021, 161; Uricchio 2022a, 185], efficient, competitive, sustainable and inclusive paradigm [Uricchio, Chironi, and Scialpi 2020, 1], through the implementation of clean technologies, favored by the provision of incentive fiscal policies, in order to promote, in the long term, the production of completely decarbonised energy with a consequent zero climate impact.

As part of the program called "Fit for 55" [Monteduro 2021, 447; Fregni 2022, 161], the European Commission has presented a series of proposals aimed at achieving the objectives expressed by the European Green Deal, consisting of a 55% reduction in net carbon dioxide emissions by 2030 (compared to previous levels) and energy neutrality to be achieved by 2050 through a series of regulatory interventions aimed at modifying or revising the European framework for the taxation of energy products [Salvini 2007, 1670; Verrigni 2007, 251; Cerioni 2008, 49; Puri 2013, 191; Orsini 2014, 9; Traversa and Wolff 2016, 397; del Federico and Giorgi 2017, 297; Giorgi 2017, 58; Verrigni 2017, 67; Pirlot 2020, 359; Dibilio 2021, 393].

According to the objectives, acquire further importance the Directives on energy efficiency and renewable sources, those on the emissions trading system, on transport, as well as on the creation of a new EU own resource, called the "Carbon Border Adjustment Mechanism" [Majocchi 2020b, 275; Idem 2020a, 91; Letizia 2021, 561; Santacroce and Sbandi 2021, 3942; Letizia 2022, 199].

The 2030 Agenda for Sustainable Development [Montini and Volpe 2016, 19; Niklasson 2019; Karlsson and Silander 2020], an ambitious action program for people, planet and prosperity, signed in September 2015, also deals with issues relating to the energy sector, setting 17 objectives and 169 targets that address the dynamics of the sustainable development in an economic, social and environmental dimension [Moratti 2020, 439].

In this context, the theme of energy is divided into multiple objectives, the common feature of which is the need to increase the diffusion of clean energy to counteract environmental degradation and reduce the risk of catastrophic events[1]: objective number 7 intends to ensure access for all to affordable, reliable, sustainable and modern energy systems to significantly increase the share of renewable energies by 2030 and double the global rate of improvement in energy efficiency [Moratti 2020, 439].

[1] More generally, on the tools developed to prevent natural disasters resulting from climate change, see Pistone and Traversa 2015, 27.

Almost simultaneously with the preparation of the 2030 Agenda, with the Communication entitled "A framework strategy for a resilient Energy Union, accompanied by a forward-looking climate change policy" COM (2015) 80 final, which can be considered the prodromal act to the adoption of the "climate package", in relation to the energy policies adopted within the EU [Pozzo 2009, 841; Quadri 2011, 839; Marletta 2014, 465; Roggenkamp, Redgwell, Rønne, et al. 2016, 8; Talus 2016, 4; Leal-Arcas and Wouters 2018, 3; Sbrescia 2020, 819], concerns were expressed deriving from the fact that the Union still imports too high a percentage of its energy needs and highlighted the role that they could have played individual citizens in the energy transition process [Meli 2020, 633].

2. THE ITALIAN LEGISLATION AND THE *DE IURE CONDENDO* PERSPECTIVES. THE "ENERGY COMMUNITIES"

Even at the domestic level [Quadri 2012, 1031; Mainardis 2020, 1329; Manno 2023, 19], the legislative acts adopted to transpose EU directives, with repercussions in tax matters, are many: Article 24, legislative decree 3 March 2011, n. 28, implementing Directive 2009/28/EC, in the formulation resulting from the changes made by Article 20, law 20 November 2017, n. 167, which defines methods and criteria for the incentive of electricity from renewable sources; the decree of the Ministry of Economic Development of 4 July 2019, containing incentive measures for electricity produced by on shore wind, solar photovoltaic [Vitiello 2008, 835], hydroelectric and gas plants residual from purification processes; Article 65, paragraph 1, decree law 24 January 2012, n. 1, converted by law 24 March 2012, n. 27, which, in relation to solar photovoltaic systems with modules placed on the ground in agricultural areas [Marchianò 2020, 96], precludes access to state incentives recognized by legislative decree March 3, 2011, n. 28.

From a *de iure condendo* perspective, there was no shortage of proposals aimed at adopting tax exemptions for electricity from renewable sources, as well as reductions for energy sources used by "vulnerable families" or by energy-intensive companies [Santacroce and Sbandi 2021, 3943].

Focusing attention on the *de iure condito* aspects relating to "energy communities", it is appropriate to recall the "Clean Energy Package", which includes, among other things, Directive 2018/2001/EU of 11 December 2018, on "promotion of the use of energy from renewable sources" (so-called RED II), and Directive 2019/944/EU of 5 June 2019, concerning "common rules for the internal electricity market".

These sources have been incorporated, initially partially with Article 42 *bis*, decree law 30 December 2019, n. 162, converted by the law 28 February

2020, n. 8, and subsequently definitively with the legislative decree 8 November 2021, n. 199 (which implemented Directive 2018/2001/EU) and with legislative decree 8 November 2021, n. 210 (which transposed Directive 2019/944/EU), in order to promote the energy transition from an ecological point of view and give the citizen/taxpayer a central role in the energy sector.

In this way, the domestic system has given entry to the figures of collective self-consumption from renewable sources, renewable energy communities and energy communities of citizens, mechanisms of cooperation, aggregation and sharing of self-production and consumption of renewable energy, endowed with particular flexibility, successfully used for some time in other jurisdictions, thanks to which even small users, in the past only consumers, can take an active part in the energy market, becoming producers [Bevilacqua 2020, 1; Cusa 2020, 287; Romeo 2021, 1; Sokołowski 2020, 1].

3. THE FIGURE OF THE "PROSUMER" AND THE TRANSITION TOWARDS A LOW CARBON ECONOMIC MODEL

These institutes represent a form of democratization of the energy system, achieved through the co-ownership of the means of production of renewable energy and the shared management of distribution tools, to allow users to become producers, consumers and managers at the same time, in order to transforming the energy market into a "green" perspective, which is still fueled mainly by fossil fuels and organized according to a centralized production and distribution network [Meli 2020, 632].

Regardless of the various declinations assumed, a unifying element can be found at the basis of the "energy communities": the aggregation of a certain number of prosumers (understood as self-producers and self-consumers of energy from renewable sources) willing to share the plants of production to facilitate the adoption of eco-sustainable behaviors.

In this context, there is no shortage of differentiations. In fact, while the "renewable energy communities" are based on the principle of autonomy between the members and on the necessary proximity to the generation plants, being able to produce and manage the energy generated from renewable sources in different forms (electricity, heat, gas), the "energy communities of citizens" are not inspired by the principles of autonomy and proximity, being able to produce and manage only electricity generated from both renewable sources and fossil fuels [Giobbi 2021, 64].

The phenomenon, which evokes (but overlaps with) that of the energy cooperatives [Cusa 2015, 663; Tarhan 2015, 104; Capo 2021, 616] present in our system from an era dating back and, for some time, also widespread

in the renewable energy sector, revolves around the figure of the "prosumer"[2], whose headword, composed from the phrases "producer" and "consumer" (sometimes considered a "professional consumer"), it identifies a subject who at the same time assumes the role of producer and consumer or who, by consuming, contributes to production [Meli 2020, 630].

In Directive 2018/2001/EU, self-production and consumption of renewable energy become a priority tool for the transition to a low-carbon economy, through forms of aggregation that stimulate change and encourage citizens to use renewable energy sources, making them protagonists of the ecological renewal of the energy sector.

This objective is pursued more explicitly with Directive 2019/944/EU, which, by providing an even more detailed regulatory framework, recognizes the right to citizens who operate individually or within the "Citizen Energy Communities" to become an active part of the energy system, acquiring the ability to produce, consume, accumulate and distribute self-produced energy, through a decentralized and competitive model [ibid., 634-35].

4. NON-FISCAL INCENTIVE MECHANISMS AND TAX BENEFITS IN FAVOR OF RENEWABLE ENERGY COMMUNITIES

This reflection, taking its cue from the measures developed at EU and domestic level, intends to focus attention on the tools, mechanisms and tax incentives aimed at operating the energy transition from an ecological point of view [Kogels 2019, 2; Uricchio 2020, 13; Clò 2018, 102; Muratori 2021, 255; Uricchio 2021, 327], also from a *de iure condendo* perspective [Parente 2022, 129].

In a promotional dimension, to implement the spread of "energy communities", in addition to the tax incentives recognized in the field of energy efficiency by sector legislation (Article 16 *bis*, paragraph 1, letter h, Presidential decree 22 December 1986, n. 917; Articles 119 and 121, decree law 19 May 2020, n. 34, converted by the law 17 July 2020, n.7), the domestic legislator, transposing the 2018/2001/EU Directive, previously provided, on an experimental and transitional basis (Article 42 *bis*, legislative decree n. 162/2019, converted by law n. 8/2020 and decree of the Ministry of Economic Development of 16 September 2020), then, definitively (legislative decree 8 November 2021, n. 199), specific non-tax incentive measures, applicable at no additional cost to the State.

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[2] Expression coined by Toffler 1987.

In addition to these last measures, the economic advantages and the *favor* fiscal instruments which renewable energy communities can enjoy are of specific relevance.

From an economic point of view, an energy community that uses renewable sources benefits from multiple advantages, both in terms of cost savings, not having to bear costs for the purchase of energy, and in a lucrative key, being able to make a profit through the sale of the energy produced and use the incentive mechanisms described above.

From a tax point of view, the benefits reserved for energy communities are limited to the direct taxation sector and, although placed in an alternative relationship, are manifold.

On the one hand, Article 16 *bis*, paragraph 1, lett. h), Presidential decree n. 917/1986 [Forte 2013, 2072; Lamedica 2013, 2961; Milan 2013, 1711; Forte 2014, 3397; Fanelli 2017, 3606; Forte 2018, 655; Basilavecchia 2017, 146; Uricchio 2017, 206; Melis 2020, 591; Uricchio 2020], in the formulation resulting from the changes made by Article 119, paragraph 16 *bis*, decree law 19 May 2020, n. 34, converted by the law 17 July 2020, n. 77, provides, with regard to income tax, a deduction equal to 50% of documented expenses, up to the threshold of 200 kW and a total amount of expenditure not exceeding 96,000 euros, for interventions relating to the construction of works aimed at achievement of energy savings with particular regard to the installation of systems based on the use of renewable energy sources.

On the other hand, Articles 119 and 121, decree law 19 May 2020, n. 34, converted by the law 17 July 2020, n. 77, as resulting from the changes made by law 30 December 2020, n. 178,[3] increased the deduction rate for expenses incurred from 1 July 2020 to 30 June 2022 [Balzanelli and Valcarenghi 2021, 4327] to 110%, in the face of specific energy efficiency measures, the reduction of seismic risk, the installation of photovoltaic systems [Bordolli 2021, 149] and infrastructures for electric vehicle charging.[4]

For the latter measure, as an alternative to the use of the tax deduction, it is possible to exercise an option for the assignment of the credit corresponding to the deduction due or to benefit from an advance contribution in the form of a discount from the suppliers of the goods or services on the consideration due, for a maximum amount not exceeding the amount itself (so-called discount on the invoice).

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3 On which, see Friscolanti 2021a, 19; Idem 2021b, 34.

4 See Agenzia delle Entrate, *Superbonus 110%*, marzo 2021, p. 2.

5. CRITICAL CONSIDERATIONS

Although it emerges from the regulatory framework that, in the intentions of the EU legislator, in the near future, energy communities should play a crucial role in the production and market of "clean" energy, tax breaks and economic incentives developed at domestic level, at present, still appear inadequate.

In fact, while the incentive tools (i.e. those of a non-fiscal nature) constitute a peculiarity of the reward system reserved for energy communities, despite the perplexities and antinomies that emerge on the application level due to the complexity of the regulatory provision, the same singularity is not found. for tax concessions[5] applicable to energy communities: the latter do not present particular differences with respect to those benefiting, in the presence of the legal requirements, those who carry out energy redevelopment interventions.

By emphasizing the promotional dimension of the tax authorities, within a more advanced model of assessment and taxation of the energy sector, it would have been preferable to seize the opportunities offered by EU legislation, enhancing, through more incisive tax measures, the role assumed by energy communities for the pursuit of collective interests of absolute importance, such as, for example, the implementation of renewable energy sources, environmental protection and the fight against climate change [Bernardi and Miccù 2021, 89].

This profile would have made it possible to reduce the tax burden and enhance environmental interests, encouraging investments for energy efficiency to implement an "effective" ecological transition [Uricchio 2022b, 867; Idem 2023, 83].[6]

The hope, then, is that, by reviewing the legislative choices with a view to the use of adequate incentive tax models, energy communities can be conceived "in a functional sense", becoming a driving force for the promotion of renewable energy sources and an effective tool of consumer protection.

In this way, the phenomenology of energy poverty would be limited, access to "clean" energy would be favored and a "truly" sustainable development achieved, allowing environmental interests to be combined with the recovery of the economic system, severely compromised by the COVID-19 pandemic and war crisis.

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5 On tax concessions, see Fantozzi 2004, 91-92; d'Amati 2015, 25; Fiorentino 2017, 69; Stevanato 2019, 52; Paparella 2021132.

6 More generally, on the main preordained incentives for the implementation of environmental investments in Italy, see Maruccia 2021, 367.

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LAW AND RECOGNITION OF CONSTITUTIONAL LEGAL PERSONALITY OF FORESTS: A FEW REMARKS ON FUNDAMENTAL PRINCIPLES AND VALUES

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Abstract. The legal subsumption of biosphere processes necessitates recognition of the fact that the timescales on which nature reproduces itself are disparate from those of human life and societies. Additionally, nature exhibits variations in conformity across space. In the face of these challenges, the law must be able to integrate the aspects of complexity that characterize the construction of legal systems, the conception of fundamental rights, and the foundational values of legal systems with the facets fundamental to nature's welfare. Therefore, due to the ambiguous nature of granting legal subjectivity and associated rights to nature, which could impede social inclusion and diversity, the author suggests granting constitutional legal personality to forests. This would enable precise definition and the application of established legal and managerial knowledge for the conservation of nature.

Keywords: legal subsumption of biosphere; constitutional protection of nature; legal personality of forests

1. INTRODUCTION: PROTECTION OF NATURE AND CONSTITUTIONAL PERSONALITY OF FORESTS

This brief contribution aims to further explore the issue of recognizing the legal personality of forests in the constitution, a proposal that I have recently presented on various fora [Policastro 2022-2023; Idem 2023]. Initiatives aimed at recognizing the legal personality of nature and its rights are multiplying. These trends reflect both a legal perspective seeking to transcend the instrumental view of the surrounding world as merely serving human interests and, in various cases, asserting new concepts, such as indigenous or native peoples' perspectives, which aim to recognize the deep connections between nature and human beings.

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As early as the United Nations Declaration of 1992, the World Charter for Nature[1] emphasized that humanity derives from nature and that by caring for nature, it will bestow its gifts in return. The Stockholm Declaration of 1982[2] also sought to promote a heightened awareness of the relationship between human societies and nature. In this contribution, we will primarily examine how the legal personality of forests can consistently address the development of a conscious symbiosis between humanity and the biosphere.

2. PROTECTION OF THE BIOSPHERE, FOUNDATIONS OF LAW, AND COMPLEMENTARY KNOWLEDGE

The intense debate unfolding in many countries regarding nature's rights or its components has garnered significant interest within the field of legal science.[3] The legal recognition of nature and its rights occurs both in its entirety and in relation to specific areas, considered in terms of their spiritual, cultural, and ecosystemic identity. The interest in protecting nature as a whole or in relation to its parts or ecosystems is undoubtedly justified given the growing concerns about the preservation of the state of the Biosphere, understood as the space where life, including that of human beings and their societies, manifests itself. These concerns united, among others, scientific research, theological and literary reflections [Vernadsky 1926; Idem 1945; Le Guin 1972; Lovelock 1979; Margulis 1998; Powers 2018].[4]

The complexity of the subject is linked to the need to protect life from both a cosmic perspective, i.e., planetary,[5] and a social perspective, i.e., in the context of the relationships between different cultures and the various institutional and organizational models through which humans act.[6] Law

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[1] UNO General Assembly, World Charter for Nature, 48th Plenary Meeting 28th October 1982, A RES 37/7 ENG.

[2] UNO, Declaration of The United Nations Conference on The Human Environment, Report of The United Nations Conference on The Human Environment, Stockholm, 546 June 1972, A/Conf 18/14/Rev. 1, United Nations Publications, New York 1973.

[3] "A search on 'derechos de la naturaleza' and 'rights of nature' in Google Scholar yields 21,100 publications on the subject in Spanish and 15,800 in English. In HeinOnline, 2,079 texts appear when searching for the words 'rights of nature', and in JSTOR 555 articles appear when entering these same words in the search engine. Over the last fifteen years, a network of scholars studying these rights has developed, and the corresponding body of scholarship is profoundly heterogeneous" [Bonilla Maldonado 2023, 42].

[4] See Franciscus PP., Littera encyclica *Laudato si'* de communi domo colenda, AAS 107 (2015), p. 847-945.

[5] "To a great extent, exogenous cosmic forces shape the face of the Earth, and as a result, the biosphere differs historically from other parts of the planet. This biosphere plays an extraordinary planetary role" [Vernadsky 1997-1998, 44].

[6] Luhmann's call for communication beyond individual perspectives is indicative in this

plays a key role in this regard. Indeed, the law is not only constructed to facilitate communication among diverse individuals and societies but, in attempting to resolve the issues stemming from different legal relationships,[7] it is called upon to engage with an increasingly diverse range of sciences and knowledge.

When these sciences and knowledge aim to underpin legal reasoning, they function as metatheories of the law. Conversely, when they support legal reasoning by providing elements derived from their respective fields of inquiry, they serve as complementary theories of the law.[8] Moral knowledge, i.e., ethical values, and wisdom knowledge, i.e., those through which different cultures represent and interact with natural phenomena, can also be utilized as complementary theories to legal knowledge or as theories that allow for the establishment of legal knowledge itself (namely as metatheories). Furthermore, the various conceptions of law as a product of civilization[9] can

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regard [Luhmann 1986, 142]. "We must therefore ask the question, whether, […] an ethics that abstains from paradox will develop and be able to be practiced with moral responsibility. This could give us pause to wonder whether it is not the recognition of paradox that is the way for ethics to go […]. If anywhere, it is in ecological communication that society places itself in question […]." See to this regard the reflections stemming from: Franciscus PP., Littera encyclica *Fratres omnes* de fraternitate et sociali amicitia, AAS 112 (2020), 969-1074.

[7] Indeed, see Policastro 2010a, 55-56: "legal knowledge can be expressed only through language. The way in which languages develop their semantic contents depends very much on the historical background of the interpreters, on the history of thought and the challenges that the societies that make use of a given language went through" through highly inductive processes. "In this approach, language may be seen not only with respect to a creative function, an information function and a memory function as Lotman pointed out. This aspect ought to be seen also in connection with the past experience deriving from a community and its interaction with other communities, that includes language and culture. Last but not least there is the interaction between the deep consciousness of the individual, For this reason the relationship between conventional and symbolic meaning of linguistic expressions, appears not univocal. On the contrary it yields a plurality of solutions that cannot be considered without an adequate approach to complexity." Lotman paved this way to approach the problem, writing [Lotman 1990, 12-13]: "For a fairly complex message to be received with absolute identity, conditions are required which in naturally occurring situations are practically unsustainable […] languages have functions, which are inherent to them in the natural state". Including the reflection on the different aspects concerning our life, and in particular of our life within nature appeared to us thus, a reasonable approach to improve the awareness of the communication. Scholars such as Vernadsky and Lovelock encourage us to do so.

[8] "the use of complementary theories will be an element of our legal justification. It will be compounded, through our use of the meta-theories as an hypertext, which is itself not a theory but that permits to bridge up between our complementary theories, and our object theory of law" [Policastro 2012, 190].

[9] Concerning the conceptions of law in relation to civilization we have the conception of the historian Arnold Toynbee [Toynbee 1954, 217] that "In their unanimous repudiation

also serve to underpin and integrate legal reasoning, taking into account various issues and circumstances.

In the face of fundamental global issues, such as the protection of the Biosphere and nature, human dignity, rooted in our biological existence, becomes the reference value.[10] This calls for a dialogue that entails complete acceptance of the other and likely incorporates the postulates of Niklas Luhmann regarding the ethics of ecological communication. On the other hand, dialogue is both necessary and creative, as different views of law characterize each community and society, including the question of deeply rooted customs and ways of life, which should be viewed as substantive constitutions. Therefore, dialogue among various ways of life requires not only consideration of their general relationship with culture, society, and history but also a close examination of all the structures that give rise to their substantive

of a belief in a 'Law of God*, all Iate Modern Western minds alike had been making the unwarrantably overweening assumption that they had a deeper insight into the secret of the Universe than the Prophets […] and these seers' Christian and Muslim epigoni [...]. In their sectarian repudiation of a belief in 'laws of Nature' as well, the antinomian school of Late Modern Western historians had been making a still more overweening assumption that was even more unwarrantable." The jurist Hans Kelsen had a diametrically opposite perspective [Kelsen 1943, 265-67]: "With the emancipation of causality from retribution and of the law of nature from the social norm, nature and society prove to be two entirely different systems […]. Hence there is no longer room for a natural behind or above a positive legal order. The dualism of nature and society is replaced by that of reality and ideology." Within this debate, thus, the position of the sociologist Niklas Luhmann on ecological communication stresses that [Luhmann 1986, 265] "But if anywhere it is ecological communication that society places itself in question, and we cannot see how ethics can dispense with this and remain available as something that can be relied on." This statement and the one of the scientist James Lovelock [Lovelock 1979, 130] "A more promising solution of the problems we have created […] is a honest recognition of our dependence on technology and an attempt to select only those parts of it which are seemly and in their demands on planetary resources" call perhaps for a new civilization approach to our life in common. To this aim, the Encyclicals of Pope Francis *Laudato si'* and *Fratelli tutti* appear especially important.

[10] According with our research [Policastro 2010b, 624]: "Dignity acquires significant meaning as a value. First, because with its help, we can seek universal traits of humanity as a whole, regardless of the legal system of the state in which the individual lives and the legal categories that pertain to them. Second, because framing dignity as a value allows us to attribute distinguishing features to it compared to legal principles. In relation to what has been said, we can establish connections between the concepts of legal norm, legal principle, and legal value with the intellectual activities that individuals undertake when conceiving the legal reality. Third, because human dignity enables us to consider the correlations between legal systems, which are becoming increasingly important." Furthermore [Policastro 2010c, 2670], writes: "The trend towards the development of a law of interdependencies," which is intensifying due to the growing interest in the relationship between nature (the Biosphere) and human beings, this law "appears useful for researching the existential manifestations of the human person in order to determine the appropriate legal mechanisms for their protection."

constitution. Among these structures are the aims of societies, the principles governing the distribution of influence in society, the economy, and collective decision-making. They also encompass those related to the perception of law and its implementation.[11]

When we examine these relationships from the perspective of different subjects and institutions, we observe the presence of numerous complex relationships that can pose obstacles to full ecological communication. However, precisely these complexities can be very useful for the evaluation and selection of legal instruments. In fact, if we want to think about ecological communication effectively, we must also consider the use of legal institutions that are suitable for sharing and defining the object of protection clearly. So far, the legal institutions that have been used for the protection of nature include constitutional principles, constitutional or fundamental rights, other constitutional norms, norms establishing specialized organizations, ordinary laws or administrative acts. In addition to these, we must consider the practices adopted by constitutions and communities, as well as the principles and declarations of international law.

3. THE RELATIONSHIP BETWEEN HUMAN SOCIETIES AND THE BIOSPHERE, THE IMPORTANCE OF FORESTS AND THE DUTIES OF PROTECTION ARISING FROM THE INCORPORATION OF THESE APPROACHES INTO THE LEGAL FRAMEWORK

As our concern revolves around the relationship between human societies and nature, we must base our discourse on what we currently understand about nature, particularly the Biosphere. Nearly 100 years ago, Vernadsky,

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[11] We can see the development of the approach in the range of studies we developed between 2010 and the present moment. In [Policastro 2010a, 21] we write: "For this reason constitutionalism embodies a rule of exercise of the political problem, that whenever applied to concrete cases, produces different substantive constitutional relations, that is the patterns of distribution of the influences: a) on the political sphere, b) on the social sphere, and c) on the economic sphere. Such enactments and such rules of distribution tend to produce a legal order with specific features for the life of the individual subjects and for the relations with the other communities". We follow then [Policastro 2020, 362-63] with: "notwithstanding […] differences of the ways in which we live in common and relate to nature, constitutional law […] is characterised by three classes of elements […]: 1) […] aims of each society, the conditions in which it constituted, the problems it wanted to avoid or overcome by setting a form of life in common; 2) […] three kinds (subclasses) of principles and norms: (i) – the ones that indicate […] how the relations between the different parts of society take place; (ii) – […] in which way the decisions on the common issues may take place; (iii) – […] the relations through which resources and goods needed to conduct life are gathered and produced, and […] distributed; 3) a third class of rules, concerns how law determines its range of action […]."

in a landmark work, emphasized that ancient cultures that considered the Sun to be a common ancestor were closer to the truth than one might think.[12] Lynn Margulis, on the other hand, pointed out that life is a cosmic phenomenon, and that symbiosis, hence the systemic coherence of the Biosphere, was the result of the activities of all primary living organisms forming the basis of life on Earth.[13] Both of these analyses address the ethical problem in a very general way, transcending subjective and cultural assessments: given that life is an immanent characteristic of our planet and its condition in the Cosmos, surpassing our creative possibilities, we must act to preserve it.

James Lovelock further adds that human beings' self-awareness and their ability to exchange information should be useful for a collective effort.[14] We need to overcome fragmentation through our ability to choose. This brings to mind Pico della Mirandola, who expressed Renaissance thought by stating that the dignity of man lies in their freedom, which is the ability to choose.[15] This means that the capacity to choose is inextricably linked to each individual, and this implies that pluralism in choices is recognized as a characteristic of being human.

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[12] "Ancient religious intuitions that considered terrestrial creatures, especially man, to be children of the sun were far nearer the truth than is thought by those who see earthly beings simply as ephemeral creations arising from blind and accidental interplay of matter and forces. Creatures on Earth are the fruit of extended, complex processes, and are an essential part of a harmonious cosmic mechanism, in which it is known that fixed laws apply and chance does not exist" [Vernadsky 1987-1988, 44].

[13] L. Margulis writes: "Life is an incredibly complex interdependence of nature and energy among millions of species beyond (and within) our own skin. These Earth aliens are our relatives, our ancestors and part of us. They cycle our matter and bring us water and food. Without 'the other' we do not survive. Our symbiotic, interactive, interdependent past is connected through animated waters" [Margulis 1998, 110].

[14] See Lovelock 1979, 126: "The remarkable success of our species derives from its capacity to collect, compare, and establish the answer to environmental questions, thus accumulating what is sometimes called conventional or tribal wisdom. […] this wisdom has now become a bewildering mass of stored information. In a small tribal group still leaving in its natural habitat, […] where conventional wisdom and Gaian optimization conflict, the discrepancy is rapidly seen and the correction made…As society became more urbanized, the proportion of information flow from biosphere […] decreased […]. At the same time the complex interactions within the cities produced new problems…their solutions [were] stored […]."

[15] See the reference to Pico della Mirandola "De Hominis Dignitate" in Policastro 2010b, 613: 23. "Poteris in inferiora qui sunt bruta degenerare; poteris in superiora qui sunt divina ex tui animi sententia regenerari" (You can degenerate into lower things, which are brutish; you can regenerate into higher things, which are divine, according to your own judgment of the mind). Furthermore see Policastro 2010b, 648-49: "The dignity of man, emphasizing its existential aspect, creates a basis for the comprehensive interpretation of human dignity together with values such as freedom, equality, and the rule of law."

Therefore, what James Lovelock envisions – a coherent action by all of humanity aimed at caring for the balances of Gaia, Mother Earth – must first and foremost be consistent with the decisions of each individual. This coherence must be able to make use of all the substances and entities of the Biosphere, including those generated by anthropic processes, by anticipating how to use them in a way that preserves its equilibrium. These substances and flows should be regarded as opportunities and should therefore be considered within a prediction framework that allows for their sustainable use.

The aspects mentioned above should be taken seriously. Indeed, the Biosphere's primary characteristic is its attempt to maintain stable conditions for all living species over time.[16] Nevertheless, mass extinctions that have occurred during the planet's evolution have seen new species replace others with the transformation of planetary living conditions.

Therefore, even though the Biosphere has shown its capacity for renewal, the contribution of societies to preserving homeostasis is crucial, especially given that scientific literature suggests we are approaching a sixth mass extinction.[17] In this regard, Vladimir Vernadsky already observed in 1926 that humans had made a significant alteration to the vegetal covering of the earth through the drastic reduction of forested areas. Vernadsky added that, in 1926 the effects of this depletion of the Biosphere were incalculable. However, nearly 100 years later, the opinion of authoritative scholars in the field of global forest evolution is that the best remedy to address the climate crisis is to increase the surface area of trees. Nevertheless, the method to achieve this remains to be identified. We simply want to note that human actions directed towards preserving homeostasis in the current state of the Biosphere equate to ensuring the adequate survival of the human species. This means that acting to protect or refrain from causing harm to life, freedom, personal integrity, or the property of another [Locke, II, Chap. II, 7] is an essential duty for individuals, communities, and institutions. The state of the Biosphere in which our life has developed is the starting point, or the state of nature, for every human society. Therefore, faced with the current state

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[16] See "The most important property for Gaia is the tendency to keep constant conditions for all terrestrial life" [Lovelock 1979, 119].

[17] See: "Our examination of existing data in these contexts raises two important points. First, the recent loss of species is dramatic and serious but does not yet qualify as a mass extinction […] that there is still much of the world's biodiversity left to save, but daunting that doing so will require the reversal of many dire and escalating threats. The second point is particularly important. There are clear indications that losing species now in the 'critically endangered' category would propel the world to a state of mass extinction that has previously been seen only five times in about 540 million years. Additional losses of species in the 'endangered' and 'vulnerable' categories could accomplish the sixth mass extinction in just a few centuries" [Barnosky et al. 2011, 56].

of the Biosphere, protection through criminal law for actions or omissions that harm its equilibrium, or that prejudice the conditions of individuals due to climate change itself (of course, with the corresponding safeguards), must be considered admissible. Furthermore, the relationship between human societies and nature must be understood as part of the limitation of political power and, consequently, constitutionalism.

4. PLURALISM AND LAW: TIME, SPACE, AND COMPLEXITY IN BIOSPHERE PROTECTION

As we have seen, Lovelock calls upon societies and human communities to develop a coherent action within a pluralistic context, through consciousness and communication. It should be emphasized that in addressing the need for states to develop a cooperative approach to caring for the Biosphere, the recognition of broad pluralism is necessary [Policastro 2015]. Pluralism is also considered necessary in the development of the institutions through which the protection of nature is pursued in various legal experiences. Therefore, different concepts of "rights", for example, in the protection of the rights of nature, appear not only plausible but necessary.[18]

More generally, in the long debate over Ronald Dworkin's thesis that in difficult cases, through a judge particularly endowed with cognitive and interpretative skills, only one correct solution can be reached, new views appeared.[19] One of them has been purported by Michel Rosenfeld

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[18] D. Bonilla Maldonado underlines: "Legal pluralism offers a set of conceptual lenses through which to […] evaluate the heterogeneity of normative systems that exist […] as well as their interactions. This heterogeneity, […] challenges the assumptions underlying the legal monism that is dominant in modern law whereby states have (and should have) an autonomous, […] legal order that reflects the ethos of the nation. The rights of nature have created a form of external legal pluralism […][they] are legal products that have emerged in peripheral national legal systems and that have influenced and partially transformed international law" [Bonilla Maldonado 2023, 1]. He adds: "The rights of nature are not a tool to promote or consolidate weak legal pluralism …They are not a means to complicate the rule of recognition […] and accept authorities from minority cultures as a source of law, a source that will generate rules and principles applied solely within the territories they govern […] the rights of nature, like the "Virgen-Cerro", are also innovative and subversive. Indigenous cultures represent a valuable source of legal knowledge creation […] and artistic wisdom. Historically, these cultures have been regarded by the dominant modern culture as minor and exotic forms of knowledge" [Bonilla Maldonado 2022, 84-85]. These statements reveal an approach quite opposite with respect to the one of Kelsen [Kelsen 1943].

[19] Namely the solution of judge Hercules, who "must consider a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified as principle, constitutional and statutory provisions as well" [Dworkin 1977, 117]. He added, however, that "Hercules technique of adjudication […] serves a reminder to any judge […] that he should decide hard cases with humility"

in favor of "comprehensive pluralism."[20] It is also important to consider that from a philosophical perspective, the pluralist principle is widely advocated in reference to the interaction between ways of life.[21]

4.1. Law, time, and nature

To address the issue of using legal tools to care for the common home, or the Biosphere, we must consider that the law operates in three dimensions: time, space, and complexity. Time is a crucial factor, especially in the relationship between humanity and nature. The emergence of forests has played a significant role in shaping the current conditions of the Biosphere.[22] Therefore, maintaining adequate forest coverage (contributing at the same time to the needs of wood as raw material) should be regarded as a fundamental constitutional obligation linked to sovereignty over natural resources.[23]

[ibid., 30].

[20] "In societies such as the typical of Western constitutional democracies in which the citizenry divides among several competing conceptions of the good – i.e. societies that are 'pluralistic in fact' the best way to fulfill the demands of equal concern and respect principle is arguably through adoption of 'pluralism-as-norm' or in other words, through commitment to 'comprehensive pluralism' which "must mediate between conceptions of the good and seek to insure that pursuit of any such conception should not frustrate the opportunity to pursue other such conceptions" [Rosenfeld 2005, 389].

[21] "The plurality of worldviews in which a human being normally lives and endures all existential threats is therefore only meaningful if it signifies the rationale of its own pluralism. The rationale of pluralism is the internal complexity of existence, above all, the fundamental complexity without which other complexities would not be real, the complexity of Essence and Being, constituting the adventure of existence, which is contrary to the external reason of being. Like the Absolute, the First Being, it exists on its own through an absolute internal complexity, like 'existential parts]" [Krąpiec 1986, 74].

[22] "The rise of land plants, which became well established during the Devonian Period (419-359 million years ago), is a key episode in the history of life. The evolution of moderate to large sized plants had profound influence on many aspects of the Earth system, including atmospheric composition, the hydrological cycle, sediment transport and the nature of the sedimentary rock record, and albedo and global temperatures – arguably creating the modern Earth" [Berry 2019, 792].

[23] However, according with Anna Stilz [Stilz 2019, on-line abstract]: "The proposed […] principle is […] a right to control resource management decisions. By investigating the case of forest conservation, the chapter also argues that in the case of certain global systemic resources, resource sovereignty should be constrained by duties of environmental justice that require cooperation in international institutions." Instead Nico Schrijver points out: that the Forestry Statement of the 1992 UN Conference on Environment and Development reaffirms the "permanent sovereignty over all types of forests", and provides that their "sound management and conservation [are] of concern to the Governments of the countries to which they belong and are of value to local communities and to the environment as a whole" [389]. Here it emerges that international law does not neglect the importance of forestry management for the protection and the use of natural resources.

On the other hand, the development and sustainable management of natural resources occur over a timespan much broader than human life. Thus, linking decisions about natural resource management to decision-making processes driven by electoral majorities seems inappropriate. Balancing the interests at stake may not adequately consider the relationship between society's immediate expectations and symbiosis with nature. In this field also the judiciary may find difficulties, which call for an approach based on humility [Dworkin 1977, 130].[24] A sociological aspect arises here: the need to integrate the governance process regarding the relationship between society and nature with institutions capable of accounting for the temporal dimension of nature and taking responsibility for it.

Therefore, entities akin to defenders of nature's rights may seem generally to show contingent interests in nature protection but lack the hands-on experience and knowledge to envision the orderly development of human societies in symbiosis with nature. Greater interest lies in institutions with centuries of experience in observing nature, whether they are a spontaneous product of society, as in the case of indigenous nations traditionally caring for forests and biodiversity, or institutions like the Polish State Forests, born from the confluence of social awareness of the importance of natural resources and the scientific reflection and technological applications characteristic of Polish society [Policastro 2022-2023, *passim*].

An important issue concerning time and natural resources is that forest growth requires much more time than the professional lifespan of foresters or the populations that care for them. The transfer of information in this regard is crucial. The formulation of plans serves this purpose. They are essential both in cases where it is necessary to reforest areas that have been completely deforested and in cases where forests need to be managed to improve biodiversity and ecological values. Achieving adequate results takes many years, and the results must be planned and constantly evaluated for each forest. Therefore, decade-long coordination laws rather than national plans may be important for this purpose.

4.2. Space, nature, and law

The Biosphere is not homogeneous. Each place has its own specificity and characteristics. Moreover, every population living in a particular

[24] Indeed: "The trial has taken on a new role in the environmental field. […] The judge plays an essential role in cases related to soil, water, air pollution, waste, or various oil spills. Furthermore, the trial has become a platform for political expression by civil society, particularly by NGOs, […] However, environmental disputes [...] have a specific, collective, complex, and sometimes transnational nature that challenges the trial's ability to contribute to the enforcement of environmental law" [Hautereau-Boutonnet 2020, 9].

territory has its own peculiarities. For this reason, the relationship between law and space is fundamental and constitutes a constituent element of the pluralist principle. Societies and human communities, by settling in various places, have developed their own cultures and also their relationship with nature. American poet Walt Whitman sang the wonder of the American citizen in the face of the wonders of nature,[25] calling for the use of "nature itself for freedom and democracy. Storytellers like Woody Guthrie ("This Land is Your Land")[26] or Lee Marvin ("I Was Born Under a Wandering Star")[27] follow this trend, in which there is no thought for the primary nations that were practically exterminated. Instead, more recently, Ursula K. Le Guin, with a different and more updated experience of the relationship between American society, space, and nature, described the lost relationship with nature: "The Word for World is Forest" [Le Guin 1972].[28] Moving on to other examples, the populations of the Amazon and other indigenous populations represent themselves as dedicated to preserving the specific biodiversity of their areas, trying in various ways to assert this role.[29] We can also observe that in those countries where there has been a distinction between material and immaterial function of nature, the space of nature has been in many cases put at serious risk by its appropriation for the purpose of real estate development. [Saint Marc 1967, 322-26]. In Poland instead, joining the productive, the ecologic and the social function of the forests is a serious obstacle for the instrumentalization of the forests as space of life.[30]

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[25] "In the poetry of Walt Whitman, nature is, on one hand, a spiritualized, orderly, and perfect mother, a cosmic force that manifests itself in various and diverse ways, and a whole composed of interdependent and interconnected parts. On the other hand, it is an instrument for the materialization of a particular political project: modern democracy in the New World" [Bonilla Maldonado 2022, 96]. The author however seems not to take into account that this new conception of nature is the outcome of the violent superposition of white colonizers over the original nations. See Whitman 1885, *passim*.

[26] See https://www.woodyguthrie.org/Lyrics/This_Land.htm [accessed: 15.09.2023].

[27] See https://www.justsomelyrics.com/1364273/lee-marvin-i-was-born-under-a-wandering-star-lyrics.html [accessed: 15.09.2023].

[28] The novel is the story of the colonization of a distant planet and the local populations, members of a people who identified their lives with the forest: "But to the Athsheans soil, ground, earth was not that to which the dead return and by which the living live: the substance of their world was not earth, but forest. Terran man was clay, red dust. Athshean man was branch and root. They did not carve figures of themselves in stone, only in wood" (from Chapter 5).

[29] As Melubo stresses: "despite the external pressures to dismantle Maasai ecological strategies and practices through imported religions, Western-oriented education, constraining policies, and the cumulative loss of land, the community has continued to maintain significant practices for the conservation of Tanzania's wildlife ecosystems and livestock […] indigenous practices are central to a continued nurturing of biodiversity conservation" [Melubo 2020, 180].

[30] Article 6(1a) of the Act of 28 September 1991 on forests, Journal of Laws of 2023, item

The Polish approach to forests is based on a decentralized planning approach, the implementation of which is the responsibility of the local forest superintendent.[31] The implementation of this approach takes place through the division of the national territory into forest regions and districts,[32] and these are then divided into as many forest units managed by a person in charge. The first result of this division and distribution of related responsibilities is the production of different networks. The first network connects natural elements with each other. In fact, the territory of each forest unit is divided into numbered parcels, each of which is considered in its natural identity, both in the formation and in the implementation of the plan. Each of these parcels has access to water and access to fire prevention interventions. On the other hand, the responsibility of each forest district for initiating and executing the plan (which is drawn up by an independent technical authority) supports solidarity mechanisms, first and foremost the fire prevention network, which includes a permanent national surveillance network and a network of dedicated and active airports. In this way, despite the increasing wildfires due to climate change and increasing soil aridity, the relationship between the management of Polish forests and space allows for rapid response to wildfires. This leads to a very low incidence of wildfires, which in Poland are measured in hectares. It should be noted that the conservation of the coppice biome that takes place through this constant activity of monitoring and localized care for increasing biodiversity is a manifestation of global solidarity. Polish forests cover an area of just under one seventieth of the Amazon, so care extended over them has a general global importance, even for the green mantle covering the Earth.

Another solidarity element that emerges from the Polish model of forest management is that the decentralized responsibilities for managing them have led to the development of a forest fund that allows for intervention in cases of particular difficulties arising in different forest districts with specific needs. On the other hand, from the perspective of the relationship

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1356 [hereinafter: LF], states: "Sustainable forest management – activity aimed at shaping the structure of forests and their use in a manner and at a pace ensuring the sustainable preservation of their biological richness, high productivity, regenerative potential, vitality, and the ability to fulfill, now and in the future, all important protective, economic, and social functions at the local, national, and global levels, without harm to other ecosystems." Article 7 states: "Sustainable forest management shall be conducted according to a forest management plan or a simplified forest management plan."

[31] "The forest supervisor independently conducts forest management in the forest district based on the forest management plan and is responsible for the condition of the forest" (Article 35(1) LF).

[32] Please refer to the map of the division of forests in Poland into forest districts: https://www.bdl.lasy.gov.pl/portal/mapy?t=0&ll=19.412949,52.001221&scale=4622324&map=0,0.7&layers=0,1,2,3,4,5,8,9,10,11,12,14,15,16,17&basemap=2&extwms=&hist= [accessed: 15.09.2023].

between nature and society, an important networking aspect is found in forest education. The Polish approach to nature management has, for almost two centuries now, placed great importance on forest education. Technical forestry institutes are now organized in a network throughout the national territory. Studies conclude with graduation, and students can then access forestry studies, which are also widely distributed across the country.

The sovereignty model that emerges from the decentralized model of Polish forest management is therefore a model based on the care of every part of the territory according to its natural vocations. The sustainability of this model, understood broadly as not only capable of being locally supported but also adopted in other places, is based on the symbiotic characteristics of the model.[33] In fact, forestry practice has developed over time an approach that is based on the inseparable union of the productive, ecological, and social functions of forests. This approach, emphasized in the Polish specialized press on forests, constitutes, precisely because of its decentralized approach, an evolution distinct from the German sustainability approach, supported primarily by Carlowitz and then developed by Cotta, Hartwig, and others [Policastro 2021-2022, III, 108-109 passim].

The fact that the Polish legislative approach to forest management adopted in Poland is a reflection of the country's longstanding forestry practices adds a significant layer of interest, particularly concerning its alignment with the implementation of the Rio Convention on Biodiversity.[34] Indeed, the Convention has underscored the significance of ecosystems [Policastro 2021-2022 V, 21-40], and its subsequent efforts have further refined the concept of ecosystem-based management.[35] This ecosystem approach is also mentioned in the German forest framework [Häusler and Scherer 2002, 5-8], which acknowledges the forest's multifaceted roles encompassing productivity, ecology, and certain social functions.[36]

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[33] "1. The increase of forest resources occurs through afforestation of lands and the enhancement of forest productivity as specified in the forest management plan. 2. Afforestation may include unused lands, non-arable agricultural lands, agriculturally unused lands, and other lands suitable for afforestation, especially: 1) Lands located near river or stream sources, on watersheds, along riverbanks, and on the shores of lakes and reservoirs; 2) Volatile sands and sandy dunes; 3) Steep slopes, hillsides, cliffs, and depressions; 4) Spoil heaps and areas after the exploitation of sand, gravel, peat, and clay" (Article 14 LF).

[34] United Nations Treaty Collection, file name: Ch_XXVII_8, vol. 2, chapter XXVII. Environment, title: 8. Convention on biological diversity. Rio de Janeiro, 5 June 1992, in particular Article 2: "Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit (Article 2. Use of terms).

[35] See Convention on Biological Diversity distr. general unep/cbd/cop/4/inf.9 20 march 1998, p. 3: report of the Workshop on the Ecosystem Approach, Lilongwe, Malawi, 26-28 January 1998.

[36] See the German "Forest Conservation and Forestry Promotion Act (Federal Forest Act).

The concept of ecosystem has a significant importance in the present process of recognising the rights of nature and its legal personhood.[37] Indeed, the concept of an ecosystem may be linked not only to compact spaces that encompass specific areas, such as a forest district or, for example, a river's course. It may involve much more complex fractal spaces. In this regard, in Colombia, the Mama,[38] interpreters and spokespeople for all of humanity of the knowledge and metaphysics of the Kogi nation, highlight the problems for the ecosystems of the mountains they live in due to the modification of the lower lagoons. They emphasize a general issue, namely the relationship between ecosystems and the alteration of water flows, which occurs when riverbanks or river mouths are modified. Therefore, addressing the issue of ecosystems requires their full discovery. The empirical knowledge of communities, individuals, and institutions dedicated to forest management and care can be of great importance here.

Research on and recognition of ecosystems in their mutual relationships require communication among multiple stakeholders, including those responsible for forest and nature care, those living in their vicinity, civil

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BWaldG Date of promulgation: May 2, 1975. Section 1, Purpose of the Law: The purpose of this law is in particular: To preserve, and if necessary, increase the forest's proper management in a sustainable manner for its economic benefits (utility function) and its significance for the environment, especially for the continuous performance of the natural balance, climate, water management, air purity, soil fertility, landscape, agricultural and infrastructure, and the recreation of the population (protective and recreational function). To promote forestry. To achieve a balance between the interests of the public and the concerns of forest owners."

[37] For example see: New Zealand Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (20 March 2017 no. 7, version as at 30 November 2022): "[...] 12. Te Awa Tupua recognition. Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements […] 14. Te Awa Tupua declared to be legal person (1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person." Cfr. New Zealand Te Urewera Act 2014 (27 July 2014) no. 51, version as 28 October 2021 "[…] 3. Background to this Act. Te Urewera (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty. (2) Te Urewera is a place of spiritual value, with its own mana and mauri. (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care […]. 11. Te Urewera declared to be legal entity. (1) Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person." See https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html#DLM6831458 [accessed: 15.09.2023]; https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183705 [accessed: 15.09.2023].

[38] "The Kogi integrate the way of thinking into their total perception of the circle of life and water. The waters of life bind the Sierra together. They are very conscious that evaporation from the sea and the rain forest rises as a cloud, and is deposited again as rain, and as snow on the highest peaks […] Visiting the sea is therefore a most important activity for the Mamas. It is important as visiting the mountain tops. In fact and the peaks are linked […] both must be kept in harmony" [Ereira 1990, 200-201].

society, forest institutions, states, and organizations. Indeed, public awareness of interactions between ecosystems can become a fundamental point for protecting the biome and thus embrace areas beyond individual ecosystems. The various dimensions of the necessary dialogue for this purpose lead us to consider the complexity in the relationship between law, society, and nature on a global scale. In this context, we will develop our main thesis, which is to emphasize the importance of recognizing and ensuring legal personality for forests.

5. COMPLEXITY, NATURE, AND LAW

A fundamental characteristic of human beings is their ability to observe and represent reality in a much faster and broader manner than other living beings. In this regard, they leverage their anatomical capacity to develop and establish a language that enables the exchange of acquired information, and based on this, they create artifacts that enhance their relationship with the surrounding reality. These artifacts can be material or immaterial, and the law is one of them. Indeed, the law is a cybernetic process that imitates the processes of the biosphere and homeostatic processes in general. The law seeks to preserve the stability of certain goods, such as life, liberty, and dignity. For this reason, it must operate to safeguard the stability of the processes of the biosphere.

The law, as a cybernetic process, starts from sets of variables that characterize the existence of a community or society at a given moment, or a given state of reality ($R = r^1,....r^n$), and through the legal process, it seeks to transform it into another state ($R^{(i)} = r^{1(i)},....r^{n(i)}$) that is preferable to the initial one. Each component of a state of reality pertains to different aspects of communal life. Therefore, the law, influencing each of these components as we have already noted, must take them into account. Every type of hindrance in this transformation is subject to various controls, through processes of retroaction. Such retroaction takes place both through institutions and through values to which the members of the society attribute supreme importance. Kelsen had only apparently overlooked this aspect, focusing on the functions of enacting general norms and applying them as fundamental to the legal order.[39] Indeed, it cannot be overlooked that medieval

[39] "[…] the general norms of statutory or customary law have a two-fold function: (1) to determine the law applying organs and the procedure to be observed by them and (2) to determine the judicial and administrative acts of these organs" [Kelsen 1949, 132] and "The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation […] this *regressus* finally leads to the first constitution" [Kelsen 1949, 128].

culture was built upon the recursiveness of reasoning,[40] and this approach has become fundamental in legal culture through the relationship between legislation and judicial review.

Law, thus understood as a cybernetic process,[41] must confront the complexity of nature, and art the same time legal orders have their own specific characteristics.

Nature is incredibly complex, with a vast network of interconnections between species, ecosystems, and processes. This complexity presents one of the main challenges for conserving the biosphere. Law, as a human tool for governing society and managing natural resources, must take this complexity into account. To address the complexity of nature, the law must develop flexible approaches and tools that can adapt to ongoing changes in ecosystems and biodiversity. This requires an approach based on science and knowledge that considers the interconnections between species and the chain reactions that can result from legal or policy decisions. Furthermore, the law must be able to handle situations where there are conflicts between different interests related to nature. For example, conflicts may arise between biodiversity conservation and economic development. In such cases, the law must balance these interests fairly and equitably.

Another important aspect is international communication and collaboration. Since nature knows no national borders, the protection of the biosphere

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[40] In this well-argued volume, the author emphasizes that the transition from antiquity to the modern construction of law and politics was significantly influenced by the diffusion of recursive reasoning from Indian and Arab universities to Europe. This approach shaped the identity of European universities and successfully maintained a balance between moral comprehension and reason-based understanding [Beckwith 2012, *passim*]

[41] Legal orders are homeostatic; they tend to maintain fundamental values [Locke, II, Chap. II, 6]: "[...] there cannot be supposed any subordination among us that may authorise us to destroy one another… Every one as he is bound to preserve himself, and […], when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not […] take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another." "The basis of the cybernetic model is the feedback cycle (FIG. I.l) in which, by way of feedback of information, a desired value (Sollwert) is maintained, a target is reached, etc." [Bertalanffy 1968, 150]; "regularities and laws can be found in social phenomena; […] and we have some ideas about intrinsic, specific and organizational laws of social systems." [ibid., 199]: Luhmann however [Luhmann 1993, 465], sees some difficulty when considering "law as a cybernetic machiche in a cybernetic machine [society P.P. see Evan 1990, 219], which is programmed to maintain a steady state". From the autopoietic characteristics of legal systems it comes the difficulty to evaluate the risk [Luhmann 1993, 472], the difficulty to global communication which leads, for example in the field of human rights, to enact "supposed meta-positive law as positive law" [ibid., 483] and "the high dependence of all autopoietic systems on history" [ibid., 490]. This encourages the approach to legal orders letting each of them develop their potential, but highlighting symbiosis with nature as a common problem.

requires global cooperation. However, only taking into account the potential of each legal order that international environmental law may play a crucial role in addressing transboundary environmental issues and promoting nature conservation on a global scale. In summary, the law must be able to address the complexity of nature through the adoption of approaches based on scientific knowledge, flexibility, interest balancing, and international cooperation, at the same time motivating and enhancing the potential of each participant to the dialogue. Only through joint efforts can we hope to protect the biosphere and ensure a sustainable future for future generations. Sustainable use of domestic resources and attention to symbiosis with nature may be consistent with the specific characteristics of each legal order and thus supporting an ethics of ecological communication respectful of the different legal and cultural approaches.

6. THE ISSUE OF FUNDAMENTAL PRINCIPLES IN LEGAL SYSTEMS AND CONSTITUTIONS AND THEIR USE WITH RESPECT TO NATURE AND FORESTS

To better understand how the elements within a legal system can be used in the context of the relationship between human societies and nature, we must first briefly examine the fundamental tools of each legal system and their use in this regard. Let us begin with constitutional customs. As mentioned earlier, there have been societies in the past that sought to live in harmony with nature, respecting its elements. This approach, though fascinating, is now primarily associated with indigenous populations. Societies have also developed competitive relationships with nature, or more recently, have asserted their dominion over nature while simultaneously advocating for conservation principles. On the other hand, geobiophysics supports the idea of a conscious and active symbiosis with nature. Therefore, we need to consider how the fundamental principles of constitutions or the concept of supreme principles of a legal system can be useful in this context.

The Italian scholar Emilio Betti, considering legal principles within the framework of the theory of interpretation, which connects to the representation of law in the realm of human affairs, viewed them as legal expressions that qualify the entire legal system. They therefore concern an open and indeterminate set of legal descriptions and applications.[42] For this reason, principles allow for the expression of creativity in the political and social processes that lead to the development of law. Another conception

[42] "General principles, as inherent criteria for assessing the legal system, are characterized by an excess of deontological (or axiological, if you will) content compared to individual norms, even when recognized as a system" [Betti 1955 (1990), 849].

of fundamental principles, more related to the application of the law itself, was formulated by the German scholar Robert Alexy. He, primarily interested in issues of applying conflicting principles in the legal process, considered them imperatives for optimizing the values at stake.[43] This perspective, though fully applicable, is best suited for highly conceptually formalized constitutional models[44] and cannot easily be adapted to contexts where the application processes of the constitution are more intuitive or have other sources of cognition.[45]

In both cases, we see that ignoring or not adequately considering nature in the fundamental principles of the constitution can be a sign of an approach indifferent to nature, focusing solely on human affairs, assuming either that

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[43] Alexy writes on this subject" "According to the standard definition of principle theory (Alexy 1996, 75ff), principles are norms commanding that something be realized to the highest degree that is actually and legally possible. Principles are therefore optimization commands. They can be fulfilled in different degrees. The mandatory degree of fulfilment depends not only on actual facts but also on legal possibilities" [Alexy 2000, 295].

[44] Moreso writes: "According to Alexy, the balancing can be divided into three stages. In the first stage, the determination of the degree of non-fulfillment of the first principle takes place. In the second stage, an attempt is made to establish the degree of fulfillment of the opposing principle. In the third stage, it is determined whether the importance of fulfilling the second principle justifies the non-fulfillment of the first principle. We can divide the intensity of interference with a specific right into three degrees: light, medium, and severe. It is evident that the intensity of interference depends on the specific circumstances […] in deadlock cases, the restrictions set by the legislator are justified […] the concrete weight of a principle P, in conflict with a principle P, [...] is the quotient obtained by dividing the intensity of interference in the first principle (I) by the hypothetical intensity of interference in the second principle (I), assuming that the interference in the first principle is omitted. […] According to Alexy, this reconstruction of balancing allows it to be recognized as a rationally controllable process […]. Alexy adds another aspect to the formula, the representation of which is omitted here, namely, the reliability of empirical assumptions" [Moreso 2012, 413].

[45] As Bonilla Maldonado reflects: "The paradigmatic models of the rights of nature […] are modern law and they are indigenous law; they simultaneously 'are' and 'are not'. The syncretism of these models calls into question the following central ideas […]: (i) there are rich cultures that can create legal knowledge and poor cultures that cannot; (ii) the Global North has rich cultures that enable the production of law while the Global South has weak cultures that do not enable the production of real law, only morality or politics; (iii) within the Global North there are some cultures that are at the origin of Western law […] and other cultures that, for imperialism and settlement colonisation, for example […] (iv) Global North law is the […] most powerful […] legal standard and can be transferred globally; (v) Global South countries must transplant this single global legal standard to their jurisdictions if they want to construct true law; and (v) when the Global North law that has been either reproduced in the lesser cultures of the Global North or transplanted to the Global South mixes with local culture, it becomes contaminated. The purity of true law is tainted; it loses clarity and precision; and it becomes a culturally-illegitimate offspring that is conceptually and practically ineffective" [Bonilla Maldonado 2023, 43].

nature is inexhaustible (as seen in the old theory of public goods[46]) or that the state pursues a geopolitics strategy aimed at securing control over resources where they are available. This solipsistic view of societies should not be confused with a human-centered approach.

Indeed, the law can only regulate human actions. In this sense, I agree with Vico, who stated that humans did not create nature. History did.[47] On the other hand, a conception of the constitution that appears indifferent to nature can presuppose a relationship that, according to ancient legal concepts, considers the concept of occupation as the foundation for the exploitation of natural resources. However, the legitimacy of occupation depends on the perspective of the order which is produced by the occupation.[48] This approach suggests that some communities may not be able to claim sovereignty over natural resources due to a lack of organizational capacity or suitable cultural origins. It also postulates the possibility for powers that mutually recognize each other to divide the world beyond which different forms of occupation, even violent ones, are legitimate.

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46 Reiss considers different notions, and to start with, the one proposed by Paul Samuelson, who defines a public good as a good, "which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtractions from any other individual's consumption of that good […]" [Reiss 2021, section 1]: "In the legal perspective see the opinion of Grotius, who writes: "so of those things which nature had brought forth for the use of man she would that some of them should remain common and others through every one's labor and industry to become proper. But laws were set down for both, that all surely might use common things without the damage of all and, for the rest, every man contented with his portion should abstain from another's" [Grotius 2004, 6].

47 As Benedetto Croce writes about Giambattista Vico's approach: "He reconstructed the history of man; and what was the history of man if not a product of man himself? Who makes history if not man, with his ideas, his feelings, his passions, his will, his action? And isn't the human spirit that makes history the same one that is engaged in thinking and understanding it? The truth of the generative principles of history, therefore, arises not from the strength of clear and distinct ideas but from the inseparable connection between the subject and the object of knowledge" [Croce 2022]. With the words of Giambattista Vico [1744, 124-25]: "Indeed, we advance to assert that whoever contemplates this Science narrates to themselves this Eternal Ideal Story because, as this World of Nations has undoubtedly been made by Men, which is the First Undoubted Principle that has been placed above it; and therefore, since the manner of it must be found within the modifications of our own Human Mind, he, in that endeavor, MUST, SHALL, WILL indeed make it for himself. For when it happens that the one who does things also narrates them, there the History cannot be more certain" [1922, 23].

48 According with Schmitt, who published the first edition of the quoted work in 1950: "The term Landnahme (land-appropriation), used here to describe a process of order and orientation that is based on firm land and establishes law, has been in common usage only in the last few decades […] there are two different types of land-appropriations: those that proceed within a given order of international law, which readily receive the recognition of other peoples, and others, which uproot an existing spatial order and establish a new nomos of the whole spatial sphere of neighboring peoples" [Schmitt 2006, 80-82].

The fact that these conceptions, among them the one of "amity lines"[49] which Schmitt considered to underlie the Jus Publicum Europæum, have been disavowed by positive international law through decolonization does not mean that they lack ideological effectiveness, even in an analogical perspective. In fact, from the law of decolonization, the system of the United Nations has derived the affirmation of the absolute sovereignty of states over natural resources. These two principles, namely the right to independence and formal autonomy of states, combined with state sovereignty over natural resources, have generated a series of geopolitical claims.[50]

The Cold War, globalization, and the ongoing conflict between Russia and Ukraine are manifestations of geopolitical conflicts. On the other hand, the decolonization process merged with the attempts by colonial states to secure control over the economic and financial resources of the countries from which they were relinquishing territorial control.[51] The resulting process is conceptually linked, on the one hand with Grotius's concept of the free

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[49] As Schmitt wrote: "The characteristic feature of amity lines consisted in that […] they defined a sphere of conflict between contractual parties seeking to appropriate land, precisely because they lacked any common presupposition […] the only matter they could agree on was the freedom of the open spaces that began 'beyond the line'. [...] A closer […] consideration of amity lines in the 16th and 17th centuries reveals two types of 'open' spaces […]: first, an immeasurable space of free land – the New World, America […] free for appropriation by Europeans – where the 'old' Jaw was not in force; and second, the free sea […]." However, he observes that "the Congo Act of February 26, 1885" [Schmitt 2006, 224] "attempted to bind international freedom with neutralization of the Congo Basin. The type and means of the realization of this endeavor were of great symptomatic significance. Thus, neutralization was meant both to guarantee free trade and to prevent Europeans from engaging in war with each other on the soil of Central Africa with the Africans' consent and complicity" [ibid., 219].

[50] Among these voices are those advocating for the imperative constitutionalization of the transformation of all raw materials in Africa. This move aims to empower Africans to effectively and swiftly combat poverty by fostering dynamic wealth accumulation through value-added processes in the local production of finished goods, which can be marketed both within and beyond the African continent [Agbohou 1999, 269 *passim*].

[51] Concerning the former French colonies: "Despite the diversity of colonial bloc logics, the initial project is consistently similar, centered around the exploitation of colonies based on the needs of the metropolises. This project, which can be referred to as economic standardization, has led to a recognizable structure characterized by key elements such as the binary, the branch, and the trail network. The exploitation of mining and agricultural resources, along with political control over inland territories, initially required the construction of penetrative routes and coastal exit points" [Debrie 2007, 50]. Instead for what concerns the former Commonwealth: "Offshore finance is [...] believed to have emerged in 1958 […] due to the Suez canal crisis and the ensuing run on the sterling […] London's position at the earth of offshore financial market can be traced back to attempt by successive British governments to reestablish London at the center of global financial activities after the second World War." In both the cases the attempt to recreate a space order appears evident [Palan 1998, 631-32].

sea and, on the other hand, with Schmitt's ideas about demarcation lines and large spaces. As a result, it has rendered the connection between natural resources and the safeguarding of life, liberty, and property progressively intricate and challenging to oversee.

Indeed, financial markets controlled beyond national borders have led to the convergence of finances from tax evasion and finances from criminal activities. Even though a fundamental complexity issue is that each country and In what we might call the "open financial sea", financial values are not directed towards implementing the constitutional principles of communities or limiting power to enable conscious symbiosis with nature.

The presence of such tensions and contradictions, shall not lead one to forget that at present times many states and many communities have the ambition to develop their own space order [Agbohou 1999, 269 *passim*; Bonilla Maldonado 2021, 10/42[52]]. For this reason, the enunciation of principles recognizing the importance of biodiversity, the legal personality of nature and of human life in symbiosis with it in the national constitution is of great importance. However, their scope should not be overestimated. Firstly, because the issue of recognizing the normative force of the constitution remains highly problematic, despite the various advances made.[53] Secondly, because even if the normative force of the constitution is recognized, its overly general formulation leaves too much room for the discretion of legislators, judges, and society. Consequently, their implementation becomes challenging. Several examples can be given, including that of the 2018 decision of the Supreme Court of Colombia on climate change.

This Court was petitioned at the end of a complex case that also involved a decision by the Constitutional Court. The initiative to institute legal

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[52] The creation of a new space order following the recognition of the rights of nature is altogether difficult and jeopardizes the creation of a new space order: "The rights of nature (and their representatives), however, are in tension with other rights that are also part of the legal systems in which they are located, for example, the right to a healthy environment, the right to equality, and the right to sustainable development. These rights protect nature by appealing to an anthropocentric perspective (nature is defended to safeguard the interests of human beings) or they conceptualise nature as a resource that should be exploited to generate wealth that can be redistributed in the political community. Hence, Bolivia and Ecuador are currently described as neo-extractivist countries or countries committed to 'social extractivism'" [Bonilla Maldonado].

[53] Let us consider at least the words of Jeremy Waldron that calls for "a reasonably sophisticated, approach […] to talk in a grown-up way about the social foundations of a system of norms that is legal, and about the complexity of both the social phenomena and the emergent legal phenomena that this involves" [Waldron 2006, 1713]. Therefore, when dealing with constitutional norms that aim to restore equilibrium with society and nature, it is crucial, during their enactment, to develop practices that enable people to comprehend their significance and actively participate in the implementation of these norms [Policastro 2015; Idem 2016; Idem 2019, *passim*].

proceedings came from a group of young citizens from Amazonian countries who pointed out the danger to their lives and well-being resulting from excessive exploitation of Amazon resources. The Supreme Court sentenced all public institutions in the country to develop a plan, including sustainable logging and mining as well as reforestation.[54] However, it is observed that the decision of the Supreme Court has not been implemented due to difficulties in formulating and implementing such a plan.[55]

As is known, while France has long included the Nature Charter in its constitutional framework, which is a subject of great interest and debate [Boda 2008, *passim*], the Italian Constitution has included the issue of biodiversity among its fundamental principles [Piscitelli et al. 2022, *passim*.], i.e., among its political-ideological principles [Carrara, Martorana, and Saltarelli 2022, *passim*]. Several constitutions, starting with those of Bolivia[56]

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[54] Supreme Court of Colombia, Luis Armando Tolosa Villabuena, Reporting Justice, STC4360-2018 (April 4, 2018), "it is ORDERED to the Presidency of the Republic and the Ministry of Environment [...] to develop a short, medium, and long-term action plan to counteract the deforestation rate in the Amazon, where they must address the effects of climate change […]."

[55] According with the well informed and attentive internet platform "De Justicia": "First order: a plan of action to counteract deforestation in the Amazon has not yet been formulated." See https://www.dejusticia.org/que-le-hace-falta-al-gobierno-para-implementar-la-sentencia-contra-el-cambio-climatico-y-la-deforestacion/ [accessed: 15.09.2023].

[56] See "Official Gazette Plurinational State of Bolivia. Law 71 Published in Edition: 205NEC Publication Date: December 22, 2010. Law of December 21, 2010 – "Recognizes the rights of Mother Earth, as well as the obligations and duties of the Plurinational State and society to ensure respect for these rights." See also Law 300 Published in Edition: 431NEC Publication Date: October 15, 2012. Law of October 15, 2012 – "Framework law of Mother earth and comprehensive development for living well." Concerning law 71 see at least: "Article 3 […] Mother Earth is the dynamic living system comprised of the indivisible community of all life systems and living beings, who share a common destiny. Mother Earth is considered sacred. Article 5. […] Mother Earth adopts the character of a collective subject of public interest. Mother Earth and all its components, including human communities, are the bearers of all inherent rights recognized in this Law […]. Article 6 […] All Bolivians […] exercise the rights established in this Law […]." Concerning the organic law 300 of 2012: "Article 5 […] 1 […] Mother Earth is considered sacred; she nourishes and is the home that contains, sustains, and reproduces all living beings […] 2. Living Well (Sumaj Kamaña, Sumaj Kausay, Yaiko Kavi Päve). It is the civilizational and cultural horizon […] that arises from the worldviews of indigenous […] peasant nations and peoples […]. It is achieved collectively, complementarily, and in solidarity […] 3. Integral Development for Living Well. It is the continuous process of generating and implementing […] measures and actions for the creation, provision, and strengthening […] material, social, and spiritual means […] to achieve Living Well in harmony with Mother Earth […]. 4. Components of Mother Earth for Living Well. They are the beings, elements, and processes that make up life systems located in different life zones, which, under conditions of sustainable development, can be used or harnessed by human beings as natural resources, as established by the Political Constitution of the State."

and Ecuador,[57] have recognized a legal status of nature.[58] In New Zealand, the legal personality of two areas of importance to native cultures, one of which encompasses the entire space, both physical and metaphysical, of a river, has been recognized.[59] There is a growing literature dealing with these aspects.[60]

However, the recognition of the legal status of nature has manifested itself in Latin America in a state context where, faced with the complexity of indigenous nations, the affirmation of the legal personality of nature has also emerged as an attempt by the prevailing indigenous nations to assert their legal importance within the national political territory.[61] From this perspective, it should be emphasized that the relationship between nature and the limitation of political power must be understood taking into account the diversity of nature itself and, therefore, the need to protect the different ways in which the relationship between humanity and nature is configured,

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[57] We shall remember here at least: "Constitution of the Republic of Ecuador, Official Registry No. 449, October 20, 2008 [...] Preamble [...] Celebrating nature, the Pacha Mama, of which we are a part, and which is vital for our existence [...] we decide to build a new form of citizen coexistence in diversity and harmony with nature, to achieve the good life, the sumak kaway [...] Title II Rights [...] Article 71. Nature or Pacha Mama, where life is reproduced and realized, has the right to have its existence fully respected, as well as the maintenance and regeneration of its vital cycles, structure, functions, and evolutionary processes. Every person, community, people, or nationality may demand from the public authorities the fulfillment of the rights of nature [...] Article 74. Individuals, communities, peoples, and nationalities have the right to benefit from the environment and natural resources that enable them to live well [...] Article 83. It is the duty and responsibility of Ecuadorians [...] 6. To respect the rights of nature, preserve a healthy environment, and use natural resources in a rational, sustainable, and responsible manner."

[58] As of now, the "legal toolkit" of "Eco Jurisprudence Monitor" identifies 356 issues related to the rights of nature, 90 on indigenous knowledge related to the relationship with nature, 79 on the eco-governance system, 74 on legal personality for nature, 42 on animal rights, and 5 on local ecological knowledge.

[59] New Zealand Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 […] Article 14 […] (1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person."

[60] According to Bonilla Maldonado: "A search on 'derechos de la naturaleza' and 'rights of nature' in Google Scholar yields 21,100 publications on the subject in Spanish and 15,800 in English. In HeinOnline, 2,079 texts appear when searching for the words 'rights of nature', and in JSTOR 555 articles appear when entering these same words in the search engine. Over the last fifteen years, a network of scholars studying these rights has developed, and the corresponding body of scholarship is profoundly heterogeneous" [Bonilla Maldonado 2023, 33-42].

[61] More in general, "It is important to consider the critiques offered against rights of nature, among others, that they essentialise indigenous communities; that they do not really represent the religious views of indigenous communities; that they homogenise the very diverse cultures of indigenous peoples; and that they can be used against indigenous groups' rights" [Bonilla Maldonado 2023, 10-42, footnote 35, *passim*].

especially among the various populations that have developed a way of life in symbiosis with nature. One conclusion that can be drawn is that the development of conscious symbiosis with nature, as proposed by proponents of different scientific approaches, is consistent with the postulate of equality, understood as the protection of differences, which is a fundamental characteristic of constitutionalism. Indeed they demand proportional efforts of each one to preserve the state of the Biosphere. As we have been seeing, the constitutions of Bolivia and Ecuador included such aspects.

It's worth noting that various models exist for recognizing the legal status of nature, each with its unique set of challenges. These challenges encompass issues ranging from control to the enforcement of rights. For instance, in New Zealand, "rights derived from ecological credentials may confine Indigenous communities to future scenarios of non-development" [Coombes 2020]. Similar situations have been observed in Africa, particularly among the Maasai people [Melubo 2020, *passim*], where conservationist approaches aimed to displace these communities from their ancestral lands. In the USA, the establishment of a land allotment system without due consideration of the customs and requests of Native American nations has led to enduring problems.[62]

In Latin America, objections have arisen against some indigenous nations, alleging that they are exercising self-governance over nature, even through resource extraction. Also in New Zealand, Maori viewpoints appear significantly underestimated.[63] This situation underscores the ambiguity between recognizing rights for nature and protecting the existential connection between individuals and nature, which is deeply rooted in their ancestral heritage. We cannot think of taking care of natural mechanisms if we do not take proper consideration of human symbiosis with nature, which demands a conscious and participating attention to the fruits of nature and the preservation of its mechanisms. We can hardly think of protecting nature without considering that natural resources are essential for both the material and spiritual life of human beings.

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[62] According with Bobroff: "Indians had many different, functional, and evolving property systems, many of which recognized private property rights in land. […] to replace these multiple, functioning property systems with a single, dysfunctional system, one that failed to provide for property transfers and rational inheritance" [Bobroff 2001, 1621].

[63] Coombes refers in a documented way to the implementation of the rights of Mori populations saying: "Many Indigenous philosophers call for renewal of kinship bonds with non-human others, […]. However, […] the rights-for-nature framework is exogenous to Maori communities, but its apparent imminence and relevance to Indigenous cultures may displace other agendas, and particularly the desire to renew ownership of lands lost to colonial practices. The philosophies that inform Te Urewera's newfound status […] are a continuation of historically resilient discourses of wilderness and its preservation that have alienated Maori from their homelands in the past" [Coombes 2020, *passim*].

Despite these difficulties, we believe that constitutions can play an essential role in the relationship between humanity and nature. First and foremost, by recognizing the importance of human activities aimed at achieving conscious symbiosis between human societies and nature. Formulating such recognition is complex because it is very difficult to indicate how the essence of human freedom can be directed towards achieving symbiosis with nature. In our opinion, introducing provisions into the constitution that recognize the importance of education (including lifelong education) as a moment of development and transformation of society and that emphasize that education must be based on constant research aimed at developing models for the symbiotic development of nature, seems clear and prudent. On the other hand, indicating support for organizations with ecological purposes could turn out to be an ambiguous solution that privileges organizations that, through seemingly ecologically-oriented claims, primarily seek a transfer of political power in their favor without presenting clear and sustainable solutions.[64]

Furthermore, an important contribution that constitutions could make to improving relations between society and nature, in our opinion, is the recognition of the legal personality of forests [Policastro 2021-2022, V *passim*, Policastro 2023, *passim*], along with the fundamental public obligation to manage renewable forest resources in a sustainable manner, by combining the productive, ecological, and social functions of forests. This principle requires simultaneously enunciating the principle that forest management applies to both public and private forests. It is evident that this principle does not violate property rights or limit them in a way that prejudices the public interest. Instead, it allows for the efficient exercise of these functions for present and future generations through the simultaneous exercise of productive, ecological, and social functions. In this perspective, even indigenous populations, being obliged to develop a management plan, will be required to share their observations regarding the inventory and sustainability of natural resource extraction, and constitutional forest authorities will be obliged to listen, thereby improving the level of ecological communication. It is clear that the top bodies of a constitutional authority responsible for forest management must be appointed with the participation of the fundamental constitutional bodies, namely the Parliament and the Presidency

[64] Sénit is one of the authors, who focused in a recent and documented study: "on the role of the participatory space, and reveals a reverse correlation between civil society influence, and inclusive, democratic global policymaking. In particular, the study showed that civil society actors have higher chances of influence when they engage in informal participatory spaces. Yet these spaces are also the most exclusive ones, to which highly organized, professionalized civil society actors have a privileged access, compared to the resourceless" [Sénit 2019]. These results appear very eloquent.

of the Republic. At the same time, the proposal of candidate lists can be left to civil society, particularly to communities dedicated to forest care or living on its margins.

7. CONCLUSION: LEGAL PERSONALITY OF FORESTS AND CONSTITUTIONAL ECOLOGY OF THE BIOSPHERE

The constitutional recognition of the legal personality of forests must go hand in hand with their decentralized management. In this way, the existing relationships between nature and space can be adequately respected. The coherence between the constitutional legal personality of forests and the constitutional governance of the state is also realized by considering the relationship between law and time. Forest management plans, according to the dictates of forestry science, last for 10 years. They must be formulated precisely so that they can be transferred to foresters who will be responsible for their evolution. Therefore, by assuming the principle of adaptation to the different conformation of nature in space, and thus a significant plurality of plans at the national level, the proposal for a decade-long legislation of information and coordination on these plans can better involve institutions and society in a discourse based on listening *logos-leghein* [Heidegger 2000, 180, *passim*][65] to the Biosphere, taking into account that the time needed by nature to develop and renew resources is longer than that of human societies.

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[65] "The essence of logos as gathering yields an essential consequence for the character of legein. Legein as gathering, determined in this way, is related to the originary gatheredness of Being, and Being means coming-into-unconcealment; this gathering therefore has the basic character of opening up, revealing. Legein is thus contrasted clearly and sharply with covering up and concealing."

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LEGAL FOUNDATIONS OF SPACE SECURITY*

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Abstract. The advancement of space technology in recent times and the diplomatic efforts by the countries involved in space exploration indicate that conflicts in space are still possible. It is important to note that conflicts on Earth can have adverse effects in space, thereby jeopardizing security for all countries. Securing safe and sustainable access to space and preventing space hazards are crucial components of space security and safety. Maintaining the principle of peaceful use of space has become increasingly challenging today. Hence, greater attention is being devoted to the issue of space security and the corresponding international regulations. This article presents some global-level programs and initiatives, such as disarmament programs, PAROS and UN Long Term Sustainability.

Keywords: space security; space law; space debris; UN Long Term Sustainability; PAROS

INTRODUCTION

Space security and safety mean a secure, safe and sustainable access to Space and mitigation of Space hazards. This definition covers also aspects of security and safety of man-made equipment sent into Space as well as ground stations. Space infrastructure can be described as a network of Space and ground systems connected by means of communication channels and enabling access to Space. Security and safety of Space infrastructure involve numerous challenges, such as: unintended hazards (Space debris, geomagnetic and solar storms and other accidental interferences), intended hazards (anti-satellite weapons – ASAT, malicious interferences and cyber-attacks) and increasing problems with Earth orbit congestion

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and growing quantities of Space debris coming from equipment launched into Space. The definition of space security guiding this report reflects the intent of the 1967 Outer Space Treaty that outer space should remain accessible for all to use for peaceful purposes now and in the future. The key consideration in this approach to space security is not the interests of particular national or commercial entities, but the security and sustainability of outer space as an environment that can be used safely and responsibly by all. This definition encompasses the sustainability of the unique outer-space environment, the physical and operational integrity of humanmade objects in space and their ground stations, as well as security on Earth from threats and natural hazards originating in space. Outer space is a global commons that is central to military, environmental, socioeconomic, and human security on Earth, as well as science, exploration, and discovery. The ability to access and use outer space is critical to the well-being of all nations and people. Resources in outer space support applications from global communications to financial operations, farming to weather forecasting, and environmental monitoring to navigation, surveillance, and treaty monitoring. It is imperative that all humankind can access and enjoy its many benefits today, and that this use is sustainable in the future. But maintaining the safety, security, and sustainability of outer space is challenging.

The outer space environment is fragile and threatened by the accumulation of debris that results from all human activities, but which is exacerbated by accidental collisions and the intentional destruction of objects in orbit. Even the smallest pieces of debris can be harmful to satellites operating in space. At this moment, we don't have sufficiently precise information on what exactly is in outer space, where it is, and how it is moving through orbit to ensure that the objects and people that we send there remain safe.

This environment is also a scarce natural resource with limited abilities to support human activity, including available orbital positions, and radiofrequency spectrum to communicate data back to Earth. It is a harsh environment where safe operations are threatened by natural occurrences such as space weather. And this environment is increasingly congested. The access and use of outer space is growing rapidly. These new activities are expanding the number of global stakeholders who have an interest in maintaining the security of outer space and contributing to global well-being. Renewed interest in space exploration – particularly of the Moon – is inspiring a new generation of exploration and science, and possibly the discovery of new resources. But this activity, if not well governed, also adds pressure to equitable access to and sustainability of this environment.

As on Earth, activities in outer space are subject to cooperation, competition, and conflict. Sometimes these dynamics advance access to space through technological transfers and capacity building, and the agreement

of new governance rules, such as the recent guidelines on the long-term sustainability of outer space. Sometimes, competition encourages wider access to space by spurring innovation in launch technology and new satellite services. But, sometimes, it hinders the ability to enhance security by, for example, encouraging competition and secrecy linked to orbital data. And, increasingly, competition – particularly military competition – risks escalating into conflict.

The prospect of conflict in space is accelerating as more states come to rely on space assets to support a broad array of military purposes, such as precise positioning, navigation, and timing; surveillance, reconnaissance, and intelligence gathering; strategic and tactical communications; and missile early warning and tracking. In this context, some states now consider outer space to be a domain of warfare. No hostile anti-satellite attacks have been carried out against an adversary; however, development and demonstration of capabilities to interfere with or physically damage space systems are accelerating. Governance is not keeping up. While there is widespread international recognition that the existing regulatory framework is insufficient to meet current and future challenges facing the outer space domain, the development of an overarching normative regime has been slow. While some progress has been made related to sustainability and safety, it remains insufficient. Questions related to national security uses of space and the dynamics of conflict and arms control remain unresolved.

1. DEFINITION OF SPACE SECURITY

Space security entails the possibility to access and use space for all nations. Although traditionally it has been associated with military engagement, over the past years it has been enriched with safety aspects. The space race between the United States and the former Soviet Union in the 1960s triggered the first concerns regarding space security. The attempt to end an arms race in space was effected with the conclusion of the United Nations (UN) Outer Space Treaty in 1967 (United Nations 1967).[1] The treaty sought to define boundaries for the security of outer space by establishing the principle of peaceful purposes in accordance with the UN Charter and by prohibiting the militarization and weaponization of space. The ratification of the Outer Space Treaty was a remarkable endeavor of resolving the space race tension, ensuring stability, and promoting international cooperation. Thus, space security – although not explicitly defined – was

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html [accessed: 22.02.2021].

the result of the stabilizing effect of a treaty-based mechanism, and vice versa space security meant that activities in outer space ensure stability and peaceful uses of outer space.

In this context, the interrelatedness between space security and stability was reinforced by the explicit distinction between civil and military uses of outer space. Five decades later, the scope of space security has changed. In the chapter "Defining Space Security," of the previous edition of this Handbook, "space security includes now aside the military dimension, also, economic, societal and environmental dimensions." These elements are indispensable to space security, in view of the ongoing transformation of the space sector that moves away from the traditional confines of space activities. The so-called New Space encapsulates major changes taking place at unprecedented rate. These are related to the growing participation of private actors, the rising number of spacefaring nations, and the emergence of the civil-military paradigm. This means that the dividing line between civilian and military uses of outer space has yet become artificial leading to uncertainty regarding governance of dual-use or hybrid areas.

The terms "safety," "security," and "defense" are intertwined and used interchangeably with no clear separation between areas of action. In many languages there is no clear distinction between the words safety and security. The cultural aspects of safety, security, and defense vary from country to country and from region to region. What is more, the understanding of space security has been redefined considering the new often blurred borders between safety – a clearly civilian area – and defense – a clearly military one. Security lies in between and for some countries/regions is closer to safety while for others closer to defense. This debate extends to governance questions as to who has legitimacy to act in space security and for what type of actions. Also, what would the role of the civil and defense actors respectively be and in which area. Accordingly, the various and divergent concepts, approaches, and definitions across the chapters of this Handbook are representative of an evolving space security landscape.

The absence of an internationally agreed definition – combined with the systemic nature of the space sector with multiple strategic objectives – presents challenges when endeavoring to build cooperative approaches among diverse organizational actors. As such, this requires the development of a mechanism that fosters new forms of cooperation among states in the advent of the new space era. Therefore, stability remains of strategic importance to the space sector, as it influences the effectiveness of states to manage the growing challenges and ultimately ensure space security.

There is no commonly agreed definition and uniform understanding of space security. Be that as it may, there are myriad definitions adopting either a "soft" or "hard" approach. Often, the concept of "security" is used

instead of the term "safety" or the term "defense," or instead of both. This creates ambiguity concerning the content of space security and the set of underlying shared values and principles. As a result, the lack of clear boundaries between these concepts poses a major definitional challenge for space security. In attempt to address this definitional challenge, this section will first take a closer look into the security concept under international relations/law perspective and, then, it will examine the evolution of the security concept in the outer space context.

The definition of space security is as elusive as the definition of security itself. Similarly, to the ambiguity of the security concept within the frame of international relations, there is no universally agreed definition on space security. As such space security is a multifaceted term that many have attempted to define yet no consensus has been reached. The evolution of the security concept over time combined with the evolution of outer space activities poses unique challenges to the understanding and definition of space security. What is more, a significant challenge remains the dual-use nature of space technology and applications.

The military perspective of space security, closer to the "defense" side, has to a large extent derived from the global agenda on international peace and security. The launch of Sputnik-1 in the 1960s, followed by the first manned spaceflights in the 1970s, marked a technological race between the former Soviet Union and the United States. This created the fear of an arms race in space and profoundly influenced the definition of space security.

Use of Outer Space, including the Moon and other Celestial Bodies, with the United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS) being the most important UN body engaging in the development of international space law [Antoni 2020]. Space safety includes the protection of human life, the safeguard of critical and/or high-value space systems and infrastructures, as well as the protection of Earth, orbital, and planetary environments. Space safety is necessary for the sustainable development of space activities. Space safety actually covers many diverse areas that are discussed in this chapter. Space safety can be defined as freedom from or mitigation of human or natural harmful conditions. These conditions can cause death, injury, illness, damage to or loss of systems, facilities, equipment or property, or damage to the environment. The term "safety" refers to threats that are non-voluntary in nature (design errors, malfunctions, human errors, natural hazards, etc.), while "security" refers to threats which are voluntary (i.e., of aggressive nature such as use of anti-satellite weapons).

Peter Martinez write the terms space security and space sustainability are sometimes used interchangeably to encompass a set of largely overlapping concerns as seen from two somewhat different perspectives. Underlying

both of these perspectives is the acknowledgment that space systems underpin the modern information society and now form part of the critical infrastructure of most nations, whether they are spacefaring or not, and that this infrastructure is exposed to a series of risks of natural and anthropogenic origin. Regardless of the perspective from which one sees the problem, the point is that coordinated global action will be required to address these concerns. Acknowledging and addressing these different perspectives is one of the challenges that will be faced by multilateral initiatives to promote either space security or space sustainability.

Space security is a term that is used among space actors to refer to preserving order, predictability, and safety in space and avoiding courses of action that would ultimately undermine mission assurance, operational safety, and freedom of action in outer space. Another key dimension of this dialogue is the notion that, because of growing reliance on space systems in every facet of modern life, security on Earth (regardless of how one defines it) is increasingly underpinned by security in outer space. Hence one of the key aims of the space security dialogue is to ensure freedom from threats (either ground-based or space-based) to the effective access to and utilization of outer space. For some actors this is closely coupled to concerns about the potential weaponization of outer space, although it is difficult to progress beyond a general acknowledgment of the potential problem to practical measures to avoid it, because of disagreements around the definition of what constitutes a space weapon.

An important point to note is that the space security discourse has, up until recently, been dictated by the national interests and concerns of the major space powers, who are the ones who most heavily invested in space-based infrastructure to support their national security. For some sitting on the sidelines of the debate, space security has sometimes been perceived to be predominantly the preoccupation of the advanced space actors and thus far-removed from the day-to-day concerns of the non-space nations. Others, particularly those from emerging or aspiring space nations, have seen the promotion of multilateral space security discussions as an attempt by the leading space actors to advance and preserve their national space interests and advantages by raising entry barriers to aspiring newcomers on the pretext that the space environment is already "saturated" with actors. Neither of these perceptions has helped to build multilateral consensus on normative rules of behavior for all space actors. However, there are promising signs of middle space powers beginning to play a more active role in promoting multilateral space security dialogues in the future and hence helping to bridge the gap between these different perceptions of space security.

Space Sustainability – the word sustainability is derived from the Latin verb sustinere (tenere, "to hold"; sus, "up") and is usually used in the context of being able to maintain an activity at a certain rate or level. Since the 1980s the concept of sustainability has been applied to human habitation and utilization of planet Earth and its resources. This has given rise to the widely used term sustainable development. This term was coined in the book Our Common Future, which contains the report published by the Brundtland Commission in 1987 (UNGA 1987). The definition for sustainable development given in that book is worth quoting here: development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

Notice the emphasis on "needs" in this definition. The Brundtland Commission's report placed emphasis in particular on meeting the essential needs of the world's poor, rather than satisfying the nonessential desires of the well-to-do. The connection of sustainability with outer space arises from the perspective that space systems are now major global utilities that meet various societal needs. When seen in this light, space sustainability is understood to be about using outer space in such a way that all humanity will be able to continue to use it in the future for peaceful purposes and for societal benefit. The sustainability concern here is driven by the realization that the Earth's orbital environment and the electromagnetic spectrum are limited natural resources. This realization leads naturally to a concern for how to ensure that the benefits of space activities will continue to be accessible to future generations and to all nations and raises issues about the equitable and responsible access to and use of space resources. In other words, from this perspective, space sustainability is seen in the context of wider sustainability discussions and is perceived to be the concern of all beneficiaries of space activities. It is thus an intrinsically multilateral issue. This is a significantly and fundamentally different point of departure for addressing a very similar set of issues driving the space security discourse [Martinez 2020].

Space security is safe and sustainable access to space and the reduction of threats from there. This definition also includes security aspects of manmade devices sent into space and ground stations. Space infrastructure can be described as a network of space and ground systems connected by communication channels that allow access to space. There are many challenges associated with the security of space infrastructure, such as unintentional threats (space debris and accidental disruptions), intentional threats (anti-satellite weapons-ASAT, malicious disruptions and cyber-attacks) threats related to space weather (geomagnetic storms, solar storms, etc.) and the growing problem of space debris from devices launched into Space.

Because space is so important to many countries, their leaders are creating policies and strategies for its safety and security. The first task is to secure the significant investments made by public and private entities. The state must protect the economy and society from the dangers of their significant dependence on space infrastructure. Security also plays an increasingly important role in commercial space markets. The 21st century for the process of space development has brought many significant achievements. New technologies have been developed, the commercialization of the space industry has taken place, the number of countries actively working in space has increased, space resource utilization projects have emerged, etc. However, the continuous process of commercialization of Space requires adapting existing legislation to current needs and challenges. In addition, economic challenges and those related to security, have increased conflicts between democratic states and autocratic states. As early as the 1960s, space was at risk of becoming a new arena for military competition. If space was not weaponized, it was nevertheless constantly used: space devices became very important for military communications, navigation, nuclear early warning and other functions [Silverstein, Porras, and Borrie 2020, 1-25]. Today, space has become more accessible and much more valuable to the most powerful countries than before. A wide range of space technologies are now essential to today's global economy and society. Meanwhile, information is proliferating about states that can disrupt or destroy space-based systems and devices. While few states have successfully demonstrated ground-launched anti-satellite (ASAT) weapons capabilities, others have the means to disrupt or destroy space assets using cyber and electronic techniques. This has caused concern in the international community.

2. DISARMAMENT PROGRAMS

Among those working to prevent an arms race is the Geneva Conference on Disarmament, which in 1979 was given a mandate to negotiate arms control and disarmament agreements.[2] The Conference on Disarmament soon changed its name to the "Diplomatic Conference" (CD). Each year, three separate sessions of the Diplomatic Conference are held in Geneva with the participation of representatives of 65 states. Each year, or more often if necessary, the conference reports to the UN General Assembly. The CD may adopt its own agenda, taking into account the recommendations submitted to it by the UN General Assembly and the proposals made by its members.[3] The CD is an important mechanism in the field

[2] See https://www.unog.ch/CD [accessed: 22.06.2020].

[3] UNGA Res S-10/2 UN Doc A/RES/S-10/2.

of disarmament to help the UN fulfill its role as an organizer on this issue [Froehlich and Seffinga 2020, 24]. The CD's terms of reference cover virtually all multilateral arms control and disarmament issues. Currently, the CD focuses its attention primarily on the issues of: stopping the nuclear arms race, preventing nuclear war and preventing an arms race in space.

The organization's mandate to deal with disarmament issues in outer space was confirmed by the UN General Assembly in Resolution 36/97-C.[4] Moreover, in Resolution 36/99, the General Assembly asked the CD to consider the possibility of a treaty banning the stationing of weapons of any kind in space.[5] In fact, however, the powers of the Diplomatic Conference clash to some extent with the statute of the UN COPUOS (UN Committee on the Peaceful Uses of Outer Space), which was established by the General Assembly in 1959 to manage the exploration and use of outer space for the benefit of all mankind, for peace, security and development. The Committee was tasked with reviewing international cooperation in the peaceful uses of outer space, examining space-related activities that could be undertaken by the United Nations, supporting space exploration programs and providing opinions on legal issues arising from space exploration. The committee was instrumental in the creation of the five treaties and five principles on space.[6]

Due to rapid advances in space technology, the space agenda is constantly changing. As such, the Committee provides a unique platform at the global level to monitor and discuss these developments. The Committee has two subsidiary bodies: the Scientific and Technical Subcommittee and the Legal Subcommittee, both established in 1961. The Committee reports to the General Assembly's Fourth Committee, which adopts a resolution annually on international cooperation in the peaceful uses of outer space.[7] A cursory glance indicates that UN COPUOS focuses exclusively on the peaceful uses of space and the legal problems associated with space exploration. However, the use of space for military purposes has been and continues to be an important part of space activities, as stated in the 1967 Outer Space Treaty (Articles III and IV). The following CD sessions, among others, deliberated on this topic.[8] However, some countries considered the 1967 OST treaty

[4] UNGA Res 36/97-C Doc A/RES/36/97-C.

[5] UNGA Res 36/99 Doc A/RES/36/99.

[6] See https://www.unoosa.org/oosa/en/ourwork/copuos/index.html [accessed: 22.06.2020].

[7] See https://www.unoosa.org/oosa/oosadoc/data/resolutions/1959/general_assembly_14th_session/res_1472_xiv.html [accessed: 22.06.2020].

[8] Europe, Space and Defense, From "Space for Defence" to "Defence of Space", file:///C:/Users/ASzWoj25/Downloads/ESPI%20Public%20Report%2072%20%20Europe%20Space%20and%20Defence%20-%20Full%20Report.pdf [accessed: 22.06.2020]

inadequate because it failed to prevent the development and deployment of weapons in space.

3. PAROS PROGRAM

In this situation, discussions on new ways to prevent an arms race in outer space intensified at the UN; as a result, work on the PAROS (Prevention of an Arms Race in Outer Space) program began in 1978. In 1981, the first two draft General Assembly resolutions on PAROS appeared. Western countries spoke only in favor of banning ASAT systems. The USSR and its allies, proposed issuing a ban on stationing weapons of any kind in space. The two camps could not come to an agreement. The end of the Cold War and the collapse of the Soviet Union in the early 1990s changed the political landscape. Discussions at Diplomatic Conference (CD) sessions became more substantive and involved diplomats from many countries. Against this backdrop, China and the Russian Federation submitted a joint working paper outlining the elements of a future international legal instrument on preventing the deployment of weapons in space. Subsequently, the two delegations submitted compilations of other countries' comments and suggestions on their original proposal as diplomatic conference documents, and prepared further working papers on specific aspects of their treaty proposal.

In February 2008. China and the Russian Federation submitted the final draft of the Treaty on the Prevention of the Placement of Weapons in Outer Space (PPWT) to the CD. This draft consisted of 14 articles, which obligated states not to "place in orbit around the Earth any objects carrying any kind of weapons" or "resort to the threat or use of force against space objects." In particular, the draft PPWT defined terms such as "space," "weapons" and "use of force," which had not previously been introduced in discussions related to the PAROS program. Based on its missile defense program and the technical advantages of its space weapons, the United States has consistently refused to negotiate PAROS in the CD. In this situation, China and the Russian Federation introduced a new text in 2014 that sought to allay these concerns. To this day, however, the United States and other Western countries continue to oppose the draft MSP, considering the amendments made to PAROS insufficient. In 2014. The European Union proposed an alternative, submitting a draft voluntary international code of conduct for space activities, but this initiative too eventually collapsed [Harrison 2020, 13]. It appears that the PAROS treaty would complement and reaffirm the importance of the 1967 Outer Space Treaty, which aims to preserve outer space for peaceful purposes by prohibiting the deployment and use of space weapons. The treaty would prevent any state from gaining military superiority in space. The discussion of PAROS has actually not completely

stopped; one of the research platforms dealing with this project is the United Nations Institute for Disarmament Research – UNIDIR.[9]

The current situation has changed significantly and is in many ways more complex. The use of space no longer reflects the dynamics of bipolar competition. The number of countries, as well as commercial entities launching and operating space objects, and the number of satellites in orbit have increased significantly. New threats have emerged, such as hacking and cyber-attacks, electronic jamming of space facilities and unauthorized maneuvers near satellites – all of which can lead to the outbreak of armed conflicts. Protecting space infrastructure is a concern for those countries that depend on space systems for strategic military functions, such as communications, navigation, control of certain precision weapons on Earth and anti-missile systems [Silverstein, Porras, and Borrie 2020, 26-35]. In general, arms races are the product of competitive pressures that motivate or otherwise induce states to improve the quality of their armed forces or to expand them.

Back in the "Cold War" period, scholars proposed normative ways of defining arms race behavior, including indicators that take into account the impact of "bureaucratic political games" and other intra-state interactions. Other definitions have addressed the causal aspects of arms races, pointing to "conflicting goals or mutual concerns" between "two states or coalitions of states." These definitions capture important aspects of the dynamics of arms races, but were developed at the height of the Cold War and focus on rivalry factors that may only partially motivate states to compete today, if at all. They also often attempt to capture the multifaceted technical and political problems of contemporary interstate competition in space. It is difficult to draw meaningful conclusions from this framework when trying to determine whether there is an arms race in space. In the current geopolitical environment, it seems unlikely that the international community will reach consensus on negotiating legally binding measures on PAROS. One challenge is that the PAROS debate covers an increasingly diverse range of technologies and activities. A second challenge is that diverse inter-state rivalries complicate attempts to formulate universal or general agreements that encourage states to refrain from arms races in space. Third, because many space-related technologies serve both civilian and military purposes, states are reluctant to agree to restrictions or limitations that may stifle innovation in the emerging commercial or military space sectors. A fourth challenge for the countries involved in the PAROS discussion is to clearly define the success and end goals of such an agreement.

PAROS emerged out of concern about the potential effects of an unfettered arms race in space, and four decades later, the language used in the PAROS

[9] See https://www.unidir.org/ [accessed: 22.06.2020].

debates remains largely the same. The latest version of the General Assembly's annual resolution on PAROS lists its main goals as preventing serious threats to international peace and security and ensuring the continued use of outer space in accordance with international law and space treaties. The language gives policymakers the necessary latitude to shape PAROS measures or agreements, but gives no guidance on how to overcome the associated political obstacles. It seems that a concise and concrete codification of PAROS goals could help advance the discussion. Countries could agree that the short-term goal of PAROS activities is to ensure the safe and responsible use of space by countries. This includes access to space and its use for economic, civil and military purposes. This approach could help focus PAROS discussions on those technologies or activities that make the greatest contribution to stabilizing order in space. On this basis, states could jointly identify the most destabilizing aspects of military competition in space and analyze how these specific threats could be mitigated, including how competing states could be encouraged to cooperate in such efforts.

Most states would prefer to prevent the placement of weapons in space and establish clear rules on what military activities are allowed. However, a solution that achieves both of these goals is unlikely. Moreover, it is unclear whether imposing restrictions on military competition in space is an acceptable solution for large states with significant space capabilities. In 2020, UNIDIR experts began work on a report on the future approach to PAROS. The first, dubbed the "three vectors," refers to three directions of attacks: space-to-space; earth-to-space; and space-to-earth. The first of these, space-to-space attacks, involves co-orbital vehicles and other types of technology that can threaten vulnerable satellites in orbit. This includes the use of such vehicles to destroy a satellite, eavesdrop on or interfere with telecommunications signals, or control the physical properties of space objects.

The second vector, ground-to-space, includes kinetic, destructive weapons such as re-aligned missile interceptors, as well as jamming capabilities. The last category, space-to-earth, includes technologies that are probably still far from economic or operational feasibility. These three vectors have the advantage of dividing technologies into three distinct categories that could essentially be addressed independently. Homing missiles and electronic interference on the ground are two elements of the earth-space vector. In particular, disruption of communications between satellites and other nodes in space systems is becoming more common. To date, states and commercial entities appear to have tolerated jamming activities, or at least the victims have not resorted to overt military or legal responses. However, if jamming interferes with some strategically important space systems, such as missile launch detection and early warning systems, it could raise fears of an imminent attack and trigger a more aggressive response from

the targeted party. Countries could negotiate protected bands by designating certain parts of the radio spectrum as being off limits to jamming and interference. The space vector is particularly difficult to resolve through international negotiations, primarily because these systems remain unproven to date. The usual example cited is the U.S. space-based missile interceptors, designed to combat surface-launched missiles.

One recent proposal promotes the principles of non-interference, derived from the START treaty. Such an arrangement could be extended to all satellites considered critical to strategic systems, such as command and control or guidance systems. This approach is not perfect. Countries may be reluctant to determine which of their satellites are strategic. Or conversely, they may want to designate all of their satellites as critical to strategic systems. In the meantime, the idea of adopting rules or formal agreements to protect certain important satellites could alleviate the ambiguity surrounding the deployment of capabilities (capabilities) in space. UNIDIR's second approach is to divide the topic into two types of threats: to and from space objects. Technologies such as co-orbital vehicles and direct-attraction rockets pose a threat to space systems because they destroy or otherwise disrupt the functions of space facilities. Unfortunately, threats to and from space systems are strongly linked in the perceptions of some policymakers. States may be particularly reluctant to formally limit or abolish terrestrial ASATs (which pose a threat to space) without simultaneously banning the deployment of space-based weapons on the ground Eliminating a viable capability to counter threats from space would artificially increase the value of space-based systems, without consequently reducing the effectiveness of the threats these systems pose.

As past discussions at forums such as the CD conference have shown, some countries still do not accept the PAROS project. However, some experts argue that a willingness to discuss missile interceptors in the context of PAROS is essential in light of current realities. Among other benefits, such a discussion could help build trust between states, which could benefit their subsequent willingness to engage in strategic arms control issues. A third approach considers the impact of space countermeasure capabilities more broadly, including in terms of economic and other civilian space impacts that states may wish to avoid. This type of technology is mostly "non-destructive" and has limited impact on the continued availability and utility of orbits around the Earth (large-scale jamming can still be destabilizing). Countries could apply this approach to PAROS by focusing on destructive technologies that could threaten more objects in space, especially those that raise the prospect of "shared tragedies" (the production of persistent space debris). At present, the utility of destructive ASATs is questionable

in a military sense, since combatants would likely have to destroy many satellites over a short period of time to mount an effective attack with ASAT weapons.

It is clear that the development of space technology and military space units is part of a broader strategic competition taking place on Earth. States are investing in quantitative and qualitative improvements in military functions, and space is an additional area in which some are seeking to gain or maintain an advantage over their rivals or future competitors. Competing states are more openly seeking ways to exploit or neutralize this advantage [Silverstein, Porras, and Borrie 2020, 30].

4. PASSING A NEW CODE OF CONDUCT IN SPACE

Due to the lack of success of new international law projects, soft law codes began to be developed; initially, they did not find recognition. Meanwhile, the UN Committee on the Peaceful Uses of Outer Space – UN COPUOS launched its own initiative to create a "soft law."[10] In June 2016. The Committee agreed on the first set of guidelines for the long-term sustainability of space activities (A/71/20, Annex). In 2018, agreement was reached on a preamble and nine additional guidelines (A/AC.105/1167, Annex III and A/73/20). Although the working group could not agree on its final report for quite a long time, on June 21, 2019, the 62nd session of UN COPUOS adopted a preamble and 21 guidelines for "long-term sustainability of space activities" (LTS). These documents contain programs on the policy and regulatory framework for space activities. This is the result of more than eight years of work by a working group established by UN COPUOS and supported by the United Nations Office for Outer Space Affairs (UNOOSA). The subject of their work was issues of sustainable use of space. The committee urged countries and international organizations to take appropriate action to implement the guidelines adopted on June 21. At that session, UN COPUOS decided to establish, for the next five years, a new working group to continue work on "long-term sustainability of space activities." The Committee decided that at the fifty-seventh session of the Scientific and Technical Subcommittee in 2020, the working group would agree on its own terms of reference, working methods and special work plan toward: a) to identify and analyze new challenges and consider possible new recommendations for the "long-term sustainability of space activities;" b) exchange experiences, practices and lessons learned from the voluntary implementation of the adopted guidelines at the national level;

[10] UNCOPUOS – The Committee on the Peaceful Uses of Outer Space, http://www.unoosa.org/oosa/en/ourwork/copuos/index.html [accessed: 21.01.2023].

c) awareness-raising and capacity-building, particularly among developing countries and countries intending to launch space activities.

The 21 guidelines represent the first concrete achievement of the Committee for the Peaceful Uses of Space since 2007. Over the past 10 years, it has succeeded in persuading most member states not only to reach an agreement, but also to continue further discussion regarding the implementation of the guidelines into member states' national legal systems. The enactment of the guidelines, or "soft" law, represents a major success for the international community. The main goal of the guidelines is to help states and international organizations, in their efforts to reduce the risks of conducting activities in space, so that current benefits can be maintained and future ones can be exploited. The guidelines promote international cooperation in the peaceful use and exploration of space.

Peter Martinez, chairman of the Working Group on the Long-Term Sustainability of Space Activities, which completed its term last year, presented, among other things, "This is a historic moment for the Committee. It represents an important step forward in ensuring the long-term sustainability of space activities so that present and future generations from all countries can continue to benefit from the peaceful exploration and use of space." André Rypl, chairman of the Committee's 62nd session, commented: "We started this session by talking about how we at UN COPUOS are making the impossible possible. We just did it. The guidelines for the long-term sustainability of space activities and, more importantly, the decision to continue and develop the concept of sustainable development in space, are probably the most important achievement of UN COPUOS in a decade." Simonetta Di Pippo, director of UNOOSA, stated, among other things: "The office looks forward to continuing its efforts to support countries in building capacity in space science, technology, law and policy. Ensuring the long-term sustainability of space activities is a key part of this work."[11]

The main purpose of the guidelines is to help states and international intergovernmental organizations, to reduce the risks associated with conducting space activities, so as to maintain current benefits and realize future opportunities. In this regard, the implementation of the guidelines for the long-term sustainability of space activities should promote international cooperation in the peaceful use and exploration of space.[12] Long-term sustainability of space activities is defined as the ability to maintain the conduct of space activities indefinitely into the future in a manner that achieves the goals of equitable access to the benefits of space exploration and use for peaceful purposes to meet the needs of present generations while

[11] UNIS/OS/518; 22nd of June 2019.

[12] A/AC.105/L.318/Add.4, 19th June 2019; V.19-04973.

preserving the space environment for future generations. This is in line with the objectives of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty). States understand that maintaining the exploration and use of space for peaceful purposes is an objective to be pursued in the interest of all mankind.

The goal of ensuring and enhancing the long-term sustainability of space activities, as understood internationally and defined in the guidelines, involves the need to set the overall context and conditions for continuous improvement in the way states and international intergovernmental organizations, in developing, planning and implementing their space activities, continue to engage in the use of space for peaceful purposes to ensure the preservation of the space environment for present and future generations.

The guidelines are based on the premise that space exploration and use should be conducted in a manner that ensures the long-term sustainability of space activities. They are therefore intended to support states in engaging in activities to preserve the space environment for the exploration and use of space for peaceful purposes by all states and international intergovernmental organizations. The guidelines also promote international cooperation and understanding to counter natural and man-made threats that could jeopardize the space activities of states and international intergovernmental organizations and the long-term sustainability of space activities.

The guidelines support the development of national and international security practices and frameworks for conducting space activities and for states and international intergovernmental organizations in developing their space capabilities through joint efforts, where appropriate, in ways that minimize or, where possible, avoid causing damage to the space environment and the security of space operations. The document addresses political, regulatory, operational, security, scientific, technical, international cooperation and capacity-building aspects of space activities. It is based on the knowledge as well as the experience of some countries, international intergovernmental organizations and relevant national and international non-governmental entities. As such, the guidelines are relevant to both governmental and non-governmental entities. They also apply to all space activities, both planned and ongoing, and to all phases of space missions, including launch, operation and disposal of end-of-life waste.

The guidelines are based on the premise that the interests and activities of states and international intergovernmental organizations in space, which have or may have an impact on national defense or security, should be consistent with the preservation of space for peaceful exploration and use

and the preservation of its status in accordance with the Outer Space Treaty and relevant principles and norms of international law. The guidelines take into account the relevant recommendations of the report of the Group of Government Experts on Transparency and Confidence-Building Measures in Space Activities (A/68/189).

Existing United Nations space treaties and principles provide the basic legal framework for the guidelines. They are voluntary and not legally binding under international law, but any action taken to implement them should be consistent with existing principles and norms of international law. Nothing in the guidelines should constitute a revision, qualification or reinterpretation of these principles and norms. Nothing in the guidelines should be interpreted as creating any new legal obligation for states. Any international treaties referred to in the guidelines apply only to states that are parties to those treaties.

States and international intergovernmental organizations should voluntarily take measures, through their own national or other applicable mechanisms, to ensure that the guidelines are implemented to the fullest extent possible and in practice, in accordance with their respective needs, conditions and capacities, and with their existing obligations. States and international intergovernmental organizations are encouraged to administer existing and, if necessary, establish new procedures to meet the requirements of the guidelines. In implementing these guidelines, states should be guided by the principle of cooperation and mutual assistance and conduct all their space activities with due regard for the respective interests of all other states. States and relevant international intergovernmental organizations that can support developing countries in developing their national capabilities to implement these guidelines are encouraged.

The competent body of the United Nations is the Committee on the Peaceful Uses of Airspace, which is the main forum for further institutionalized dialogue on issues related to the implementation and review of the guidelines. States and international intergovernmental organizations are encouraged to share their practices and experiences in the Committee on the implementation of these guidelines. States and international intergovernmental organizations should also work within the Committee and the Office of Foreign Affairs of the United Nations Secretariat, as appropriate; to address issues that have arisen in connection with the implementation of the Guidelines.

The guidelines reflect a common understanding of existing and possible challenges to the long-term sustainability of space activities, the nature of those challenges, and measures that could prevent or reduce their harmful effects, based on current knowledge and established practices. States and international intergovernmental organizations are encouraged

to promote or conduct research on topics related to these guidelines and their implementation.

CONCLUSION

At present, it makes no sense to talk about an arms race in space isolated from the strategic development of the superpowers. Progress on PAROS is likely to remain limited again until there is a shift in the strategic relationship between major competitors such as China, the Russian Federation and the United States. All three countries are developing technologies that will have an increasing impact on both the space sphere and international stability on Earth. Currently, the relationship is strained, and strategic arms control is still non-existent. The United States has indicated that it wants China to participate in negotiations on various strategic systems in the context of New START, the last remaining nuclear arms control agreement between the United States and the Russian Federation. This desire is not currently reciprocated by China. Nevertheless, there may be new opportunities for PAROS progress in the broader arms control efforts between the three countries.

Many space systems are linked to strategic nuclear missions and could be included in arms control agreements that address broader strategic systems. If such agreements were concluded, China, the Russian Federation and the United States would have an incentive to promote broader international efforts to control space. PAROS-related approaches could be negotiated in multilateral or ad hoc forums if traditional forums such as CDs remain ineffective.

Perspectives on PAROS suggest specific confidence-building and transparency measures that could be valuable, both bilaterally and multilaterally. The three-vector approach discussed in the UNIDIR report shows that greater transparency and unified rules of engagement could significantly reduce ambiguity for operations near or directed at strategically sensitive satellites. Distinguishing between destructive and non-destructive weapons could be a way to find an area of common interest for all, including the superpowers, which could lead to non-testing or nonproliferation agreements for certain weapons. While neither of these approaches addresses concerns about the arms race in space, they could at least serve to refresh the discussion of PAROS and offer new ways out of the current stalled debates.

In conclusion, it should be said that the development of space technology in recent times and the diplomatic action conducted by the countries involved in the process of exploiting space indicate that conflicts in space are still possible. Conflicts on Earth may have their effects in space, with

devastating consequences for security in Space and all states on Earth. Today, more and more countries are either using or planning to use space for military purposes. In addition, more and more civilian satellites are being used for military purposes. There is also a process of transition from militarization to weaponization of Space. Maintaining the principle of peaceful use of Space is increasingly difficult. Hence, more and more attention is being paid to the issue of space security and international regulations related to it – space security, such as disarmament programs or UN Long Term Sustainability.

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THE THREE SEAS UNIVERSITY NETWORK AS A VEHICLE FOR MACRO-REGIONAL COOPERATION

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Abstract. This article is concerned with the Three Seas University Network as a vehicle for the macro-regional development of the Three Seas Initiative area. Based on the existing body of research, the author identifies potential new administrative and legal solutions for advancing cooperation between the higher education and research sectors and local governments. To achieve the research aim, he explores the legal possibilities of enabling the macro-regional development of the Three Seas Initiative area. Following a legal analysis, the author concluded that a networking scheme in the form of the Three Seas University Network would be an effective legal vehicle for fostering the macro-regional development of the region concerned. The Network would intensify international cooperation not only in the fields of education or research, but also, and most importantly, in the sphere of regional development.

Keywords: macro-regional local government cooperation; network administration; cooperation between the education and research sectors and local government; Three Seas Initiative

INTRODUCTION

The legal and administrative considerations of regional development from the macro-regional perspective have not been the subject of extensive research. There exists a particularly noticeable gap in interdisciplinary research on regional development in the Three Seas area.[1] This has significant implications, since interdisciplinary approaches are very important for exploring this subject-matter. While publications on the Three Seas Initiative do exist, the large majority of them focus on economic [Popławski and Jakóbowski 2020] or political issues [Kowal and Orzelska-Stączek

[1] An initiative formed by 12 European states – Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Lithuania, Latvia, Poland, Romania, Slovakia, Slovenia and Hungary. During the presidential summit of the Initiative in 2023, Greece and Moldova were invited to join as a member and as a partner-participant, respectively. Ukraine became a partner-participant in 2022. See https://www.prezydent.pl/aktualnosci/wizyty-zagraniczne/szczyt-inicjatywy-trojmorza,74048 [acccessed: 30.09.2023].

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2019; Grosse 2022; Raczkowski 2022]. Hence, it is very important to align the legal forms of macro-regional development functioning within the European Union with the bottom-up initiatives emerging under the Three Seas Initiative in the fields of education and research. This paper explores the legal avenues through which to support the macro-regional development of the Three Seas area by facilitating institutional cooperation in the educational and research sectors. The research hypothesis is that network administration processes, such as those occurring within the Three Seas University Network, should be used as a legal vehicle for promoting regional development in higher education. The above-mentioned subjects will be analysed using primarily the doctrinal method, with minor elements of the historical and comparative-legal methods.

1. MACRO-REGIONAL COOPERATION IN THE EUROPEAN UNION

Macro-regional strategies are political frameworks established by EU states and non-EU European countries to form collaborative partnerships to promote economic, social and territorial cohesion. These strategies facilitate problem-solving on partnership terms and help tap the combined development potential. They operate on the principle of cross-sectoral and multi-level governance. At the same time, macro-regional strategies highlight regional identities to strengthen accountability and encourage active civic participation. The soft cooperation model adopted under macro-regional strategies is an advantage in that it opens up paths to solutions that are more difficult to develop in more formalised contexts characterised by competing national interests.[2]

The existing four macro-regional strategies involve 19 EU and 10 non-EU states.[3] They are: the European Union Strategy for the Baltic Sea Region,[4] the EU Strategy for the Danube Region,[5] the EU Strategy forthe Adriatic –

[2] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of EU macro-regional strategies, Brussels, 9.12.2022, COM 705 final, p. 1.

[3] Ibid., p. 1-2.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions concerning the European Union Strategy for the Baltic Sea Region COM 2009, 248 final, https://ec.europa.eu/regional_policy/sources/docoffic/official/communic/baltic/com_baltic_en.pdf [accessed: 12.09.2023].

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions concerning the European Union Strategy for the Danube Region, Brussels, 8 December 2010, COM 2010, 715 final, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010DC0715 [accessed: 12.09.2023].

-Ionian Region[6] and the EU Strategy for the Alpine Region.[7]

Macro-strategies provide frameworks of response to emerging problems. For instance, a situation where Ukrainian refugees fleeing from war are seeking shelter all over Europe calls for orchestrated action within the framework of all four macro-regional strategies. This raises new concerns, particularly around the additional burden that the crisis has put on healthcare and welfare systems already strained by the pandemic. Many stakeholders of macro-regional strategies help refugees and support humanitarian aid initiatives. Recently, the macro-regional strategy measures have been focusing on integrating Ukrainian refugees and establishing safe routes for goods transportation.[8]

In all of the four macro-regional strategies, the political level is represented by ministers of foreign affairs and, in some cases, by ministers or authorities responsible for EU funds. The rotating presidency plays an increasingly important role in all these strategies. This includes both EU and non-EU states. In all the three macro-regional strategies involving non-EU members (Danube, Adriatic-Ionian and Alpine Regions), a non-EU state has already held, or will hold, presidency. Currently, each of the four macro-regional strategies has a fixed, rotating presidency arrangement, and uses the format of three succeeding presidencies (previous/current/next presidency). The role of the presidency has been elevated through the establishment of "a group of three presidencies within four strategies." This group meets regularly and always closely ahead of the annual EU Macro-Regional Strategies Week.[9]

It is worth noting that efforts have been made to engage young people in developing macro-regional cooperation. This is a tool of building civil society – a process that requires encompassing civic initiatives and a population of young people that have experience in tackling social issues and collaborating with institutions at all levels [Chałas and Szewczak 2021, 85]. In recent years, the annual forums held under all four macro-regional strategies have invited young people to contribute to discussions with

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions concerning the European Union Strategy for the Adriatic-Ionian Region, Brussels, 30 November 2012, COM 2012, 713 final, https://ec.europa.eu/regional_policy/sources/docoffic/official/communic/adriatic/com_2012_713_en.pdf [accessed: 12.09.2023].

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions concerning the European Union Strategy for the Alpine Region, Brussels, 28 July 2015, COM 2015, 366 final, https://ec.europa.eu/regional_policy/sources/cooperate/alpine/eusalp_communicationtion_en.pdf [accessed: 12.09.2023].

[8] Report, p. 5.

[9] Report, p. 8-9.

decision-makers. "Youth councils have been created and institutional civic dialogue has been opened on a macro-regional scale to foster synergies through intensive exchange between macro-regional strategies and other regional cooperation networks."[10] It seems that the existing macro-regional strategies and their implications for the educational and research sectors could serve as positive examples on which to model analogous strategy documents covering the Tree Seas Initiative area, or at least parts of it. Consider, for instance, the Carpathian Strategy that is being worked on. Its main objective would be "to preserve the area's high nature value, and to boost the competitiveness and attractiveness of the Carpathian macro-region on the basis of its unique natural and cultural heritage, internal sustainable development potential and creating a competitive advantage."[11] One of the key priorities of the Carpathian Strategy would be to support the innovative development of regional ties through cross-sectoral cooperation between science and business [Smętkowski, Majewski, and Przekop-Wiszniewska 2022, 50]. Regrettably, despite the many years of work put into its preparation, the Carpathian Strategy still awaits acceptance to become another macro-regional strategy of the European Union.

To summarise, macro-regional strategies are important vehicles for economic, social and territorial development. They shape the macro-regional identities and aspirations and build trust among neighbouring countries.[12] They should foster regional integration around "economic cooperation and the resulting mutual benefits, as well as support for the weakest economic organisms" [Grosse 2022, 128]. This begs the question of why there is no macro-regional strategy in Central and Eastern Europe despite the lively regional cooperation under the Three Seas Initiative.

2. THE THREE SEAS UNIVERSITY NETWORK

First, it is important to consider the role of the Three Seas Initiative. In 2016, its Member States signed a Joint Statement that: "Having recognised the importance of connecting Central and Eastern European economies and infrastructure from North to South, in order to complete the single European market, given that so far, most efforts served to connect Europe's East and West; [...] Convinced that by expanding the existing cooperation in energy, transportation, digital communication and economic sectors,

[10] Report, p. 7.

[11] Opinion of the European Committee of the Regions – Macro-regional Strategy for the Carpathian Region, 10 March 2020, https://eur-lex.europa.eu/legalcontent/PL/TXT/PDF/?uri=CELEX:52019IR3425&from=EN [accessed: 13.09.2023].

[12] Report, p. 14.

Central and Eastern Europe will become more secure, safe and competitive, thus contributing to making the European Union more resilient as a whole; [...] they have endorsed The Three Seas Initiative as an informal platform for securing political support and decisive action on specific cross-border and macro-regional projects of strategic importance to the States involved in energy, transportation, digital communication and economic sectors in Central and Eastern Europe."[13] Almost a decade after its establishment, the Three Seas Initiative has yet to see concrete efforts towards its institutionalisation. It does not have a head office, lacks a structural framework and relies on non-binding statements promulgated at annual summits. Consequently, the project is largely driven by political factors [Orzelska-Stączek 2022, 55].

However, there are exceptions to this. One example of macro-regional efforts towards the institutionalisation of the Three Seas Initiative is the Network of the Three Seas Regions, established in Lublin in 2021 [Szewczak 2021]. This network is based on cooperation between regions from the Three Seas Initiative Member States. One of its priorities is to strengthen cooperation between Three Seas regions in the fields of education and research. The subject was addressed during a session entitled "Cooperation between Three Seas Universities" at the 2nd Three Seas Local Government Congress held in Lublin in 2022.[14]

Member states followed up on this discussion by taking further steps to promote research cooperation between Three Seas universities as an important component of macro-regional regional development. A research project has been implemented to help draw up a more concrete agenda. It saw an interdisciplinary team of Polish researchers (W. Gizicki, J. Dobkowski, G. Grzywaczewski, A. Ostrowska, I. Szewczak) explore opportunities for cross-regional cooperation under the Three Seas Initiative in the fields of education and research, among others. The central problem was to determine whether the Three Seas University Network was seen as a viable and effective undertaking with the potential to strengthen international local-government cooperation. Based on their analysis of empirical studies conducted at the turn of October and November 2022 in a large number (61) of Three Seas regions, the researchers found that an overwhelming 98.4% of the respondents were in favour of establishing the Three Seas University Network. They were largely in agreement that this undertaking would strengthen international local-government cooperation [Gizicki, Dobkowski, Grzywaczewski, et al. 2022, 30, 44].

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[13] See https://www.prezydent.pl/aktualnosci/wizyty-zagraniczne/art,105,wspolna-deklaracja-w-sprawie-inicjatywy-trojmorza.html [accessed: 16.08.2023].

[14] See https://congress.lubelskie.pl/agenda-2022/ [accessed: 20.08.2023].

It should be stressed that international academic cooperation has already been the central subject of two editions of the Three Seas Local Government Congress in Lublin (2021, 2022). Representatives of local governments, as well as of the education and research sectors, welcomed that discussion, making it clear that further moves towards institutionalised macro-regional cooperation between Three Seas regions was strongly expected. The above-mentioned findings align with what the "Cooperation between Three Seas Universities" panel at the 2022 Three Seas Local Government Congress in Lublin concluded – namely, that the primary way for Three Seas states and societies to establish stronger relations was by increasing student exchange, bolstering inter-university cooperation, undertaking joint scientific research, as well as sharing ideas at the university level [Czarnek 2022].

From a functional point of view, it was important to map specific areas of cooperation under the Three Seas University Network. Here, the aforementioned study provided some interesting insights. The respondents mentioned medical sciences – 72%, technical sciences – 49.2%, social sciences – 36.1% and jurisprudence and administrative science – 32.8% as critically important areas of inter-university cooperation in the Three Seas Initiative area. [Gizicki, Dobkowski, Grzywaczewski, et al. 2022, 44]. The findings of the study are consistent with the position adopted by the academic community concerning the development of medical programmes at the John Paul II Catholic University of Lublin, which launched the Medical Faculty in October 2022.[15]

In order for macro-regional cooperation in the fields of education and research to work and bring the expected outcomes, certain conditions must exist to stimulate it and make it more effective, According to the study, these include: academic faculty mobility (39.3%) and joint research projects (39.3%), student mobility (36.1%), academic faculty courses and training (34.4%) and joint e-learning programmes (19.75). University administration training took the last two positions – 16.4% of the respondents thought it was necessary to train managerial staff, while 13.1% believed academic administration staff should receive training [Gizicki, Dobkowski, Grzywaczewski, et al. 2022, 45]. It is evident from the study that higher education requires internationalisation addressed to students, research faculty and administrative staff alike. This would foster interdisciplinary cooperation and provide a concrete framework for cooperation between the educational and research sectors and local governments.

The Three Seas Initiative area encompasses 12 states with different aspirations and problems. Due to social, cultural and economic differences,

[15] See https://www.kul.pl/wydzial-medyczny-kul-zainaugurowal-dzialalnosc,art_100380.html [accessed: 12.09.2023].

it is important to identify common areas in which university cooperation would effectively stimulate regional development. According to the respondents, the following aspects should be considered: environmental protection (42.6%), cultural heritage (39.3%), entrepreneurship (37.7%), information technology (34.4%), social issues (26.2%), sports and tourism (13.1%) and religious heritage (11.5%) [ibid.]. From the local-government perspective, these aspects are critical and indispensable for macro-regional cooperation. Collaborative partnerships between research establishments (universities) in these areas may contribute to the regional development in the Three Seas Initiative area.

Just as there are numerous benefits of developing macro-regional cooperation between Three Seas Initiative Member States, there are many different barriers that hamper or altogether prevent its progress. The main barriers mentioned by the respondents were inadequate funds (67.2%), excessive bureaucracy (49.2%) and sociocultural differences (29.5%). Other identified obstacles included low level of interest among beneficiaries (26.2%), lack of central-government support (11.5%) and lack of local-government support (4.9%) [ibid., 46]. It is important to note here a possible solution that could facilitate both the Three Seas University Network and macro-regional development in this area – the Three Seas Fund, which is now primarily an investment fund focused on supporting infrastructural projects [Raczkowski 2022, 28]. With a steady source of funding, it is certainly conceivable for macro-regional cooperation to grow within the Three Seas University Network.

Based on their survey, the researchers produced a set of recommendations and conclusions. One of their key recommendations was to establish the Three Seas University Network with Lublin as its seat [Gizicki, Dobkowski, Grzywaczewski, et al. 2022, 61]. The Three Seas Initiative followed through with this recommendation fairly quickly. A year later, at the 3rd Three Seas Local Government Congress held in May 2023 in Lublin, twelve Three Seas Universities signed an international agreement on establishing the Three Seas University Network. The John Paul II Catholic University of Lublin took leadership of this undertaking. The Network's objectives include to promote the internationalisation of academic research cooperation by establishing an internal system of research faculty and student exchange, organising joint international conferences, providing summer schools, undertaking joint international projects and cooperating with the socio-economic environment.[16] Designed to foster macro-regional cooperation between universities, this new legal instrument will also serve as a vehicle for consolidating cooperation between local governments and businesses.

[16] See https://www.kul.pl/siec-uniwersytetow-trojmorza-umiedzynarodowi-wspolprace-naukowa,art_102924.html [acccessed: 30.09.2023].

CONCLUSIONS

Based on our analysis, we can draw several key conclusions on how to promote macro-regional development under of the Three Seas Initiative and create the legal instruments to make the project viable and effective.

First of all, it is important to note that there are legal and administrative possibilities for the regional development of the Three Seas Initiative area in the fields of research and higher education. Important changes have been set in motion to shift the emphasis from the presidential to the regional level in relation to developing macro-regional inter-university cooperation. Consequently, new opportunities have been unlocked to develop and implement joint international projects.

Second, it is essential to take advantage of international cooperation opportunities in the research and higher education sectors within macro-regional EU strategies. It seems that the key challenge for the Three Seas Initiative area would be to implement the Carpathian Strategy [Paruch 2017, 213]. This strategy could become a vehicle for advancing the macro-regional development of the research and higher education sectors.

Third, the further development of the Three Seas University Network is a prerequisite to fostering macro-regional cooperation in the Three Seas area. The Network should form an international association of universities within a broader administrative system to encourage active cooperation with local-government communities, aimed particularly at advancing education and cooperation between research institutions and businesses.

To conclude – the Three Seas University Network should be prioritised as a vehicle for macro-regional development of the Three Seas Initiative area. It will facilitate cooperation between the education and research sectors, local-government administration and business, and consequently promote inter-regional collaborations.

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LEGAL ASPECTS OF ESG DEVELOPMENT IN THE FIELD OF POLAND'S RAW MATERIAL POLICY USING THE EXAMPLE OF THE GEOLOGICAL AND MINING SECTOR

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Abstract. The challenges connected with energy transformation, and in particular the raw materials policy, require due care for the functioning of the sector in question, in compliance with the applicable laws. The creation of an adequate set of legal instruments, including the ESG reporting obligation, will foster the responsible development of the raw materials security sector, which will also contribute to a sustainable regional development model. The article analyzes the raw materials policy within the sustainable regional development system and legal regulations governing ESG reporting.

Keywords: environmental governance; social governance; Poland; EU regulations

INTRODUCTION

The legal bases governing the ESG[1] (i.e., environmental, social and corporate governance) responsibility of business entities stem from the legal regulations of the European Union and national regulations in the Polish legal system. As part of the EU regulations, new requirements are to be introduced regarding sustainable development reporting, which will be implemented within the domestic legal system from 2024. The open-ended system of legal regulations regarding ESG enables an ongoing analysis of the proposed solutions, taking into consideration proposals prepared for high-risk sectors in terms of sustainable development, i.e., agriculture, coal mining, extraction, refinery, energy, land transport, automotive, and food sectors.[2] The choice of sectors within the raw materials policy domain is connected with the role they play in sustainable development and their functional specificity. Considering the above, the author has chosen to analyse the activities

[1] ESG – environmental, social governance.

[2] See https://www.pkobp.pl/media_files/c34091cf-a104-4b7e-a85f-0ac7875abd80.pdf [accessed: 16.10.2023].

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within the extraction sector as an important energy transition area influencing sustainable development.

To date, legal aspects pertaining to the ESG reporting on sustainable development have not been the subject of any broader studies within the doctrine of legal sciences. When searching through the literature on the subject matter, one can find publications presenting this issue mainly from the perspective of economic sciences [Cicirko 2022; Zyznarska-Dworczak 2022; Ahmed, Muhammad, and Lee 2023]. The research conducted as part of this article includes, in the theoretical part, the analysis of legal regulations related to the national raw material policy and its impact on sustainable development. In the analytical part, the legal analysis covers regulations governing the obligation to introduce enterprise reporting on sustainable development. The purpose of the article is to analyse the legal mechanisms enabling the creation of a system of enterprise reporting on the activities implemented in the field of sustainable development, with a particular focus on the raw materials policy. The research hypothesis is the statement that legal regulations governing the implementation of the above system must be developed in consideration of the specificity of economy sectors, resulting from their strategic position in the economy system. In relation to the raw materials policy related to minerals, these regulations should be included in the *Geological and Mining Law*. The analysis of the proposed research domain will be conducted using the dogmatic legal method and – to a minor extent – the historical and comparative legal method.

1. RAW MATERIALS POLICY WITHIN THE SUSTAINABLE REGIONAL DEVELOPMENT SYSTEM

The legal aspects of ESG reporting in the field of sustainable development are currently subject to implementation within the EU law. This also requires specific legal regulations within the national legal system, in particular, in relation to the raw materials policy that is one of the key issues influencing the sustainable development system. The crucial element in the process of shaping the sustainable regional development system is the raw materials policy which is of utmost importance for the overall development of Polish economy.

The ESG concept comprises the environmental, social and corporate governance dimensions. The environmental and social dimensions previously functioned as the principle of corporate social responsibility (CSR), while the new component – referring to corporate governance – has mainly arisen from the need to introduce restrictive legal regulations on enterprise reporting on non-financial data [Misztal 2023, 92-93]. It is worth noting that the ESG issues may influence the long-term outcomes of enterprises,

and they should, therefore, be taken into consideration while making investment decisions [Cicirko 2022, 125]. It is indisputable, as regards the ESG analysis, that the instruments for its verification are insufficient. Further development-oriented measures are also required from the owner party, which should undoubtedly entail promoting the ESG culture across enterprises [Ahmed, Muhammad, and Lee 2023, 15-16]. Measures taken in the course of implementing the ESG principles to foster sustainable development are primarily focused on reducing carbon dioxide emissions by large enterprises [Baratta, Cimino, and Longo 2023, 15]. In consequence, the state's support in preparing the appropriate mechanisms to facilitate ESG implementation appears indispensable and may take the form, *inter alia*, of tax reductions or lower credit instalments [Jin and Hue 2023, 20]. The ESG concept has been rapidly developing for the past three years, given the extensive measures taken by Poland in the field of raw materials security or energy transformation. It is a concept that changes the face of Polish economy both rapidly and expansively, thus shaping the sustainable development process.

Poland's raw materials policy was defined in the Responsible Development Strategy[3] as "a project for building an efficient and effective system for the management of all types of minerals and mineral raw materials along the entire value chain, and their resources held by Poland, including the adequate – i.e., related – legal and institutional changes. The raw materials policy also supports the transition into a circular economy."[4] The action taken by the legislator to include the above definition in a strategic document demonstrates the process of integrating the raw materials policy into the sustainable regional development system [Szewczak 2022, 226].

Measures taken in connection with the implementation process of the national raw materials policy[5] relate, to a large extent, to issues connected with ensuring the country's energy security through sustainable extraction of minerals, and with attempts to shape a circular economy. The principal objective of Poland's raw materials policy is "to ensure the country's raw materials security by guaranteeing access to the necessary raw materials both currently and in the long-term perspective, taking into consideration the changing needs of future generations."[6] It is worth noting that, in view of the evolving legal regulations landscape, issues concerning the implementation of the national raw materials policy and those related to the system of sustainable development must co-exist to form an integrated system.

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[3] See "Monitor Polski" of 2017, item 260.

[4] Ibid.

[5] See "Monitor Polski" of 2022, item 371.

[6] Ibid.

Activities in the field of minerals extraction from deposits are regulated by the provisions of the Geological and Mining Law.[7] Interestingly, the lack of a legal definition of a mineral constitutes a sort of legal gap. The Geological and Mining Law only defines the concept of a deposit – as a natural accumulation of minerals, rocks, and other substances, the extraction of which may be economically profitable, and the concept of an extracted mineral – as the whole of the mineral separated from the deposit (Article 6(1)(3) and (19)). In addition, it stipulates that minerals do not include waters, except for brine, curative and thermal waters (Article 5(1)). The above concepts do not explain the criterion of economic profitability, the attainment of which often depends on the actual situation on the raw materials market [Wojtulek, Kocowski, and Małecki 2020, 52-53], or on issues related to the need to implement sustainable development policies. A certain solution is provided by legal aspects regulated by the amendment to the Geological and Mining Law, introducing, *inter alia*, the definition of a strategic deposit, which is understood as a mineral deposit which is subject to special legal protection due to its significance for the national economy or security.[8] The introduction of the above definition by the legislator is likely to significantly simplify the implementation of tasks in the field of raw materials policy which will, at the same time, translate into the implementation of this policy within the sustainable development system.

It should be noted that the national raw materials policy defines specific objectives relating to the development of the geological and mining sector. First, a significant objective is to take measures for the protection of minerals, *inter alia*, through an appropriate planning and spatial development process. Second, it is important to support the development of a circular economy. Third, the process related to the dissemination of knowledge in the field of geology and mining is part of the overall environmental education shaping the principles of sustainable regional development [Szewczak 2022, 231-35]. In Poland, the geological and mining sector is important in view of the need to carry out the energy transition process.

The raw materials policy in Poland plays a crucial role in the process of creating a system of sustainable regional development. The characteristic feature of the sustainable regional development model is "responsible development, ensuring the participation of and benefits for all social groups, based on multi-dimensional social and cross-generation solidarity, connecting urban and rural areas" [Szewczak and Szewczak 2020, 189]. The development of that model must be based precisely on the implementation of the mandatory legal requirements for action in the field of sustainable

[7] Act of 9 June 2011, the Geological and Mining Law, Journal of Laws of 2023, item 633.
[8] Journal of Laws of 2023, item 2029.

development. The concept of sustainable development should be based on "four intrinsically linked elements: society, natural resources, cultural resources and ethics" [Sałek 2022, 21]. When formulated in this way, the concept makes it possible to ensure the complementary development of the sustainable development model, with particular emphasis on the role of the raw materials policy, which should be an advantage, rather than a disadvantage, for the country's economic development.

Defining the role of the raw materials policy in the process of shaping sustainable development is inextricably linked to the implementation of legal regulations in this field by the European Union.

2. LEGAL REGULATIONS GOVERNING ESG REPORTING

The legal obligation of ESG reporting in the European Union has been valid since 2017,[9] and it mainly concerns large public-interest entities, in particular stock-listed companies and financial institutions hiring over 500 employees. In 2019, the European Commission recognised the need to review the Directive, as an element comprising the European Green Deal, which led to the commencement of works on Directive 537/2014 of the European Parliament and of the Council of 14 December 2022 on amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU in relation to enterprise reporting on sustainable development,[10] which eventually entered into force in January 2023 and shall be fully implemented in 2024.

The Directive introduces the obligation to draw up reports on the enterprise activities, including, on the one hand, information indispensable to understanding the undertaking's influence on issues related to sustainable development, and, on the other hand, information indicating how the sustainable development issues influence the development outcomes and standing of that entity.

The information mentioned above should contain: a brief description of the undertaking's business model and strategy, including: 1) the resilience of the undertaking's business model and strategy in relation to risks related to sustainability matters, 2) the opportunities for the undertaking related to sustainability matters, 3) information on how the undertaking's business model and strategy take account of the interests of the undertaking's stakeholders and of the impacts of the undertaking on sustainability matters, 4) how the undertaking's strategy has been implemented with regard to sustainability matters, namely: a) a description of the time-bound targets

[9] Official Journal of the European Union, 15.11.2014, L 330/1.
[10] L 322/15.

related to sustainability matters set by the undertaking, including, where appropriate, absolute greenhouse gas emission reduction targets at least for 2030 and 2050, a description of the progress the undertaking has made towards achieving those targets, and a statement of whether the undertaking's targets related to environmental factors are based on conclusive scientific evidence, b) a description of the role of the administrative, management and supervisory bodies with regard to sustainability matters, and of their expertise and skills in relation to fulfilling that role or the access such bodies have to such expertise and skills, c) a description of the undertaking's policies in relation to sustainability matters, d) information about the existence of incentive schemes linked to sustainability matters which are offered to members of the administrative, management and supervisory bodies, e) a description of the due diligence process implemented by the undertaking in relation to sustainability matters, f) a description of the principal risks to the undertaking in relation to sustainability matters (Article 19a(1) and (2) of the Directive 2014/95/EU).

It is worth stressing that the Directive has a very broad material scope, which is numerative and mandatory in nature, since all elements must be fulfilled in order for the reporting obligation to be considered duly met. The aforementioned material scope is, in my opinion, perfectly sufficient at the stage of legislative enactment. It should be noted at this point that, after the legislation has been in force for some time, it will be important to review it, as the above catalogue may be expanded. This will depend on the direction of legal activities in the European Union related to the process of better understanding the sustainable development issues. At the same time, if we analyse the issues of ESG reporting from the point of view of the national raw materials policy (including, in particular, the policy applicable to the geological and mining domain), it should also be noted that the dynamics of the legislative process in this field requires the legislator to conduct an effective legislative review. It appears that one of the *de lege ferenda* postulates should be to place the issues related to above-mentioned information in the Geological and Mining Law in order to highlight the aspects related to the specificity of this domain.

Issues related to the process of ESG reporting on sustainable development are directly connected with the reporting standards which were determined in the Directive analysed herein.

The sustainable development reporting standards specify the information to be provided by entities in accordance with Articles 19a and 29a, and, where applicable, they also indicate how that information should be presented. These standards aim to ensure the quality of reported information, as they require such information to be understandable, relevant, verifiable, comparable and faithfully presented.

In subjective terms, the reporting standards primarily cover the following information: a) the information that undertakings are to disclose about the following environmental factors: climate change mitigation; climate change adaptation; water and marine resources; resource use and the circular economy; pollution; and biodiversity and ecosystems, b) the information that undertakings are to disclose about the following social and human rights factors: (1) equal treatment and opportunities for all, including gender equality and equal pay for work of equal value, training and skills development, the employment and inclusion of people with disabilities, measures against violence and harassment in the workplace, and diversity; (2) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements, the information, consultation and participation rights of workers, work-life balance, and health and safety; (3) respect for human rights, fundamental freedoms, democratic principles and standards, as laid down in international instruments; c) the information that undertakings are to disclose about the following governance factors: (1) the role of the undertaking's administrative, management and supervisory bodies with regard to sustainability matters, and their composition, as well as their expertise and skills in relation to fulfilling that role or the access such bodies have to such expertise and skills; (2) the main features of the undertaking's internal control and risk management systems in relation to the sustainability reporting and decision-making process; (3) business ethics and corporate culture, including anti-corruption and bribery, the protection of whistleblowers, and animal welfare; (4) activities and commitments of the undertaking related to exerting its political influence, including its lobbying activities; (5) the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices, especially with regard to late payment to small and medium-sized undertakings (Article 29b(1) and (2)).

Summing up, the reporting standards listed in the Directive are divided into thematic standards which cover the following three groups: environmental, employee and corporate governance domains.[11] For the purpose of this article, only selected standards, i.e., those related to the environmental area, will be analysed, as they are the most relevant for implementation in the geological and mining sector.

First and foremost, climate change was identified as a key standard. Therefore, "all companies subject to ESG reporting shall outline the climate impact of their activities, their existing and planned actions aimed at its

[11] Report, p. 7.

mitigation, prevention or remediation; they should also analyse in detail the risks (transformational and physical) and opportunities associated with climate change."[12] In addition, it is worth noting that "greenhouse gas emission reduction targets should be disclosed as part of the standard. This includes the emission of greenhouse gases, namely carbon dioxide, methane, nitrous oxide and fluorinated gases. The standard also provides for the disclosure of information on energy consumption and energy mix. Undertakings are required to present their total energy consumption in MWh by renewable and non-renewable energy sources, with a further breakdown into more detailed subcategories."[13] The guidelines related to the climate change process, which have a significant impact on the development of the raw materials policy in Poland, should be analysed in detail by the relevant entities in the field of geological and mining administration.

Another important element is the pollution standard, stipulating that "the undertaking should describe how it prevents and manages pollution resulting from its activities. The standard focuses on disclosing information on air (indoor and outdoor), water and soil pollution. Pollution includes factors of human origin which affect people or the environment, and can result in damage or deterioration to health, property and the environment. Pollutants can be divided into three main groups, i.e., air, water and soil pollutants."[14] This standard will be of utmost importance to the undertakings operating in the field of raw materials policy, in terms of implementing effective systems contributing to pollution control.

Biodiversity and ecosystems constitute another standard. This one concerns "the relationship between the undertaking's activities, on the one hand, and biodiversity and ecosystem change, on the other. The underlying causes of biodiversity loss include: climate change, pollution, change in the use of land and water surface (e.g., habitat destruction, deforestation or urbanisation), direct exploitation (e.g., overfishing), and invasive alien species. All these causes are connected with a growing population and increased demand for resources. The disclosure of information under this standard will contribute to the implementation of the EU Biodiversity Strategy 2030 as an important element of the European Green Deal"[15]. The above standard is directly linked to the sustainable development implementation model in terms of the policies pursued by the European Union. From the point of view of individual Member States, it is crucial to implement raw material policies, including those pertaining to the geological and mining sector constituting a key domain, in an equally responsible manner from

[12] See https://www.efrag.org/lab6 [accessed: 30.09.2023].
[13] Report, p. 9-10.
[14] Ibid., p. 10.
[15] Ibid., p. 11.

the perspective of their development prospects. Otherwise, the uniform implementation of the EU Biodiversity Strategy is likely to cause distortions in the sustainable development of individual regions.

Another standard concerns issues related to the use of resources and the shaping of a circular economy. The reporting objectives as part of this standard "focus on activities that implement the concept of a circular economy within an enterprise. The information disclosed largely concern the enterprise's raw materials policy, including the use of secondary raw materials, eco-design, and waste management. Companies should provide information on the resources they purchase, including the share of raw materials obtained from renewable and secondary sources, and generated by the enterprise, along with indicating products and materials designed in line with the principles of circular economy. Information on packaging or plant equipment will also be provided."[16] Apparently, the above standard is crucial in the entire catalogue, as it refers primarily to the issue of implementing the principles of a circular economy which, in turn, is specifically related to the raw materials policy. The appropriate implementation of processes by enterprises operating in the geological and mining sector will facilitate the shaping of a circular economy system, and thus the creation of a responsible sustainable development model.

Summing up the standards under analysis, several conclusions can be drawn. First, the standards laid down in the Directive, and referring to environmental areas, constitute a robust information basis for the market shaping the country's raw materials policy. Assuming that economic entities implementing the raw materials policy provide reliable information, there is a possibility to monitor their activities precisely in terms of how they pursue their objectives connected with developing a sustainable regional development model. Second, the presented standards merely constitute a substantive introduction, with the aim of further clarifying these standards in the future, from a sectoral perspective. It is worth noting that the reporting issues pertaining to the mining and geological sector must also be based on national legal regulations. Therefore, it is necessary to make attempts to clarify this issue and promote it within the public system. The functioning of ESG systems, particularly in the field of the national raw materials policy, is a practically unexplored aspect in the doctrine of legal sciences, as issues related to the law governing sustainable regional development have not been the subject of any extensive scientific discourse. Due to the differences encountered between the various economic sectors, it seems advisable to assign separate standards to specific sectors, e.g., those related to the raw materials policy, so that the actual policies in the field of ESG reporting

[16] Ibid.

and the creation of a sustainable regional development model could be implemented in the most effective way.

CONCLUSION

The implementation process of the analysed Directive within the Polish legal system is intrinsically connected with energy transition activities. The transformations taking place in the context of implementing sustainable development regulations influence the structural transformations occurring in the domain of geological and mining administration. In reality, the lack of appropriate legal instruments would make it impossible to develop the appropriate legal forms of shaping the development of the national raw materials policy with sustainable development in mind.

The analysed provisions of the Directive and the proposed framework of standards must be implemented within the Polish legal system through appropriate documents. On the one hand, these can and should be our national standards referring to the binding raw materials policy. On the other hand, issues related to facilitating sustainable development should be regulated in legal acts. Therefore, a *de lege ferenda* postulate is to regulate the functioning of the ESG reporting system in relation to raw materials policy in the Geological and Mining Law. The consequence of introducing the legal solution proposed above would be the systematisation of procedures related to the process of reporting on sustainable development activities by undertakings pursuing the raw materials policy. In addition, it would allow the geological and mining administration to exercise supervision in this field in a more efficient manner.

The heterogeneity of the implementation of the sustainable development reporting processes in individual EU Member States is worth noting. This implies that ESG reporting in the context of Poland's raw materials policy should be essentially based on standards developed by reference to the EU Directive, on the one hand, and to Polish economic conditions, on the other. The national standards should not aim at excluding or completing with the EU standards, but they should merely complement them through guidelines for public entities. Therefore, a *de lege ferenda* postulate is to develop legal regulations governing the ESG reporting standardisation system, from the point of view of both the EU and national law. This will also allow the specificity of the geological and mining sector in Poland to be taken into account. Moreover, it is crucial to recognise the important role of other documents, often referred to as guidelines, which indicate good practices that may be applied in selected cases. As such, they should be prepared especially for sectors related to the raw materials policy, in order to take into consideration their specific operational conditions. It should, therefore, be expected

that geological and mining administration entities prepare the appropriate guidelines referring to ESG reporting (based on national regulations), which will constitute an additional instrument governing the process in question.

In summary, it should be noted that the challenges connected with energy transformation, and in particular the raw materials policy, require due care for the functioning of the sector in question, in compliance with the applicable laws. The creation of an adequate set of legal instruments, including the ESG reporting obligation, will foster the responsible development of the raw materials security sector, which will also contribute to the functioning of the sustainable regional development model.

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DIGITAL TRANSFORMATION AND ITS SOCIAL AND ADMINISTRATIVE-LEGAL IMPLICATIONS. FROM HOMO SAPIENS TO HOMO DIGITALIS

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Abstract. The ongoing digital transformation that we are experiencing as humanity requires in-depth analysis at many levels of research. In the field of law and administrative procedure, the issue of automated administrative decision-making in individual cases is of particular importance. That is, the making and issuing of decisions in the process of applying the law. Against this background, a number of concerns and questions arise, not only of a legal nature, but also of a social nature, related to the perception of the human being in an intensely digitally changing reality. As can be surmised, never before in the development of administrative law has the consideration of ethical issues in the context of administrative procedure been so frequently addressed. One of the fundamental questions is whether this act of applying the law, hitherto performed by a human being, can be performed by a device/algorithm?

Keywords: digital transformation; administrative law and procedure; automated administrative decision-making; artificial intelligence

INTRODUCTION

The digital transformation currently taking place – seen as the fourth industrial revolution[1] – and the transformations it implies are becoming a key driver of social transformation.[2] At the same time, this transformation is affecting all economic, social and societal systems.[3] It is the sixth

[1] See https://irp-cdn.multiscreensite.com/be6d1d56/files/uploaded/190830-Six-Transformations_working-paper.pdf [accessed: 21.03.2023].

[2] See https://www.idos-research.de/uploads/media/TWI2050-for-web.pdf [accessed: 17.03.2023].

[3] A slightly different view is presented in the Report "Towards our Common Digital Future", which concludes that "Digitalisation" is often – erroneously – described as a massive upheaval facing our societies and to which we must adapt. The authors of the Report oppose this interpretation, arguing that digitalisation must be shaped in such a way that it can serve as a lever and support for the Great Transformation towards a sustainable world, and can be synchronised with it. Detailed position paper available in a report published at https://www.researchgate.net/publication/332414643_Towards_Our_Common_Digital_Future_Summary_WBGU_Flagship_Report [accessed: 21.03.2023].

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building block of what is referred to as "The Sustainable Development Goals (SDGs)."[4] Furthermore, the digital transformation that we as humanity are witnessing is affecting the development and psycho-physical state of the entire population in an unprecedented way. Today, modern technologies are an essential part of the life of modern society. However, human involvement with them often leads to information overload and digital stress as a result of information overload, distraction, over-stimulation and a sense of living on the run and under time pressure. This is referred to as digital "fast food". Its opposite is "slow content" which consists of selecting valuable content for which the viewer deliberately looks online.

In this context, taking into account the axiological issues, the doubt expressed by St. John Paul II in the Encyclical *Redemptor hominis* remains topical and requires consideration: "The question which persistently recurs concerns what is most essential: is man, as man, in the context of [technological] progress, becoming better, spiritually more mature, more aware of the dignity of his humanity, more responsible, more open to others, especially to those in need, to the weak, more ready to witness and to help everyone?"[5]

1. THE INFORMATION REVOLUTION

The information revolution has undoubtedly, on a much wider scale than before, provided universal access to information. At the same time, however, it has opened up a wide field for disinformation, fuelling distrust and causing polarisation of views. The overabundance of information – among which there is a certain amount of misinformation – makes it difficult to verify it quickly. At the same time, the impact of new technologies on human mental and cognitive abilities is noted. In particular, this concerns attention span, inability to concentrate and attention deficit syndrome [Campo 2022]. In this area, threats besides disinformation include information noise and the phenomenon of "post-truth" [Skrabacz and Lewińska-Krzak 2022, 134].

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[4] The first five modules consist of: 1) education, gender and inequality; 2) health, well-being and demography; 3) decarbonisation of energy and sustainable industry; 4)sustainable food, land, water and oceans; 5)sustainable cities and communities. Profound transformations in each of the above areas require complementary action by governments, civil society, science and business. "The World in 2050" (TWI2050) is a global, multi-year, multi-stakeholder and interdisciplinary research initiative to help address the issues covered by all of the modules listed above, including the module on the digital revolution, see https://www.idos-research.de/uploads/media/TWI2050-for-web.pdf [accessed: 17.03.2023].

[5] John Paul II, Encyclical letter *Redemptor hominis* (04.03.1979), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis.html [accessed: 28.11.2023].

2. CHALLENGES OF COGNITIVE ENHANCEMENT

The enhancements provided by the widespread use of the internet and mobile applications significantly increase our cognitive capacity, acting as a kind of external memory and depositories of knowledge. At the same time, the overabundance of data makes it difficult to identify reliable knowledge and truth among the flood of information. Therefore, the pursuit of reliable and responsible use of data/resposable data science should be considered a key issue. In this context, the development of standards for the use of data, especially personal data, in a fair, transparent and confidential manner should be considered essential.

3. CHALLENGES OF THE DIGITAL SOCIETY

The challenges of the digital revolution that whole societies now face have already been recognised and sought to be identified in some countries. For example, in the Netherlands, where a "digital society"/"Digital Society" programme has been developed. The Association of Universities in the Netherlands (VSNU) has brought together leading researchers from all fourteen universities in the country to work together on a number of pressing issues related to the functioning of the digital society. Dutch universities benefit from an excellent digital infrastructure to support education and research in this area. The Netherlands has a long-standing culture of openness and collaboration in human-centred digital society research. Digital Society research is based on observing how culture, society and digital technologies influence each other. Researchers seek to develop a complementary and interdisciplinary environment in which digital technologies are developed precisely so that different, legitimate actors can intervene to ensure their optimal use and further development. This is not about 'mere' technical problems with technical solutions, but rather about the complex social, ethical and political issues facing all levels of government, public and private organisations and individuals in their daily lives. For example, a good 'smart city' is a city in which citizens, city authorities, infrastructure providers, schools, cultural organisations and employers work together to create a living environment that works for society as a whole. The "Digital Society"/"Digital Society" programme identifies seven main issues to focus on, building on existing knowledge and interest.[6]

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[6] See https://www.thedigitalsociety.info/challengesofadigitalsociety/wp-content/uploads/2018/11/VSNU-Disa-2018.pdf [accessed: 17.03.2023].

4. ARTIFICIAL INTELLIGENCE

Human intelligence has had no rival since the emergence of Homo sapiens. It is now being supplemented by artificial intelligence, which, at least in some areas, far surpasses human analytical abilities.[7] The origins of artificial intelligence, related to the concept of creating intelligent machines as independent entities, can be traced as far back as the late 18th and early 19th centuries. A. A. Lovelace and her friend and fellow mathematician Ch. Babbage invented the concept of a programmable machine, which is considered the prototype of the modern computer [Oksanowicz and Przegalińska 2023, 27] .

One of the pioneers of AI is considered to be A. Turing. In 1935, Turing described an abstract computing machine composed of an unlimited memory and a scanner that moved back and forth through the memory, symbol by symbol, reading whatever it encountered and noting the subsequent symbols. The scanner's actions were guided by a programme of instructions, which was also to be stored in the machine's memory in the form of symbols. This concept gave rise to the idea of a machine/device operating on the basis of its own programme, with the possibility of modifying or improving it. The Turing concept is now known as the universal Turing machine. All modern computers are considered to be universal Turing machines.[8]

Since J. McCarthy used the term artificial intelligence (AI) in the 1950s, it has become a key concept in the technological development of all mankind. It has appeared in every area of life and science. AI is found in areas that previously – it seemed – were reserved for decision-making by human beings. Artificial intelligence is based on the interpretation of large amounts of data, used in algorithms. According to the contemporary definition, artificial intelligence encompasses an area of knowledge that includes fuzzy logic, evolutionary computing, neural networks, artificial life and robotics, and one of its special features is its ability to learn [Kaim 2020] and to take new circumstances into account, in the course of solving a given problem [Zalewski 2020, 2]. In other words, artificial intelligence is the ability of a machine to mimic or imitate human intelligence [ibid., 14]. It involves creating models of intelligent behaviour and building programs that are capable of reproducing such behaviour [Oksanowicz and Przegalińska 2023, 32]. Artificial intelligence should be understood as a system capable of performing tasks that require a process of learning and taking into account new

[7] *The Digital Revolution and Sustainable Development: Opportunities and Challenges*, https://www.idos-research.de/uploads/media/TWI2050-for-web.pdf [accessed: 17.03.2023].

[8] See https://www.britannica.com/technology/artificial-intelligence/The-Turing-test [accessed: 22.11.2022].

circumstances in the course of solving a given problem, which can – depending on its design – act autonomously and interact with the environment [Zalewski 2020, 3]. A glaring example of artificial intelligence, the essential feature of which is the ability to learn, is the actions of the robot Deep Blue, which won a chess game against the master Garry Kasparov nearly 30 years ago. The first winning game took place on 10 February 1996. After losing the match, Kasparov said that at times he saw deep intelligence and creativity in the machine's moves that he himself did not under stand. Importantly, the ability of a given system to learn is a prerequisite for it to be classified as artificial intelligence [ibid., 14].

Algorithms are not a novelty. Over the decades, they have been used in computer programmes. Today, however, advanced algorithms have become digital robots – often being evolved computer programmes (rather than physical entities as before) with the ability to adapt and "learn". The early AI systems of the mid-20th century, often referred to as expert systems, were in principle comprehensible to both the creator and the user because they operated according to defined rules. Expert systems were primarily intended to transparently represent relationships in order to explain multi-causal phenomena. Although this identifiability can be considered a strength, early AI systems could only represent the real world incompletely [Etscheid 2019].

Contemporary AI systems, in foreign literature, are compared to the operation of a "black box"/black box. In this view, this black box makes decisions but is unable to communicate the motives behind the decision. Thus, when solving a problem, an artificial intelligence provides the final result, but does not answer the question: why/how? The fundamental "black box" problem boils down to the artificial intelligence's inability to fully analyse and understand its decision-making process and its inability to predict its decisions or the results of its actions. This is because the thought process of an artificial intelligence may be based on assumptions and patterns that human perception will not be able to fully trace and reproduce. Moreover, this may also mean that even the people who created or implemented the AI in question may not be able to predict what solutions it will arrive at or what decisions it will make and why [Bathaee 2018, 893].

5. AUTONOMY

Autonomous systems that make autonomous decisions based on the data they have are already being used in industrial production to control production processes, in public spaces to improve public safety and to predict and monitor human behaviour (e.g. in relation to prisoners in the context of possible recidivism). In the future, such autonomous systems will be used

in many different ways: in transport (autonomous driving), in the banking system, in the social sector, in the judicial system and in political negotiation processes. They can recognise patterns that are hidden from humans due to their complexity or large amounts of data. They can also help to make more informed economic, political and social decisions, but they can also lead to a loss of social control, abuse of power or infringement of privacy and freedom.[9]

6. ISSUANCE OF ADMS DECISIONS

One possibility for the use of artificial intelligence is for it to issue administrative decisions in individual cases. Automatic decision-making – Administrative Decision Making System – should take place in simple and routine cases, i.e. those in which there can always be only one outcome/resolution. An example of this type of case is the issuing of decisions in housing allowance cases, the amount of which boils down to an arithmetically calculated allowance, according to a mathematical formula defined by the legislator. The issuing of decisions through ADMS can undoubtedly increase the efficiency of public administration, however, negative, discriminatory consequences should also be borne in mind, such as violating individual privacy, devaluing human skills, undermining human self-determination. Therefore, new governance mechanisms are needed to ensure that the implementation of ADMS is done in an ethical manner while allowing the full benefits of the system to be reaped. If ethical challenges are not sufficiently addressed, the lack of public trust in ADMS may hinder the widespread implementation and adoption of such systems. In this regard, the literature points to the need for ethics-based auditing. This is a structured process whereby an entity's current or past behaviour is assessed for compliance with relevant principles or standards [Mökander, Morley, Taddeo, et al. 2021].

7. ETHICS AND ADMINISTRATIVE PROCEDURES

According to J. Tischner, "Man is by nature an ethical being, that is, someone for whom the problem of 'ethos' is at the same time the problem of his own being" [Tischner 1982]. However, as John Paul II noted – almost half a century ago – in the Encyclical *Redemptor hominis*: "The development of technology and the development of modern civilisation, marked by the reign of technology, demand a proportional development of morality

[9] See https://www.researchgate.net/publication/332414643_Towards_Our_Common_Digital_Future_Summary_WBGU_Flagship_Report [accessed: 21.03.2023].

and ethics. Meanwhile, the latter seems, unfortunately, to be still lagging behind."

Nowadays, issues related to ethics in the context of the application of artificial intelligence in the area of public space assume particular importance. According to the guidelines adopted by the Polish Council of Ministers, an AI system should comply with the ethical principles envisaged for trustworthy AI, such as: 1) the supervisory role of the human being, 2) technical soundness and safety, 3) privacy protection and data management, 4) diversity, non-discrimination and fairness, 5) social and environmental well-being, 6) transparency, 7) accountability and responsibility.[10]

8. STILL HOMO SAPIENS OR ALREADY HOMO DIGITALIS?

In evolutionary terms, Homo Sapiens is a creation of the Ice Age, in which environmental conditions were characterised by rapid and massive change. Humans of the time had to organise themselves as hunters and gatherers in small, highly mobile groups. The advantage of the species lay not in the shaping of living conditions, but in perfect adaptation to the given circumstances. This advantage was partly offset by the transition to sedentary agriculture. Individually, Neolithic people were probably weaker and more prone to disease than their early ancestors. However, these disadvantages were offset at the level of the population as a whole by new opportunities (such as stockpiling), allowing the population to grow markedly. A similar process took place during the Industrial Revolution, which ultimately brought a rapid acceleration of social metabolism and population dynamics in the 20th century. There are many indications that the digital innovations that are now beginning are likely to transform human characteristics and the structures of human coexistence even more radically – depending, of course, on how – as humanity – we manage, constrain or prevent them.[11]

At the same time, it cannot be overlooked that the free development of AI technologies is accompanied by social fears and a lack of complete acceptance, even though the Covid-19 pandemic undoubtedly influenced greater acceptance of innovative technologies and increased their use. Currently, the reality of *science-fiction* films, as never before, requires in-depth reflection, including legal reflection, because in recent years the term "artificial intelligence – AI" has started to appear on a large scale in legal sciences.

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[10] Annex to Resolution No. 196 of the Council of Ministers of 28 December 2020.

[11] See https://www.researchgate.net/publication/332414643_Towards_Our_Common_Digital_Future_Summary_WBGU_Flagship_Report [accessed: 21.03.2023].

9. EXISTENTIAL AND SOCIAL CONCERNS AND QUESTIONS

There are many general claims and expectations in the field under discussion, often quoted in the public space, where less specific analyses and data are often pointed to. The public perception is that the digital transformation is likely to eclipse all previous phases of technological progress in terms of scope, speed of spread and impact on all areas of social life.[12]

The ongoing digital transformation is accompanied by numerous concerns. For example, S. Hawking already saw the development of artificial intelligence as the end of the human race many years ago. S. Hawking saw the development of AI as the end of the human race [Coglianese and Lehr 2017, 1150-151]. Consequently, fears are being voiced about the emergence of digitally enhanced totalitarianism, fears of elite domination, fears of increased social inequality, fears of total surveillance and loss of freedom and social cohesion, fears about the evolution of artificial humans and the blurring of boundaries between humans and machines, fears about whether animated artificial entities with autonomous decision-making and reproductive capabilities could emerge in a later phase of the digital revolution.

Numerous questions are being formulated in this connection: What tasks will intelligent machines handle better than humans? How can we avoid the creation of digital, self-organising systems and networks, with potential control over human behaviour, which can be misused by powerful actors? Where is the limit when it comes to using technology to change and improve human cognitive abilities?

10. COMPLETION

We are most likely standing at the door of a new stage of human development. The future is open, but the direction of change is unknown. In the current situation, the highest priority should be to establish appropriate ethical standards and rules in a humanocentric spirit.

Virtual access to the most advanced global knowledge of humanity and the planet should be used to achieve a just, dignified and secure future for all. Against this backdrop, the absence of certain standards may trigger threats to the values that have been nurtured so far. In view of this, the digitalisation process and related technologies must be shaped accordingly. The challenge is undoubtedly to avoid the risks associated with accelerated technological change spiralling out of control.

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[12] Ibid.

In the digital age, at least two fundamental objectives can be identified: on the one hand, to exploit the enormous potential of the new information and communication technologies to achieve global sustainability and, on the other hand, to prevent the possible, indeed highly probable, negative side effects of rapid innovation. Against this background, there are a number of more or less real concerns and a great many questions, many of which remain unanswered for the time being.

Against the background of doubts and concerns about the application of AI in the sphere of public administration, the following questions are formulated in the doctrine of administrative law: are society and the state ready for a situation in which it will not be possible, or will be significantly impeded, to know the reasoning and motives of the decision made by an algorithm. The fundamental question is whether an algorithm can/is entitled to fully replace a human being in the process of applying the law? Thus, will it be socially acceptable that an administrative decision issued in an individual case may be the result of the actions of a machine and not a human being? Does the justification of the act of applying the law made by a human being as opposed to a decision made by modern technology provide a full guarantee of a complete explanation of the process and the final decision? Do we, as a society, expect an administration that can provide the individual with a detailed justification for every decision or an administration that acts efficiently and quickly [Piecha 2021, 786-87].

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COMPETENCE OF TAX AUTHORITIES IN THE GIFT AND INHERITANCE TAX

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Abstract. The topic of tax authorities is essential from both theoretical and practical perspectives. It encompasses a variety of questions related to the fundamental features of these institutions and to the identification of comprehensive regulations for establishing their competency. Additionally, it holds particular importance regarding taxes since tax liability arises following the delivery of a constitutive decision by such an entity (a decision that determines the amount of tax liability). These premises facilitate an in-depth examination of the legal measures relevant to this case. Thus, the research presented here encompasses the relevant statutes, an implementing act, and the perspectives of legal scholars and commentators. Special attention is paid to the judiciary's stance. The conclusions drawn from this study are useful for formulating *de lege lata* and *de lege ferenda* recommendations.

Keywords: tax authorities; competence; gift and inheritance tax; Tax Ordinance Act

INTRODUCTION

This study will analyse the competences of tax authorities in one of the taxes that make up the Polish tax system, that is the gift and inheritance tax.[1] The motivation behind this research lies in the fact that legal writers show little interest in this subject matter, while its practical and theoretical significance is crucial. On top of this, these issues are multifaceted and require both general and detailed arrangements. Relevant regulations have been laid down in a few legal acts, but only a comprehensive analysis allows *de lege lata* and *de lege ferenda* conclusions, which in turn determine the scope and design of this study. Therefore, this work's main goal is to formulate a catalogue of general and detailed principles for determining tax authorities' competences in the tax in question and also the stages in determining this competence while taking into account possible interpretation problems. To realize this research intention, I examine the law in force by explicating legal acts in effect and legal commentary.

[1] Act of 28 July 1983 on the gift and inheritance tax, Journal of Laws of 2020, item 1977 as amended [hereinafter: GIT].

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It must also be noted that the breadth of this subject matter means that the discussion here needs to be narrowed down to questions pertaining solely to GIT taxpayers; the research does not cover determination of jurisdiction of tax authorities competent for remitters of this tax, third persons and taxpayer's legal successors.

1. TAX AUTHORITIES AND THEIR COMPETENCES – OPENING REMARKS

When committing to studying this matter, we must first and foremost signal that there is no legal definition of the term tax authority in the Polish legal order. Inter – and post-war regulations alike fail to define it and only enumerate these authorities [Teszner 2022, 228-29]. Similarly, planned amendments do not envisage a definition of these entities either [Etel, Babiarz, Dowgier, et al. 2017, 160], though it is being highlighted that there are valid reasons for doing so. Namely, tax authorities have different systems and organizations, different competences resulting from special rules and a differing scope of power [Münnich 2009, 53-54]. Importantly, scholars that deal with tax law have not produced a single definition of such bodies either. It is pointed out that these authorities represent certain unions under public law which are beneficiaries of tax proceeds and their competences include actions for imposing and collecting taxes [Olesińska 2012, 30].

The Tax Ordinance Act[2] lists the following tax authorities in its Article 13: the head of a tax office, the head of a customs office, the village administrator, the mayor of a town (president of a city), starost or voivodship marshal, the director of a tax chamber, the director of a customs chamber, the local government board of appeals, the Head of the National Revenue Administration, the Director of the National Tax and Customs Information Office and the minister responsible for public finances. Interestingly, this provision needs to be interpreted in connection with Article 13b which lays down that the bodies listed in this provision may gain competences of tax authorities provided that the Council of Ministers issues a relevant regulation. The reasons behind making such a decision is, in turn, to protect confidential information and state security.

While this study will not present the competences of individual authorities, nor will it categorise them according to various criteria [Taras 2009, 42ff], as this would go beyond its framework, it must address one of the possible classifications of tax authorities. It is based on the criterion of division of tax proceeds between the state budget and the budgets of local

[2] Act of 29 August 1997, the Tax Ordinance Act, Journal of Laws of 2020, item 2651 as amended [hereinafter: TOA].

government units. If assumed so, we may identify commune – and state-level tax authorities [Ofiarski 2013, 98]. Still though, such a division is unreliable for certain taxes that are commune's own revenue because it is central government bodies (bodies of the National Revenue Administration) that are their competent tax authorities, which will be discussed later in this study. Before we delve deeper, it must be noted that this principle is also applied in the case of the levy discussed here. Apart from compromising the postulate of granting tax-administering power to beneficiaries of a tax performance, this may also have negative consequences in the process of granting reliefs in the payment of tax liabilities.

In turn, the competence of tax authorities may be defined as an ability to examine and adjudicate certain cases [Kalinowski and Prejs 2015, 11]. It is also emphasized that conducing tax proceedings and issuing a ruling that solves a tax case depends on the competence of the entity that issues an individual administrative act (positive aspect) and on the absence of reasons to exclude it (negative aspect) [Nowak 2016, 72]. When reviewing provisions of the basic act of general tax law, that is the Tax Ordinance Act, one must conclude that the legislator identifies material, territorial and instance-related competence of authorities and specifies basic rules of outlining such competence. This will be presented later in this study. At this point it is only fair that we signal that the material competence refers to the category of cases that the tax authority handles, the territorial competence involves specification of which local authority has the power to adjudicate a given case, while the instance-related competence defines the instance that is relevant to adjudicate such a case [Wiktorowska 2009, 102].

2. GENERAL RULES FOR DEFINING THE COMPETENCE OF TAX AUTHORITIES IN THE GIFT AND INHERITANCE TAX

As has already been mentioned above, this part of the study will talk about general rules of determining competences of tax authorities. At the same time, it seems valid to emphasize that the term "general rules" is rather conventional and has been formulated for the needs of this research. It accommodates regulations of the rank of a statute that follow mostly from the provisions of the Tax Ordinance Act. They must be analysed in detail to include individual kinds of competences of tax authorities, which will allow us to confront them with relevant corresponding regulations applicable to the gift and inheritance tax.

We must first quote the wording of Article 15 TOA as it is cardinal in the process of determining competences of tax authorities. This section provides that tax authorities shall observe their material and local competence *ex officio*. Therefore, tax authorities are obliged to examine this

competence and failure to apply the instruction of Article 15 TOA must be treated as a qualified procedural flaw. This means that a ruling that has been appealed against must be declared invalid. Its legitimacy and substantive correctness are irrelevant at that. This applies to violation of any kind of competence.[3] The consequences of issuing a decision by an authority not competent in the case are specified in Article 247(1)(1) TOA. An incompetent authority, in turn, is such which is not allowed under the law in force to conduct such proceedings. When a tax authority violates any type of competence at any stage of proceedings when issuing a decision, such a decision is deemed ineffective, irrespective of how correct the substance of the ruling was.[4] Also, as is rightly pointed out in the judicature, "assumption of the authority's competence" in settling a case is inadmissible and so is specifying the competence of a tax authority by way of analogy.[5] The view presented in the next relevant judgment of the administrative court may evidence the absolute terms of the obligation of tax authorities in this regard. This ruling prescribes that if a taxpayer fails to update the information on the address of their seat, the tax authority is not relieved of the obligation to observe, *ex officio*, its territorial competence pursuant to Article 15(1) TOA.[6] It must also be assumed that the competence of tax authorities must not be a subject of a separate debate between the taxpayer and the tax authority, thus it cannot be determined as a result of a two-sided dispute between them. The challenge of incompetence of a tax authority should be brought in by the party to the proceedings; it should concern the substance of the case and it should result in its re-examination.[7]

Moving on to the issue on the principles of specifying the material competence of tax authorities, it must be concluded that in the light of Article 16 TOA it is determined under provisions that specify their scope of operation. Clearly, this regulation may not be a stand-alone basis to decide which authority will be competent for the tax in question. The legal acts that the Tax Ordinance Act refers to here include mainly: the National Revenue

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[3] Cf. judgement of the Voivodship Administrative Court in Łódź of 6 July 2022, ref. no. I SA/Łd 43/22, Lex no. 3372315; judgement of the Voivodeship Administrative Court in Gdańsk of 21 September 2016, ref. no. I SA/Gd 486/16, Lex no. 2141690.

[4] Judgement of the Supreme Administrative Court of 2 December 2021, ref. no. II FSK 710/19, Lex no. 3288594.

[5] Judgement of the Supreme Administrative Court of 9 December 2020, ref. no. II FSK 1598/20, Lex no. 3121944.

[6] Judgement of the Supreme Administrative Court of 4 December 2018, ref. no. II FSK 1685/18, Lex no. 2607375.

[7] Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 1 April 2008, ref. no. I SA/Go 732/07, Lex no. 467750.

Administration Law (NRA Law)[8] and regulation from the Finance Minister.[9] At the same time, we cannot avoid the fact that the NRA Law only specifies basic responsibilities of individual bodies and at the same time obliges them to respect regulations laid down in specific tax law acts. Pursuant to Article 28 of the NRA Law, the head of a tax office is responsible for, for example, determining, specifying and collecting taxes, fees and non-tax budgetary dues and other amounts due pursuant to separate provisions. As clearly results from it, the quoted regulation acts as a framework and may be a springboard to determine to what taxes the head of a tax office is a materially competent tax authority. Determining material competence requires an analysis of provisions of tax laws such as the Gift and Inheritance Tax Act. What is important, the head of a tax office is not named *expressis verbis* as a materially competent authority in this tax. His power is only laid down in individual provisions of the law which specify his dominion and which evidence his exclusive material competence (cf. Article 4a, Article 8 and Article 17a).

Another provision of the Tax Ordinance Act that regulated the subject matter of competences of tax authorities is Article 17 which addresses their local competence. As laid down in Article 17(1), unless tax acts provide otherwise, the local competence of tax authorities shall be determined according to the place of residence or the address of the registered office of the taxpayer, tax remitter, tax collector or the entity indicated in Article 133(2). Whereas, in the light of Article 17(2), the minister responsible for public finances may issue a regulation determining the local competence of the tax authorities for certain tax liabilities or the particular categories of taxpayers, tax remitters or tax collectors differently than determined in Article 17(1), taking in consideration, in particular, the fact of having a place of residence or registered office abroad, the place of acquiring income, and the location of the taxation object. This provision shows that the legislator has given us a general rule which is not, nevertheless, absolute and may be modified by the minister. At the same time, the legislator lists an open catalogue of premises that justify abstaining from this rule. Special rules that result from the implementing act, as has been signalled before, will be analysed later in this study. But going back to the core of the discussion here, special note must be given to the taxpayer's place of residence or his address of the registered office as features that determine the tax authorities' local competence. On the other hand, when taking into consideration the personal scope of the Gift and Inheritance Tax Act it is reasonable to limit it

[8] Act of 16 November 2016 on the National Revenue Administration, Journal of Laws of 2023, item 615 as amended.

[9] Regulation of the Minister of Finance of 22 August 2005 on competences of tax authorities, Journal of Laws of 2022, item 565.

to natural persons. As has been highlighted above, the place of residence is important in determining the competence of tax authorities. Since this institution has no definition under the tax law, measures adopted in civil law must be applied. It is worth noting here though that, as has been emphasized in one of the rulings, their definition has been formulated universally enough to also be used in administrative law. It allows differentiation between a temporary and permanent place of residence of a given person, which would be more difficult if the lexical meaning of this term were to be assumed.[10] Pursuant to Article 25 of the Civil Code, the domicile of a natural person is the place where that person stays with the intention of residing permanently. This tells is then (and is reflected in interpretations done by the judicature) that the concept of the place of residence adopted in Article 25 of the Civil Code[11] is a legal construct composed of two elements: physical presence at a place (*corpus*) and intention of residing permanently at a place (*animus*). Both these elements must feature jointly. An interruption on the presence, caused by extraordinary circumstances such as serving a prison sentence, being drafted or studying in a different town, does not change one's place of residence in the legal sense. A stay in a penitentiary, a military unit or a city where one studies is temporary and does not equal to residing in these places. The place of residence of such persons in these situations will be the place where they stay while on leave or non-school days and to which they intend to return after serving their sentence, after completing their military service or after graduating.[12] Analogically, a stay in a care and treatment facility or in a health care establishment do not have the character of residing in a residential dwelling, which means that this place cannot be considered a place of permanent residence in the meaning adopted in said Article 25.[13] Staying in establishments for homeless persons cannot be considered as staying at a place of residence either in the meaning of Article 25 CC. These situations lack the element of *animus*.[14]

We can talk about the change of a permanent place of residence when there are circumstances that allow an average observer to draw a conclusion

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[10] Judgement of the Supreme Administrative Court of 9 September 2020, ref. no. II OSK 364/20, Lex no. 3054777.

[11] Act of 23 April 1964 Civil Code, Journal of Laws of 2022, item 1360 as amended.

[12] Judgement Of the Voivodeship Administrative Court in Kraków of 6 June 2022, ref. no. III SA/Kr 1842/21, Lex no. 3351302; cf. judgement of the Supreme Administrative Court of 26 July 2022, ref. no. I OW 20/22, Lex no. 3400380; Decision of the Local Government Board of Appeals in Łodź of 26 October 1995, ref. no. KO 2501/95, Lex no. 42749.

[13] Judgement of the Supreme Administrative Court of 23 November 2022, ref. no. III OSK 4976/21, Lex no. 3454192; Order of the Supreme Administrative Court of 11 August 2020, ref. no. I OW 300/19, Lex no. 3044259.

[14] Judgement of the Voivodeship Administrative Court in in Warsaw of 10 May 2018, ref. no. II SA/Wa 43/18, Lex no. 2544120.

that a specific location is a centre of activity of an adult natural person.[15] At the same time, we must note that an expression of an intention of permanent residence is not a legal act and thus does not require that a relevant declaration of intent be made. It is enough that such an intention results from behaviour that involves this person concentrating their centre of life in a given place.[16]

To sum up, the mere residing somewhere in the physical sense without an intention to reside there permanently does not suffice to determine one's place of residence, even if this residence were to last for some time; the very intention of permanent residence in a given place which does not go with actually being in this place is not enough either. The place of residence is usually determined after taking into account all of the circumstances that evidence the fact of residing somewhere with an intention of such residing.[17]

What needs to be highlighted in particular is that a registered place of residence, which is an institution under administrative law, does not prejudge residing in the understanding of civil law. The place of residence, therefore, will be a place where a given person is actually located and where their centre of vital interests is at this particular time, thus premises referred to in Article 25 CC are fulfilled.[18] Information from the National Taxpayer Register cannot decide about this place either. As has been rightly emphasised, the essence of the legal significance of a register that includes, among other things, address details provided by a taxpayer, does not apply to the concept of "the place of residence of a natural person" as defined in Article 25 CC. The information provided in it, including address details, is a binding basis for tax authorities to determine the address to which correspondence for a given taxpayer must be posted. Since it is the taxpayer himself who provides this address, he may do so by providing a place of residence in the meaning under Article 25 CC, but he may also provide an address which does not correspond to the definition of a place of residence under the civil law. This is why to establish that a given address of a taxpayer is not up-to-date, the taxpayer himself must act according to the law and take the initiative to update it.[19]

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[15] Judgement of the Supreme Administrative Court of 5 April 2022, ref. no. OW 197/21, Lex no. 3338645.

[16] Judgement of the Voivodeship Administrative Court in Warsaw of 10 October 2018, ref. no. II SA/Wa 517/18, Lex no. 277477.

[17] Judgement of the Voivodship Administrative Court in Białystok of 7 December 2021, ref. no. II SA/Bk 763/21, Lex no. 3282843.

[18] Cf. Judgement of the Supreme Administrative Court of 9 February 2022, ref. no. OW 152/21, Lex no. 3334003.

[19] Judgement of the Voivodship Administrative Court in Warsaw of 9 January 2020, ref. no. III SA/Wa 1250/19, Lex no. 3010731.

When analysing general rules for determining territorial competence of tax authorities, we must also point to the essence of regulation of Article 18 of the Tax Ordinance Act. This provision introduces the principle of continuity of territorial competence of a tax authority during a fiscal year. The aim of this regulation is to limit situations that are detrimental to the state budget. The regulation prescribes that the competence is evaluated on the date of initiation of proceedings, not on the date of submitting, for example, a tax return, or the date of payment of a tax. Articles 18a and 18b of the Tax Ordinance Act complete provisions of Article 18 and address a situation where the taxpayer changes his place of residence after the fiscal year is finished or a situation where there are circumstances that cause a change in the competence of the authorities after the fiscal year is finished.[20]

Provisions of Articles 17(2) and 18(2) TOA are indisputable for this discussion. They prescribe the Finance Minister's competence to specify separate rules for determining the territorial competence of tax authorities, which will be addressed later in this study.

Given the above, some focus must be given to rules under the Gift and Inheritance Tax Act. We must first note that relevant statutory regulations are very modest. We have to draw a certain conclusion out of the total regulations of the GIT Act, its Article 1 in particular, which specifies its personal scope. Namely, the TOA rules that refer to natural persons will apply here to specify the competence of tax authorities. It is them that, under the GIT Act, bear the tax obligation. Therefore, determination of competences of tax authorities will be based on the place of residence of a natural person,[21] understood as described above. This case will call for TOA provisions that refer to a change in the competence which is an effect of the change of a place of residence of a natural person.

What is crucial in determining the competence of tax authorities in the gift and inheritance tax is the fact that one must invoke special regulations that result from an implementing act, that is regulation of the Finance Minister. These rules must be specified, which will be the focus of a separate part of this study.

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[20] Judgement of the Supreme Administrative Court of 5 January 2017, ref. no. II FSK 3679/14, Lex no. 2239481.

[21] There might be exceptions here, which I will discuss when talking about detailed rules on determining the territorial competence of tax authorities in the gift and inheritance tax.

3. SPECIAL RULES FOR DEFINING THE COMPETENCE OF TAX AUTHORITIES IN THE GIFT AND INHERITANCE TAX

This part of the study focuses on the rules resulting from the Regulation of the Finance Minister of 22 August 2005 on the competence of tax authorities. As has already been signalled, it was issued under authorising instruction included for example in Articles 172(2) and 18(2) TOA. Interestingly, the first one lists an open catalogue of premises to specify territorial competence of tax authorities by other means than procedures applied in the Tax Ordinance Act. They include, for example, the location of the taxation object, which was taken into account in the tax in question.

Moving on to the analysis of provisions of the implementing act in question, we must note that the scope it regulates, specified in § 1, is quite broad. Chapter 2 of the Regulation applies to the gift and inheritance tax. Its title reads: "Territorial competence of tax authorities in certain cases of tax liability or in cases of individual categories of taxpayers, tax remitters or collectors". Detailed rules were formulated in § 7. This editorial unit refers directly to the Gift and Inheritance Tax Act, which is a reflection of the system of its material scope. It differentiates between different taxable ways of acquisition and takes into account specific characteristics of the acquired thing or property. The first subsection of § 7(1) lays down the territorially competence of tax authorities in succession, ordinary particular legacy, further legacy, specific bequest, testamentary instruction and legitime, taking into account the object of things and property rights so acquired. Therefore, where the following are the object of acquisition: real estate, perpetual usufruct, co-operative member's right to a dwelling, co-operative member's ownership right to a commercial premises, the right to single family home in a housing cooperative, the right to pay a contribution towards a premises in a housing cooperative, gratuitous use of a real estate or servitude and where the real estate is located within the territorial scope of operation of one head of the tax office, then this competence shall be specified according to the location of the real estate. In turn, where the object of acquisition includes real estate or property rights listed above and at the same time other property rights or movables and where the real estate is located within the territorial scope of operation of one head of the tax office, then the territorial competence of the tax authority shall be specified according to the location of the real estate. In other cases, to acquire property in the way specified, the territorially competence of tax authorities is specified according to the last address of residence of the testator, and where there is no such place – according to his last place of stay.

Territorially competence of tax authorities for donation, donor's instruction, usucaption, gratuitous abolition of co-ownership, establishing usufruct

and servitudes is determined under §(7)(1) of the regulation. An identical rule like the one above was adopted. Where the following are the object of acquisition: real estate, perpetual usufruct, co-operative member's right to a dwelling, co-operative member's ownership right to a commercial premises, the right to single family home is a housing cooperative, gratuitous use of a real estate or servitude and where the real estate is located within the territorial scope of operation of one head of the tax office, then this competence shall be specified according to the location of the real estate. Analogically to §(7)(1), where the object of acquisition includes real estate or property rights listed in letter (a) and at the same time other property rights or movables and where the real estate is located within the territorial scope of operation of one head of the tax office, then the territorial competence shall be specified according to the location of the real estate. In other cases of acquisition by way of a gift, donor's instruction, usucaption, gratuitous abolition of co-ownership, establishing usufruct and servitude, the competence of the head of a tax office shall be established according to the place of residence of the acquirer on the date of emergence of the tax obligation, and should there be no such place – according to his last place of stay on that day. It clearly shows that a rule contrary to the one applied to acquisition by way of inheritance (legitime) is introduced here.

Subsequent subsections of §7 of the Regulation specify procedures for establishing territorial competence of tax authorities applied to other means of acquisition that are subject to the gift and inheritance tax. It is specified as follows: a) in cases of gratuitous annuity – based on the beneficiary's place of residence on the date of emergence of the tax obligation and where there is no such place – based on his last place of stay on that day; b) in cases of acquisition of a right to savings contribution paid out pursuant to an instruction about the contribution in the event of death or acquisition of membership units pursuant to the instruction of a participant of an open investment fund or a special investment fund in the event of his death – based on the last place of residence of the contributor or fund participant and where there is no such place – based on his last place of stay; c) in cases of acquisition which wholly or in part refers to a thing located abroad or property rights that are executable abroad – pursuant to the place of residence of the acquirer on the date of emergence of the tax obligation and where there is no such place – based on his last place of stay on that day.

Provisions of the regulation (§ 7(2)) also specify that where a joint tax declaration on acquiring a thing or property rights is submitted, territorial competence of tax authorities is established based on the place of residence (stay) of one of the acquirers.

The analysis of these regulations yields the following conclusions: the how and the what of the acquired things and property rights is crucial in establishing the territorial competence of a tax authority. It has been logically assumed that when it comes to real estate it is its location that determines the competence of a head of a tax office. It is important especially in cases of joint acquisition by several taxpayers – one head of a tax office remains competent. A situation where the competence of a head of a tax office is dependent on the place of residence of the testator entails analogical consequences. Therefore, adopting such regulations fosters the economics and efficiency of tax proceedings. It is also justified (especially when it comes to real estate) as budget proceeds are linked with the place of gratuitous acquisition subject to taxation.

The next conclusion resulting from the investigation of rules laid down in the regulation is that adoption of other rules for gifts where territorial competence of tax authorities is determined on the basis of a place of residence of the acquirer is completely rational. It eliminates possible interpretation doubts that could have emerged were the donor is not a natural person.

CONCLUSION

The analysis of legal measures that allow the determination of the competence of tax authorities in the gift and inheritance tax brings the following conclusions. First of all, we must note that the process of establishing the competence of a tax authority has a "cascade" character here. It involves multiple stages and must take into account a number of legal acts of the rank of a statute and their implementing acts. This facilitates specification of both general and specific rules that refer to the entire process. Only their joint application can correctly determine the power of a tax authority in this tax.

In the first group special focus must be given to rules specified in the Tax Ordinance Act, including rules on respecting the competence of an authority *ex officio* which prejudge the validity of a tax decision. This rule has an unquestionable meaning, especially in the context of dispersion of regulations that apply to the tax discussed here whereby having to apply provisions of the regulation should not be too burdensome on the taxpayers.

The next conclusion concerns individual types of competences of tax authorities. When it comes to material competence, the basic observation is that it is the National Revenue Administration, not the tax authority of a local government unit, that holds competence. This distorts the scope of the commune's tax-related authority and thus we must postulate *de lege ferenda* that relevant regulations be amended. Such an amendment is also advocated by the commune body's obligation to cooperate with the tax

authority, under Article 18(2) of the Act on revenues of local government units,[22] in granting reliefs in the payment of tax liabilities. Given the special character of these tax preferences, the postulated change would lead to rationalization (acceleration) of proceedings in this regard.

Investigation of rules for specifying territorial competence of tax authorities in the gift and inheritance tax also leads to a conclusion that the scope of regulation here is exceptionally broad and detailed. Therefore, the implementing act to the statute, that is the regulation of the Finance Minister, is paramount here. It prescribes a number of special rules that are a dramatic departure from those laid down in the statute (Tax Ordinance Act). While we may have reservations as to the place of regulation of such crucial questions outside the statutory matter, they are somewhat mitigated by the specific characteristics of the gift and inheritance tax. The characteristics of the personal and material scope of the tax act were taken into consideration when establishing the territorial competence. The rationality of legal measures was also respected.

The analysis of the body of judicial decisions in this area allows a conclusion that the most interpretation doubts are brought about by identification of a place of residence of a natural person, which in certain (identified) cases determines the territorial competence of tax authorities. At that, we can see a coherent and stable line of judicial decisions that looks to civil-law canons to specify the place of residence of a natural person.

To sum up, it must be said that even though determination of the competence of tax authorities in the gift and inheritance tax has a few stages, it does not trigger major interpretation doubts reflected in decisions of administrative courts.

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THE IMPACT OF ELECTRONIC DELIVERY ON THE COURSE OF GENERAL ADMINISTRATIVE PROCEEDINGS

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Abstract. The entry into force of the Act on electronic delivery of November 18, 2021 has exceeded the expectations of technology supporters. It has entailed several changes in the permissible methods of communication for participants in various legal procedures, with particular emphasis on electronic communication. The branch of law in which such changes have taken place is, inter alia, administrative proceedings. This includes regulations concerning the written form, formality, and submission of applications to public administrations. The purpose of this article is to ascertain the impact of electronic delivery regulations on contemporary administrative procedure by examining these regulations.

Keywords: electronic delivery; administrative procedure; administrative proceedings

INTRODUCTION

Computerization is a process with many facets that touches various areas of individual life. Originally interpreted as the rational use of previously entered data into information and communication systems to the fullest extent possible by other similar systems [Kotecka 2010, 3] it now takes on various forms and forms of implementation. It is subject to implementation by using a variety of methods, each of which is closely linked to new technologies, gradually transforming into a process of automation. In the simplest terms, the computerization of public administration boils down to the use of modern technologies by public entities in the process of performing tasks to protect the public interest, and one of the most recent manifestations of computerization of this kind of activity is electronic delivery, as provided for in the Act on Electronic Delivery of November 18, 2020[1] [Chałubińska-Jentkiewicz and Kurek 2021]. And although the work on their introduction into the Polish legal order stretched over time, they represent an innovative institution directed at raising the level of functioning

[1] Journal od Laws of 2023, item 285 [hereinafter: Act on Electronic Delivery or ED].

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of individuals in the state. The purpose of this type of delivery is to expand the possibility of dealing with matters remotely, without the need to leave home and pay a personal visit to the seat of the public administration body or the post office. As K. Chałubińska-Jentkiewicz and J. Kurek rightly point out, the so-called e-delivery is an efficient instrumentalization of public tasks by guaranteeing citizens a new path of communication seven days a week and twenty-four hours a day [ibid.]. They are also an effective tool for independence from the postal operator's working hours and from the office hours of the public administration itself.

The entry into force of the Act on Electronic Delivery led to the formation of new instruments for the implementation of electronic delivery and entailed several changes in the Polish legal system. The implementation of some of them has been staggered, which has been dictated, among other things, by the level of electronification of procedures that apply to certain entities, as well as by the actual possibilities of integrating the system implementing electronic delivery with the systems of individual entities [Pietrasz 2002].[2] Importantly, these changes affected, among others, the administrative procedure regulated by the Act of June 14, 1960, the Code of Administrative Procedure,[3] where a new understanding of the principle of the written form was established and a new methodology was shaped for the mutual communication of subjects in the procedure in question, i.e. the public administration body with a party to the proceedings or other participant, as well as the supplicant with the subject of sovereign influence (public subject).

The focus of the discussion is on the importance of the current regulations, which relate to the two fundamental principles governing administrative procedure (the principles of the written form and officiality). The issue of currently regulated methods of communication between a party (another participant in the proceedings) and a public administration body is also not without significance in this regard. Indeed, it is in these aspects that the changes dictated by the validity of the Act on Electronic Delivery are most apparent. Juxtaposing them with the regulations of the Code of Administrative Procedure in force before the entry into force of the Act on Electronic Delivery creates the basis for determining the extent of the impact of electronic delivery on modern administrative procedure.

[2] See justification of the draft act on electronic delivery, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=239 [accessed: 21.04.2023].

[3] Journal of Laws of 2023, item 775 [hereinafter: Code of Administrative Procedure or CAP].

1. NEW UNDERSTANDING OF THE PRINCIPLE OF THE WRITTEN FORM

According to the content of Article 14(1a) CAP public administration bodies shall conduct and settle a case in writing prepared in paper or electronic form. These letters, depending on the method of fixation adopted, shall bear, respectively, the handwritten signature or one of the three electronic signatures accepted by the legislator (qualified, trusted, personal), or the electronic seal (qualified) of the authority, together with the indication of the employee who decided to use it in a particular case. A detailed analysis of the new wording of Article 14(1a) CAP shows the extension of the rule of written form also to the active actions of the procedure – i.e., to the specific actions of the public administration body taken in the course of the ongoing procedure – to the so-called conduct of the procedure, rather than being limited in the creation of the requirement to record actions in writing only to the stage that crowns the procedure – to the settlement of the case (actions made). B. Adamiak describes this action of the legislator as an extension of the meaning of the principle of the written form in the subjective aspect and at the same time refers to the accompanying subjective extension, related to the broad understanding of the rule of the writ also in the scope of letters coming from a party to the proceedings, an entity on the rights of a party or another participant in the proceedings [Adamiak and Borkowski 2022].

Despite the lack of explicit use of the term "form" in the content of the cited regulation (as was the case under the previously existing Code of Administrative Procedure,[4] where the written form and the form of an electronic document were mentioned), the legislator did not completely abandon this legal construction. However, the legislator in Article14(1a) CAP limited itself to one form of a document, namely the written form, although understood broadly as a result of the formation of two permissible forms of the letter – paper and electronic [Wołowski 2022]. Regardless of the adopted method of fixing the letter, they require appropriate signatures or seals for their validity. This is due to the established condition of signing documentation coming from a public administration body. As it has been emphasized by Z. Kmieciak, J. Wegner and M. Wojtuń, the legislator in Article 14(1a) CAP has given expression to the fact that the electronic document is only a binding of the letter, which implies the fact that the written form is not excluded even when it comes to recording and transmitting the letter electronically [Kmieciak, Wegner, and Wojtuń 2023].

[4] Journal of Laws of 2021, item 735.

Importantly, however, the abandonment of the explicit (linguistic) reference in the content of Article 14(1a) CAP to the construction of an electronic document may raise unnecessary doubts about the rejection of this legal category and the inhibition of computerization within the procedure in question. For it is through the prism of the use of the electronic document in various aspects of proceedings before public administration bodies, among others, that the process of computerization was considered [Gołaczyński and Tomaszewska 2021, 55-56]. However, the claim to reject the category of the electronic document does not merit consideration and must be rejected given the regulations of Regulation (EU) 910/2014 of the European Parliament and of the Council of July 23, 2014, on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/WE,[5] and more specifically given Article 3(35) determining the concept of an electronic document as any content stored in electronic form [Jaśkowska, Gotowicz-Wilbrandt, and Wróbel 2020]. What will be this electronic form of the letter, which is provided for by the legislator in the content of Article 14(1a) CAP for if not an electronic document within the meaning of EU regulations? Thus, despite the lack of explicit linguistic reference in the content of Article 14(1a) CAP to the electronic document, there is not a complete rejection of it, but a resignation to treat it as a separate from written – form of drafting a letter by a public administration body.[6] This allows us to conclude that this construction(electronic document) in the administrative procedures underway today has only a technical meaning [Kmieciak, Wegner, and Wojtuń 2023], and is not strictly legal, as it was before.

An additional argument that decisively contradicts the assumption that computerization will be halted as a result of the Act on Electronic Delivery is the further content of Article 14 CAP, namely (1b) and (1c), where the legislator allows for the possibility of settling a case using letters generated by an ICT system automatically, as well as using online services made available by a public administration body after prior authentication of the interested party (party or other participant in the proceedings). This significantly modifies the traditional methodology of submitting applications to the authority – applications signed with a handwritten or electronic signature. In the case of automatically generated letters, it is worth pointing out that as long as these letters are stamped, there is not only a legal but also a factual necessity to indicate the person of the employee involved in issuing them, which confirms the automation of the activities performed. As G.

[5] Official Journal of the European Union L 257 of 28.8.2014, pp. 73-114 [hereinafter: the eIDAS Regulation].

[6] In the content of the Act on Electronic Delivery itself, there is a reference to the EU definition of an electronic document (Article 2(2) ED).

Sibiga points out, the desirability of this solution boils down to the formation of conditions for the automatic handling of the case, through the use of a qualified electronic seal of the public administration body [Sibiga 2022]. This is because it is the system itself that selects a certain type of data that is available to it, reaching out to public collections, and creates writing without human activity or with only a little human involvement (including the applicant himself) [Wilbrandt-Gotowicz 2021, 440]. Through the prism of the above, the assumption is confirmed that just as the process of computerization is a consequence of computerization, so automation is its further stage and a harbinger of the use of artificial intelligence in Polish administrative procedure.

Importantly, despite the predominant principle of the written rule, set forth in Article 14(1a) CAP the legislature, in making the changes dictated by the entry into force of the Act on Electronic Delivery, did not abandon the permissibility of, among other things, oral settlement of the case. However, in this case, it does not create a separate form – separate from the written form – for the performance of actions by a public administration body. Thus, by deciding on one form and at the same time on two forms of recording a letter from a public administration body in the process of conducting and resolving administrative cases, it also allows them to be handled orally, by telephone, by electronic and other means of communication (Article 14(2) CAP). However, as was the case under prior legislation (the Code of Administrative Procedure), these possibilities form a group of exceptions to the rule, limited by prerequisites, only the combined fulfilment of which creates the legitimacy to depart from the principle of the written rule. Among other things, the interest of the party must be in favour of an oral settlement of the case, and the provision of the law cannot oppose it. And so then, however, the content and significant motives for such (non-written) settlement of the case should be recorded in the case file in the form of a record or annotation signed by the party (on paper or electronically).

The new understanding of the principle of the written form runs through several regulations of the Code of Administrative Procedure where reference is made to the delivery of administrative decisions, decisions, and summonses for hearings in writing and not, as was previously the case, in writing or the form of an electronic document (Article 109(1) CAP, Article 91(2) CAP, Article 125(1) CAP). The situation is similar to settlements drawn up by an employee of a public administration body in writing (Article 117(1) CAP) and concerning powers of attorney given in writing or reported orally to the record (Article 33(2) CAP). As M. Wierzbowski and J. Róg-Dyrda point out, the principle of the written nature is not absolute, but administrative proceedings, taking into account other general rules, are

focused on the quick and simple settlement of administrative matters [Wierzbowski and Róg-Dyrda 2020], in which they are largely assisted by new technologies.

2. NEW UNDERSTANDING OF THE PRINCIPLE OF OFFICIALITY

Pointing to the new understanding of the principle of officiality, it is necessary to refer to the newly shaped ways of serving letters from public administrations. Their application has been differentiated by the method of fixing the letter (on paper or in electronic form). Among these, one can distinguish between methods of essential nature (Article 39(1) CAP) and supplementary methods (Article 39(2) CAP). The second of the above, are in close connection with the so-called impossibility of serving a correspondence using traditional methodology.[7] P. Gacek, who remains in the minority, points out that service to an electronic delivery address is the only method that should be considered primary and mandatory, while the others specified in Article 39(2) CAP and Article 39(3) CAP have only a supplementary character [Gacek 2022]. Particularly noteworthy is also the modified approach concerning the methods of service of a letter, as defined by the content of Article 39(1) CAP. The previously existing and clearly subjectively defined methods of delivery (by a postal operator, through an employee of the authority or other authorized person or body) and, at the same time, the free choice of the public administration body as to which of these entities it will use to deliver the letter, have been replaced by methods that depict the place of delivery of the documentation. This includes an account in an ICT system, an electronic delivery address and the seat of the public administration. These methods have a subjective character. What is additionally noteworthy about them is that there can be no unfettered choice of the public administration body, for the order of their use has been clearly defined by the legislator.

It is worth noting at this point that those methods which under the previous legislation (the Code of Administrative Procedure) were regarded as dominant (delivery through a postal operator, by an employee of the authority or other authorized person or body) currently constitute only supplementary (optional) methods. As a rule, the public administration body electronically recorded letters are delivered to the address for electronic

[7] See also the decision of the Voivodship Administrative Court in Wrocław of 9 March 2023, ref. no. IV SA/Wr 708/22, https://orzeczenia.nsa.gov.pl/doc/AA17E60A70 [accessed: 21.04.2023], judgment of the Voivodship Administrative Court in Poznań of 9 February 2023, ref. no. IV SA/Po 803/22, https://orzeczenia.nsa.gov.pl/doc/7358AB26EF [accessed: 21.04.2022].

delivery,[8] unless they were delivered to an account in the body's ICT system.[9] This implies an additional statement that among all the ways of essential importance, it is delivery to an account in the body's ICT system that appears to be the priority (superior) way. Letters, on the other hand, fixed on paper are delivered at the seat of the public administration body to the addressee's own hands. The occurrence of "or" in the content of Article 39(1) sentence 1 CAP the conjunction "or" unquestionably confirms the existence of two forms of the letter (electronic and paper) and the differentiation of methods of service dictated by this fact. The juxtaposition of the content of Article 39(1) CAP and the content of the previously occurring (Article 39 CAP) allows us to conclude that the modern legislator has placed great emphasis on electronic letters and their delivery. This is determined, among other things, by the adopted order of use of the methods referred to in Article 39(1) CAP. It introduced the principle of priority of electronic correspondence over traditional or paper correspondence, moreover, remaining in complete independence from certain requirements, such as, inter alia, the consent of the applicant to electronic delivery, or the submission of an application electronically [Chałubińska-Jentkiewicz and Kurek 2021]. Under the previous legislation (the Code of Administrative Procedure), the regulation of the service of letters by public administration bodies indicated the primacy of the written form of documentation, although the form of electronic document was then considered equivalent and alternative to the written form. Moreover, according to the criticized position of the Supreme Administrative Court, it could be subject to simultaneous preparation as the written form of the letter taking then the same content and identical date of issue (otherwise it was treated not as an original, but only as a copy) [Przybysz 2022].[10]

Referring to the optional methods of service, it is necessary to go to the content of Article 39(2) CAP. In its content, there is no explicit assignment of a supplementary method to the type of letter (paper or electronic) and the impossibility of its service. This implies that, on the one hand, it is

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[8] An address for electronic delivery is the designation of an ICT system that allows communication by electronic communication means, in particular by e-mail.

[9] See also judgement of the Voivodship Administrative Court in Wrocław of 21 February 2023, ref. no. I SAB/Wr 1144/22, https://orzeczenia.nsa.gov.pl/doc/F4C8BCE3A7 [accessed: 20.04.2023].

[10] Judgment of the Supreme Administrative Court of 18 April 2018, ref. no. I OSK 2174/17, https://orzeczenia.nsa.gov.pl/doc/582AEF8418 [accessed: 21.04.2023]. The opposite was stated by the Voivodship Administrative Court in Gorzów Wielkopolski on 28 February 2013: "Service made in electronic form replaces «traditional» service, hence it is inadmissible to serve a document simultaneously in both paper and electronic form" – see the judgment of the Voivodship Administrative Court in Gorzów Wielkopolski of 28 February 2013, ref. no. II SA/Go 43/13 [accessed: 21.04.2023].

possible to take the position that the legislator has created a general catalogue of such methods that can be used when the basic methods of delivery (delivery to an electronic delivery address or at the seat of the authority) cannot take place. On the other hand, however, this explicit enumeration of supplementary methods may give rise to claims in light of which point 1 of Article 39(2) CAP details the impossibility of serving a letter fixed electronically, while point 2 of Article 39(2) CAP is closely related to the lack of grounds for serving a paper letter at the seat of a public administration body. After all, the interpretation of the regulation in question indicates that in the absence of the possibility to deliver a letter fixed electronically to an address for electronic delivery (e.g., in the case of not having an address for electronic delivery due to the lack of an obligatory possession of such an address[11]) the public administration body delivers the letter against receipt by a designated operator (Poczta Polska S.A. until 2029) using a public hybrid service [Pietrasz 2022],[12] where there is a transformation of data occurring in electronic form into "paper data", which are then subject to delivery [Jaśkowska, Wildbrandt-Gotowicz, and Wróbel 2020]. On the other hand, if the addressee of the letter does not receive the letter fixed on paper at the headquarters of the public administration body, the letter may be delivered against receipt by the employees of the body, or other authorized persons or bodies in the apartment or place of work of the addressee (Article 42(1) CAP) [ibid.].

The content of Article 39(3) CAP indicates a special way of service. This peculiarity is based on the permissibility of considering its nature in two ways. On the one hand, this method appears as a supplementary one – the application of which takes place when the authority cannot deliver the letter either to an electronic delivery address, at its registered office, or by hybrid mail. On the other hand, however, in the context of Section 4 of Article 39 CAP provides the only means that a public administration body may use in exceptional circumstances, i.e., when a decision has been given the order of immediate enforceability, which is subject to immediate execution by law, as well as in the case of the need to deliver a letter concerning the personal affairs of an officer and a professional soldier. This method is also applicable in a situation where there is an important public interest in its use, in particular state security, defence or public order. In terms of subject matter, it comes down to the delivery of the letter

[11] Obligatory possession, and strictly defining the list of entities obliged to have an address for electronic delivery, is outlined in Articles 8 and 9 ED.

[12] A public hybrid service is a service involving the transmission of postal items using electronic communication if they take the physical form of a letter mail at the stage of receipt, movement or delivery of the information message, provided by a designated operator if the sender of the letter mail is a public entity.

by registered mail[13], either by the employees of the authority or by other authorized persons or bodies.

3. NEW WAYS OF SUBMITTING APPLICATIONS TO PUBLIC ADMINISTRATION BODIES

The principle of complaint has been defined in Article 61a the issue of submitting applications to a public administration body in Article 63 CAP. As indicated in one of the judgments of the Supreme Administrative Court: An individual may become a party to a substantive legal relationship that is a consequence of an administrative decision in a proceeding initiated upon request when he or she reveals his or her will in the form of a request addressed to a public administration body – when he or she applies to it.[14] It should be emphasized that the entry into force of the Act on Electronic Delivery has significantly modified the way a petitioner (party, participant in the proceedings) communicates with a public administration body. Returning briefly to the regulations creating the principle of the written form, it is worth pointing out that it is in the content of Article 14(1d) CAP that the legislator created the possibility of submitting letters addressed to public administration bodies recorded in paper or electronic form. The choice in this regard was left to the applicant, for it is he who, acting within the limits of the law, decides on the external form of the document addressed to the public administration body [Gacek 2019]. Under the previous legislation, applications, i.e. requests, clarifications, appeals or complaints could be made in writing, by telegraph, by fax, or orally into the record, by electronic means of communication through the electronic inbox of a public administration body established under the Act of February 17, 2005 on computerization of the activities of entities performing public tasks. Referring, in turn, to the current content of Article 63 CAP one can point to a kind of doubt about the inconsistency of the legislator. The phrase appearing in sentence 1 of Article 63(1) CAP regarding acting in writing serves to highlight one of the legally guaranteed and superior forms [Adamiak and Borkowski 2022][15] of applying – the written form, which has been singled out in addition to the oral form and in addition to acting by telefax. Its expediency does not boil down to emphasizing once again in the text

[13] This refers to postal mail accepted against receipt and delivered against receipt (Article 3(23) of the Act of November 23, 2012, the Postal Law (Journal of Laws of 2022, item 896 as amended].

[14] See the judgment of the Supreme Administrative Court affiliate in Wrocław of 4 December 1987, ref. no. SA/Wr 829/87, https://orzeczenia.nsa.gov.pl/doc/4998B6DA88 [accessed: 20.04.2023].

[15] Such a term is used by B. Adamiak and J. Borkowski [Adamiak and Borkowski 2022].

of the Code of Administrative Procedure a broad understanding of the principle of the written form – this was not the intention of the legislator. The above statement finds its justification in connection with Article 14(1d) CAP where it provides for the admissibility of written form understood broadly (as related to the recording of information on paper or in electronic form). However, while in the field of applications fixed in electronic form, it was clearly emphasized that they must be submitted to the electronic delivery address of the authority (unless they were submitted to an account in the ICT system), in the field of paper applications, the legislator did not choose to explicitly refer to the manner of their submission, such as the permissibility of applying in person at the seat of the public administration, or through a postal operator.[16] This should also be seen as giving primacy to applications submitted electronically, but also as an effort to create a kind of counter-weight for sending applications to the e-mail of a public administration body. As it follows from the content of Article 63(1) sentence 2 CAP applications submitted to the e-mail address of a public administration body are left without consideration unless a special provision provides otherwise [Prasal 2023].[17]

Juxtaposing the regulations currently in force with those of the previous legislation and referring only to their linguistic wording may give rise to unnecessary conclusions about the rejection of the use of electronic means of communication, which was explicitly mentioned after the rule of the previous regulations of the Code of Administrative Procedure. However, it cannot be considered given the public service of registered electronic delivery and qualified electronic delivery service, the functionality of which is indisputably based on the use of electronic communications. The legal determination of the address for electronic service is also significant in this regard.

According to Article 2(8) ED in conjunction with Article 3(36) of the eIDAS – Electronic Identification, Authentication and Trust Services, the public service of registered electronic delivery, also referred to as a default service used by public entities [Chałubińska-Jentkiewicz and Kurek 2021][18]

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[16] Not without significance in this regard is the content of Article 147 section 2 ED concerning the so-called transition period.

[17] A typical example of an exception to this rule – submitting applications to an e-mail address – is a request for public information (Act of 6 September 2001 on access to public information, Journal of Laws of 2022, item 902); judgment of the Voivodship Administrative Court in Szczecin of 14 September 2017, ref. no. II SAB/Sz 74/17, https://orzeczenia.nsa.gov.pl/doc/4BDF7B977F [accessed: 20.04.2023], judgment of the Voivodship Administrative Court in Warszawa of 12 December 2022, ref. no. II SA/Wa 433/22, https://orzeczenia.nsa.gov.pl/doc/F3D62CFEE6 [accessed: 21.04.2022], decision of the Voivodship Administrative Court in Warszawa of 20 February 2023, ref. no. III SA/Wa 2390/22, https://orzeczenia.nsa.gov.pl/doc/C6BDCE3074 [accessed: 23.04.2023].

[18] Such a term is used by J. Kurek.

enables the transfer of data between third parties electronically and provides evidence related to the handling of transmitted data, including proof of sending and receiving data, and protects transmitted data from the risk of loss, theft, damage or other unauthorized alteration. A qualified registered electronic delivery service, on the other hand, is a registered electronic delivery service provided by one or more qualified trust service providers that guarantees the identification of the sender with a high degree of certainty; that ensures the identification of the addressee before the data is delivered; whereby the sending and receiving of the data is secured by an advanced electronic signature or advanced electronic seal of the qualified trust service provider in such a way as to exclude the possibility of undetectable alteration of the data; and any change in the data necessary for the purposes of sending or receiving the data is communicated to the sender and addressee of the data, and the date and time of sending, receiving, and entering any change in the data are identified by a qualified electronic time stamp (Article 2(2) ED in conjunction with Article 3(37) and 44 of the eIDAS).

An application filed in writing or submitted orally for the record should be signed by the applicant, and although the legislature does not explicitly determine this, the aspect of signing is determined by the way the letter is fixed. A paper application is stamped with a handwritten signature, while an application recorded in electronic form is stamped with an electronic signature (qualified, trusted or personal). An application submitted orally for the record is additionally stamped by an employee. An application from a person who is unable or incapable of affixing his signature shall be affixed by a person authorized by him, which shall be informed in the body of the application itself (Article 63(3) CAP). The signature on the application is one of the elements required for its submission to a public administration body. According to Article 63(2) CAP, an application should indicate the person from whom it comes, the request, and the applicant's residential address, including when the application is recorded in electronic form. It should also meet other requirements provided by the content of specific provisions, including in the area of electronic applications should contain data in the established format contained in the template specified in separate regulations. If the application does not specify the address of the applicant and the public administration body has no way of determining this address based on the data contained in the application – it is subject to being left unprocessed. The address of residence, regardless of the way the letter is fixed, is a necessary condition – essential in the process of determining the local jurisdiction of a public administration body [Przybysz 2022]. In this regard, the address for electronic delivery (possibly indicated by the applicant) is an additional element that may be placed on the application but does not condition its proper submission. A significant change that

has occurred under the influence of the Act on Electronic Delivery becomes apparent in the scope of the obligation to confirm the fact that an application has been filed by a public administration body. This is because regardless of the method of recording (on paper or electronically), this obligation has only a relative and not an absolute character. The public administration body is obliged to confirm the filing of an application, but only if the applicant himself requests it (Article 63(4) CAP).

CONCLUSION

The Polish legislator has long been introducing solutions that move towards full electronification of the administrative procedure [Łuczak 2014, 65-80]. These solutions are intended to move away from outdated methods of communication between public and private entities and vice versa, for it is these that prove unreliable in some circumstances. The COVID-19 pandemic period decisively confirmed this. The changes dictated by the entry into force of the Act on Electronic Delivery focused on establishing such constructions that will be alternative to the existing solutions, related to paper receipt of documentation and paper submission to the public administration body [ibid.]. It focused on three fundamental issues of administrative procedure. This makes it possible to claim that the impact of the Act on Electronic Delivery on the shape of Polish administrative procedure is momentous. The formation of a new understanding of the principle of the written form was intended to eliminate doubts about the permissibility of treating an electronic document as a separate form from the written form – a form of handling cases. On the other hand, the changes to the principle of officiality and, in a way, the principle of accusatorial procedure, provide an opportunity to de-localize the process of service of letters by creating conditions for sending and receiving correspondence from any place and at any time, without the obligation to inform about the change of location of the applicant and the recipient of the letter from the public administration body [Adamiak and Borkowski 2022].[19] And yet, the legal regulations of the Act on Electronic Delivery themselves, the full implementation of which has been spread out over time and which, in principle, do not create an obligation on the part of private entities to have and use an address for electronic service, are not able to guarantee a breakthrough in the communication of parties within the framework of administrative procedure. It is also important to make individuals aware of available IT solutions and their functionality and to constantly encourage the use of technological innovations for, among other things, handling official matters. It is necessary to make

[19] See https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=239 [accessed: 25.04.2023].

clearly visible the benefits that result from their use. This is because many individuals, despite the advancing process of computerization, are still sceptical of what is new, unfamiliar, and generally defined as electronic. However, the clear emphasis on the primacy of the electronic form in the process of conducting or settling administrative matters, as well as in the area of submitting applications to public administration bodies, which is evident in the text of the Code od Administrative Procedure is in this case insufficient.

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PROTECTION OF LIFE IN THE LEGISLATION AND TEACHINGS OF SAINT JOHN PAUL II

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Abstract. The paper discusses the teachings and legislation of St John Paul II on human life and its legal protection. The Pope's attitude to abortion, euthanasia and the death penalty was subjected to closer analysis. The author also points out that the legal protection of human life in the teachings and ecclesiastical documents is closely related to the essence of democracy. According to John Paul II, the "moral" value of democracy is not automatic, but depends on conformity to the moral law. In such a society, civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person. First and fundamental among these is the inviolable right to life of every human being from the moment of conception.

Keywords: John Paul II; human life; right to life; abortion; euthanasia; death penalty

1. JOHN PAUL II – *THE POPE OF LIFE*

The issue of the protection of human life was one of the most important topics in the teaching and legislative activity of Saint John Paul II, also called *the Pope of Life* [Grześkowiak 2017, 125], and *the Pope of Human Rights* [Beyer 2014, 69; Majka 1982, 240; Skorowski 2018, 55]. Statements in which he raised various issues related to the protection of human life had a different form and rank, and also contained rich and varied arguments.

For the purposes of further analysis, texts addressed to the faithful of the Catholic Church should be distinguished from other texts addressed to "all people of good will". The first group includes, above all, the achievements of John Paul II as a legislator. Therefore, it is worth nothing that according to can. 331 of the Code of Canon Law,[1] The bishop of the Roman Church, by virtue of his office, possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely. Exercising the highest governing power (*potestas regiminis*), including the law-making (legislative) power,[2] John Paul II referred to a number

[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317 [hereinafter: the Code of Canon Law, CIC/83].

[2] The legislative power of the Bishop of Rome can take various forms, at the top of this

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of important issues in the field of the protection of human life – first of all, by regulating them in the Code of Canon Law.

Furthermore, in-depth theological and philosophical reflection can be found in the papal teachings, contained both in numerous high-ranking documents (encyclical letters, exhortations, apostolic letters), as well as in homilies and occasional speeches. The arguments cited in them often go beyond the moral teachings of the Head of the Catholic Church and take the form of participation in discussions with contemporary philosophical and anthropological trends, and often even fall within the scope of the theory of criminal law and penology. In this extensive collection of statements, special attention should be paid to *Evangelium Vitae*,[3] the encyclical letter about which W. Półtawska said that it was written against the background of the whole life of a priest who defended life from the very beginning [Grześkowiak 2006, 42].

The analysis of the above-mentioned sources allows us to distinguish two grounds of reflection in the teachings of John Paul II – theological (biblical) and universal (human rights) [Idem 2017, 128]. In statements addressed to members of the Catholic Church, and even more broadly – to all Christians, biblical themes prevail. And so, on the one hand, in *Evangelium Vitae* there is an interpretation of the so-called the Yahwist account of the creation of the world, which illustrates the origin of life from God, the analysis of the scene of Cain killing Abel and emphasizing the importance of the commandment "Thou shalt not kill". On the other hand, the universal justification, with the argumentation referring to the existence of the natural order of things and the inherent and inviolable dignity of every human being, from which human rights derive, has become a common ground for discussion with contemporary, diverse philosophical and ethical concepts, in other words – with "with all people of good will". In the encyclical letter *Evangelium Vitae*, the firm conviction was expressed that every person sincerely open to truth and goodness can, by the light of reason and the hidden action of grace, come to recognize in the natural law written in the heart, the sacred value of human life from its very beginning until its end, and can affirm the right of every human being to have this primary good respected to the highest degree (EV 2).

An important feature of John Paul II's thoughts on the protection of life is the continuity of teaching in relation to his predecessors and to the achievements of the Second Vatican Council, which find expression in a firm

hierarchy is the code as a set regulating all matters related to the Church's mission, followed by the apostolic constitution and the *motu proprio* [Góralski 1998, 29-30].

[3] John Paul II, Encyclical letter *Evangelium Vitae. On the Value and Inviolability of Human Life* (25.03.1995) [hereinafter: EV], https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [accessed: 22.07.2023].

repetition of the hitherto assessment of attacks on human life. Both condemnation of long-known acts against human life, such as any type of murder, genocide, abortion, euthanasia or wilful self-destruction,[4] and opposition to new forms of attacks on the dignity of human being, resulting from the progress of science and technology, such as various techniques of artificial reproduction (so-called *spare embryos*), prenatal diagnosis (an opportunity for proposing and procuring abortion) was upheld (EV 4 and 14).

A separate part of the teachings is the issues of admissibility of the death penalty and the use of legitimate defence. John Paul II clearly distinguished the problem of the violation of the right to life of weak, defenceless and innocent beings (unborn children, the elderly, people in a terminal state) from the issue of the attitude to the death penalty as retribution for the evil done by the perpetrator of the crime and legitimate self-defence against the unlawful actions of the aggressor.

2. CAUSES OF CONTEMPORARY ATTACKS ON HUMAN LIFE AND THEIR EVALUATION

The reflection on contemporary threats to the life of every human being included in the papal documents is preceded by an in-depth diagnosis referring to their social conditions and various causes. Above all, John Paul II noticed the intensification of attacks on human life in the 20th century. In the address to the diplomatic corps on May 19, 2000 he said: "I have lived my 80 years in a century which has known unprecedented attacks on life."[5]

In the papal teaching there is an extensive reflection on social changes of a cultural nature, which initiated the process of re-evaluating the assessment of human life, affecting the legislation of modern states. Among such degrading factors, John Paul II pointed to "the profound crisis of culture, which generates scepticism in relation to the very foundations of knowledge and ethics, and which makes it increasingly difficult to grasp clearly the meaning of what man is, the meaning of his rights and his duties" (EV 11). This crisis leads to the spread of "a culture which denies solidarity" and in extreme cases takes the form of a veritable "culture of death" (EV 12). In *Evangelium Vitae*, John Paul II outlined a picture of a society in which one could even speak of "a war of the powerful against the weak: a life which

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[4] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), pp. 1025-120, no. 27.

[5] John Paul II, *Address of the Holy Father John Paul II to the Diplomatic Corps Who Had Come to Congratulate Him on 80th Birthday* (19.05.2000), https://www.vatican.va/content/john-paul-ii/en/speeches/2000/apr-jun/documents/hf_jp-ii_spe_20000519_diplomatic-corps.html [accessed: 22.07.2023].

would require greater acceptance, love and care is considered useless, or held to be an intolerable burden […]. A person who, because of illness, handicap or, more simply, just by existing, compromises the well-being or lifestyle of those who are more favoured tends to be looked upon as an enemy to be resisted or eliminated. In this way a kind of *conspiracy against life* is unleashed" (EV 12). The depreciation of human life is also contributed to by philosophical trends that "equate personal dignity with the capacity for verbal and explicit, or at least perceptible, communication. It is clear that on the basis of these presuppositions there is no place in the world for anyone who, like the unborn or the dying, is a weak element in the social structure, or for anyone who appears completely at the mercy of others and radically dependent on them" (EV 19).

According to John Paul II, at the source of this "culture of death" lies a completely individualistic concept of freedom, which ends up by becoming the freedom of "the strong" against the weak who have no choice but to submit (EV 19). The affirmation of the absolute autonomy of an individual leads to the negation of other people and, consequently, to permanent structural changes in society. In such a society "everything is negotiable, everything is open to bargaining: even the first of the fundamental rights, the right to life" (EV 20). This right may be simply negated by a vote of Parliament or by the will of one part of the population in a referendum. Therefore, summarizing, John Paul II stated: "the "right" ceases to be such, because it is no longer firmly founded on "the inviolable dignity of the person, but is made subject to the will of the stronger part. In this way democracy, contradicting its own principles, effectively moves towards a form of totalitarianism" (EV 20).

The cultural changes described above have led to a change in social assessments of human life and, subsequently, to a re-evaluation of ethical and legal assessments. A "quality of life" ethic along with a "utilitarian" or "proportionalistic" ethical methodology has contributed to the idea that certain attacks against innocent human life are morally legitimate and regarded as fundamental constitutional "rights" [Latkovic 2011, 423]. In this context, John Paul II recognized the fact that legislation in many countries, perhaps even departing from basic principles of their Constitutions, has determined not to punish these practices against life, and even to make them altogether legal (EV 4). This leads to the situation that in generalized opinion these attacks tend no longer to be considered as "crimes"; paradoxically they assume the nature of "rights" (EV 11).

John Paul II also saw that, apart from the declaration that the law should always express the opinion and will of the majority of citizens and recognize that they have, at least in certain extreme cases, the right to abortion and euthanasia, further arguments of a criminological nature are formulated. There

is a widespread fear among lawyers that the prohibition and the punishment of abortion and euthanasia would necessarily lead to an increase of illegal practices, carried out in a medically unsafe way. The question is also raised whether supporting a law which in practice cannot be enforced would not ultimately undermine the authority of all law (EV 68).

3. OBLIGATION TO PROVIDE THE LEGAL PROTECTION OF LIFE IN DEMOCRATIC STATES

The important issue of linking the legal protection of human life with democracy is present in the teaching of John Paul II. It is connected with considerations about the essence of democracy. In *Evangelium Vitae*, the Pope's analyses begin with the observation that in contemporary democratic countries the view is widely spread that "the legal system of any society should limit itself to taking account of and accepting the convictions of the majority. It should therefore be based solely upon what the majority itself considers moral and actually practices" (EV 69). In such a concept of democracy, such relativism alone is held to guarantee tolerance, mutual respect between people and acceptance of the decisions of the majority, whereas moral norms considered to be objective and binding are held to lead to authoritarianism and intolerance (EV 70).

In *Evangelium Vitae*, however, an outline of a completely different concept was presented, in which democracy is a system and as such is a means and not an end. According to John Paul II, the "moral" value of democracy is not automatic, but depends on conformity to the moral law: "the value of democracy stands or falls with the values which it embodies and promotes. Of course, values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the 'common good' as the end and criterion regulating political life are certainly fundamental and not to be ignored. The basis of these values cannot be provisional and changeable 'majority' opinions, but only the acknowledgment of an objective moral law which, as the 'natural law' written in the human heart, is the obligatory point of reference for civil law itself" (EV 70). So, John Paul II contended that democracy can be "ethical" [Beyer 2014, 77].

In the opinion of John Paul II, the real purpose of civil law is "to guarantee an ordered social coexistence in true justice" (EV 71). In such a society, civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, First and fundamental among these is the inviolable right to life of every innocent human being (EV 71).

Referring to the values of democracy, John Paul II denied legal force to regulations legalizing attacks on human life. In *Evangelium Vitae*, the Pope firmly emphasized that "laws which legitimize the direct killing of innocent human beings through abortion or euthanasia are in complete opposition to the inviolable right to life proper to every individual; they thus deny the equality of everyone before the law […]. Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law" (EV 72).

It is worth noting that the view that the very essence of a democratic state ruled by law implies the obligation to ensure the protection of human life from the moment of conception has been expressed several times by the Polish Constitutional Tribunal [Wiak 2021, 493]. In the decision of 28 May 1997 (K 26/96) the Constitutional Tribunal outlined in detail the constitutional standards for the protection of human life and linked them to the essence of democracy. "Life" – the Tribunal said – "is the fundamental attribute of a human being. When life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of a democratic state ruled by law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, providing for the minimum level of fairness thereof, therefore, under a democratic state ruled by law, the first such directive must be respect for the value, as its absence excludes the recognition of a person before the law, i.e. human life from its outset. The supreme value for a democratic state ruled by law shall be a human being and his/her goods of the utmost value. Life is such a value and, in a state under a democratic state ruled by law, it must be covered by constitutional protection at every stage of development."[6]

4. ABORTION

Among all the crimes which can be committed against human life, procured abortion (*termination of pregnancy, interruption of pregnancy*) was treated by John Paul II as a particularly serious and deplorable act. Quoting the Second Vatican Council, he called abortion, together with infanticide, as an "unspeakable crime" (EV 58). Abortion is thus crime "which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection" (EV 73).

[6] Decision of the Constitutional Tribunal of 28 May 1997, ref. no. K 26/96, OTK 1997, No. 2, item 19, p. 6-7.

This firm assessment is not surprising, since it has remained unchanged in the tradition and legislation of the Catholic Church for centuries. Respect for human life before birth was expressed already in the oldest monuments of Christian writing. The *Didache* and the *Letter to Barnabas* contained the admonition "do not kill the foetus", and the first local synods imposed a severe sanction of exclusion from the community on a woman who voluntarily caused the death of a child. The Synod of Elvira at the beginning of the 4th century provided for the penalty of lifelong excommunication in such a case. The set of provisions of canon law, known as the *Gratian Decree*, recalled the firm words of Pope Stephen V when assessing the termination of pregnancy: "Whoever kills a conceived life is a murderer" [Góralski 1991, 141; Wiak 2001, 82-83].

A clear and strict assessment of attacks against the life of an unborn child in the form of abortion is also articulated in the *Catechism of the Catholic Church*[7] and in the *Code of Canon Law*. The *Catechism* declares that human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person – among which is the inviolable right of every innocent being to life (CCC 2270). According to can. 1397 § 2 of the CIC/83, a person who actually procures an abortion incurs a *latae sententiae* excommunication (which does not require a separate warning). The doctrine of canon law emphasizes that the perpetrator of this crime may be a Catholic who consciously and voluntarily, in order to cause death, effectively terminates a human foetus in any way, e.g. a doctor, a midwife, a mother who voluntarily underwent an abortion or terminated the pregnancy herself, all necessary partners who, through their actions, including: referral for surgery, order, advice, or provision of funds, effectively contribute to the removal of a living human foetus from the mother›s womb [Wenz 2016, 148].

Analysing the issue of abortion, John Paul II pointed out that nowadays the perception of its gravity has become progressively obscured. He recognized the linguistic phenomenon that when describing abortion, there is a widespread use of ambiguous terminology, such as "interruption of pregnancy", which tends to hide abortion's true nature and to attenuate its seriousness in public opinion. However, the Pope firmly stated that "no word has the power to change the reality of things: procured abortion is the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception

[7] *Catechism of the Catholic Church* promulgated on October 11, 1992 by Pope John Paul II with his apostolic constitution *Fidei Depositum*, https://www.vatican.va/archive/ENG0015/_INDEX.HTM [hereinafter: *Catechism*; CCC].

to birth. […] The one eliminated is a human being at the very beginning of life. No one more absolutely innocent could be imagined" (EV 58).

According to John Paul II, the attribute of human dignity belonging to every human being should set the limits of permitted procedures carried out on the human embryo, e.g. experimentation, prenatal diagnosis. Procedures which respect the life and integrity of the embryo and do not involve disproportionate risks for it, but rather are directed to its healing, the improvement of its condition of health, or its individual survival, should be considered acceptable. However the use of human embryos or foetuses as an object of experimentation constitutes a crime against their dignity as human beings who have a right to the same respect owed to a child once born, just as to every person (EV 63). Similarly, prenatal diagnosis is morally licit, if it respects the life and integrity of the embryo and the human foetus and is directed toward its safe guarding or healing as an individual. It is gravely opposed to the moral law when this is done with the thought of possibly inducing an abortion (CCC 2274).

5. EUTHANASIA

Much space in the documents constituting the legislation and teachings of John Paul II is devoted to explaining the issue of euthanasia. First of all, the following definition was formulated in the encyclical letter *Evangelium Vitae*: "Euthanasia in the strict sense is understood to be an action or omission which of itself and by intention causes death, with the purpose of eliminating all suffering" (EV 65). John Paul II also confirmed the clear moral assessment expressed by previous popes and contained in their teachings (the *Magisterium*): "euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person" (EV 65). Likewise, according to the Catechism, direct euthanasia, which consists in putting an end to the lives of handicapped, sick, or dying persons, is morally unacceptable (CCC 2277).[8] Euthanasia can take the form of so-called "assisted suicide", but it becomes more serious when it takes the form of a murder committed by others on a person who has in no way requested it and who has never consented to it (EV 66). For this reason the penal law of the Catholic Church refers euthanasia to the crime of homicide covered by can. 1397 of the CIC/83 [Leszczyński 2013, 101].

Euthanasia "in the strict sense" must be distinguished from "the decision to forego so-called "aggressive medical treatment" – medical procedures

[8] The literature emphasizes that the church's pastoral response to the phenomenon of euthanasia spreading in the modern world should be to promote palliative care; see: Zawadka and Balicki 2015, 154.

which no longer correspond to the real situation of the patient, either because they are by now disproportionate to any expected results or because they impose an excessive burden on the patient and his family. To forego such extraordinary or disproportionate means is not the equivalent of euthanasia (EV 65).

6. DEATH PENALTY

It should be noted that the motives contained in the teaching of John Paul II, expressing the Church's attitude to the death penalty, differ from the arguments raised against abortion and euthanasia. The assessment of the admissibility of the death penalty has traditionally been made from the perspective of legitimate defence against an aggressor threatening the common good. Moreover, the use of "capital punishment" is not the murder of an "innocent person", but is a retribution for the evil committed earlier [Grześkowiak 2017, 150]. However, regardless of the circumstances that constituted the reason for imposing the death penalty, the papal teaching also included the idea that the perpetrator of even the most terrible act does not lose inalienable rights, such as the right to life – because these rights are due to the inherent and inviolable dignity of a human being.

The Church's attitude towards the death penalty during the pontificate of John Paul II underwent a significant evolution, which led to the Pope "taking the side of moderate abolitionists" [Mazurkiewicz 2009, 212]. John Paul II himself is called "the precursor of the abolitionist movement in the Church" [Pachciarz 2016, 188].

The analysis of these changes should begin with the statement that in the original version of the *Catechism of the Catholic Church* (published on October 11, 1992), the traditional teaching of the Church was still recalled, according to which "Preserving the common good of society requires rendering the aggressor unable to inflict harm" (CCC 2266). This teaching has acknowledged "as well-founded the right and duty of the legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty" (CCC 2266). However, the content of the next point of the *Catechism* clearly indicated the subsidiary nature of the norm allowing the death penalty: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means because they "better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person" (CCC 2267). In this approach, the death penalty was to be the *ultima ratio* among the various measures of responding to a crime available in criminal law.

The basis for the first change in the editorial of the *Catechism* regarding the assessment of the admissibility of the death penalty was provided by the encyclical *Evangelium Vitae*, in which John Paul II placed the problem of the death penalty "in the context of a system of penal justice ever more in line with human dignity" (EV 56). In this encyclical letter, the Pope also expressed the belief that in order to protect public order and the safety of people and to influence the perpetrator, the punishment imposed should not "reach to the highest extent, that is, to taking the life of the criminal, except in cases of absolute necessity, that is, when there are no other ways to defend society" (EV 56). Furthermore, a firm belief was expressed that "Today, however, thanks to the increasingly better organization of penitentiary institutions, such cases are very rare, and perhaps do not occur at all" (EV 56).

The position taken by John Paul II in the encyclical letter *Evangelium Vitae* became the basis for introducing changes to the text of the *Catechism* in 1998 (*Corrigenda*).[9] Partly new teaching was added in point 2267 of the *Catechism*: "Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm – without definitively taking away from him the possibility of redeeming himself – the cases in which the execution of the offender is an absolute necessity 'are very rare, if not practically non-existent". In this sense, the death penalty has become an exceptional measure and should be applied only as *extrema ratio*.

The final shape of the current teachings of the Church towards the elimination of the death penalty was given by Pope Francis, who, by adopting an abolitionist position, goes much further than his predecessors [Grześkowiak 2016, 57]. Under the influence of Francis' teachings, point 2267 of the *Catechism* gained the following content in 2018[10]: "Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good. Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have

[9] Amendments made by the Congregation for the Doctrine of the Faith in a letter of April 25, 1998.

[10] Congregation for the Doctrine of the Faith, *Letter to the Bishops regarding the new revision of number 2267 of the Catechism of the Catholic Church on the death penalty, from the Congregation for the Doctrine of the Faith*, (01.08.2018), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180801_lettera-vescovi-penadimorte_en.html [accessed: 22.07.2023].

been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption. Consequently, the Church teaches, in the light of the Gospel, that "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person, and she works with determination for its abolition worldwide".

John Paul II presented extensive and in-depth arguments against the admissibility of this penalty. He indicated both arguments resulting from a rationally conducted penal policy, as well as philosophical and anthropological considerations resulting from respect for the dignity of every human being, which also belongs to criminals. When analysing John Paul II's attitude towards the death penalty, we should also take into account the speeches in which the Pope appealed for the abolition of the death penalty [Boike 2019, 49]. He also repeatedly called for a moratorium on the death penalty and expressed his appreciation for the Council of Europe, which led to the abolition of the death penalty among member states [Grześkowiak 2017, 151].

CONCLUSION

The teachings and legislative activities of Saint John Paul II on human life and its legal protection are based on a coherent concept of a human being who has inherent dignity and inalienable rights resulting from it. This papal reflection has both a theological and universal dimension.

Referring to the Bible, the Tradition of the Church and the teachings of his predecessors, John Paul II firmly stated that every deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end. It is in fact a grave act of disobedience to the moral law, and indeed to God himself.

At the same time, John Paul II built a dialogue with followers of other religions and non-believers – with "all people of good will". He used argumentation based on universal values, noting the close relationship between the legal protection of human life and democracy. According to the teachings, the moral value of democracy depends on conformity to the moral law and values such as the dignity of every human person and respect for and inalienable human rights. First and fundamental among these is the inviolable right to life. In this way, Saint John Paul II created the basis for building a universal "culture of life".

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FROM POST-TRUTH TO POST-JUSTICE? IN DEFENCE OF TRUTH IN THE ERA OF POST-TRUTH. A CONTRIBUTION TO THE DEBATE

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Abstract. The article explores the interplay between truth and justice, two primary values in humanistic and social spheres. The thesis maintains that even in the *post-truth* era, where facts are often disregarded, justice still motivates an individual to seek objective truth. Ultimately, justice is a crucial norm in society and cannot be abandoned for the betterment of humanity. To foster a just society, it is imperative to acknowledge and recognise objective truths. Therefore, comprehending mankind and the fundamentals of social structures is crucial for the attainment of fair and impartial interpersonal relationships. The absence of truth compromises the credibility of justice, resulting in vacuous verbiage from politicians, a mere slogan and a façade for totalitarian regimes.

Keywords: person; society; justice; personalism

INTRODUCTION

In *A Theory of Justice*,[1] John Rawls noted "like truth in knowledge systems, justice is the primary virtue of social institutions" [Rawls 1994, 13]. This is the particularly suggestive way the American thinker defined the relationship between the two foremost values of human activity that are uncompromising [ibid.]. The link between these values is so close it's virtually impossible to practise one and ignore the other. In spite of the variety of concepts of both truth and justice, the initial intuition is simple: truth is pre-requisite to justice while justice, the primary social value, leads to the truth about the most profound foundations of public life, in particular, to the truth about law by reflecting its deepest meaning [Tokarczyk 1997, 141].

To support this idea, and following the principle *per opposita cognoscitur*, the doubts can be raised: Can action inconsistent with truth be just? Can a court issue a just judgment without knowing the truth about all evidence

[1] The book published by Harvard University Press in 1971. The Polish edition of 1994 is used here.

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in a case? Doesn't justice without truth, on the other hand, become merely a means to achieving goals set by powers and politics in the service of ideology? Even a cursory interpretation of the interdependence between truth and justice shows its determination is important not only to philosophers but also to every so-called ordinary man. Therefore, given the dangerously fashionable notion and phenomenon of post-truth, which is gaining considerable acclaim, for the sake of the human person's good and rights and above all in the name of the proper shape of public reality and good interpersonal relations, the closest possible links should be highlighted between truth and justice. This is the idea I see as fundamental to the issue addressed in this paper. To make my purpose a bit clearer, it must be added it consists in arriving at the juncture of the truth-justice relationship and demonstrating some dangerous social consequences of severing the links between them.

The understanding of truth in its classic sense is the starting point for this discussion. To avoid becoming entangled in the considerations of justice undertaken by a range of scientific disciplines, this approach to justice will be restricted to the philosophy of law and guided by the perspective of neo-scholastic personalism in its metaphysical, axiological, and ethical profiles. I'll mainly refer to the leading lights of the Polish personalism.

1. TRUTH AS A TASK FOR THE HUMAN PERSON

The question "What is truth?" has played a special role in the cultural development of humankind among the great theoretical questions. It comprises a fundamental problem whose perception defines man as such in relation not only to the entire variegated reality but first of all in relation to himself. Focusing on the issue of truth is the evidence of the discovery of the status of reason in human life. Aristotle's significant words in the beginning of *Metaphysics*: Πάντες ἄνθρωποι τοῦ εἰδέναι ὀρέγονται φύσει ("The desire for cognition is native to all humans") are worth citing here. Using the word 'φύσει' (from φύσις – nature), the Stagira thinker points out the desire for cognition is natural, or innate, and this fact can be observed in everyone. This is not about specialist scientific ambitions yet, but about commonsensical knowledge shared by everybody who is conscious [Jaroszyński 2008, 28]. As cognitive powers become spontaneously active in every person and oriented towards their proper object, so the human thought spontaneously turns to truth. Human reason tends towards truth as its task by its very nature.[2] In order to know the nature of thinking and thus the deepest essence

[2] See Jan Paweł II, *Homilia w czasie liturgii słowa skierowana do środowiska Katolickiego Uniwersytetu Lubelskiego, Lublin, 9 czerwca 1987 r.*, in: *Dzieła zebrane*, vol. IX: *Homilie i przemówienia z pielgrzymek – Europa*, part 1: *Polska*, edited by Paweł Ptasznik, Wydawnictwo M, Kraków 2008, p. 322.

of human rationality, therefore, one must ask, What is truth? Non-truth, or falsehood, is its opposite.[3]

Man is the only being in the entire visible world who not only desires and is able to know but also realises he knows, and therefore will know the truth about what he perceives and experiences. It's not indifferent to him, as a rational being, whether his knowledge is true. The skill of distinguishing the truth from falsehood and of making your own judgment about the objective state of affairs is proof of man's personal maturity.[4] Certain types of cognition are shared by man and animals. The latter, guided by senses and instincts, do not have the desire for truth, however. They do have the ability of receiving sensory impressions, and some even have memory and imagination and thus can acquire certain skills. However, as Piotr Jaroszyński notes, "in man, that cognitive drive gains a kind of impetus where the animal skills end" [Jaroszyński 2008, 29]. Aristotle expressed it as follows in *Metaphysics*: "They [animals] all live by imagining and remembering and take but little part in experiencing, where the humankind lives by art and reasoning" [Arystoteles 1984, 980b, 25-28]. The art the Stagira philosopher writes about involves the skill of producing by means of knowledge and experience.

Relying on some valuable intuitions of both Christian and pagan authors, the full definition of truth in its classic meaning was provided by Thomas Aquinas as follows: *veritas est adaequatio intellectus et rei, secundum quod intellectus dicit esse quod est vel non esse quod non est* ("truth is the conformity of intellect and things, where the intellect declares the existence of what is there or speaks of the non-existence of absent things").[5] In spite of the numbers of objections to this formulation, it remains the point of reference for any considerations of truth [Stróżewski 1982, 121]. The classic definition of truth assumes the existence of a thing and of thought. Truth is determined by the very structure of broadly-defined reality, which as if splits in two different domains: things and thoughts. They are facts completely different to each other, on the one hand, and the issue of determining their proper relationship arises. On the other hand, it's possible to determine that relationship [ibid., 122]. One can repeat after Władysław Stróżewski, therefore, truth is a task, something to reconcile (*ad-aequatio*) [ibid.].

By speaking of truth as a task for man, we identify man with the domain of thought. The classic definition of truth is conditioned not only by everything contained in the Latin *rei* but also by everything included in the term

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[3] Ibid.

[4] Cf. Ioannes Paulus PP. II, Litterae encyclicae cunctis catholicae ecclesiae episcopisde necessitudinis natura inter utramque *Fides et ratio* (14.10.1998), AAS 91 (1999), pp. 5-88, no. 28.

[5] Thomas Aquinas, *Summa contra gentiles*, I, 59.

intellectus. The human subject is specific among the whole gamut of beings and this specificity consists in truth as a task and a fulfilment of this task. Truth is thus a particular way of existence of the human subject, who reaches towards things in his acts of cognition – inherent only in him in the visible world. The issue of truth emerges anywhere there is intellect, a knowing subject, and where there is a thing, an object of cognition. The difference between them is to be overcome as part of the cognition. Truth as a task consists in overcoming of both this difference and the inconsistency between thought and thing, that is, non-truth. In this manner, non-truth conditions truth as a task [Stróżewski 1982, 123-24]. Man's original link with existence and reality is revealed in man's absolute desire for truth. This is the special power of truth, too – by tending towards it, man strives for a consistency with the objective reality as well [Tischner 1982, 131-32].

The cognition of truth is at the same time the cognition of a being, object of cognition, and of oneself as a knowing subject. A denial or rejection of a known truth introduces an ontic dissonance, since truth has a property Tadeusz Styczeń defined as a "binding force", expressed in the sentence "I mustn't contradict what I have stated myself" [Styczeń 2013d, 326]. In logic, that "binding force" of truth, persuading people to obey it, shows in reasoning. By rejecting what I first of all stated with my own act of a knowing subject, I "construct" myself as an inconsistent person. In this sense, truth is a fundamental value [ibid.]. Faith to an internally discovered and accepted truth is the fundamental duty of man as a human being. Any attempt at denying the evidence of one's own cognition of truth leads to a collision against one's own identity [Chudy 2007b, 46]. To support his claims, T. Styczeń would cite the instances of the numerous "prisoners of conscience" – those who remained free even as they were locked in prison cells. They were free by force of their faith to the truth they'd known before. The examples of Socrates, Thomas Moore or Stefan Wyszyński prove the choice of truth liberates man towards his own fullness – show that truth is pre-requisite to man's inner freedom, while a self-betrayal, always a lie and a betrayal, is the sole thing one must fear at all times [Styczeń 1994, 503].

The cognition of reality becomes the starting point for man's decisions and actions, through which his inherent potentialities are actuated. Mieczysław A. Krąpiec writes: "A human person is a potential personality, that is, one that improves, builds, and fulfills itself, or reaches its fullness, through its acts" [Krąpiec 1988, 26]. Elsewhere, the Lublin-based metaphysician offers this analysis: "The human personal action is truly human insofar as it springs from our cognition, which originally connects us to the world, enriching ourselves with the contents of real being that we continue to process. In the domain of cognition … truth is the criterion separating valuable from non-valuable cognition and the immanent objective. If man is guided

by cognition in his actions, truth as the criterion and objective of human cognition is a preliminary and basic value, declaring the value of all other personal human actions, since the charge of non-truth essentially disqualifies human action from being just that, human and personal" [Idem 1990, 282-83]. Through his decisions and actions, man is to become what he should. It is not and shouldn't be indifferent to him, therefore, whether he constructs himself, through his acts, as a liar or someone telling the truth, a traitor or a faithful person, someone capable of keeping secrets entrusted to him or someone faithless [Lekka-Kowalik 2017, 79-80].

Seeking truth in the theoretical domain has its practical consequences, therefore, as the truth refers to the good that should be done. It thus has a profoundly ethical dimension, related to man's desire to define and attain the meaning of life. In the era of post-truth, when facts don't matter and populism and subjectivism seem to triumph, a life in accordance with reason is particularly demanding. Nevertheless, even in such a world truth remains what it is, i.e., truth. Therefore, it appears before man as a task at all times. And since man is what reason makes of him, in the name of respect for his rational nature, each man is bound by the fundamental moral duty of searching for truth and abiding by it once it is found.[6]

2. TRUTH AS THE SOCIAL SUBJECT'S *MODUS ESSENDI*

Truth is also the necessary foundation of social and political order in the framework of objectivist-oriented axiology. It's present in all the dimensions of social life, starting from the truth of opinion (judgment), through the truth of words to the truth of social relations and structures and scientific theories [Ślęczka 2007, 154]. In public life, it acts as the assumption for a range of formal and informal social interactions and actions [Bartkowski 2018, 15]. A society with no room for truth and its respect is no longer genuinely and fully human. It is the value that merges those in the sphere of its influence and integrates a community. Wilbur Schramm, the founder of communication studies, notes society can be regarded as the sum total of certain relationships as part of which people communicate a certain type of information to one another. Communication is the tool owing to which society continues to exist. It's no accident communication and community derive from the same root. Without communicating, no society would be possible, and vice versa [Schramm and Porter 1982; Zasępa 2000, 56].

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[6] Cf. Ioannes Paulus PP. II, Litterae encyclicae cunctis catholicae Ecclesiae episcopis de quibusdam quaestionibus fundamentalibus doctrinae moralis Ecclesiae *Veritatis splendor* (06.08.1993), AAS 85 (1993), pp. 1133-228, no. 34.

Social bonds are founded on conversation, which can be understood broadly. It can comprise both thoughts, words, and values [Chudy 2007a, 14]. In each instance, the meaning of any forms of communication is a passage of truth to others. Held and communicated, truth is a factor that develops and spiritually enriches another man and the entire society. It's the inspiration and sense of man's everyday decisions as well as all scientific research. Thus, it constitutes a fundamental common good of every human community, without which other values important to public life, such as justice and peace, can't be realised. "Where there is no ultimate truth, a guide to and trend-setter of political activity, it's easy to treat ideas and convictions as instruments towards objectives the power sets itself,"[7] John Paul II emphasised. The Polish realities of the Communist enslavement became a clear point of reference for the Pope's words, although the problem has a universal dimension.

T. Styczeń paid a lot of attention to the issue of linking truth to public life, especially social ethics. He claims neither the values I discover nor the obligations I perceive are my exclusive discovery, but are discovered together with another man. This is because he, like myself, is capable of discovering truth and, like myself, is bound with truth [Styczeń 2013b, 242; Moń, 2020, 334]. Styczeń said the choice of truth is at the same time the choice of another man. The discovery and exploration of the truth about oneself leads to the cognition of truth of every other I, that is, the universally important truth [Styczeń 2013c, 134]. Therefore, in the name of truth about oneself, about one's personal I, one must "step beyond oneself towards every other" [Styczeń 1994, 509]. Others appear as another I and, like I am, they are trapped within the truth of every other I in the act of self-cognition by force of self-transcendence in truth. Every other falls into the same 'trap' of truth of every other as soon as they commit the act of self-discovery. By learning the truth, he binds himself to recognise it and what's particularly important, the other can only fulfil himself to the end by affirming every other, including myself [ibid.]. Styczeń assumes an anthropology that shows man as someone who, being an individual, remains in relation to society. "An autonomy called to communion, self-dependence called to solidarity – this is the name of man" [Styczeń 2013a, 60], the Lublin-based ethicist states. In his view, the notions of justice and law become comprehensible only by meting the other on the foundation of truth and by experiencing a community with the other [Moń 2020, 343].

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[7] Ioannes Paulus PP. II, Litterae encyclicae Venerabilibus in episcopatu Fratribus Clericisque et Religiosis Familiis, Ecclesiae Catholicae Fidelibus universis necnon bonae voluntatis hominibus saeculo ipso Encyclicis ab editis litteris «Rerum novarum» transact *Centesimus annus* (01.05.1991), AAS 83(1991), pp. 793-867 [hereinafter: CA], no. 46.

Truth can in no way be imposed forcefully, it can be only discovered [Styczeń 1993, 90]. Truth cannot be subordinated to ideologies or any other values. It should hold the supreme place in individual and public life. The only thing one should fear is lie. It causes the most harm to man's personal structure, undermining his cognitive and volitional capacities. "To fall into the most radical crisis is to choose non-truth … and abide by it" [Styczeń 2013c, 123], Styczeń maintains. Living in non-truth also becomes the main cause of a range of social disorders. The lie, in the variety of its forms, weakens and even destroys the interpersonal social bond grounded in the communication of values. Penetrating successive areas of public life, i.e., politics, culture, science, it impairs the ethos of professions requiring a particular faith to truth [Chudy 2007a, 304-400; Ślęczka 2007, 154].

Many attempts are made at capturing the essence of the lie. Relying above all on Thomas Aquinas' concept, Wojciech Chudy offers two definitions: "1. Lie is an utterance of things we believe to be false; 2. lie is a conscious misleading of someone" [Chudy 2003, 110]. That someone being misled may be another person or a whole society. Lie consists in offering non-truth as truth, hence a deformation and denial of truth. Without going into a detailed analysis of the diverse types of lying, it should be noted the intention of telling someone else non-truth is always essential. Lie always has a social dimension, therefore. Every lie presumes the value of truth, thereby, as Józef Tischner points out, making an indirect tribute to truth. Lie is never presented as a lie, but as a truth, so it appears to be true. Second, whoever lies recognises another expects him to be truthful as a natural duty. Finally, constructing a world of non-truth, a liar must be as consistent as possible. Because of all of that, even a liar cannot free himself from the awareness of truth and its categorical power [Tischner 1990, 112-17].

Political lie has a particular capacity for spreading and is especially harmful as a result. This is "a lie that arises from and serves the interests of power" [Idem 1988, 1]. Power uses it to expand and reinforce, and above all to legitimise its rule [Idem 1991, 119]. In the organised political lie, J. Tischner saw the key to explicating the mechanisms totalitarian systems rest on. He claimed the totalitarian ideology is a peculiar system of lies, whose awareness was universal in the societies it affected. Both politicians and journalists, scientists and artists were involved in lying. Their attempts at justifying their parts in lying became another symptom of lying [Idem 1993, 67-68].

It's not only in totalitarian systems, though, that politics is especially conducive to formal non-truth. In democratic states, it's also liable to the danger of contamination with populism, demagogy, manipulation, or simple deception. In an era of post-truth, the political lie functions as a tool of political marketing employed to specific ends. Electoral campaigns have long

been referred to as the festivals of empty promises where politicians, to win the mandate of public trust, consciously "depart from truth" [Pawelczyk and Jakubowski 2017, 204]. Contemporary politicians have less and less belief in what they say themselves. Anxious for electoral success at all cost, they say not what accords with truth but what a majority of electors are currently expecting and the polls say [Wielomski 2007, 309]. In the political sphere, lie is fostered with information and communication as well as moral chaos, the absence of appropriate authorities, that is, people who can be trusted absolutely [Chudy 2007a, 269]. Undermining the value of truth in democratic societies results in the lack of moral foundations, which naturally triggers mechanisms specific to totalitarianism. Abandoning the notion of objective truth produces a situation where all the questions of axiology, ethics and anthropology are reduced to the level of resolutions arrived at as part of a voting procedure, with a parliamentary majority being the only reason. An alliance of democracy with ethical relativism brings a danger Friedrich von Hayek named "totalitarian democracy" [Hayek 1993, 249-58], where "a tyranny of the majority", capable of voting in of sheer nonsense, can be practised. Where truth loses its power in public life, facts and arguments no longer matter. What remains is invoking emotions and mutual dislikes or, put differently, a confrontation of naked forces.

As a summary to this part of the discussion, Wojciech Chudy's claim should be echoed that the fundamental task of a responsible politician is to win support for truth. It's expressed as a responsibility for the truth of political declaration and for the truth of man's nature and dignity. A politician's service to the public is, at its deepest core, a service to truth [Chudy 2007a, 272]. Without openness to truth and faith to truth once it's known, justice cannot be introduced, which is not only an ethical and political virtue but also the most profound sense of law, whose particular functions serve the realisation of fundamental assumptions of public life.

3. TRUTH AS THE CONDITION OF JUSTICE AND LAW

The concept and reality of justice contain a powerful axiological and emotional load. "Over justice, wars are fought … in the name of justice, however it is understood, revolutions break out, people are sentenced, goods are taken away from some and awarded to others, privileges are given and removed" [Ziembiński 1992, 15]. Aristotle called justice the most perfect of all virtues [Arystoteles 1956, V, 1 1129b, 30-35]. Following the Stagira philosopher, justice is usually defined as man's inner righteousness – a virtue ordering everyone to be given what is their due. Thus, justice is 'an entrenched disposition that makes people capable of just acts, of acting justly and desiring what is just' [ibid., V, 1 1129a, 6-9].

Although justice as a virtue is man's internal perfection, it is externalised and reaffirmed in relations with others, therefore, it has a social dimension. Aristotle's definition of justice draws attention to an obligatory relation between the one who is owed and the one bound to effect this obligation. The community involves relations of three types: person-person; person-community as a certain whole, and community-person. Depending on the kind of relation, a form of justice will come into play (respectively, sharing, cooperative, and distributive justice). Man is the subject of all justice relations. They are all grounded in the dignity due to each man by virtue of their being persons [Szostek 2008, 121; Wroczyński 2008, 215-16].

Any philosophical theory of the state, law and justice is based on an anthropological concept, which must, in one way or another, contain an answer to the question about man's nature. The idea of natural law remains a major point of reference for any discussions of the issue [Stawrowski 2012, 37]. In the framework of natural law, a person's rights are rooted in their rational nature. Man reads these rights, recognising some basic inclinations associated with his personal good. In line with their hierarchy, a human legal order emerges which should be respected. If justice is about giving each human person their due, it's first of all about respecting their right to life and a fully personal development. Statutory law is just insofar as it best protects both these natural entitlements of man and the entitlements founded on them [Jaroszyński 1997, 94-95].

In the context of natural law theories, justice first of all requires a recognition of and respect for the dignity of every man. Such an understanding of justice presumes the possibility of learning the truth of the special rank of that being, that is, the person. It can be said, therefore, any wrong concepts of justice originate in a philosophy relying on a false vision of man, the background of society and state. Those errors have metaphysical sources in the loss of the classic philosophical for the sake of the subjectivist perspective, which leaves no space for objective truth, including the truth of human nature. The questioning of the meaning of truth and the possibility of arriving at it, originating in the Enlightenment philosophy, has resulted in an undermining of human nature and subsequently of the connection between law and the nature of being, with the objective-good as a genuine motive for action, and with reason learning the order of real interpersonal relations [Stępień 2003, 281]. The philosophical resolutions of modernity have given rise to the legal positivism, prevailing since the 19th century, whose supporters stress the conventionality of the concept of justice. Ius-positivists, denying both any links of law and truth and the existence of any permanent truths in law, treat law, and thus justice, as determined solely by the will of the legislator [ibid., 290-92; Tokarczyk 1997, 142].

Voluntarism, present in legal positivism, was adopted and entrenched in the Marxist theories of the state, law and justice [Tokarczyk 1997, 146]. Marxist anthropology sees man as a product of both the biological evolution of species and a socio-historical product [Zdybicka 1990, 176]. The fundamental thesis of historical materialism states a human individual is, "in their reality, the entirety of social relations" [Marks and Engels 1962, 7]. "Human nature" is even a function of social relations. Everything man has in his nature is owed to society. Therefore, it's not a man-person but a collective that acts as a sovereign subject and is a holder of dignity and a subject of rights. Not a subject, man has no dignity or right to personal development. It's a collective (e.g., the party) that decides what is true, good and just, determining the goals of action and means thereto [Skrzydlewski 2003, 247-48]. Given that legal nihilism, which gave rise to its theory of state and law, was a fundamental assumption of Marxist ideology, it's no wonder the attainment of the objective, namely, a classless communist society, justified any means, including those unjust, before such a society could come into existence [Wrzesiński 1992, 213].

Individualism and its varieties offer a defective understanding of man in which a false theory of justice is rooted. Individualism presents man as an individual without any genuine social relations and bonds, hence deprived of any social duties and obligations. If any arise, it's only to protect individual good and freedom from other individuals [Skrzydlewski 2003, 246]. The anthropological concepts of Enlightenment thinkers and the idea of a pre-social state of nature, ending in the conclusion of the social contract they adopted for the purpose of explicating the origins of society and state, are the philosophical underpinnings of individualism. Any contracts restrict individuals and their freedoms, however. They are a necessary evil, temporary and conditional [ibid.]. The anthropological individualism generates theories with an anti-social bend. These theories fail to note the truth man needs others for his full development – needs a community of persons. These theories ignore the truth man has certain obligations and, by realising them, arrives at the fullness of his humanity [ibid.]. The duty of affirming the dignity of every other man takes a special place among those obligations. This cannot be done without a sense of interpersonal solidarity that helps to see every other not as a rival and enemy, but a neighbour having their good. Without a solidarity reaching the foundations of humanity, justice will not be able to step beyond the limits of egoism, enmity or revenge. It will then assume forms well-known from history, such as party, class or racial justice.

These faulty tendencies in modern social thought and practice have their contemporary varieties and shades as well. How can one defend injustice in individual and public life, then? Truth seems the most effective weapon. Justice is only feasible in a world subordinated to the primacy of truth.

Before desiring to make the world more just, therefore, one must undertake the endeavour of understanding it in depth.

CONCLUSIONS

By recalling the significance of truth to intellectual, moral, and public life, this paper intends to demonstrate the link between truth and law and, in particular, the crucial value of justice. In an era of post-truth when, as *Oxford English Dictionaries* claim, "objective facts have less effect on determining the public opinion than invoking emotions and personal convictions,"[8] justice still seems a value that opens to the effort of arriving at truth. It's in the name of justice that truth, for instance, historical truth is defended. Any attempts at bending the truth in this respect are interpreted as injustice, and thus harm, to not only individuals and particular nations, but also the whole humanity. Polish protests against the phrase "Polish death camps" that comes up in global media from time to time can be mentioned in this connection. This description, which gives rise to righteous anger, is not only against the truth, but also extremely unjust to the Polish nation and anyone who died or miraculously survived in the *Lagern* constructed by Germans during the Second World War.

Post-truth is accompanied by other, older notions, namely, postmodernism, post-culture or post-history. They all proclaim the end of something: of faith in reason, science, and progress, of human capabilities, of culture and history. A *post-justice*, announcing the end of justice, would be a nightmarish justice whose practical consequences would be quite obvious. This situation proves the notion of justice, and thus of truth, cannot be abandoned in public life. Without truth, justice would be a mere empty word that cannot be assigned any specific content, or devoid of meaning. Justice makes sense, however, even if it's not always satisfied.

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[8] See https://languages.oup.com/word-of-the-year/2016/ [accessed: 14.02.2022].

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RIGHT TO FAMILY BENEFITS FOR REFUGEES FROM UKRAINE

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Abstract. Russia's incursion into Ukraine on 24 February 2022 has forced bordering countries to host refugees fleeing from the conflict. Since the start of the war, approximately 9.75 million refugees, predominately women and children, have crossed the Polish-Ukrainian border. The situation remains challenging for those affected. The article aims to present a legal analysis of the provisions on Polish social assistance provided through family benefits to refugees from Ukraine. Article 26 of the Act on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state outlines five groups of benefits regulated by separate laws that may be enjoyed by Ukrainian citizens residing in the Republic of Poland, provided their stay is considered legal under Article 2(1) of this law. The criteria for receiving the benefit are twofold. Certain conditions are determined by the Act of 12 March 2022, while other conditions are laid out in special laws that contain provisions for a specific benefit.

Keywords: social benefits for Ukrainians; family benefits for Ukrainians; care benefits; parental benefit

INTRODUCTION

On 24 February 2022 Russia has launched an aggression against Ukraine, and countries bordering Ukraine have been faced with the necessity of accepting into their territory people fleeing from the embattled areas. 9.75 million refugees from Ukraine, mostly women and children, have crossed the Polish-Ukrainian border since the beginning of the war.[1] The situation calls for ongoing legislative efforts to regulate the legal situation of those fleeing the war, as Ukrainian citizens arriving in Poland face numerous difficulties.

The Council of the European Union on 4 March 2022 decided to implement a mechanism of so-called temporary protection for those fleeing Ukraine as a result of the war. This is a protection mechanism not used before and different from the existing institutions of temporary residence

[1] See https://strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html [accessed: 11.02.2023].

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permit and international protection in Polish domestic law. Temporary protection derives from Council Directive 2001/55/EC of 20.07.2001 on minimum standards for granting temporary protection in the event of a mass influx of displaced persons and on measures to promote a balance of efforts between Member States in receiving such persons with its consequences.[2] It is a form of protection that guarantees not only legal entry and residence, but also material assistance for those fleeing Ukraine due to the war. Temporary protection applies in all European Union member states, but the directive itself only sets a minimum standard for the protection granted. EU member states may decide to grant greater protection to those fleeing Ukraine, as Poland has done.

By the Act of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state,[3] the situation of citizens of Ukraine already residing on the territory of the Republic was regulated with effect from 24 February 2022 as well as those just entering its territory due to threats. The law protects Ukrainian citizens arriving in Poland from 24 February 2022 for 18 months (with the possibility of extending this period) [Klaus 2022, 19-21].

The purpose of this article is a legal analysis of the provisions of the on Polish social assistance provided through family benefits to refugees from Ukraine. Article 26 of the Act on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state lists five main groups of benefits regulated by separate laws, which may be enjoyed by citizens of Ukraine residing on the territory of the Republic of Poland, if their stay is considered legal under Article 2(1) of this law. They are: 1) family benefits referred to in the Act of 28 November 2003 on family benefits;[4] 2) upbringing benefit referred to in the Act of 11 February 2016 on state aid in raising children;[5] 3) "Good start" benefit, referred to in regulations issued on the basis of Article 187a of the Act of 9 June 2011 on family support and the system of foster care;[6] 4) family care capital benefit, as referred to in the Act of 17 November 2021 on family care capital;[7] 5) subsidizing the reduction of a parent's fee for a child's stay in a day-care

[2] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12.

[3] Journal of Laws of 2023, item 103 as amended.

[4] Journal of Laws 2022, item 615.

[5] Journal of Laws 2022, item 1577.

[6] Journal of Laws 2022, item 447.

[7] Journal of Laws 2021, item 2270.

center, children's club or day-care provider, as referred to in Article 64c(1) of the Act on the care of children up to 3 years of age.[8]

The conditions that must be met in order to receive the benefit are two-tiered. Some of them are determined by the Act of 12 March 2022. Other conditions are determined by special laws containing provisions for a specific benefit.

1. FAMILY BENEFITS

On the basis of Article 26(1)(1) of the Act on assistance to Ukrainian citizens residing in the territory of Poland are entitled to family benefits referred to in the Act of 28 November 2003 on family benefits. Family benefits are cash benefits and allowances related to the birth and upbringing of a child in the territory of Poland. The granting of family benefits is subject to an income criterion, i.e. income per family member. Family benefits are due for the period of residence on Polish territory.

Family benefits are: 1) family allowance and supplements to family allowance; 2) one-time allowance for the birth of a child (so-called "becikowe"); 3) care benefits, such as: nursing allowance, nursing benefit and special care benefit; 4) parental benefit. All of the above mentioned family benefits will be characterized in the context of helping Ukrainians.

By its nature, family allowance is intended to partially cover a child's living expenses. It is granted to both parents or one of them, the child's legal or actual guardian, or an adult learner who is not a dependent of the parents (if the parents are deceased), until the child reaches the age of 18 or completes schooling, but no longer than until he or she reaches the age of 21, or 24 if he or she continues schooling at a school or college and has a moderate or severe degree of disability [Drembkowski 2022, 182].

The granting of the right to family allowance depends, among other things, on meeting an income criterion. To receive it, the average monthly per capita family income or the income of a learner must not exceed the amount of PLN 674.00 or PLN 764.00 if the family member is a child with a disability certificate or a moderate or severe disability certificate. If the family income exceeds the amount entitled to family allowances, family allowances and supplements to family allowances are entitled to the difference between the total amount of family allowances plus supplements and the amount by which the family income was exceeded.

The amount of family allowance is per month: 1) PLN 95.00 per child up to the age of 5; 3) PLN 124.00 per child over the age of 5 until completion

[8] Journal of Laws 2023, item 204.

of the 18th year of life; 4) PLN 135.00 per child over the age of 18 until the completion of the 24th year.

The application is submitted to the municipality or city office with jurisdiction over the place of residence.[9] If the delivery of any of the documents would be impossible due to the ongoing hostilities in Ukraine, you should explain this circumstance in writing and ask for a waiver. To the basic amount of family allowance there are also allowances for: birth of a child; care of a child during parental leave; single parenting of a child; raising a child in a large family; education and rehabilitation of a disabled child; the child's commencement of schooling at a school outside the place of residence; beginning of the school year [Pietrzak 2022, 30-31].

One-time allowance for the birth of a child (so-called "becikowe") is due to the child's mother or father and the child's legal or actual guardian in the amount of PLN 1000. The right to a one-time payment for the birth of a child is granted to persons whose income per person in the family does not exceed the amount of PLN 1922.00. A one-time payment for the birth of a child is entitled if the child's mother remained under medical care no later than from the 10th week of pregnancy until the day of delivery. The application for determining the right to a one-time birth grant shall be accompanied by a certificate that the child's mother remained under medical care no later than from the 10th week of pregnancy until the date of delivery. A certificate that the child's mother remained under medical care no later than from the 10th week of pregnancy until the date of delivery may be issued by a doctor or midwife [Maciejko 2019, 215-20]. An application for a one-time allowance must be submitted within 12 months from the date of the child's birth to the municipality or municipal social assistance center. If the application relates to a child under legal guardianship, de facto guardianship or an adopted child, the application shall be submitted within 12 months from the date of the child's assumption of guardianship or adoption, no later than the child's 18th birthday.[10]

2. CARE BENEFITS

Care benefits include: attendance allowance, special attendance allowance, attendance benefit. Attendance allowance is granted to partially cover expenses arising from the need to provide care and assistance of another person due to inability to live independently.

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[9] The application can be found at the office or on the website: https://empatia.mpips.gov.pl/-/zasilek-rodzinny [accessed: 11.02.2023].

[10] The application form and a list of required documents can be found at: https://empatia.mpips.gov.pl/-/zapomoga-z-tytulu-urodzenia-dziecka-tzw-becikowe – [accessed: 11.02.2023].

Attendance allowance is available to: a disabled child; a disabled person over the age of 16, if he or she has a severe disability certificate; a person who has reached the age of 75; a disabled person over the age of 16 who has a moderate degree of disability, if the disability arose by the age of 21 [Drembkowski 2022, 183-90]. Attendance allowance is entitled to PLN 215.84 per month.

The special care allowance is granted in order to provide permanent care for a person with a certificate of significant disability or a certificate of disability indicating the need for permanent or long-term care or assistance of another person in connection with significantly limited ability to lead an independent life, and the need for permanent participation of the child's guardian in the child's daily life in the process of treatment, rehabilitation and education.

The special care allowance is available to persons with maintenance obligations, as well as spouses, if they do not take up employment or other gainful employment or resign from employment or other gainful employment. Special care allowance is entitled to PLN 620.00 per month. The special care allowance is due if the total per capita income of the family of the person providing care and the family of the person requiring care does not exceed the income criterion amount of PLN 764 [Pietrzak 2022, 34].

Attendance benefit is a benefit due to resignation from employment or other gainful employment in order to take care of a person with a certificate of significant disability or a certificate of disability indicating the need for permanent or long-term care or assistance of another person in connection with significantly limited ability to lead an independent life, and the need for permanent daily participation of the child's guardian in the process of treatment, rehabilitation and education. Attendance benefit is available to strictly defined persons: mother or father, the actual guardian of the child, a person who is a related foster family or other persons with maintenance obligations, with the exception of persons with severe disabilities.

The attendance benefit is due if the disability of the person requiring care arose: no later than the completion of the 18th year of life or during school or higher education, but no later than the completion of the 25th year. The attendance benefit is due regardless of family income and amounts to PLN 2119.00 per month. In order to receive the care benefit, nursing benefit, special nursing benefit, one must file an application to establish the right to the benefit at the municipality or city office competent for the place of residence[11] [Bochenek 2022].

[11] A specimen form and a list of required documents are available on the website: https://empatia.mpips.gov.pl/-/zasilek-rodzinny [accessed: 11.02.2023].

3. PARENTAL BENEFIT

Parental benefit is a type of allowance granted in connection with the birth of a child, for a period of 52 to 71 weeks (depending on the number of children born, taken into care or adopted). It is granted regardless of income criterion and amounts to PLN 1,000 per month [Pietrzak 2022, 35].

Parental benefit is available to: the mother or father of the child; the actual guardian of the child; a foster family, excluding a professional foster family; a person who has adopted a child; a temporary guardian [ibid., 36].

Parental benefit is not available if: 1) maternity benefit or the equivalent of maternity benefit is collected; 2) the person applying for parental benefit has ceased to take personal care of the child; 3) in connection with the upbringing of the same child, the right to parental benefit, supplement to family allowance, nursing benefit, special care allowance or guardian's benefit is already established; 4) abroad is entitled to a benefit of a similar nature to the parental benefit.

4. CHILD-REARING BENEFIT (500+)

The child-rearing benefit (often referred to as the "500+ benefit") is a benefit to partially cover expenses related to raising a child, including child care and meeting the child's living needs. The money is paid by the Social Insurance Institution (ZUS) to Ukrainian citizens who crossed into Poland after February 23, 2022, due to the war effort. The money, in the amount of PLN 500 per month, is paid for each child until he or she reaches the age of 18. The benefit is not dependent on income and is paid in periods from June 1 to May 31 of the following year [Drembkowski 2022, 190-94]. The benefit is transferred in non-cash form every month to the payment account number in Poland indicated in the application.

A parenting benefit can be applied for: 1) a citizen of Ukraine or the spouse of a citizen of Ukraine who, after February 24, 2022, arrived with a child from Ukraine to Poland due to hostilities; 2) a citizen of Ukraine or the spouse of a citizen of Ukraine who, after February 24, 2022, came from Ukraine to Poland in connection with the hostilities, and the child was born in Poland; 3) a citizen of Ukraine or the spouse of a citizen of Ukraine who resided in Poland before February 24, 2022, but the child for whom the benefit is sought came from Ukraine to Poland after February 23, 2022 in connection with hostilities; 4) a citizen of another country (e.g., Poland) who, on the basis of a Polish court decision, has custody of a child who is

a citizen of Ukraine and arrived from Ukraine to Poland after February 23, 2022 in connection with hostilities.

The special application for 500+ in Ukrainian can only be submitted electronically via the ZUS's Platform for Electronic Services (PUE). Information on how to set up an account in this system is provided at Social Security offices. If the Social Insurance Institution (ZUS) grants a parental benefit, you do not receive a decision on the case, but only information about the granting of the benefit on your profile on the Social Insurance Institution's PUE, as well as by e-mail to the address provided in the application [Drembkowski 2022, 190-95].

A Ukrainian citizen who wishes to file an application with the Social Security Administration must prepare: a) passports – of the applicant and the child or other identity documents on the basis of which the border was crossed (if the applicant has them); b) certificate of the Polish PESEL ID – of the applicant and the child; c) bank account number in Poland; d) telephone number in Poland and e-mail address; e) a decision of a Polish court, if the applicant is a temporary guardian; f) a document confirming that the applicant has foster care of the child, if there is such a situation; g) a document confirming the legality of the applicant's residence and access to the labour market in Poland, if the applicant arrived in Poland before 24 February, 2022 [Pietrzak 2022, 38-39].

5. "GOOD START" BENEFIT

On the basis of Article 26(1)(3) of the Law on Aid to Ukrainian citizens legally residing in the territory of Poland, after February 24, 2022, there is a benefit called "good start". This support consists in granting a benefit of PLN 300 for each child once a year.

The "good start" benefit is due to: 1) parents, actual guardians, legal guardians, foster families, persons running family children's homes, directors of care and educational institutions, directors of regional care and therapeutic institutions – once a year per child; 2) to school learners – once a year [ibid., 39].

The "good start" benefit is also due to a temporary guardian who takes care of a minor who resides in the territory of the Republic of Poland without the care of adults responsible for him in accordance with the law in force in Poland. The "good start" benefit is due in connection with the start of the school year until the completion of: by a child or a student of 20 years of age, or 24 years of age – in the case of children or students with a disability certificate.

Proceedings for the "good start" benefit are conducted by the Social Insurance Institution (ZUS). Establishment of the right to the "good start" benefit and its payment take place, respectively, at the request of the mother, father, actual guardian, legal guardian, foster family, person in charge of a family home for children, director of an educational institution, director of a regional educational and therapeutic institution or a student [Drembkowski 2022, 182-94].

A citizen of Ukraine legally residing on the territory of the Republic of Poland, the right to the "good start" benefit, is determined starting from the month in which the application was received, not earlier than from the month in which the citizen was entered in the register kept by the Commander-in-Chief of the Border Guard and applied for a PESEL number. In the case of benefits for a child, the child should also be entered in this register.

The application for benefits referred to in Article 26(1) of the Act on assistance to Ukrainians shall contain the applicant's PESEL number and, if any, the type, series and number of the document on the basis of which the applicant crossed the border, and in the case of benefits for a child – the child's PESEL number and, if any, the type, series and number of the document on the basis of which the applicant crossed the border. The Social Insurance Institution shall make available to a person applying for the "good start" benefit information on the granting of the "good start" benefit on his/her information profile created in the ICT system made available by the Social Insurance Institution. Failure to receive information on the award of the "good start" benefit does not stop the payment of this benefit [Szmid and Sawicki 2022].

6. FAMILY CARE CAPITAL

Pursuant to Article 26(1)(4) of the Act on assistance, Ukrainian citizens legally residing in the territory of Poland after February 24, 2022, are entitled to family care capital if they reside with their children in the territory of Poland.

The purpose of the capital is to partially cover the expenses of raising a child, including child care and meeting the child's living needs. The capital is entitled to either PLN 500 or PLN 1,000 per month per child in the family. The total amount of capital paid out cannot exceed PLN 12,000 per child. The Family Care Capital will be paid in monthly parts of PLN 500. Parents will be able to independently indicate whether they want to receive the Capital in the amount of PLN 500 for 24 months or in the amount of PLN 1,000 for 12 months. The benefit is payable regardless of income [Pietrzak 2022, 46].

The right to the capital is granted to persons referred to in Article 2(1) of the Act of 17 November 2021 on family care capital, if they reside in the territory of the Republic of Poland for the period during which they are to receive the capital, unless the provisions on coordination of social security systems or bilateral international agreements on social security provide otherwise.

The capital is entitled to the mother or father, by which is also meant the person who has adopted a child for upbringing and has applied to the guardianship court to initiate proceedings for its adoption, for the second and each subsequent child in the family, if the child resides together and is dependent on the mother or father. The capital is payable from the first day of the month in which the child turns 12 until the last day of the 35th month preceding the month in which the child turns 36. This means that in the month in which the child turns 36, the benefit will no longer be paid. Where a child, in accordance with a court decision, is under the alternate custody of both divorced, separated or living apart parents, exercised during comparable and recurring periods, the amount of capital shall be determined for each parent in the amount of half of the amount of capital due [Szmid and Sawicki 2022].

In the event that the mother or father wastes the capital or parental benefit paid to them or spends it contrary to its purpose, the due capital in whole or in part shall be transferred to them by the head of the social welfare center or the director of the social services center, respectively, in the form of in-kind or payment of services. Receipt of applications for family care capital, their processing and payment of this benefit are handled by the Social Insurance Institution (ZUS) [ibid.].

7. CO-FINANCING FOR A CHILD'S STAY IN A NURSERY, CHILDREN'S CLUB OR DAYCARE

The co-financing is granted to a child who attends a nursery, children's club or is taken care of by a day caregiver, if the parent does not receive family care capital for this child. The parent will have to decide whether they want to use the subsidy or the family care capital. The co-financing amounts to a maximum of PLN 400 per child per month, not more than the fee paid by the parents for the child's stay in a nursery, children's club or day care provider. The fee for a child's stay in the facility does not include the fee for meals. The subsidy will be paid to the bank account of the facility attended by the child.

8. ONE-TIME SOCIAL BENEFIT FOR FIRST NEEDS

On the basis of Article 31 of the special law, citizens of Ukraine residing in the territory of Poland whose stay is considered legal, i.e. citizens of Ukraine who arrived in the territory of Poland after February 24, 2022 and who have been assigned a PESEL number, are entitled to assistance in the form of a one-time cash benefit of PLN 300 per person. It can be used for living expenses, in particular for food, clothing, footwear, personal hygiene products and housing fees. The possibility of granting such a benefit, which can help those fleeing the war in their initial plight, should be viewed as positive. The Polish authorities examining the application for this benefit are: the commune head, the mayor and the president of the city competent for the applicant's place of residence. An application for payment of a one-time cash benefit shall be submitted in writing to the social welfare center of the municipality having jurisdiction over the place of residence of the Ukrainian citizen. The application can be submitted by the eligible person, his legal representative, temporary guardian, or the person with actual custody of the child. The legislator specifies in the spec that the application must contain the data of the person making the application or the data of the person on whose behalf the application is made: first name(s) and last name; date of birth; nationality; gender; type of document on the basis of which the border was crossed; series and number of the document constituting the basis for crossing the border; information on the date of entry into the territory of the Republic of Poland; address of stay; contact information, including telephone number or e-mail address – if possessed; PESEL number – if assigned. It should be noted that the award of a one-time cash benefit by the mayor does not require the issuance of a decision, so a negative decision cannot be appealed to a higher authority [Pietrzak 2022, 27].

CONCLUSIONS

As of mid-March 2022, special benefits for Ukrainians in Poland and other forms of financial assistance for refugees coming to our country from war-torn Ukraine have been introduced. Financial benefits for Ukrainian citizens who have a child in their care are almost identical to those provided for Polish citizens. War refugees are entitled to, among other things, a one-time cash benefit of 300, a benefit from the Family 500+ program, a subsidy for a child's nursery fee or a benefit under the "good start" benefit. The provisions of the Law of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of Ukraine rightly make the provision of financial assistance conditional on legal residence

in the territory of the Republic of Poland, linked, among other things, to the assignment of a PESEL number.

Currently, the legislature's amendments, conditioning that when a foreigner leaves the country for more than a month, he loses the right to legal residence and money for children, should be viewed as positive. In order that cases of unlawful collection of benefits by those who no longer meet these requirements can be prevented, the Border Guard Commander-in-Chief shall make available to Social Security and local governments information on the departure of a refugee in excess of 30 days. The introduction of a legal basis for ZUS and municipal institutions to obtain information on the history of border crossing by a Ukrainian citizen, including the date of each entry and exit from Poland, should be done with the utmost caution so that the principle of trust in the state and the laws it enacts is not violated. For, as the Supreme Administrative Court recognized, "a component of the principle of trust in state bodies, taken as a citizen's legitimate right to expect a certain action of the state, is the predictability and consistency of the actions of its bodies. This principle should be viewed in light of the need for both the authority and the party to the proceedings to comply with it."[12]

It should also be noted that the provisions of the Law on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state properly modify the rules for granting benefits introduced by separate laws, in order to adapt them to the situation, and thus to make it possible for Ukrainian citizens to take advantage of these entitlements.

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[12] Judgment of the Supreme Administrative Court of 8 March 2016, ref. no. II OSK 1688/14, Lex no. 2113112.

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THE STRUCTURE OF NETWORK ADMINISTRATION ON THE EXAMPLE OF THE ORGANIZATION MARKET SURVEILLANCE REGARDING PRODUCT SAFETY IN THE EUROPEAN UNION

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Abstract. This article examines how product surveillance actors operate in the EU's network structure, with a focus on forms of cooperation. Specifically, the study explores coordination systems adopted in market surveillance to demonstrate the network structure's suitability for implementing the European Union's policy on product safety assurance. The paper aims to demonstrate that in the context of the rapidly evolving e-commerce industry and the rise in cross-border sales of goods to the EU, market surveillance is ensured through a legal framework that involves cooperation between surveillance authorities and economic operators at both the national and EU level, within a network structure. The effectiveness and efficiency of this approach is established through the coordination of actions and sharing of information among the entities involved.

Keywords: administrative networks; network administration; EU internal market; market surveillance; coordination

INTRODUCTION

The normative system of product safety is intended to make the free movement of goods in the EU a reality and, given the need for the marketed products to be verified for safety, market surveillance had to be organized as a networked structure, so as to ensure uniform and consistent application and enforcement. However, dynamic technological progress (development of the digital environment and online transactions) and the emergence of new supply chains in the EU market made it necessary to update the existing structure by introducing new organizational arrangements to boost the effectiveness of surveillance. The increasing number of remote,

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largely online transactions, and products from third countries entering the EU internal market, requires increased surveillance, due to the growing risk of an influx of products that fail to meet the requirements laid down in the harmonized standards and thus pose various risks to users purchasing goods online. The new market realities imply the necessity for networked structures of market surveillance as well as coordinated action and cooperation of network administration actors to ensure effective and efficient surveillance of the safety of products entering the EU through all distribution channels, including online.

In view of such risks, integration of market surveillance was augmented by the EU lawmaker in the EU Regulation 2019/1020,[1] which introduced a new approach to product safety surveillance. First and foremost, it is to be brought up to date by reinforcing network market surveillance structures and the applicable modes of administrative interaction. This paper sets out to demonstrate that in the conditions of dynamic development of e-commerce and the influx of remotely purchased products into the EU market, the efficiency and effectiveness of market surveillance is assured by the legal mechanism of cooperation, including coordination of actions of surveillance authorities and cooperation with economic operators at the EU and national level within the network structure.

1. COOPERATION OF THE NETWORKED ECONOMIC GOVERNANCE AND THE CRUCIAL ROLE OF COORDINATION

The cooperation is not an unequivocal notion in either legal or doctrinal terms. When qualifying diverse forms of action which involve joint efforts resulting from the mutual relations of entities – owing to specific organizational or functional ties – cooperation is usually the preferred term. This produces certain difficulties in the legal qualification of acts which constitute a manifestation such a mode of action on the part of administrative entities.

In the jurisprudence of public economic law, cooperation is considerably underscored when analyzing the operation of network administration which, given the nature of its functions, performs public tasks by way of cooperation [Królikowska-Olczak 2018]. After all, it is characteristic of the tasks carried out in networked structures to be complex as well as involve multiple dimensions and intricate configurations, which require interaction between specialized entities. In order to perform such tasks effectively and efficiently, the lawmaker increasingly often takes advantage of (and creates) networks

[1] Regulation (EU) 2019/1020 of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, OJEU L 169/1 of 25 June 2019.

of connections within the EU and national administration, establishing a normative mechanism of cooperation, along with necessary rules governing coordination. By extending the circle of cooperating entities to include those outside the administrative structures, it sets out rules of cooperation with private entities.[2]

The gradually broader catalogue of entities involved in the implementation of public tasks (public administration, administrative entities) and the deepening relations (in terms of competences and tasks) between them yields a picture of cooperation that takes place on many levels, using diverse means and legal forms of action [Strzyczkowski 2023, 199]. Therefore, cooperation should be part of a more comprehensive research on the typology of cooperative activities. Cooperation within the structures that form a network of competence – and task-related connections may differ in intensity (which is determined by the nature of the relations occurring between the cooperating entities, the degree to which decisions may tie one entity to another), be undertaken by distinct categories of administrative entities (those which possess the status of public administration bodies and those which do not, but perform administrative functions nonetheless), relying on typical though increasingly often specific (different from typical, displaying distinct features) legal means and forms of action. Collaboration is an immanent characteristic of both administration and public management,[3] due to the structural organization of public administration and the tasks with which they are entrusted. M. Stahl observes that: "The area of collaboration is extensive [...]. The scope of collaboration encompasses the internal sphere of state administration, the sphere of public administration in the broad sense, the sphere of collaboration of such administration with non-public entities that perform public tasks, as well as the external sphere – the cooperation of public administration in a co-domain with private entities" [Stahl 2013, 358ff and the literature cited therein]. Network administration provides an excellent testing ground for these findings, particularly where it concerns vital functions of administration in the economy.

Studies which analyze cooperation within the network of authorities and collaboration with entities outside its structures – which are engaged in public tasks – emphasize that its scope is constantly expanded to include spheres of activity that, being crucial from the standpoint of the state as well as the European space, have hitherto been reserved for public administration. Exercising regulatory, surveillance, control and rationing prerogatives represent those areas in which cooperation is not merely important – it is

[2] On cooperation see e.g. Mączyński 2014, 29-30 and the literature cited there.

[3] On public management see e.g. Hausner 2008, 48; Gow and Dofour 2000, 578-79; Hofmann and Türk 2009, 1.

indispensable and integral to the performance of complex tasks.[4] Still, it should be noted that it takes place within the framework of tight (collaboration) or relatively loose organizational ties (cooperation), which involve both authoritative and non-authoritative forms of cooperation: consents, opinions, exchange of information, consultations. For this reason, it seems that special attention in the analyses of cooperative modalities should be paid to coordination, which not only exemplifies a cooperative relationship but also serves to organize and structure the activities of the collaborating entities, which is also evident in the analyzed product safety system that operates within a network of entities.

In research on cooperation, coordination of the activities of public administration bodies – or, more broadly, administering entities – appears easier to capture from a structural point of view than other modalities whose nature is not so "distinctive". Even so, it must be stressed that the concept of coordination is not unambiguous, and the views formulated on this form of cooperation, including the legal construction of coordination, offer no conclusive solutions [Rudnicki and Skoczny 1971, 798-808; Sobczak 1971, 298; Weiss 1975, 25-46]. This is because coordination and acts of coordination are equated with cooperation and collaboration. T. Kotarbiński defines coordination as working together to eliminate conflict [Kotarbiński 1965, 15]. According to O. Lange, coordination means gearing individual activities in a concerted manner towards a common goal [Lange 1966, 47]. The underlined element of "achieving a common goal" in the course of performing public tasks may describe the essence of coordination, but it is also a component in "cooperation" and "collaboration". Thus, distinguishing between the concepts is fairly problematic. The semantic demarcation of cooperation, collaboration and coordination also proves difficult because the legal instruments and their assigned legal forms of action are often the same or structurally similar, while their catalogue is not finite.

Coordination serves public administration bodies whose spheres of competence "intersect" to resolve common problems or to accomplish common objectives, but as the legal relationship of coordination is shaped, one entity (the coordinator) exerts an influence on another entity (the coordinated). Importantly, the participants in this relationship are unable to optimally fulfil the task (accomplish the objective) on their own due to the scope of respective tasks and competences. This means that the lawmaker introduces the relationship of coordination when cooperation within the coordinative modality serves to harmonize and integrate the actions of certain organizational structures by aligning the interests of the coordinating entity with those of the coordinated entity; specifically, this is the public interest whose

[4] On the state functions in the economy see Popowska 2006.

exponent is the coordinating entity. At this point, one might ask about the interdependencies occurring between the entities in the coordinative relationship, including the nature of the relations between them. These interdependencies may be considered on multiple levels: is it a relationship of equality or subordination; can one of the entities intervene authoritatively in the activities of the other entity of the relationship, thus determining its substance and, moreover, can the entity with respect to which certain actions are taken (as part of cooperation) evade taking actions that ultimately serve to shape that relationship? [Kokocińska 2018, 65-78]. This is decided by the normatively formulated structure of the legal relationship, including the competences, the position of an authority in the hierarchy of public administration, the scope of its tasks and the employed cooperation instruments.

In the coordinative arrangement, which should be regarded as a qualified form of cooperation, the activities of the coordinating entity have an indirect impact on the actions of the coordinated entity, whereby the coordinating entity does not take over the competences of the coordinated entity, but influences how they are used by the coordinated entity. Therefore, the resulting organizational and competence arrangement may be seen as a "type of relationship of superiority" of the coordinating entity over the coordinated entity, which does not derive from the competence arrangement. In a coordinative setup, the organizational independence of the cooperating entities whose activities are to be harmonized is preserved, as demonstrated in the analysis of the product safety system later on. It should be noted that coordinative arrangements are permanent, and the relations linking the entities involved are peculiar and unlike other organizational arrangements, as their legal grounds are distinct in material and formal terms [Chełmoński 1980, 476-77]. The fact that coordination relies on a separate normative basis and constitutes a distinct legal institution distinguishes this formula of cooperation from others. Another special feature of coordination is its complementary nature, in the sense that it serves to accomplish public objectives as part of other functions of the state performed by public administration bodies (surveillance in the economy in this particular case) by way of harmonizing and integrating activities, or establishing uniform positions.

Coordination is vital for the functioning of the surveillance system in the product market, but one cannot fail to note the increasing importance – particularly underscored in the EU regulations – of another mode of cooperation, in which public administration bodies team up with private entities. The inclusion of private actors in public administration tasks is essentially based on collaboration. The tendency to "shift the delivery of public tasks" to entities outside The Structure of public administration has been noticeable for many years, resulting from the implementation of e.g. the principle

of partnership or the concept of civil society. The cooperation between public and private entities gives rise to a number of highly complex issues, such as the legal nature of the relationship, the type of relationship between the private entity which carries out a public task and the citizen, the legal forms of cooperation or the scope of responsibility. These questions require detailed legal analyses as the cooperative purview of the administration involved in product market surveillance sees constant expansion.

2. THE NORMATIVE PREMISES UNDERLYING PRODUCT SAFETY SYSTEM WITHIN A NETWORK STRUCTURE

In the normative aspect, product market surveillance is a component in the broadly defined legal system of product safety, which comprises: legal measures (product requirements, essential or otherwise) product standards and technical specifications, rules and standards which inform the competence of conformity assessment bodies, rules of granting accreditation, conformity assessment procedures (modules and rules for CE marking), legal institutions (market surveillance, including controls of products from third countries), administrative surveillance structures (surveillance authorities)[5] as well as organizational and technical tools (information systems for dangerous product properties). In EU legislation, the essential premises, objectives, institutions and legal measures of such a system are specified in Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93,[6] as well as in Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008.[7] The rules of market surveillance rules are governed under Regulation 2019/1020 EU of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011.[8]

Market surveillance has been introduced with a view to safeguarding legally protected values such as health and human life, and protect the environment from hazards that may be caused by products that fail to comply

[5] More broadly on the premises of the compliance system: Commission notice – The 'Blue Guide' on the implementation of EU product rules 2022, (2022/C 247/01), OJEU C 247/1 of 29.6.2022; Kieres, Borkowski, Kiczka et al. 2009, 228-47; Żywicka 2018, 283-91; Fisher 2017, 234-40.

[6] OJUE L 218/30 of 13 August 2008, consolidated text of 16 July 2021.

[7] OJUE L/91 of 23 March 2019.

[8] OJEU L 169/1 of 25 June 2019.

with the normative requirements. The majority of non-food products placed on the internal market (irrespective of the distribution channel) are currently subject to market surveillance, in order to assess whether they meet the requirements set out in harmonized standards.[9]

With the efficient functioning of the economy in mind, the importance and the need for a networked market surveillance is well evinced in what is essential to the compliance verification process [Żywicka 2023, 127-42]. The chief premise of the conformity assessment system (and more broadly: the normative system of product safety) is that Member States shall recognize harmonized products that have been obligatorily checked prior to being marketed in the EU and have met the requirements set out in the European harmonized standards. Compliance with these requirements is attested by the CE marking attached to the product by the economic operator. The object of regulation in the system's harmonized standards is in fact expressed in specific, precisely defined requirements for products. The obligation to demonstrate that these requirements are met rests with the manufacturer or importer of products, which are verified in the course of applicable procedures. At the same time, it should be emphasized that the so-called "new approach" in technical harmonization presumes that a product is safe when it satisfies the essential requirements only (as defined in the technical standards), whereas failure to meet other, non-essential requirements, i.e. those not included in the standards, cannot result in restrictions on the marketing of the product on the internal market [Idem 2018, 433-34].[10]

Another reason to have a networked market surveillance in place is that public administration also outsources tasks (privatization of public tasks) relating to product compliance verification. These tasks are mainly performed by private entities (accredited notified bodies) [Idem 2020, 138-39], or in fact entrepreneurs engaged in conformity assessment business. Provision of such services is a commercial undertaking, and takes place in accordance with the rules of competition which, among other things, means that these entities compete in terms of speed of delivery or the fee they charge for the services. The commercial nature of the tasks transferred to the private sphere may raise concerns about their reliability, especially since it is the entrepreneur (manufacturer, distributor, importer of products) who has

[9] Regulation 2019/1020 EU applies to several dozen types of non-food products, the requirements for which are specified in more than 70 regulations and directives listed in Annex I to the Regulation.

[10] The identification of other hazardous characteristics of a product (not covered by standardisation) does not release the manufacturer or importer from liability; the principles which apply in such cases are set out in Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJEU L 011, 15.01.2002, P. 0004-0017. Recital 66, Regulation 2019/1020 EU.

the right to choose a notified body to have their products checked for compliance [Idem 2016, 53-62]. Furthermore, the entrepreneur may opt to have the procedure carried out by a notified body based in any EU country. The reliability of compliance verification services is guaranteed by administrative-legal regulations which set out detailed, stringent requirements for entities seeking accreditation (notified body status) and benchmarks of efficient market surveillance by public authorities.

3. NETWORK STRUCTURE OF PRODUCT MARKET SURVEILLANCE IN THE EU

From the standpoint of the issue discussed here, it is fundamentally important that the organization of administrative market surveillance structures – i.e. procedures, means of surveillance and applicable sanctions – remains within the purview of the Member States (in line with the principle of respecting national identity of the states), which regulate it within their own administrative structures and according to their own legal orders; simultaneously, the national market surveillance authorities are integrated with the European surveillance structure as part of the administrative network. This is what I. Lipowicz describes as Europeanization of administrative structures in the structural layer [Lipowicz 2008, 5-12]. Given the very broad extent of surveillance and international flows of goods, having such competences concentrated in the hands of a single authority (be it only at the national level) would, considering efficiency and effective enforcement, be difficult to say the least [Żywicka 2019, 434]. In the light of Article 10 of Regulation 2019/1020 EU, each Member State appoints at least one surveillance authority and a single liaison office. Member States are further required to provide budgetary, personnel and organizational resources to efficiently carry out market surveillance of products provided via all distribution channels, carry out controls of products, organize their activities and ensure coordination among themselves at the national level, as well as engage in cooperation across the EU. Each Member State therefore establishes an internal organizational framework for market surveillance, which bears the main responsibility for carrying out surveillance duties and organizing procedures in the country. While being part of the domestic administrative structures, this arrangement is equipped with prerogatives to enforce EU product safety law.

In order to maintain consistency in the application and enforcement of law at EU level, the following have been regulated: uniform conditions for inspections, criteria for determining the frequency of controls and the number of samples to be inspected for specific products or categories of products, procedures for designating Union testing bodies, benchmarks

and control techniques on the basis of a common risk analysis at Union level, particulars concerning statistical data from controls carried out by appointed authorities in relation to products subject to EU law, details of arrangements for the implementation of information and communication system, particulars of data that customs authorities submit to have products undergo the customs procedure known as "release for free circulation" procedure as well as the approval of individual pre-export product-related control systems and withdrawal of such approval.[11] Executive powers in this respect have been granted to the European Commission; other market surveillance bodies at EU level include the Union Product Compliance Network and the Administrative Cooperation Groups (ADCOs).

This arrangement of competences results in a two-tier network organization of administrative market surveillance structures, consisting of the European Commission, the Union Product Compliance Network and the Administrative Cooperation Groups (ADCOs) at EU level, and the national market surveillance authorities (including single liaison offices) in the Member States at the national level. By defining the organizational and functional relationships between authorities, normative regulations align mutual interactions so that they remain coherent both internally and as part of the network. Still, this arrangement translates into the competences of the individual bodies involved in market surveillance (lawmaking, product controls, administrative proceedings). Legislation specifies the scopes of action of the authorities, including the competence of certain bodies to influence others.

Thus, market surveillance authorities actively identify and eliminate the risk to the life and health of users presented by products, prioritize surveillance activities and carry out coordinated enforcement in the internal market and domestic markets, which requires close cooperation at EU level. In order to enhance this cooperation and coordination, Regulation 2019/1020 EU established the Union Product Compliance Network, a structure composed of representatives of all entities involved in market surveillance (Article 30 of the Regulation).

The activities of market surveillance authorities are based on administrative coordination, collaboration and cooperation, also with third countries. However, the coordination setup adopted in Regulation 2019/1020 does not allow a single coordinating entity to be clearly and easily identified. In fact, two centres coordinating the activities of this network administration appear to be in evidence. In the organizational, formal and financial terms, the coordinating body is the Commission; it is vested with executive powers while its tasks include ensuring smooth functioning of the information

[11] Recital 66, Regulation 2019/1020 EU.

and communication systems at EU level and use of administrative cooperation instruments. On the other hand, the Union Product Compliance Network is responsible for the substantive aspects of surveillance, since its activities are to ensure coordination and cooperation between Member State enforcement authorities and the Commission; it is also expected to optimize EU market surveillance practices and increase their effectiveness (Article 31 of the Regulation). However, the coordination prerogatives of the two entities are not disjunctive but derive from one another and, being complementary, necessitate close interaction between the Commission and the Union Product Compliance Network in the field of market surveillance (Articles 31 and 33 of Regulation 2019/1020).

In this organizational arrangement, the role of the Administrative Cooperation Groups (ADCOs) is also quite relevant. Being sectoral, they deal with specific market surveillance issues relying on sector-specific directives and regulations that lay down requirements for specific product groups. All ADCO groups have the status of coordinated entities, just as the national market surveillance authorities. It should be stressed that both coordinating and coordinated bodies are composed not only of representatives of the Commission, but also representatives of each Member State, including representatives of each single liaison office and, optionally, national experts. Consequently, countries are actively involved in the decision-making process while particular features of the trade in goods in any national economy may be taken into account when determining prospective action. However, it would be difficult to disagree with a problem identified by I. Lipowicz, namely that – on a European scale – the responsibility for taking decisions on the detected infringements may become blurred with administration networked in this fashion [Lipowicz 2008, 7].

The efficiency and compatibility of EU market surveillance at Union and national level are to be ensured by the single liaison offices. Established in each Member State, the latter bridge the EU and national structures. They are responsible for representing a coordinated position of the domestic market surveillance and customs authorities – including those which carry out controls of products entering the Union market – and for providing information on national market development strategies. Very often, such offices act as coordinating entities with respect to the domestic network structure of market surveillance.

4. LEGAL FORMS AND MEANS FOR ORGANIZING THE ACTIVITIES OF THE NETWORKED MARKET SURVEILLANCE ADMINISTRATION IN THE EU AND COOPERATION WITH ECONOMIC OPERATORS

In an internal market "without borders" with its highly dynamic influx of goods, product safety necessitates coordinated action, such as formulating common control plans, or having joint or sequential controls carried out by the administrative authorities of different countries. Hence, their positions need to be continually confronted (from the various standpoints dictated by their location in the network structure) while issues that may arise have to be solved jointly. This problem has long been recognized by the EU lawmaker, therefore coordination and administrative cooperation has been opted for as a form of organizing market surveillance activities, enabling the stakeholders to arrive at common positions and uniform policies in a shared area of interest (ensuring product safety). The network of links and adopted coordination arrangements makes it possible to undertake prompt action. The network administration is normatively obliged to engage in cooperation while specific authorities (solely on material grounds) are equipped with coordinative competences.

Market surveillance system relies on traditional acts to organize the activities of the network administration: market surveillance strategies (Article 13) surveillance plans and programmes (Article 12(2)), agreements, positions, opinions, peer reviews and endorsement of best practices (Article 12(1)) as well as ongoing exchange of information between the surveillance authorities in all coordination arrangements. Regulation 2019/1020 comprehensively sets out the relevant responsibilities of the authorities at EU and national level. These forms are intended to ensure coherent action, consistent application of law and surveillance conducted in line with uniform rules. The measures listed above facilitate accomplishing the objectives set for this structure, which fall within the purview of respective authorities involved.

In parallel with coordination of market surveillance, one develops administrative cooperation or so-called "joint activities to promote compliance", involving not only the administering authorities but also the administered entities participating in the product supply chains. Article 9 of the Regulation imposes a legal obligation for both the network administration and individual market surveillance authorities in the Member States to cooperate. This cooperation may be pursued through agreements, exchange of information as well as requests for enforcement submitted to another country when correcting product non-compliance requires legal measures within the jurisdiction of another Member State. Increasing the effectiveness of market

surveillance of products originating from third countries and marketed as a result of direct and remote transactions requires intensified international cooperation with third-country regulatory authorities and international organizations to exchange product-related information. International cooperation takes place on a reciprocal basis, under the existing agreements. In this respect, one also takes advantage of pre-export product control systems (approved by the Commission) operating in a given third country, which thus verifies products immediately prior to their being exported to the Union.

Importantly, the EU lawmaker recognizes that it would be impossible to ensure an effective product safety regime without interfacing with both economic operators involved in goods trade and end-users. This takes place through cooperation and may be considered to constitute the third tier of the networked market surveillance structure, although it formally transcends that framework. Here, cooperation consists in information exchange and agreements. Chapter III of the Regulation introduces a legal obligation for market surveillance authorities to assist and cooperate with economic operators. It stipulates that information on the implementation of national and EU harmonization legislation applicable to products be provided free of charge and affirms the need to conclude agreements with organizations which represent economic operators and end-users. Furthermore, Article 7 of the Regulation obligates economic operators and information society service providers to cooperate with market surveillance authorities with regard to actions that may eliminate or mitigate the risks posed by products that said operators make available on the market.

The dynamic development of e-commerce, online platforms and offers targeting prospective purchasers in the EU, requires surveillance verification of products available online. Therefore, to enhance the effectiveness of online surveillance, it was also necessary to significantly remodel the operation of surveillance authorities in organizational and technical terms, increase the use of IT technologies and tools to enable rapid exchange of information between the networked authorities (the ICSMS information and communication platform) and facilitate subsequent transfer of information to users (Rapid Exchange of Information System – RAPEX).[12] National market surveillance authorities have a legal obligation to enter data on detected non-compliances into the system (Article 34). In fact, it may be argued that it is the information and the speed of its exchange and transmission which largely determines the effectiveness of market surveillance especially were digital trade in goods is concerned.

[12] The RAPEX system was created to ensure high protection of consumer health and safety in the European single market. The legal basis of the system is provided under Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJEU L 11/4 of 3 December 2002.

CONCLUSIONS

The EU law which regulates networked organization of market surveillance affects how the national legal orders are shaped, with particular impact on how the performance of public tasks in this field is organized, whether in structural terms or with respect to activities as part of the network relationships. This analysis demonstrates that the EU lawmaker does establish bodies and provides for particular types of relations that arise between the institutions and bodies of the EU and the national structures, as well as for the relations of such authorities with entities outside the administrative structure, with a view to ensuring effective and efficient performance of the tasks entrusted to them. Such an approach produces an elaborate framework of "networked" connections that bring together EU institutions and administration, public administration in individual member states and private entities that deliver an array of tasks as part of product surveillance system. The actors within this networked structure cooperate and collaborate but, since their activities need to be coherent, the legislator has introduced the formula of interaction based on coordination, defining the scope of competence of some entities to "influence" others within the coordinative arrangement.

Shaped in this manner by normative instruments, the institutional arrangement of network administration required suitable legal forms of interaction. In the product surveillance system, the latter constitute ancillary and complementary acts, primarily involving agreements, expressed positions, opinions, market surveillance strategies, understandings, requests for mutual assistance and exchange of information. They serve to accomplish the designated common objectives that remain within the shared scopes of action of such entities, which is why network administration means cooperative administration. The obligation to cooperate, joint problem-solving and formulation of uniform policies would not be possible without cooperation based on coordination.

However, ongoing structural changes in the movement of goods in the EU internal market require continuous improvement of the forms of cooperation between the entities tasked with safety surveillance of products entering the EU internal market. Hence, the legal mechanisms of action employed within the network structures needs to be constantly reviewed and updated. Even so, it may be concluded that market surveillance organized as an administrative network and coordinated activities of surveillance authorities ensure adequate and uniform degree of product safety in the EU.

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REGULATION OF THE FREEDOM OF RELIGION IN CZECHOSLOVAKIA AFTER 1989 AS A REACTION TO THE LEGAL PRACTICE OF THE TOTALITARIAN REGIME*

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Abstract. Following the political changes of 1989, Czechoslovakian believers were finally able to enjoy their long-awaited freedom. This article highlights how the legislative framework of the new democratic system responded directly to the specific areas where the rights of believers and religious institutions were suppressed by the previous totalitarian government, influenced by Marxist-Leninist atheism. Compared to other Eastern Bloc countries, Czechoslovakia is unique in its complete suppression of Catholic male religious orders. The Charter of Fundamental Rights and Freedoms [Listina základních práv a svobod], which guarantees the autonomy of churches and religious societies, explicitly provides for the right of churches to establish religious institutions. The first four sections of the text examine the precise legal and extrajudicial measures taken by the Communist regime to curtail churches, with ensuing sections exploring the constitutional guarantees and legislative basis for religious freedom in Czechoslovakia and, later, the independent Czech Republic. Legal regulation encompasses more than the individual rights of believers. It also pertains to church activities in a variety of public interest areas, their financial provision, and state recognition of new churches and religious societies.

Keywords: freedom of religion; communist regime; Catholic Church

1. CONSTITUTIONAL REGULATION OF THE FREEDOM OF RELIGION UNDER THE COMMUNIST REGIME

The Communist regime in Czechoslovakia came to exist as a result of the coup d'etat in February 1948.[1] At that time, a draft constitution was

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[1] "An important legal and political element in tackling the February crisis was the fact that the Parliament was excluded from the decision-making process. [...] Despite the seemingly constitutional solution to the political crisis, February 1948 constituted a coup d'état, albeit carried out without the open use of violence" [Kuklík, et al. 2011, 79-80].

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being prepared to replace the 1920 Constitutional Charter of the Czechoslovak Republic (*Ústavní listina Československé republiky*).[2] The final version of the new constitution was approved shortly after the coup, first by the Central Committee of the Communist Party of Czechoslovakia, and only later – as was the typical practice in the era of one-party rule – was this "Ninth-of May Constitution" (*Ústava 9. května*) unanimously adopted by the Constituent National Assembly (*Ústavodárné národní shromáždění*).[3]

Unlike the "Stalinist" Soviet Constitution of 1936, the new Czechoslovak Constitution retained many of the formal features of parliamentary democracy, but its very preamble indicated that the state system was taking a new direction. A typical feature for the communist propaganda of the time was, e.g., the misinterpretation of history and the role of religion in the spirit of ideologically conceived "revolutionary traditions": "The Czechs and Slovaks, two brotherly nations, members of the great Slav family of nations, lived already a thousand years ago jointly in a single State, and jointly accepted from the East the highest achievement of the culture of that era-Christianity. As the first in Europe they raised on their standards, during the Hussite revolution, the ideas of liberty of thought, government of the people, and social justice" [Gronský 2002, 12].[4]

Following the Soviet model, however, the Czechoslovak Constitution of 1948 contained two elements characteristic of the constitutional enshrinement of the freedom of religion as envisioned by the ruling Communist Party. The first of these related to service in the military: "No one shall suffer prejudice by virtue of his views, philosophy, faith or convictions be a ground for anyone to refuse to fulfil the civil duties laid upon him by law."[5] The second element is the freedom of atheist position, persistently and quite unnecessarily invoked in the context of freedom of religion, which subliminally revealed the real ideological monopoly enforced by the state under the leadership of the Communist Party: "(1) Every one shall be entitled to profess privately and publicly and religious creed or to be without denomination. (2) All religious denominations as well as the absence thereof shall be equal before the law."[6]

However, an explicit acknowledgement of the ideological monopoly of "scientific atheism" can only be found in the so-called "Socialist" constitution of 1960: "The entire cultural policy of Czechoslovakia, the development

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[2] Published under No. 121/1920 Coll.

[3] Constitutional Act No. 150/1948 Coll., of 9 May 1948, *Constitution of the Czechoslovak Republic*.

[4] The official English translation is available at: http://czecon.law.muni.cz/content/en/ustavy/1948/ [accessed: 04.09.2023].

[5] Constitutional Act No. 150/1948 Coll., § 15(2).

[6] Ibid., § 16(1) and (2).

of all forms of education, schooling and instruction shall be directed in the spirit of the scientific world outlook, Marxism, Leninism, and closely linked to the life and work of the people."[7] However, religious freedom is incompatible with this notion of a state-imposed ideology, including the one enshrined in the Constitution of the time: "Freedom of confession shall be guaranteed. Every one shall have the right to profess any religious faith or to be without religious conviction, and to practise his religious beliefs in so far as this does not contravene the law."[8] It is worth noting that the religious freedom referred to here is only *individual*. In the vocabulary of the regime, this very limited notion of religious freedom (i.e., individual freedom) was understood as "satisfying religious needs". As if churches and religious societies, as corporations independent of the state, would not even exist.[9] Interestingly enough, this was not necessarily the practice in every country of the former Eastern Bloc, as it can be documented in a provision of the Constitution of the German Democratic Republic:[10] "The churches and other religious communities conduct their affairs and carry out their activities in conformity with the Constitution and the legal regulations of the German Democratic Republic. Details can be settled by agreement."[11]

2. HOW THE REGIME ATTEMPTED TO CONTROL THE CATHOLIC CHURCH

In the state and social system controlled by the Communist Party, the churches represented a foreign body. According to the official Marxist-Leninist doctrine, religion was deemed to gradually disappear. This process was supposed to unfold spontaneously, together with the changing social and cultural conditions; however, the aim of the repressive interventions

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[7] *Constitution of the Czechoslovak Socialist Republic of 11 July 1960*, published under No 100/1960 Coll., Article 16(1). The official English translation is available at: https://www.worldstatesmen.org/Czechoslovakia-Const1960.pdf [accessed: 04.09.2023].

[8] Constitution No. 100/1960 Coll., Article 32(1).

[9] "The general theoretical and legal framework of the constitutional regulation of the freedom of religion was the predominance of individual confessional norms, which define the legal status of the individual, but no longer the (collective) rights of churches and religious societies, following the example of Article 24 of the so-called Stalinist Constitution of the USSR of 1936. [...] One of the elements of this trend was the so-called privatization of religion, i.e., the reduction of religion to the level of 'belief' without external social and cultural manifestations" [Jäger 2009, 778].

[10] 1968 Constitution, comprehensively amended in 1974, in: *Gesetzblatt der DDR*, I, No. 47 (29 September 1974).

[11] Constitution of GDR, Article 39(2). Citation. English translation available at: https://web.archive.org/web/20050825141706/http://eis.bris.ac.uk/~gemaa/10015/week4.html#Rights [accessed: 04.09.2023]. Cf. also Svobodová 1984, 119.

of the state was to deliberately accelerate this supposedly objective historical process. In Czechoslovakia, the regime opted for a combination of formal legal acts and numerous completely illegal or only subsequently "legalised" measures serving this particular end.

Based on the principle "divide and rule" (*divide et impera*), the regime treated various churches differently. From the outset, the Catholic Church was seen as the most dangerous, not only as the largest and thus the most influential denomination amongst the citizens of the country, but also as a church whose worldwide centre was in Rome, in the demonized Vatican, i.e., beyond the reach of the Communist Party's domination and control. By far, the repressive crackdown on the Catholic Church was the harshest, especially in the first years after the Communist takeover; the other churches did not represent significant points of potential resistance to the new regime. In fact, some of the leading figures in most of the non-Catholic churches would even explicitly side with the new regime.[12]

Especially reliable for the regime was the Eastern Orthodox Church as it was controlled from the USSR. The Czechoslovak Church[13] was thought to be exceptionally promising for the regime and its plans, as it represented a sort of "national" variant of the Catholic Church, separated from the hostile Vatican.[14] According to this model, the whole Catholic Church was to become "independent" eventually. However, this plan failed. As a result, the regime resorted to attempts to at least divide the Catholic Church internally. The "reactionary" episcopate was to be separated from the "progressive" lower clergy and laity. This was to be done, for example, by the unsuccessful attempt to create a regime-controlled Catholic Action (*Katolická akce*). The plan immediately provoked a reaction from the Holy See: the Sacred Officium issued an excommunication decree, which directly addressed this particular decision of the Communist regime in Czechoslovakia.

[12] Communist propaganda tended to emphasise their positive attitude towards the 'people's democratic establishment': "In the course of this development, however, an increasing number of the faithful gradually became convinced that the conflict between the Catholic Church and the state was not about restrictions on religion and the freedom of worship, but primarily about the property interests of the Catholic Church and their attempt to exploit religion for political ends. The normal activities and religious activities of all other, i.e., non-Catholic churches, whose actions in the new political situation after February 1948 did not come into conflict with the interests of the state, served as an argument here. In fact, they officially expressed their loyal attitude towards the state and sought to cooperate with it" [Mlýnský 1980, 8].

[13] The church was recognised by a government declaration of 15 September 1920. In 1971, it extended its name to "Czechoslovak *Hussite* Church".

[14] "In particular, the highest Communist authorities initially considered the Czechoslovak Church as a good basis for the so-called national church, serving the regime. Later on, however, the non-Catholics faced both individual and collective repression" [Jäger 2009, 770].

The very opening words of the decree clearly evidence this connection: "Recently, the opponents of the Catholic Church in Czechoslovakia have fraudulently instigated a false Catholic Action. They use it as a means to attempt to lead the Catholics of this Republic to apostasy from the Catholic Church and thus away from obedience to the proper shepherds of the Church."[15] By its actions, the Communist regime made it clear that it no longer felt bound by the international treaty of *Modus vivendi* negotiated at the turn of 1927 and 1928.[16] In 1950, the diplomatic relations with the Apostolic See were broken off completely.

The regime not only sought to remove bishops from their respective sees: some of them were even deprived of their freedom through imprisonment or internment. The Communists also attempted to separate priests from the hierarchy, both from the diocesan authorities and from the influence of the Pope and the Holy See. For this purpose, the Peace Movement of the Catholic Clergy (*Mírové hnutí katolického duchovenstva*) was founded: it was meant to summon, under duress, a meeting of all Catholic clergy operating with the approval of the state. In 1968, this movement was spontaneously dissolved. However, after the suppression of the democratization process of the "Prague Spring", during the period of the so-called 'normalization', the regime instigated another puppet organization of Catholic clergy: it the Association of Catholic Clergy "Pacem in terris" (*Sdružení katolického duchovenstva "Pacem in terries"*), which was active between 1971 and 1989.[17]

3. SPECIFIC REPRESSIVE MEASURES OF THE REGIME

All the churches recognised prior to the rise of the Communist regime were, of course, affected by the complete transformation of their funding, which the system imposed unilaterally and uniformly on all of them. The churches were deprived of their property base from which they had hitherto covered their expenses[18]; state-imposed financing was introduced,

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[15] AAS 41 (1949), p. 333.

[16] *Modus vivendi inter Sanctam Sedem et Rempublicam Cecoslovachum*, AAS 20 (1928), p. 65-66.

[17] "After the Roman Congregation for Clergy issued a ban on the unilateral involvement of priests in the political sphere in 1982, the *SKD PiT* [Association of Catholic Clergy 'Pacem in terris'] was dissolved by the Church. A part of the clergy gradually withdrew from the association, while the other part did not dare to obey the church leadership. This remnant of the organisation dissolved itself on 7 December 1989 at the call of the Conference of Bishops and Ordinaries in the Czechoslovak Republic" [Tretera and Horák 2015, 367].

[18] Again, this mainly concerned the majoritarian Catholic Church, which was still a significant owner of land and other real estate until the Communists took power. Law No. 46/1948 Coll., on the new land reform, became an instrument for the withdrawal of church property immediately after the Communist coup d'etat.

which the 1949 Law on Churches and Religious Societies calls their "economic security".[19] The key means of administrative bullying of churches and of the regime's arbitrariness in matters of personnel was, in particular, the institution of the state approval with the exercise of clerical activity.[20] The law did not lay down any specific conditions under which such a consent was to be obtained, nor did it clarify the circumstances under which the state power could withdraw it. Moreover, the development of any religious activity beyond the control of the state was subsumed under the criminal offence of "Obstructing the Surveillance of Churches and Religious Societies" (*Maření dozoru nad církvemi a náboženskými společnostmi*): "Whoever, with the intention of obstructing or hindering the exercise of state surveillance of a church or a religious society, violates the provisions of the law on the economic security of churches and religious societies by the state, shall be punished by imprisonment for up to two years."[21]

This measure, however, would not exhaust the penal sanctions against clergy and believers. Especially during the Stalinist period of its existence (i.e., in the late 1940s and early 1950s), the regime held a number of staged trials, which also aimed to undermine the influence of the Catholic Church. Completely fictitious were the charges of, e.g. "espionage in favour of the Vatican", subversion of the Republic, treason, charges of sedition, etc. The Communist judiciary and the entire state apparatus thus set out to the goal of establishing a new "class" justice.[22] The offence called 'Abuse of the Office of the Clergy' was constructed specifically against the clergy: "Whoever abuses the their clerical or a similar religious office with the intention of exercising influence on the affairs of political life which would be unfavourable to the people's democratic order of the Republic shall be punished by imprisonment for three months up to three years."[23] Also, the introduction of compulsory civil marriage in 1950[24] was accompanied by a statute intended to punish clergymen who would perform a religious

[19] Act No. 218/1949 Coll., on the Economic Security of Churches and Religious Societies by the State.

[20] Ibid., § 7.

[21] Penal Code No. 86/1950, § 173; Penal Code No. 140/1961, § 178.

[22] "In fact, the reality was even worse because the power of the Communist Party dominated over the power of the state. It controlled everything: who was to be arrested, what was to be investigated, what was the scenario of the trial, it drafted sentences as well as instigated the 'spontaneous' resolutions of the workers demanding exemplary punishments for those who were to be seen as 'traitors to the people'. What was the fruit of this? Nearly a quarter of a million political prisoners: 240 were executed, and eight thousand died in pre-trial detention, while serving the sentences or passed away from the effects of imprisonment" [Vaško 2004, 183].

[23] Criminal Code No. 86/1950 Coll., § 123; the facts of the offence were first formulated by Act No. 231/1949 Coll., on the Protection of the Republic, § 28.

[24] Act No. 265/1949 Coll., on Family Law, § 1.

ceremony without a prior civil marriage: "Whoever, in the exercise of his clerical or similar religious function, violates, even by negligence, the provisions of the Family Law Act, in particular by performing religious marriage ceremonies with persons who have not yet concluded a marriage, shall be punished by imprisonment for up to one year."[25] Immediately after the events of 1989, religious and other punitive offences were abolished by an amendment to the Criminal Code.[26]

In addition to trials intended to give the impression of "revolutionary justice", in 1950 the StB (State Security) secret police resorted to two violent measures that lacked any support in any valid legal provisions: the so-called *Akce K* ("K" referring to 'kláštery' in Czech, i.e., monasteries) consisted in raiding most of the male monasteries in Czechoslovakia without any prior warning. Even before this event, trials had already been fabricated against some of the most important representatives of the male orders. The 'K' action was carried out in such a way that the monks (and partly also the nuns) were first interned in centralization camps. After that, the male monasteries were unable to resume their activities until 1989; the existence of religious priests and brothers was not tolerated by the regime.

The aim of the "P" action ('pravoslaví' in Czech, meaning 'Eastern Orthodox' in English) was the destruction of the Greek Catholic Church, which was active mainly in Slovakia. A canonically unjustifiably staged synod assembly (*sobor*) in the eastern Slovak town of Prešov voted for the 'voluntary' conversion of all Greek Catholics to Eastern Orthodoxy.[27] The resumption of the Greek Catholic Church in 1968 remained the only significant lasting result of the "Prague Spring" in the area of state-church relations.[28]

4. AUTHORISATION OF CHURCHES BY THE COMMUNIST REGIME

The Communist regime would not tolerate the existence of free initiatives by citizens; all interest organisations in the society had to be united under a single umbrella institution: "The National Front of Czechs and Slovaks, in which the people's organizations are associated, is the political expression of the alliance of the working people of town and country, led

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[25] Penal Code No. 86/1950, § 207; Penal Code No. 140/1961, § 211.

[26] Act No. 159/1989 Coll.

[27] "Strictly speaking, we cannot speak of an official ban or dissolution of the Greek Catholic Church. However, the takeover of churches, parishes and other property by the Orthodox Church took place under the supervision of the public authorities and with their assistance (which was completely contrary to the law)" [Tretera and Horák 2015, 356].

[28] Government Decree No. 70/1968 Coll., on the economic security of the Greek Catholic Church by the State.

by the Communist Party of Czechoslovakia."[29] The churches were completely unclassifiable in the system of the Communist-dominated National Front. Not only were their activities far more thoroughly controlled than those of the pro-regime associations, in fact, the whole religious scene was divided into entities whose leadership was permitted by the regime (even if under surveillance), while other entities were banned and completely suppressed. The latter ones were labelled as 'sects': as early as 1948, this was the case of the Jehovah's Witnesses: for them, the aggravating circumstance was that their organisational and religious centre was located in Brooklyn, New York, i.e., on the territory of the USA.[30] The same applied to the Church of Jesus Christ of Latter-day Saints (the Mormons), whose activities were banned in 1950.

On the other hand, other churches were subjugated by the regime by the means of their official authorization. Because the Law on the Economic Security of Churches and Religious Societies abolished all the regulations on churches which had been valid until then,[31] the recognition of these churches could not be based on the Austrian law which had been in force in Czechoslovakia up to that time.[32] These authorizations were thus unlawful both formally, i.e., they lacked any legal basis, but also materially, since these churches deliberately would not ask for state recognition at a time when they were still free to operate. As early as 1951, the regime thus legalized the activities of the Baptist Unity (*Chelčický*), the Church of the Brethren, the Evangelical Methodist Church, and the Seventh-day Adventist Church,[33] although the latter church was soon banned; in 1956, the activities of the Christian Congregations and the New Apostolic Church

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[29] Constitution No. 100/1960 Coll., Article 6.

[30] Official propaganda boasted of its swift action against this religious society: "Even before the issuance of Laws No. 217 and 218/1949, the activities of this sect were explicitly prohibited by specific administrative measures of the Ministry of the Interior. The Society of Jehovah's Witnesses – International Association of Bible Scholars, Czechoslovak Branch, was dissolved by the decree of the Czechoslovak Ministry of the Interior of the Czechoslovak Republic of 4 April 1948, No. 3111/25-31/12-1948-VB/3, and the Watchtower, Bible and Tract Society, Czechoslovak Branch, was dissolved by the decree of the Czechoslovak Ministry of the Interior of the Czechoslovak Republic No. 3111/6-2/3-1949-VB/3." In: Sekretariáty pro Věci Církevní při Ministerstvech Kultury ČSR a SSR, *Právní poměry církví a náboženských společností v ČSSR a jejich hospodářské zabezpečení státem*, Praha 1977, p. 21.

[31] "Section 14 of the Act served to remove all existing legal obstacles to the application of the new ecclesiastical policy, by which all regulations governing the legal relations of churches and religious societies were abolished across the board, without any differentiation or specification" [Jäger 2009, 789].

[32] Act No. 68/1874, which concerns the legal recognition of religious societies (*betreffend die gesetzliche Anerkennung von Religionsgesellschaften*).

[33] Decree of the State Office for Ecclesiastical Affairs No. 11847/51-I/2-SÚC of 17 May 1951.

were permitted.[34] In the same year the Adventist Church was also restored to legality.[35]

Some overlapping characteristics can be found in most of these churches, which led the Communist regime to bring them under control. In fact, they are generally classified among the so-called "free" churches (referred to as *Freikirchen* in the German-speaking world), since they gradually separated from some of the established and highly institutionalized churches associated with the state (especially the official Anglican *'Established Church'*), and initially found their natural habitat primarily in North America. In the post-1968 'normalization' period, it was characteristic of Jehovah's Witnesses that some of their believers were imprisoned for resisting military service in arms, while the leadership of this religious society not only pursued activities not permitted by the regime without much difficulty, but even applied for state recognition in 1980.[36]

The Apostolic Church, which is part of the Charismatic-Pentecostal movement, was authorized soon before the fall of the regime.[37] In early 1990, the deliberately created legislative vacuum in the matter of state recognition of churches during the Communist era was exploited by the missionary expansion of the Church of Jesus Christ of Latter-day Saints into Czechoslovakia. The "Mormons" achieved official recognition in the Czech part of the federal (and at that point still "socialist") Czechoslovak state. It took place in a situation when the social and political attitude towards churches, after forty years of oppression, became friendly and favourable.[38]

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[34] Decrees of the State Office for Ecclesiastical Affairs No. 119/56 of 11 February 1956 and No. 248/56 of 29 March 1956.

[35] "The activities of this church were *suspended* by swift intervention of the State authorities, namely by an administrative act of the State Office for Ecclesiastical Affairs of 1952, without specifying the period for which they were suspended. The suspension of the Church's activities was revoked by a governmental resolution in 1956. The property of the church, seized in 1952, was not returned. In atheist training manuals, the ban on Adventists was justified on the grounds that by ordaining the Sabbath, they were allegedly 'interfering with the edifying efforts of the working people'" [Tretera and Horák 2015, 361].

[36] "Nor did the Witnesses create any major problems with their attitude towards military service. They either went to work in the mines instead or (apparently mostly fraudulently) procured 'blue books'. [These indicated that their holders were excluded from the military service on account of their health...] In 1980, Jehovah's Witness leaders formally applied for registration, but were refused" [Martinek 2000, 52].

[37] Resolution of the Government of the Czech Socialist Republic No. 20/1989.

[38] Resolution of the Government of the Czech Socialist Republic No. 51/1990, on the authorization of the activity of the religious society Church of Jesus Christ of Latter-day Saints (Mormon) in the Czechoslovakia, 1 March 1990.

5. CONSTITUTIONAL AND LEGAL REDRESS OF THE STATUS OF RELIGIONS AND CHURCHES AFTER 1989

One of the telling symbols of the changes after 1989 was the abolition of the constitutionally enshrined guiding role of the Communist Party of Czechoslovakia, formulated in what was still the valid 1960 constitution: "The guiding force in society and in the State is the vanguard of the working class, the Communist Party of Czechoslovakia, a voluntary militant alliance of the most active and most politically conscious citizens from the ranks of the workers, farmers and intelligentsia."[39] The ideological monopoly was later explicitly renounced in the constitutional Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*): "Democratic values constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular religious faith."[40] Here the state declares its religious-sectarian neutrality. Against the backdrop of the historical experience of the Czech state, this can also be considered as a significant historical step forward.

The rule of the Habsburg dynasty in Bohemia and Moravia was associated, from the time of the publication of the so-called Renewed Land Restoration (*Obnovené zřízení zemské*) by Ferdinand II (1627), with the application of the principle *cuius regio eius et religio*: the country was to be changed in an exclusively Catholic reign.[41] In the course of further development, the rigid application of this principle was gradually abandoned in favour of non-Catholic religious denominations, the breakthrough being the Toleration Patent (*Toleranční patent*) of Joseph II (1789). The whole process was then completed in the constitution of the first Czechoslovak Republic (1920), which enshrined the equality of all denominations: "All religious denominations are equal before the law."[42]

Beginning in 1948, the totalitarian Communist regime replaced the former dominance of religion with atheist ideology. After the fall of Communism,

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[39] Constitutional Act No. 100/1960 Coll., Article 4.

[40] Constitutional Act No. 23/1991 Coll., of 9 January 1991, importing the Charter of Fundamental Rights and Freedoms, Article 2(1). The official English translation is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf [accessed: 04.09.2023].

[41] "As early as 1624, Emperor Ferdinand II issued a patent declaring Catholicism the only permitted religion for his subjects in Bohemia and Moravia. Following the restoration of the provincial system (and with reference to Emperor Charles IV), this norm was extended by the so-called Recatholicization Patent (*Rekatolizační patent*) of 31 July 1627 to the estates of the nobility and knights; they could (unlike common subjects) leave the country within six months of the promulgation of the patent, unless they intended to convert to Catholicism. The only other faith tolerated was the Jewish faith" [Hrdina 2007, 283].

[42] *Constitutional Charter of the Czechoslovak Republic* No. 121/1920 Coll., § 124.

the democratic lawgiver therefore rejected both the idea of a confessional state tied to a particular religious denomination, as well as the model of an ideological state imposing pervasive propaganda and worldview uniformity on the society and individuals alike. Monopolistic ideology, in turn, resents any public expression of a different worldview, including openly manifested religious beliefs.

In contrast to the "socialist constitution" of 1960, the intent of the democratic constitution-maker was to enshrine not merely individual religious freedom in the Charter, but also the free status of churches and religious societies. Freedom of atheistic belief is no longer part of the provision on individual religious freedom: "Everyone has the right freely to manifest his religion or faith, either alone or in community with others, in private or public, through worship, teaching, practice, or observance."[43] In particular, intra-church autonomy is very generously articulated in the Charter: "Churches and religious societies govern their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independently of state authorities."[44] The criticism that the Charter was intended to enshrine only the rights of individuals and the provision on the status of churches as collective associations is thus superfluous is unjustified.[45] After all, the Charter still takes into account other corporations in which individuals collectively exercise their constitutionally guaranteed rights: private associations and political parties and movements,[46] trade union associations[47] and territorial self-governing units.[48]

The tradition of interference in intra-church autonomy on the Czech territory goes back long before the Communist regime in Czechoslovakia was established in 1948. Particularly notorious are the interventions of Emperor Joseph II (1780-1790): the system of state church (*Staatskirchentum*) imposed by this monarch is called 'Josephinism'.[49] Some of the measures

[43] Charter of Fundamental Rights and Freedoms, Article 16(1).

[44] Ibid., Article 16(2).

[45] "The seemingly unconstitutional inclusion of this provision on the relationship between religious associations and the State in the catalogue of rights and freedoms can be understood as an expression of the collective rights of the religiously observant citizens [...]" [Pavlíček, et al. 1999, 173].

[46] Charter of Fundamental Rights and Freedoms, Article 20.

[47] Ibid., Article 27.

[48] Constitutional Act No. 1/1993 Coll., *Constitution of the Czech Republic*, Article 8.

[49] "The radicalism and thoroughness even in tiniest details made him a symbol of the whole era (later called 'Josephinism'): the emperor personally stood behind hundreds of different measures in the religious sphere and, in addition to purely practical steps, he was also guided by ideological motives influenced by the Enlightenment. It was precisely this uncompromising and insensitive approach disregarding tradition, diplomacy and social ties that provoked a growing wave of resentment among the nobility and ordinary people. As a result, it left the whole reform effort with a certain bitterness" [Suchánek and Drška 2018, 341].

decreed by the emperor were characterised by extraordinary bizarreness and obstinate pedantry; however, even at a time of general stabilisation of the Austrian state-church situation during the 19th century, the state did not relinquish its unilateral efforts to determine what belonged to the external affairs of the Church; it also reserved the right to interfere within such an arbitrarily defined space, especially as regards the personnel policy in the Catholic Church.[50] In fact, even the 1928 *Modus vivendi* agreement between the Holy See and the Czechoslovak Republic granted the Czechoslovak government the right to exercise "objections of political nature"[51] in relation to the appointment of archbishops, diocesan bishops, coadjutors *cum iure succesionis* or military ordinaries.

The arbitrary and intransigent policy of the Czechoslovak Communist regime gradually vacated the majority of the episcopal sees, and thus – in accordance with the canon law of the time – the dioceses were mostly headed by vicars capitulary,[52] who tended to succumb to the pressure of the regime. Subsequently, the system of granting and withdrawing state approval for the exercise of clerical activity completely dominated the personnel policy concerning the clergy: this was the case not only in the Catholic Church, but in all the other state-recognised churches, too. The provision on state approval was deleted by an amendment to the Act on the Economic Security of Churches and Religious Societies by the State immediately after the events of 1989.[53] All this historical background, and especially the direct experience with the practice of the totalitarian regime, explains why the autonomy of churches is conceived and expressed so openly in the Czechoslovak Charter of Fundamental Rights and Freedoms. In comparison with all other foreign constitutional laws on the status of churches, the specificity of the Charter is the explicit reference to the establishment of religious institutions, which serves as a reminder of the Communist restriction of women's religious orders and the complete liquidation of the legal activities of men's religious orders.[54]

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[50] Act No. 50/1874, on the external conditions of the Catholic Church (*wodurch Bestimmungen zur Regelung der äußeren Rechtsverhältnisse der katholischen Kirche erlassen werden*).

[51] Cf. *Modus vivendi inter Sanctam Sedem et Rempublicam Cecoslovachum*, Article IV.

[52] Cf. CIC/1917, can. 429-444.

[53] Act No. 16/1990 Coll.

[54] "Although the abolition of the internment camps took place by the mid-1950s, classical religious life was not officially permitted throughout the Communist era (except for a small number of women's religious communities entrusted with the care of the mentally disabled in sparsely populated border areas), and religious orders could only operate underground" [Valeš 2008, 147].

6. THE RIGHTS OF CHURCHES AND RELIGIOUS SOCIETIES UNDER ACT NO. 308/1991 COLL.

The constitutionally guaranteed autonomy of churches was subsequently concretized and elaborated in detail in the first "post-revolutionary" Act on Churches and Religious Societies, issued in 1991, the same year in which the Charter of Fundamental Rights and Freedoms was passed. The very title of the act indicates that the legislator intends to address both individual freedom of religion, i.e., "freedom of religious belief" as well as collective religious freedom in its corporate form, i.e. "the status of churches and religious societies."[55] The explanatory memorandum of the law recalls the participation of socialist Czechoslovakia in the Helsinki process in the mid-1970s, when the regime committed itself to respecting human rights, but failed in fulfilling its obligations.[56] On the contrary, it did not change its previous practice even in the area of the rights of believers and legal relations arising from freedom of religion. This is also confirmed in the explanatory memorandum: "The legal regulation of these relations adopted in 1949, with subsequent amendments, suppressed these rights until November 1989. Many of these relations were solved by regulations of lower legal force or by mere administrative acts, the vast majority of which were not published. The combination of legal norms and additional secret administrative regulations allowed for widespread repression, which was, in fact, the harshest in the countries of the so-called socialist camp."[57]

Very soon after 1989, the restored rights arising from religious freedom, however, began to be taken for granted, and the attention of the Catholic Church shifted to the need for property settlement with the state. An issue of particular interest was the problem of the restitution of church property. On the part of the Church, expressing gratitude for the coveted opportunity to operate freely became rare,[58] in fact, one tended to expect such an attitude vice versa.[59] Religious orders, which were free to resume their activities

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[55] Act No. 308/1991 Coll., on Freedom of Religious Belief and the Status of Churches and Religious Societies (Act on Churches and Religious Societies).

[56] The State has only admitted to these commitments in the form of a sub-legal norm: Decree No. 120/1976 of the Minister of Foreign Affairs of 10 May 1976, on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[57] Available at: http://spcp.prf.cuni.cz/lex/zp308-91.htm [accessed: 04.09.2023].

[58] "The final response was Law No. 308/1991 Coll. in the Czechoslovak Federal Republic, which represents the highest level of religious freedom for churches and religious societies in the history of our state" [Duka 2004, 18].

[59] "Society's gratitude to the churches for their indisputable contribution to the destruction of the totalitarian regime gained its normative expression in 1991 in the Charter of Fundamental Rights and Freedoms, [...] this gratitude, however, quickly faded away..."

after forty years of oppression, were helped by the state with two provisional restitution laws.[60] The Law on Churches and Religious Societies also explicitly affirmed the legitimate existence of intra-church associations, including religious communities: "Churches and religious societies are legal persons; they may associate with each other. They may form communities, orders, societies and similar associations."[61]

Notable is the twelve-item demonstrative list which specifies the content of intra-church autonomy in more detail: "In order to fulfil their mission, churches and religious societies may, in particular: (a) freely determine their religious doctrines and ceremonies; (b) issue internal regulations, insofar as they do not contradict generally binding legislation; (c) provide spiritual and material services; (d) teach religion; (e) teach and educate its clerical and lay staff in its own schools and other establishments as well as in divinity schools and divinity faculties, under the conditions laid down by generally binding legislation; (f) organise its assemblies without notice; (g) own movable and immovable property and to have other property and intangible rights; (h) establish and operate special-purpose establishments; (i) run a press, publishing house or a printing company; (j) establish and operate its own cultural institutions and facilities; (k) establish and operate its own health care and social services facilities and to participate in the provision of these services, including in State institutions, in accordance with generally binding legal regulations; and (l) send their representatives abroad and receive representatives of churches and religious societies from abroad."[62]

7. GUARANTEEING THE RIGHTS OF CHURCHES AND RELIGIOUS SOCIETIES AS A RESPONSE TO THE PRACTICE OF TOTALITARIANISM

The mentioned enumeration can be understood as a form of satisfaction for the practice of the Communist regime, which either completely prevented some of the activities listed above, or strictly controlled others. Although the state did not directly interfere in the doctrine and rituals of the churches, it did attempt to enforce loyalty of church leaders, for example, through their participation in various so-called "peace" initiatives. On occasions such as the death of Stalin or the anniversary of the liberation of Czechoslovakia by the Red Army, it demanded the announcement of public prayers. Holding

[Hrdina 2004, 254].

[60] Act No. 298/1990 Coll., on the regulation of certain property relations of religious orders and congregations and the Archbishopric of Olomouc, amended by Act No. 338/1991 Coll.

[61] Act No 308/1991 Coll., § 4(3).

[62] Ibid., § 6(1).

public religious gatherings, unless they were regime-organised events, was impossible; the church was "driven into the vestry".

The internal regulations of the churches, including canon law, were not considered legally relevant by the regime. The totalitarian character of the state made it impossible to recognize or allow any other normative subsystem that would compete with the party and state monopoly. Moreover, e.g., referring to the canon law of the Catholic Church as a real law system would have contradicted the Marxist doctrine about the necessary coexistence of law and the state: it believes that only the state can make law, since it alone possesses the power of coercion.[63]

Divinity faculties were unilaterally reorganized and subjected to control by the regime.[64] Teaching of religion in schools was strictly restricted during the entire existence of the Communist regime[65], although until 1953 religious instruction was still formally compulsory, with the possibility of withdrawing a child from the instruction. Religious education was liquidated soon after the coup d'etat in February 1948; in fact, this act was meant to make the impression of a direct implementation of the Constitution: "Schools are state schools."[66] Similarly, hospitals and all social facilities were taken away from the churches and nationalized, so the church could not run virtually any public services.

The right of churches to own property, which the Law on Churches and Religious Societies also explicitly lists, has subsequently become the subject of controversy: this was due to the connection with the intended and repeatedly postponed restitution of church property. Since the political changes of 1989, this has become a real burden, especially in the country's relationship with the Catholic Church. One of the evasive manoeuvres used to circumvent

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63 "The term 'history of state and law' was introduced into academic and scholarly discourse after February 1948. It expressed one of the basic theses of Marxism that law arises in society only when society organizes itself into a state, the essence of which is the domination of one class over another" [Urfus 1998, 144].

64 "On the basis of Government Decree No. 112/1950 Coll., only six faculties provided training for clergy. [...] Part of this change included the application of state supervision of the admission procedure, including the limited number of students, and control of the content of teaching, including the introduction of compulsory teaching of Marxism-Leninism" [Kuklík, Jan, et al. 2011, 139].

65 "Setting the conditions for teaching religion in schools was in the normative hands of the Ministry of Culture (and Information). The teaching of religion was not a subject of school instruction and concerned pupils in grades 2-7. Written applications signed by both parents were accepted by school principals from 15 to 25 June. In terms of school regulations, the school principals and district school inspectors supervised the teaching of religion. The maximum permissible amount of these classes was an hour a week" [Jäger 2009, 804].

66 Constitutional Act No. 150/1948 Coll., § 13(1).

the state's obligation to restitute church property was the controversial theory which claimed the Church *de facto* had no property. According to this idea, the property factually belonged to the state, but it was bound for church purposes, thus it was only nominally property of the Church [Kindl and Mikule 2007]. The real owner of the property was the one who had the right to dispose of it; in fact, this restrictive practice had been established in the Czech lands especially in the reigns of Maria Theresa and Joseph II. However, it is noteworthy, that even the Communist regime itself did not deny the existence of church ownership, as evidenced, for example, by the opinion voiced by the Office of General Prosecutor (*Generální prokuratura*) in 1954: "The ownership of churches or church institutes continues; the state only supervises the property. It cannot therefore be deemed a form of socialist ownership. Nor can it be seen as personal ownership, since the very nature of this type of ownership excludes it. Thus it is private property."[67]

The protracted process of seeking church restitution came to a close only with the 2012 Act on Property Settlement with Churches (*Zákon o majetkovém vyrovnání s církvemi*). In the preamble to this law, the Parliament of the Czech Republic expresses historical and moral satisfaction, as it was "guided in its approval by the desire to alleviate the consequences of certain injustices regarding property and other issues committed by the Communist regime between 1948 and 1989; to settle the property relations between the State and the churches and religious societies as a prerequisite for full religious freedom. Thus, by restoring the property base of the churches and religious societies, the Act enables free and independent status of the churches and religious societies, whose existence and operation is considered an essential element of a democratic society."[68]

At the time of the adoption of the law, the right of churches to send representatives abroad and to receive representatives from abroad, explicitly stated in the Law on Churches and Religious Societies, was applicable mainly to the Catholic Church, although the former Communist regime controlled or prevented other churches from having contacts with their foreign partners. However, the legislator's main aim was to confirm the re-establishment of diplomatic relations with the Holy See. These were definitively cut off in March 1950 with the expulsion of the last diplomat serving at the internment in Prague by a note from the Ministry of Foreign Affairs. This event was, however, preceded by the regime's unscrupulous actions against the freedom of the Church and its faithful, which gave the Vatican diplomacy a justified impression that the state had no intention to respect the *Modus vivendi* concluded in the first Czechoslovak Republic. With the political

[67] Opinion No. T. 282/54-ZO-33, dated 20 May 1954.

[68] Act No. 428/2012 Coll., on Property Settlement with Churches and Religious Societies and on Amendments to Certain Acts, which entered into force on 1 January 2013.

liberation of 1968 some of the diocesan sees were taken by bishops, however, the establishment of diplomatic relations with the Apostolic See was only made possible in 1990. In advance, by applying the *rebus sic stantibus* clause, both parties renounced the obligations imposed on them by the former *Modus vivendi*, and the Catholic Church was thus, probably for the first time in the history of the Czech territory, freed from any intervention of state power in its personnel policy.[69]

8. SPECIAL RIGHTS OF CHURCHES AND RELIGIOUS SOCIETIES UNDER ACT NO. 3/2002 COLL.

Among the rights of churches and religious societies contained in the impressive enumeration of the 1991 Church Act, one important item is missing; in fact, a right not exercised by churches at the time of the adoption of the Act. It concerns the civil law effects of church marriages. It was the Communist regime that introduced compulsory civil marriage in Czechoslovakia in 1950: "Marriage is contracted before the local national committee by a consensual declaration of a man and a woman that they are entering into marriage together. If this declaration of the betrothed is not made before the local national committee, the marriage fails to be contracted."[70] The Family Law Act did allow for "religious marriage ceremonies", but only after a civil marriage had been performed.[71] It was not until mid-1992 that Czechoslovak citizens were again allowed to choose between a civil and a religious marriage.[72]

The activities of churches in the prison system and in the army were restored shortly after 1989 by partial legal amendments,[73] but the Law on churches provided primarily for a contractual solution in the following areas: "Authorised persons carrying out clerical activities have the right of access to public social welfare and health care facilities and children's homes, they also have the right of access to the accommodation facilities of military units, places where detention, imprisonment, protective treatment

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[69] "The confessional legislation of January 1990 was preceded [...] by negotiations between representatives of the federal government and the Apostolic See on 18-20 December 1989. *Modus vivendi* of 1928 was found to be obsolete. By Act No. 16/1990 Coll. of 23 January 1990, *inter alia*, Section 7 of Act No. 218/1949 Coll. was repealed. The state no longer interferes in the internal affairs of churches or in the appointment of any church official" [Tretera 2002, 53].

[70] Act No. 265/1949 Coll., on Family Law, § 1(1) and (2).

[71] Ibid., § 7.

[72] Amendment to the Family Act No. 234/1992 Coll.

[73] Amendment to the Act on the Execution of Imprisonment, implemented by Act No. 179/1990 Coll., § 9; Act No. 293/1993 Coll., on the Execution of Detention, § 15.

and protective education are carried out. Churches and religious societies shall agree with these establishments and services on the rules for entering their premises and performing religious acts therein, unless the procedure is regulated by other generally binding legal provisions."[74] The first of four such agreements contracted successively between the Prison Service of the Czech Republic (*Vězeňská služba České republiky*) on the one hand and the Ecumenical Council of Churches (*Ekumenická rada církví*) and the Czech Episcopal Conference (*Česká biskupská konference*) on the other was concluded as early as 1994.[75] A set of interconnected agreements in the field of military ministry was then negotiated in 1998 and differs from foreign models by its consistently ecumenically conceived and unified structure.[76]

In the Act on Churches and Religious Societies, the right to work in prisons and the army was originally formulated as the right of clergy to enter and operate in these institutions, whereas the Act on Churches and Religious Societies, which replaced its 1991 predecessor on the territory of the Czech Republic at the beginning of 2002, classifies this work of clergy among the so-called "special right of churches and religious societies,"[77] together with the right to ecclesiastical marriage (which was still lacking in 1991[78]), and the right to teach religion in state schools, the right to establish church schools and the right of clergy to maintain confidentiality.[79] Originally, the right to public funding[80] was also included among the special rights, however, this was derogated by the Act on Property Settlement with

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[74] Act No. 308/1991 Coll., § 9(1) and (2).

[75] E.g., *Dohoda o duchovní službě ve věznicích*, Sekretariát České biskupské conference, Praha 1994.

[76] "These confessionally oriented models differ from the (unique!) model applied in the Czech Republic, conceived on the basis of tripartite agreements between the Ministry of Defence, the Czech Bishops' Conference and the Ecumenical Council of Churches. On this basis, an ecumenical ministry has been built, which is not primarily oriented either toward the ministry within members of one's own church or religious society, or to religious ministry in general: primarily, its nature is humanitarian and in close cooperation with the psychologists in the military" [Němec 2010, 172, note 204].

[77] "The main shortcoming of the special rights system stems from its philosophy: special rights are understood as entitlements of churches and religious societies as institutions. Thus, the legislation loses sight of the rights of persons in a particular life situation (detention, imprisonment, service in the armed forces, etc.). Even these persons, in their specific and difficult circumstances, have the right to freedom of religion and other rights arising from it. The authority of an institution (registered church and religious society) to exercise special rights is secondary to this need to exercise a fundamental human right" [Kříž 2011, 94].

[78] Act No. 3/2002 Coll., on Freedom of Religion and the Status of Churches and Religious Societies and on Amendments to Certain Acts (Act on Churches and Religious Societies), as amended, § 7(1), (b) and (c).

[79] Ibid., § 7(a), (d), (e).

[80] Ibid., § 7 (c) of the original version.

Churches.[81] On the whole, the 2002 Act on Churches and Religious Societies has generally lowered the standard of religious freedom in the Czech Republic. Its most important innovation was the reduction of the numerical census of persons claiming to be members of a church applying for state recognition from 10,000[82] to only 300. These newly registered churches and religious societies, however, are subject to difficult conditions for obtaining authorization to exercise the special rights,[83] and none of them has yet reached that benchmark.

CONCLUSION

The sweeping political changes in Czechoslovakia, made possible by the democratization process of the "Prague Spring" in 1968, generated enormous enthusiasm among a significant part of the population in Czechoslovakia at the time. The fact that this process was quickly and consistently suppressed by the subsequent "normalisation" of the Communist regime is not only due to the intervention of the Warsaw Pact troops, but also due to the lack of institutional security and legal anchoring of the positive changes of the "Prague Spring",[84] including those concerning the freedom of churches and their believers.

Only in the context of completely transformed foreign policy constellation of 1989 did it become obvious that the transition to a democratic system is no longer at risk: the background of general social euphoria accelerated the fundamental constitutional and other legislative changes, such as the abolition of the "guiding role" of the Communist Party and the dominance of the "scientific world outlook",[85] the abolition of repressive criminal laws against religious freedom and the abolition of discriminatory measures against churches.

The 1991 Charter of Fundamental Rights and Freedoms, as well as the Law on Churches and Religious Societies of the same year, represent the *magna charta* for the desired religious freedom in Czechoslovakia after forty years of atheist rule. However, while the same Act on Churches and Religious Societies remained in force in Slovakia[86] after the dissolu-

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[81] Act No. 428/2012 Coll., § 23.

[82] Act No. 161/1992 Coll., on the Registration of Churches and Religious Societies, § 1.

[83] Act No. 3/2002 Coll., § 11.

[84] "The weakness of the (Communist) Party, which until then had been the dominant institution of power, was the strongest argument for its conditional public support. In terms of power, however, it was anarchy. Anarchic freedom was, among other things, the fruit of the absence of clear laws and unambiguous rules of the game" [Pithart 2019, 509].

[85] Constitutional Act No. 135/1989 Coll.

[86] On the amendments that gradually changed Act No. 308/1991 Coll. in Slovakia, cf. Gyuri 2021.

tion of Czechoslovakia, in the Czech part of the former federation certain restrictions on the rights arising from religious freedom have been introduced, especially those based on the new administrative measures adopted in the second Act on Churches and Religious Societies (2002). In contrast to Slovakia, the process of restitution of church property seized by the Communists as well as the overall property settlement between the state and the churches in the Czech Republic was protracted and long. Be as it may, it must be admitted that the churches also often overestimated their real strengths and tended to exaggerate their own capacities or cherish the notion of their own irreplaceability. Given the low state of religiosity in the Czech Republic, it can still be stated that churches have a visible social role, and the believing part of the population enjoys standard rights based on the freedom of religion.

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FUNCTIONAL ASSESSMENT OF PATIENTS AFTER HIP AND KNEE ARTHROPLASTY – PRELIMINARY STUDIES

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Abstract. Osteoarthritis is one of the main causes of pain and functional disorders in society, one that often affects the performance of everyday activities. The treatment usually consist of physiotherapy and pharmacotherapy, while in advanced stages, surgical treatment is required. The common method to assess the effectiveness of treatment is the physical examination by standardized scales of quality of life, assessment of pain and functioning. More recently, advances in objective assessment tools have been included such as DIERS formetric III 4D, myotometry or bioimpedance. The aim of the study is to evaluate the functional assessment of patients after hip and knee

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arthroplasty performed due to osteoarthritis. Hip and knee arthroplasty clearly improves the functioning of patients, reduces the intensity of pain and the risk of falls. In addition, changes in muscle tone and stiffness were demonstrated before and after the arthroplasty of the lower limbs.

Keywords: osteoarthritis; arthroplasty; VAS; WOMAC; Tinneti; DIERS; Myoton; bioimpedance

INTRODUCTION

Osteoarthritis (OA) of the lower limbs is the most common joint disease and one of the main causes of pain and functional disorders in people over 50 years of age. When present it often affects the performance of everyday activities and consequently leads to a reduced quality of life [Sierakowska, Sierakowski, Wróblewska, et al. 2010]. Whilst OA most often affects people over the age of 50, it can also occur in younger people. OA of the knee affects 19-28% of the population over 45 and 37% of people over 60. According to the World Health Organization, OA is a major cause of reduced mobility in women and men [O'Neill and Felson 2018; Tomaszewski 2016; Xiaotian, Hongchen, Wenwen, et al. 2020; Zhang and Jordan 2010]. Patients with OA often present with pain, joint stiffness, limited mobility, and over time with joint deformation and contractures [Materkowski 2019]. Common risk factors for the development of osteoarthritis are: older age, female gender, overweight and obesity, joint injuries – mainly the knee joint – and long-term joint overload [Biegański and Polewska 2015].

The treatment of OA usually includes health education of patients and changes in lifestyle (e.g. weight loss), physiotherapy (including physical treatment, exercises or manual therapy) or pharmacology (non-steroidal anti-inflammatory drugs and intra-articular injections). In advanced forms of OA, when pain and stiffness significantly affect the functioning of the patient, surgical treatment is undertaken. Endoprosthetic procedures have been demonstrated to significantly improve the quality of life of patients, whilst also reducing pain in 80% of knee replacements and 90% of hip replacements [Katz, Arant, and Loeser 2021; Pop, Bejer, Baran, et al. 2018; Romanowski, Zdanowska, and Romanowski 2016].

The assessment of the effectiveness of treatment and physiotherapy usually includes a physical and subjective examination in combination with standardized but subjective scales, e.g. visual analogue scale (VAS), Tinetti balance and gait assessment scale, Laitnen scale, The World Health Organization Quality of Life scale (WHOQoL), The Western Ontario and McMaster Universities Arthritis Index (WOMAC). More recently, patient examinations have included the use of modern digital technologies like DIERS formetric III 4D device, that assess the body posture and distribution

of center of gravity, or myotometry which provides information regarding the properties of muscles, specifically their stiffness or flexibility. In addition, neuromuscular changes and resting muscle tone can be assessed by superficial electromyography, while the addition of bioimpedance allows to assess the fluid and nutritional status of the patient.

The aim of the study is to evaluate the correlation between these objective measures of muscle properties, with the functional outcomes of patients following hip or knee arthroplasty performed due to osteoarthritis.

1. MATERIALS AND METHODS

The study was conducted among patients with advanced osteoarthritis of the hip and knee joints who were listed and underwent endoprosthetic surgery. The patients were treated in the Department of Orthopedics and Rehabilitation of the Independent Public Clinical Hospital No. 4 in Lublin. The study was approved by the bioethics committee of the Medical University of Lublin – no. KE-0254/149/2021.

Patients undergoing elective endoprosthetic surgery for osteoarthritis of the lower limbs were included in the study. According to the type of surgery patients were divided into those, who were undergone knee arthroplasty (group K) and those who were undergone hip arthroplasty (group H). Patients were qualified from among those reporting to the orthopedic clinic of the Independent Public Clinical Hospital No. 4 in Lublin and identified by doctors as requiring either hip or knee arthroplasty. Patients who had a history of stroke, cerebrospinal injuries, amputation within the lower limbs, multiple sclerosis or rheumatoid arthritis were not included in the study. Patients were also excluded if they had active malignant disease or early severe post-operative complications.

In the study an author's questionnaire was used together with visual analogue scale (VAS), The Western Ontario and McMaster Universities Arthritis Index (WOMAC), Tinetti balance and gait scale. Author's questionnaire was created a priori by the research team and includes socio-demographic information together with information about duration of OA, pain intensity and comorbidities. In addition, measurement of lower limb circumferences was recorded, bioimpedance was measured by the BCM Fresenius Medical Care device, muscle stiffness and flexibility was measured by the MyotonPRO device, and the load on the lower limbs was analyzed using the DIERS formetric III 4 D device.

The measurements were performed in three time points: 1) examination was done before surgery; 2) examination was done in 8-10 days after

the surgery; 3) examination was done in one month after discharge from the hospital.

Statistical analysis of the collected research results was carried out using the Statistica13.1 (Palo Alto, CA, USA) and Origin2021b (OriginLab, Northampton, MA, USA) programs. To assess the statistical significance of differences between measurements performed at different time points depending on the type of data, the following were used, respectively: ANOVA with repeated measures for continuous variables or ANOVA of Friedman's ranks (non-parametric equivalent of ANOVA with repeated measures) for variables measured on an ordinal scale or not meeting the conditions necessary for the use of parametric analysis (normality of distribution, homogeneity of variance) along with appropriate post hoc tests (Tukey and Dunn's test with Bonferroni correction). In the case of comparisons between the study groups, the Student's t-analysis was used for variables characterized by normal distribution and homogeneity of variance, or, if the variables did not meet certain assumptions, the non-parametric Mann-Whitney U test. The normality of the distribution and the homogeneity of the variance were assessed using the Shapiro-Wilk test and the Levene test, respectively. The significance level of p was set at 0.05.

2. RESULTS

24 patients aged 47 to 77 were studied. The demographic data were presented in table 1. All procedures were performed under spinal anesthesia. In the case of surgery within the hip joint, the patient was placed on the opposite side and posterolateral access to the joint was performed. In the case of knee arthroplasty, the patient was placed on his back and an anteromedial approach to the joint was performed. Each patients received fluid therapy at a dose of 10 to 15 ml per kg of body weight during surgery and 1000 to 1500ml of crystalloids during first post-operative period. Patients were activated the second day after surgery. Every patients received analgesic treatment for 2 days after surgery (pyralgin, perfalgan or oxycodone).

Table 1. Characteristic of the research groups

		K (n=12)	H (n=12)
Age [years]		70,1 ± 5,5	64,5 ± 7,6
Height [cm]		165,3 ± 9,1	172,4 ± 7,9
BMI		31,64 ± 2,3	30,01 ± 1,8
Marital status	single	-	-
	married	50% (6)	92% (11)
	widower	42% (5)	8% (1)
	divorced	8% (1)	-
Education	primary	17% (2)	8% (1)
	basic vocational	42% (5)	17% (2)
	secondary	25% (3)	50% (6)
	higher	17% (2)	25% (2)
Place of residence	Village	50% (6)	42% (5)
	Town	17% (2)	-
	City	33% (4)	58% (7)
Time Since diagnosis [years]	0-1	-	42% (5)
	1-2	-	-
	2-5	25% (3)	25% (3)
	6-10	42% (5)	33% (4)
	11-15	8% (1)	-
	16-20	17% (2)	-
	21-25	-	-
	over 30	8% (1)	-
How long the pain persist [years]	0-1	-	17% (2)
	1-2	-	8% (1)
	2-5	25% (3)	42% (5)
	6-10	33% (4)	25% (3)
	11-15	17% (2)	8% (1)
	16-20	8% (1)	-
	21-25	8% (1)	-
	over 30	8% (1)	-

*Data is presented as mean ± (standard deviation) or frequency % (percentage)

2.1. Assessment of pain intensity based on the VAS scale

A significant reduction was observed in pain scored for all time points in both groups (see figure 1). No statistically significant differences were seen in the level of reduction between the groups.

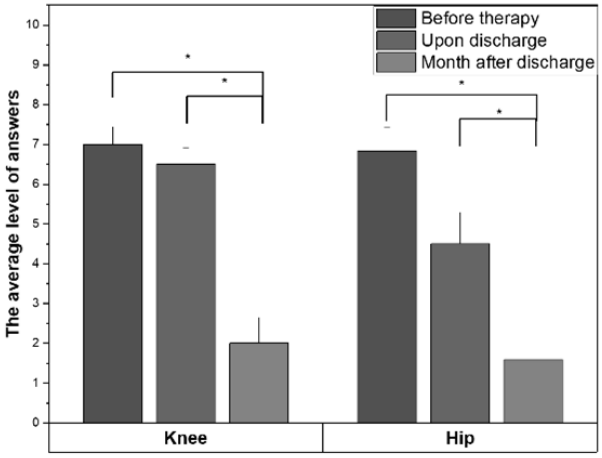


Figure 1. The average level of pain measured by VAS scale for two groups. * means statistically significant differences for the assumed level p<0,05

2.2. Assessment of balance and gait according to the Tinetti scale

The studies conducted to assess the risk of falls showed significant changes in both groups. The greatest risk of falls occurred at the time of discharge from the hospital, although this had shown significant improvement and a reduced risk of falls by one month. Again there were no statistically significant differences between the groups (figure 2).

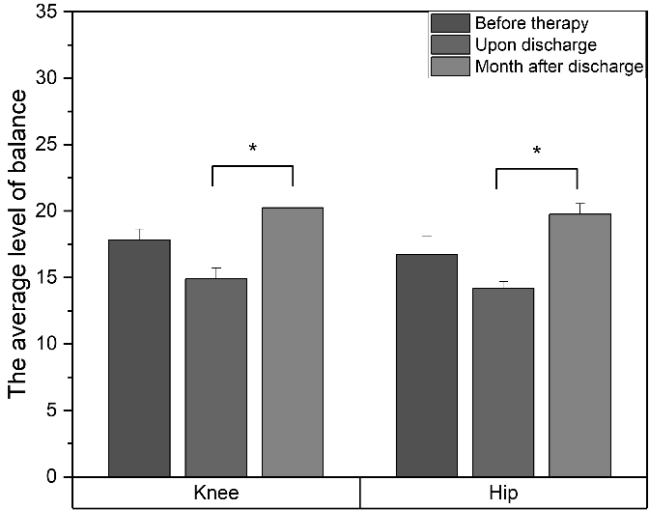


Figure 2. The average level of balance measured by Tinneti scale for two groups. * means statistically significant differences for the assumed level p<0,05

2.3. Evaluation of patients' functioning based on the WOMAC questionnaire

Measurements of the degree of functional limitation measured with the WOMAC questionnaire showed an approximately two-fold and statistically significant increase in the patients' fitness a month after discharge compared to the period before the surgery in both groups (figure 3).

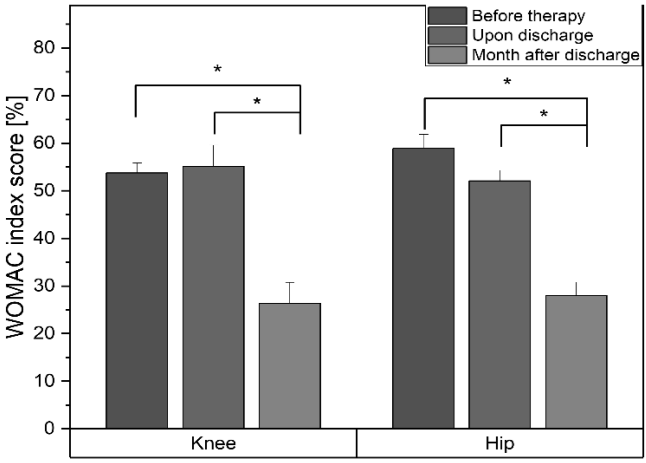


Figure 3. The average functional level measured by WOMAC scale for two groups. * means statistically significant differences for the assumed level $p<0,05$

2.4. Measurement of limb circumferences

The circumferences of both lower limbs were measured in the following locations: first femoral, second femoral, knee, first shin and second shin [Józefowski 2013].

The analysis of the results of our research showed the existence of differences in both measurements of the right and left thighs (F1 and F2) in the study groups. The values observed for group K (knee arthroplasty) were significantly higher than those recorded for group H (hip arthroplasty). This regularity was maintained in all stages of the study. None of the other circuits changed in a statistically significant way. There are statistically significant differences between the groups (table 2).

Table 2. Changes in circumferences of the lower limbs among the subjects

Measurement	Group	Average ± SE		
		Before surgery	After surgery	A month after discharge
First femoral left F 1	K	56,692±1,637	55,375±1,565	55,958±1,467
	H	51,292±1,668	51,250±1,522	50,417±1,602
p – value		p<0,05	p<0,05	p<0,05
First femoral right F 1	K	56,375±1,468	56,333±1,432	55,875±1,364
	H	50,125±1,881	50,000±1,947	50,458±1,678
p-value		p<0,05	p<0,05	p<0,05
Second femoral left F 2	K	48,292±0,836	49,083±1,090	47,667±0,966
	H	44,583±1,190	44,542±1,047	43,692±1,052
p-value		p<0,05	p<0,05	p<0,05
Second femoral right F 2	K	48,542±0,988	50,125±1,228	48,250±1,194
	H	44,125±1,428	43,625±1,322	43,417±0,939
p-value		p<0,05	p<0,05	p<0,05
Knee left K	K	43,333±0,582	44,125±0,973	42,917±0,818
	H	40,875±1,260	42,000±1,006	41,292±1,129
p-value		p>0,05	p>0,05	p>0,05
Knee right K	K	43,042±0,897	45,833±1,006	43,250±0,968
	H	41,500±0,965	41,667±1,052	40,750±1,016
p-value		p>0,05	p>0,05	p>0,05
First shin left Sh-1	K	39,333±1,110	38,750±1,069	38,625±1,195
	H	38,542±1,306	38,458±1,076	37,750±1,109
p-value		p>0,05	p>0,05	p>0,05
First shin right Sh-1	K	39,542±0,847	39,583±0,971	38,750±1,016
	H	38,167±1,322	38,000±1,195	37,208±1,215
p-value		p>0,05	p>0,05	p>0,05
Second shin left Sh-2	K	23,875±0,769	24,167±0,548	24,375±0,691
	H	24,458±0,695	24,958±0,716	24,250±0,695
p-value		p>0,05	p>0,05	p>0,05
Second shin right Sh-2	K	23,792±0,619	24,250±0,475	25,083±1,334
	H	24,458±0,711	24,167±0,664	24,208±0,661
p-value		p>0,05	p>0,05	p>0,05

2.5. Evaluation of the physiological parameters of the muscles of the lower limbs using the MyotonPRO device

Myotometry is used to assess muscle properties such as tension (F), stiffness (S) and elasticity (D). Measurements were made within the following areas: gluteus maximus, rectus femoral, tibialis anterior, gastrocnemius and hamstring muscles.

2.5.1. Gluteus maximus muscle

Significant differences in the values measured for knee and hip arthroplasty in terms of tension (F) and flexibility (D) were demonstrated (see figure 4).

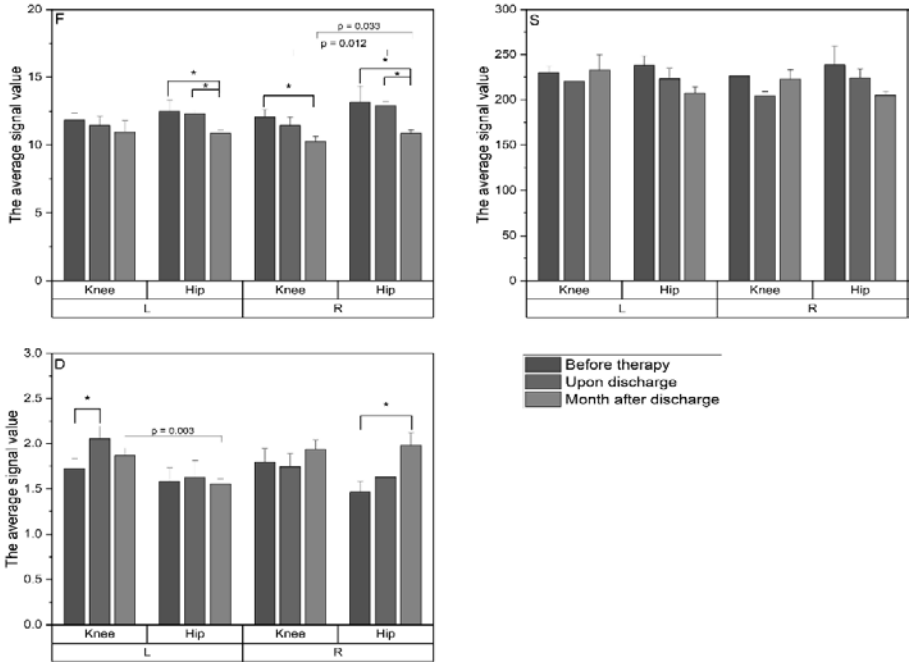


Figure 4. The average signal value for gluteus maximus muscle measured by MyotonPro device for two groups. * means statistically significant differences for the assumed level p<0,05

2.5.2. Rectus femoral muscle

There were statistical differences in the tension of the right rectus femoral muscle measured in a month after discharge between group K and H, where the values for the H group were significantly higher than those for group K. A significant difference was also observed for the right rectus femoral

muscle in the stiffness values (S), but only for the measurements carried out before the therapy (figure 5).

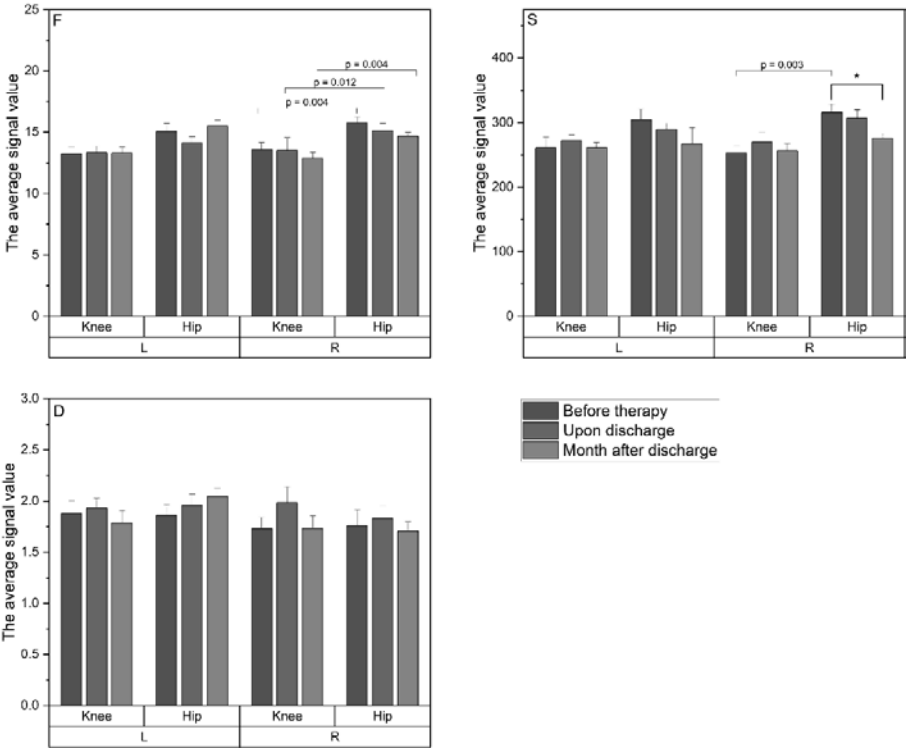


Figure 5. The average signal value for rectus femoral muscle measured by MyotonPro device for two groups. * means statistically significant differences for the assumed level p<0,05

2.5.3. Hamstring muscles

The conducted analyzes showed statistically significant differences between knee and hip arthroplasty for measurements in three stages of the study in the case of the left muscle in terms of tension (F) and the right muscle in terms of stiffness (S) (figure 6).

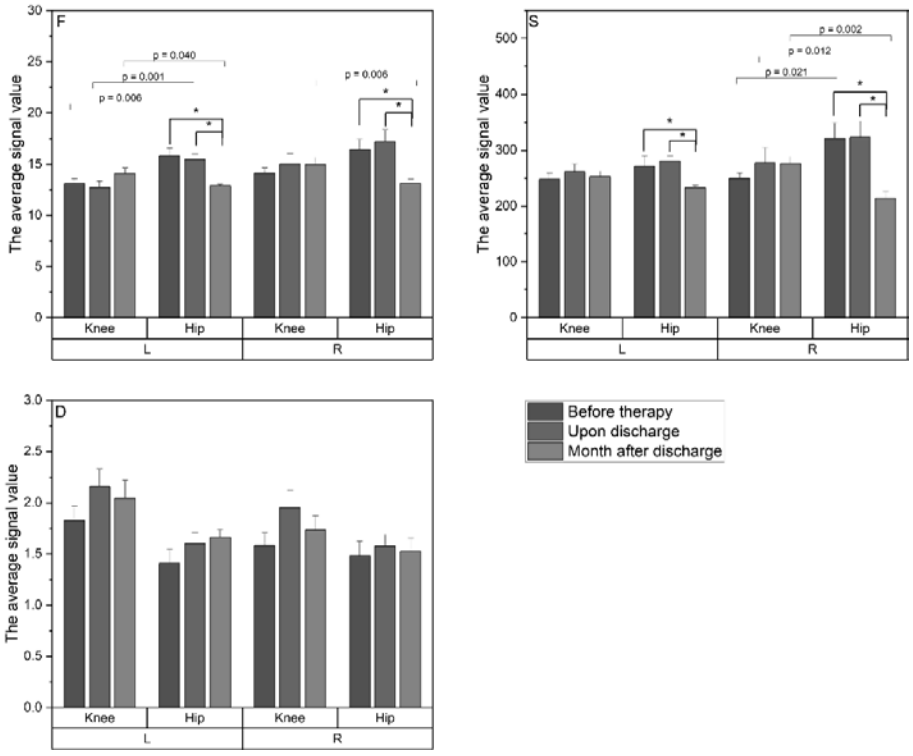


Figure 6. The average signal value for hamstring muscles measured by MyotonPro device for two groups. * means statistically significant differences for the assumed level p<0,05

2.5.4.Ttibialis anterior muscle

When comparing the parameter values for knee and hip arthroplasty, statistically significant differences were revealed between the values of tension (F) and stiffness (S) in the second and third tests. In terms of flexibility (D), the measurements for both limbs were significantly different (figure 7).

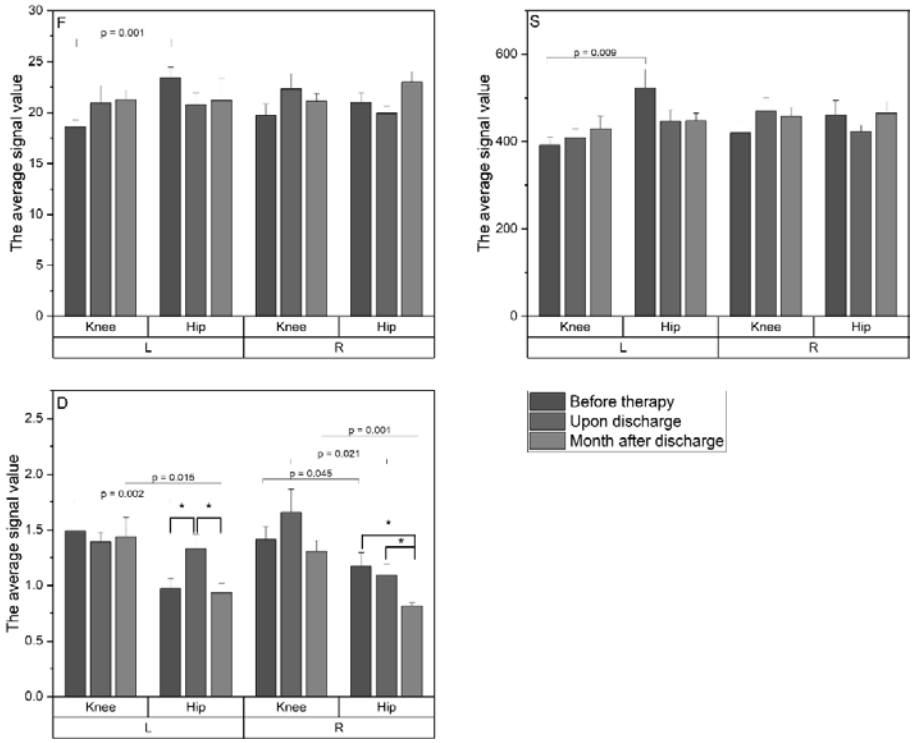


Figure 7. The average signal value for tibialis anterior muscle measured by MyotonPro device for two groups. * means statistically significant differences for the assumed level p<0,05

2.5.5. Gastrocnemius muscle

Comparing the values for knee and hip arthroplasty, it can be seen that statistically significant differences between the groups are found in the left gastrocnemius muscle in terms of tension (F) and elasticity (D), and the right one in terms of tension (F) and stiffness (S) only for measurements made one month after discharge (figure 8).

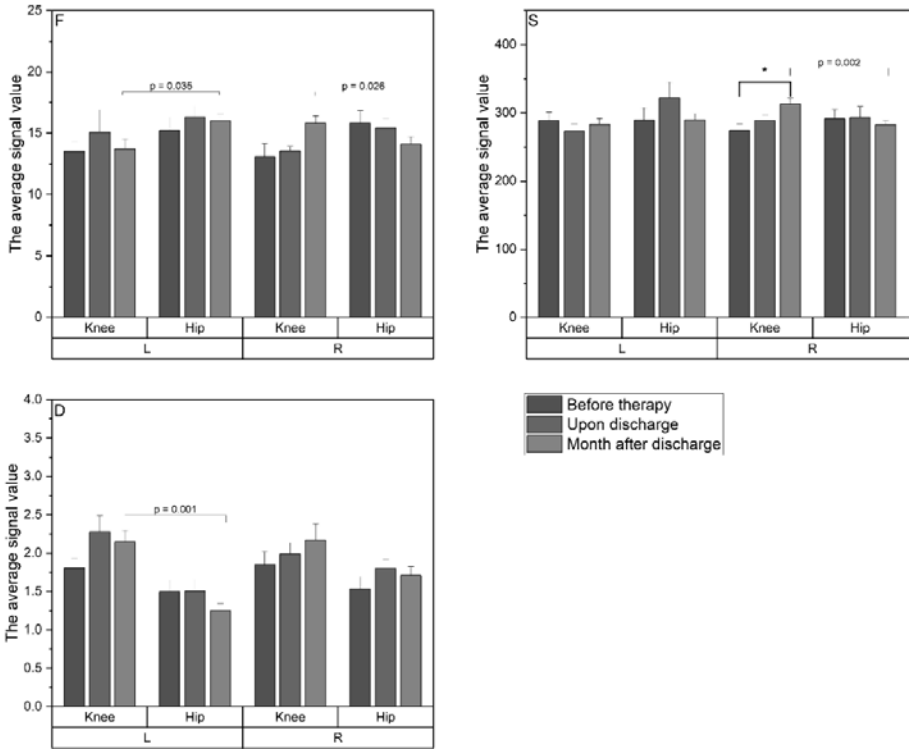


Figure 8. The average signal value for gastrocnemius muscle measured by MyotonPro device for two groups. * means statistically significant differences for the assumed level $p<0,05$

2.6. Assessment of bioimpedance using the BCM Fresenius Medical Care device

During the study, the following measurements were taken: body hydration (OH), adipose tissue mass (ATM), lean tissue mass (LTM), total body water (TBW), intracellular water (ICW) and extracellular water (ECW).

Comparing the data between the groups, statistically significant changes were shown in the measurements of the amount of total body water and the amount of intracellular water obtained one month after discharge, with higher variables among patients after hip arthroplasty. In the case of the LTM variable, measurements made for knee and hip arthroplasty before the therapy and one month after discharge were statistically different (figure 9).

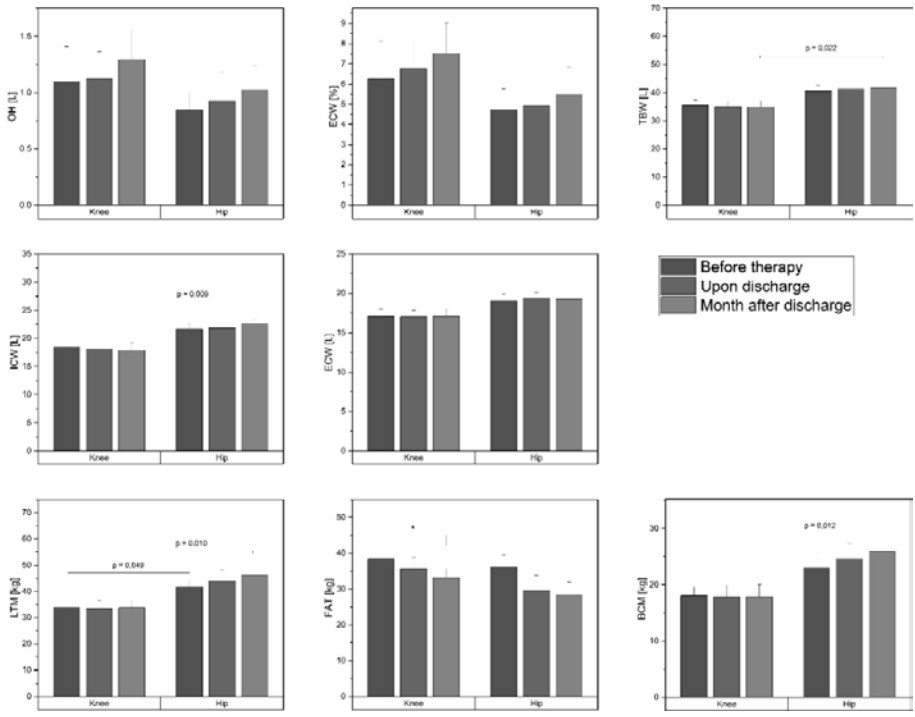
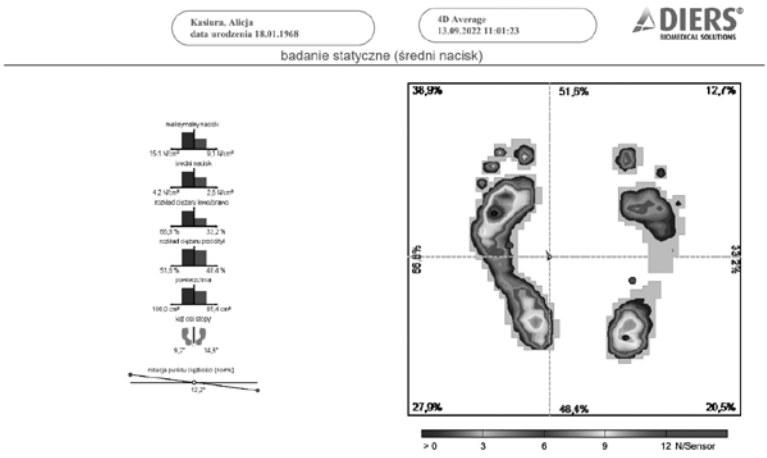


Figure 9. Body composition measurements performed by BCM Fresenius Medical Care device for two groups. * means statistically significant differences for the assumed level $p<0,05$

2.7. Assessment of the load on the lower limbs using the DIERS formetric III 4 D device

During the examination, the load on the lower limbs of the patient was analyzed in terms of pressure force, body weight distribution both in the front-back and right-left direction.



Picture 1. Assessment of the load distribution on the lower limbs by DIERS formetric 4D device.

Comparing the data obtained for group K and group H, it can be seen that the only statistically significant differences between them showed the average pressure variable (right side), for which the values obtained for group K were significantly lower compared to those obtained for group H at each stage of the study (figure 10).

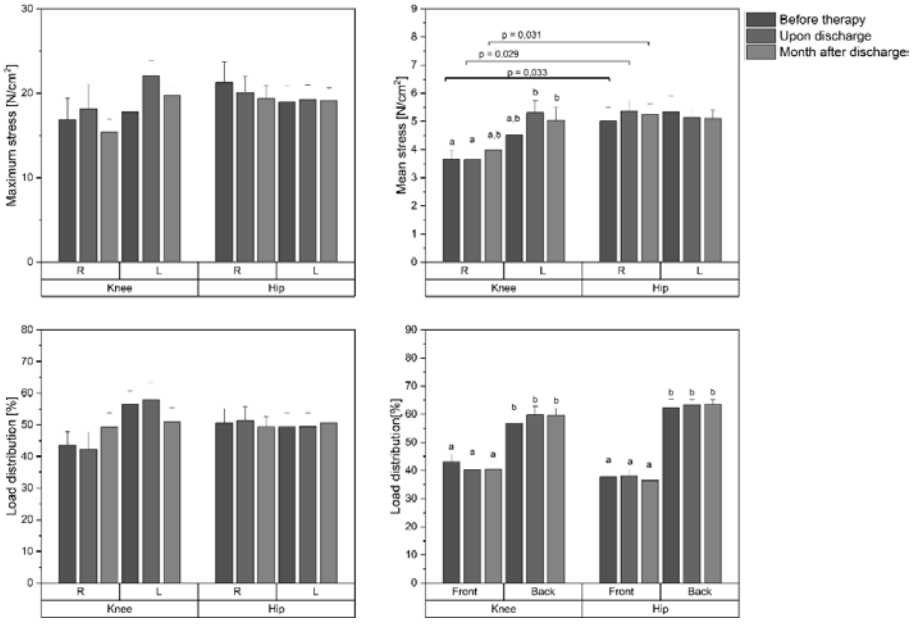


Figure 10. Assessment of limb load measure by Diers device for two groups. Letters *a* and *b* means statistically significant differences for the assumed level p<0,05

3. DISCUSSION

Hip and knee arthroplasty significantly improves patients functioning, reduces pain intensity and the risk of falls. We documented a significant improvement in fitness according to the WOMAC questionnaire and a reduction in the risk of falls according to the Tinetti scale after knee and hip arthroplasty. The improvement in the functioning of patients can be directly linked to the reduction in the intensity of the pain experienced. Similar observations by Ramlall et al. demonstrated a correlation between the knee arthroplasty procedure and the pain experienced by the patient [Ramlall, Andrion, Cameron, et al. 2019]. The study by Sierakowska et al., points to chronic pain as the main symptom of osteoarthritis of the lower limbs. The authors showed a correlation between disease duration and increased disability in patients. According to their results, long-term osteoarthritis increases patients' functional problems and negatively affects their ability to move and perform activities of daily living [Sierakowska, Sierakowski, Wróblewska, et al. 2010]. In their work Vitaloni et al. conducted a systematic review of 610 articles assessing the quality of life of patients with lower limbs osteoarthritis. The authors clearly stated that arthritis of the knee joints significantly affects the deterioration of the functioning of the patients, however, knee arthroplasty brings much better results in improving the quality of life compared to other methods of treatment [Vitaloni, Botto-van Bemden, Sciortino Contreras, et al. 2019].

In our study we found a significant changes in muscle tone and stiffness before and after lower limb arthroplasty. The difference was seen primarily in measurements of rectus femoral and hamstring muscles. Our data showed a decrease in stiffness only among patients after total hip arthroplasty, while in post-knee arthroplasty patients, stiffness parameters remained unchanged for rectus femoral and increased in hamstring muscles. Muscles tone measurement changed slightly at all stages of the research for both groups, being generally higher among patients after hip arthroplasty. An interesting study on the relationship between pain and muscle strength was presented by Waldon et al. in which they showed that advanced knee osteoarthritis is accompanied by severe pain. Additionally, they presented correlations between chronic lower limb joint pain and decreased muscle strength [Waldon, Szczypiór-Piasecka, Mińko, et al. 2021]. Similar observations were made by Basat et al., who identified a relationship between reduced muscle strength with the development of lower limbs osteoarthritis. In the study, they showed weakness in the rectus femoral muscle, which is, according to the authors, a direct factor in the development of arthritis in the knee joint [Basat, Sivritepe, Ortaboz, et al. 2021]. These results are only partially consistent with our research. Therefore, further research in this direction

should be conducted to confirm the hypothesis that osteoarthritis affects the reduction of muscle strength. Quadriceps femoral stiffness has also been studied by Chang et al. The authors showed that in patients with degenerative changes in the knee joint, there is greater stiffness of the vastus laterals muscle compared to healthy individuals [Chang, Zhu, Li, et al. 2022].

Our study with myotonometry showed the increase in tension and stiffness in the tibialis anterior and gastrocnemius muscles among patients after knee arthroplasty, while in the group of patients after hip arthroplasty, only a slight increase in gastrocnemius muscle tension was observed as well as in the tibialis anterior muscle. The collected results were confirmed with the studies of Chen et al., where an increase in stiffness of the Achilles tendon was demonstrated in patients with advanced knee osteoarthritis [Chen, Ye, Shen, et al. 2021]. Several authors in their publications focus on muscle stiffness values during myotometric examination. In own study, the authors additionally considered the following variables: muscle tension and flexibility.

In our study, we obtained slightly higher values of adipose tissue mass in knee arthroplasty patients at each stage of the examination, and higher amounts of lean tissue mass were noted in patients after hip arthroplasty. In addition, during all three stages of the study, a decrease in the amount of total body water and intracellular water was noted in patients after knee arthroplasty. In the second group of patients, these values increased slightly, but were not statistically significant. Similar data showed authors DeMik and Marinier et al. in their study. They checked the effect of osteoarthritis of the hip and knee joints on the patient's body composition components. In their results, lower values of adipose tissue mass were observed in patients with changes in the knee joint, without changes in other parameters. The lean tissue mass values of patients with knee and hip arthritis were within similar limits, while adipose tissue mass values were slightly higher in patients with the affected knee joint. They also showed that in patients with unilateral hip arthritis, the amount of total water in the lower limb, as well as intracellular water, and the amount of lean and adipose tissue mass were significantly lower compared to the unaffected limb. [DeMik, Mariner, Gulbrandsen, et al. 2022].

We also studied a load analysis on the lower limbs before and after surgery. The data collected show that the average pressure on the ground was higher in patients after hip arthroplasty, while a much higher load on the rear foot was observed in all patients, regardless of the location of the changes. During lower limbs osteoarthritis, patients experience multiple trunk compensations due to pain and limited joints mobility. Fu and Duan et al. have shown in their studies a greater pelvic anteversion and a greater inclination of the trunk in the anteroposterior direction in patients with arthritis

of the lower limbs compared to healthy individuals [Fu, Duan, Hou, et al. 2021]. In their work, Kechagias et al., examined 34 patients after hip arthroplasty and 45 patients after knee surgery. They came to an interesting conclusion that knee or hip arthroplasty does not improve spinal position and compensation, which may indicate that osteoarthritis does not necessarily change body posture [Kechagias, Grivas, Papagelopoulos, et al. 2022]. It is consistent with our observation that arthroplasty of hip or knee joint does not alter the load distribution of patients' lower limbs. This finding indicates that we should take a closer look at the posture of patients with osteoarthritis and conduct more detailed research in this area.

Limitations: This study is preliminary work, that allowed to verify suitability of selected research tools for the functional assessment of patients after hip and knee arthroplasty. However, further studies should be carried out to create larger groups in terms of the reliability of the research. The presented results of the study should be compared with the control group, which is subjected to non-surgical treatment.

CONCLUSIONS

The conducted study clearly showed functional improvement of patients after hip and knee arthroplasty. Analysis of the collected results shows a significant change in the intensity of the pain and the risk of falls at all stages of the study for both groups. Changes in muscle tone and stiffness were demonstrated before and after the arthroplasty of the lower limbs. Hip and knee arthroplasty improve balance and body weight distribution on the lower limbs.

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THE LEVEL OF PSYCHOLOGICAL TENSION AND PROFESSIONAL BURNOUT IN NURSES EMPLOYED IN HOSPITAL EMERGENCY DEPARTMENTS

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Abstract. Burnout syndrome is a collection of adverse symptoms that affect nursing staff employed in medical facilities. This syndrome is marked by a low mood, mental fatigue, and physical discomfort. Its emergence is impacted by strenuous work, organizational problems, and interpersonal conflicts. The aim of this study was to analyze the degree of mental burden and occupational burnout of nurses employed in Hospital Emergency Departments (ER). The data collection was based on the author's questionnaire, as well as the MBI Maslach occupational burnout questionnaire and the Meister's mental burden assessment questionnaire. The sample comprised 113 professionally active nurses employed in the HED. Conclusions: (1) the respondents exhibit a low and medium level of occupational burnout and mental workload, (2) socio-demographic factors, work experience and prevention methods do not affect the level of mental workload and occupational burnout, (3) employment in several workplaces causes a higher level of workload and professional burnout, (4) satisfaction with remuneration and support from colleagues is a key factor in reducing the risks of professional burnout.

Keywords: mental burden; occupational burnout; health care system

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INTRODUCTION

Professional burnout is the subject of numerous theoretical works. Maslach defines burnout as "a psychological syndrome of emotional exhaustion, depersonalization, and a reduced sense of personal achievement that can occur in people working with other people in a certain way" [Bartkowiak 2009]. The WHO European Forum of Medical Associations defines occupational burnout as "a syndrome of emotional, physical and cognitive energy exhaustion manifested by emotional and physical exhaustion, lack of efficiency and competence" [Wang, et al. 2020].

A similar description is defined by Pines and Aroson, who consider burnout "as a state of physical, emotional and mental exhaustion caused by prolonged involvement in situations that are emotionally taxing" [Sęk 2005].

In discussing this terminology, one can't help but refer to the definition of Sęk, a key researcher on this issue. According to her, "occupational burnout is one of many possible reactions of the body to chronic stress associated with work in professions whose common feature is constant contact with people and emotional involvement in their problems. Burnout is the result of prolonged and severe stress and the inability to cope with it. Burnout is not a psychopathological phenomenon, but rather a multifaceted syndrome of symptoms, the causes of which are both interpersonal, individual, and organizational-contextual factors, and thus involve professions that share a common social context, which involves interacting with patients, clients, and even fellow workers" [Mańkowska 2016].

Referring to the above definitions, it should be assumed that occupational burnout is multifaceted and is associated with emotional exhaustion, depersonalization, reduced sense of one's own successes and achievements [Świętochowski 2011].

The basic symptoms of professional burnout include frequent fatigue, lack of energy, low level of activity. People affected by emotional exhaustion are characterized by the conviction that they are constantly overloaded with professional duties, and their performance consumes much more time than before. They do not have the possibility of effective rest, relaxation, mental relaxation, as well as regeneration of their energy resources. Emotional exhaustion is the basic consequence of often experienced stress in the professional sphere [Gembalska-Kwiecień and Żurakowski 2015; Tucholska 2001].

On the one hand, fatigue is a symptom of occupational burnout, but on the other hand, the described phenomenon does not show the characteristic forms of this fatigue, because a person affected by burnout can simultaneously experience full satisfaction and contentment from his

professional life, and on the other hand, he may experience exhaustion in connection with it. In most cases, professional burnout affects those people who started their professional career with excessive commitment, showing lofty assumptions, ideals, goals, and too high expectations Kraczla's [Kraczla 2013; Wilczek-Rużyczka, et al. 2019]. Considers that the main difference between burnout and work-related stress is that stress and fatigue are inherent in every professionally active person, and that burnout only affects those who were previously convinced that work would be the main purpose of their lives.

The above-mentioned emotional exhaustion is associated with experiencing excessive mental strain, insufficient physical and mental energy, and emotional emptiness. In addition, it is associated with the feeling of reduced energy resources because of the need to establish interpersonal contacts with others on a professional basis [Erenkfeit, et al. 2012; Jankowiak 2010].

Depersonalization correlates directly with the occurrence of inappropriate attitudes, and adopting a defensive stance, which results in maintaining an excessive distance from people with whom one comes into contact in the professional sphere. A manifestation of depersonalization is adopting an attitude of indifference, lack of empathy, contempt, treating patients as objects. On the other hand, a reduced assessment of one's own achievements is associated with a tendency to negatively assess oneself, one's achievements, practical skills and qualifications, and a lack of faith in one's own abilities. Therefore, this leads to a low degree of professional commitment and a feeling of satisfaction with the goals resulting from the performance of professional duties. The factors mentioned above make it possible to distinguish between professional burnout and other effects of experienced stress in the professional sphere [Erenkfeit, et al. 2012; Jankowiak 2010; Kurowska and Zuza-Witkowska 2011; Wieder-Huszla, et al. 2016].

Occupational workload is very common in representatives of professions based on helping others, in medical professionals, including nurses. As the reasons for experiencing a high level of occupational stress, which is a risk factor for burnout in nurses, Sek's lists: requirements resulting from the characteristics of the profession, whose removal or limitation exceeds the capabilities, powers and competences of nurses, high level of mental burden resulting from the need to bear responsibility for the health and life of patients , technical and organizational deficiencies appearing during the performance of care and therapeutic activities, systemic irregularities, pay inadequate to the requirements, lack of professional prestige, inappropriate atmosphere in the workplace, experiencing a demanding attitude on the part of patients and their relatives [Sęk 2009].

Nurses also experience many other determinants during their work and stress factors. These include, above all, aggressive behavior of patients, great involvement in helping others, excessive exploitation of the body, sacrificing private life for professional. Nurses also experience negative emotions not only from patients, but also from their relatives, who in this way relieve themselves of difficult moments, death of loved ones, pain, suffering [Marcysiak, et al. 2016; Wilczek-Rużyczka 2014].

Describing the phenomenon of occupational burnout occurring in nurses, it should also be noted that through contacts with patients who are aware of the approaching end of life, nurses fully unconsciously take over the negative feelings of patients, which burdens them in the emotional and mental spheres [Klajda and Szewczyk 2016; Zbyrad 2017].

Another factor intensifying the occurrence of professional burnout syndrome among nurses is the performance of professional duties in a shift system. This is related to the treatment of nursing staff as only executors of medical orders, at the same time deprived of an autonomous role, having professional qualifications and competences [Kociuba-Adamczuk 2017; Majchrowska and Tomkiewicz 2015].

Kowalska highlights other determinants that have a negative impact on nurses' well-being, and includes high noise levels, high temperatures, artificial lighting of inadequate intensity, high levels of radiation, contact with chemicals, pharmaceuticals, biological material, secretions, and excretions of patients [Jończyk and Sawicka 2019; Kowalska 2007; Rezmerska, et al. 2016; Wojciechowska and Krzyżanowski 2011].

In conclusion, it should be recognized that occupational burnout is the result of many negative factors of a psychological, organizational, and environmental nature [Kociuba-Adamczuk 2017; Hoffmann-Aulich, et al. 2017; Lochmajer 2015; Nowakowska and Rasińska 2014; Sowińska et al. 2012; Wilczek-Rużyczka and Zaczyk 2015].

1. MATERIAL AND METHODS

1.1. Participants and characteristics of the study

The research was carried out in 2023 among 113 HED employees. The research material was collected using two methods. The first method involved paper questionnaires that were completed by respondents. The second method was based on publishing the questionnaire in an electronic version in social media on groups dedicated to medical professionals. Before completing the questionnaire, the respondents were informed about the purpose of the study, voluntary participation in it, and they were also assured of anonymity.

1.2. Method

The method used to collect the research material was the diagnostic survey method. The technique used was a questionnaire. In addition, three research tools were used in the work. The first was an original questionnaire composed of a total of 24 questions. Questions 1-9 constituted the characteristics of the surveyed group, considering gender, age, place of residence, education, specialization, work experience, marital status, and financial status. The purpose of questions 10-12 was to learn about the circumstances of employment, i.e., the type of employment contract, the number of places of employment and the system of work at the HED. On the other hand, questions 13-25 referred to the mental and physical consequences of work, experiencing the support of relatives and colleagues, and taking actions aimed at reducing stress. The second research tool was the MBI burnout questionnaire according to Maslach. This tool consists of 22 statements related to the respondents' attitudes and feelings towards their professional work. The purpose of the questionnaire was to determine the severity and frequency of experiencing burnout symptoms by a given person. Each of the included statements was described by the respondents using a 1-4 scale, thanks to which it was possible to obtain a maximum of 88 points. The higher the score, the higher the level of occupational burnout in the surveyed person [Hong, et al. 2007].

The third research tool used was the Meister questionnaire evaluating the mental burden associated with professional work. Its structure is complex out of 10 statements evaluated with 5 statements scored: 1-definitely not; 5-definitely yes. Respondents could score from 10 to 50 points. The higher the number of points obtained by the tested person, the greater was the level of mental burden: a) 10-17 points low level of mental load, b) 18-34 points average level of mental load, c) 35-50 points high level of mental burden [Świętochowski 2011].

1.3. Statistical analysis

The analysis of the research material was carried out using a statistical test, i.e., the Chi2 independence test with the assumed level of significance at $p \leq 0.05$. It was used due to the study of independence among immeasurable features presented in the form of number and percentage. The database, tables, and calculations necessary to provide answers in connection with the accepted research problems and research hypotheses were made using the Microsoft Professional Excel 2019 computer program.

1.4. Ethical statement

The research was carried out based on the requirements of the Declaration of Helsinki. All participants were informed about the purpose of the study and took part in it voluntarily and consciously.

2. RESEARCH RESULTS

2.1. Characteristics of the study group

Significantly more women (n=88, 77.9%) than men (n=25, 22.1%) participated in the study. The largest number of respondents was in the age group of 31-40 (n=36, 31.9%) and 41-50 (n=35, 30.9%), and the fewest in the age group of 21-30 (n=16, 14, 2%) and 50 years and over (n=26, 23.0%). 64 people were urban residents (n=64, 56.6%) and 49 were rural residents (n=49, 43.4%). Most of the respondents had a bachelor's degree (n=59, 52.2%). The remaining persons completed vocational studies (n=19, 16.8%) or had higher education with a master's degree (n=35, 31.0%). Only 31 respondents (n=31, 27.4%) had a specialization, 82 other people did not have a specialization (n=82, 72.6%). Most people worked in the ward for 6-10 years (n=38, 33.6%) and 11-20 years (n=29, 25.7%). The others defined their work experience in the HED as less than a year (n=17, 15.1%), 1-5 years (n=19, 16.8%) or over 20 years (n=10, 8.8%). Most of the respondents worked in the profession for 20 years (n=41, 36.3%) or 11-20 years (n=35, 31.0%), and the fewest for less than a year (n=8, 7.1%), 1-5 years (n=10, 8.8%) or 6-10 years (n=19, 16.8%). Most of the respondents were in a relationship (n=78, 69.1%). The remaining group were unmarried (n=21, 18.6%), divorced (n=10, 8.8%) or widowed (n=4, 3.5%). 46 people described their financial status as good (n=46, 40.7%), 50 as average (n=50, 44.2%), and only 17 as bad (n=17, 15.1%). Many respondents were employed full-time based on an employment contract (n=105, 92.9%), only 8 people were employed based on a civil law contract (n=8, 7.1%). 106 respondents worked in shifts (n=106, 93.8%), and 7 respondents in the day system (n=7, 6.2%). 71 respondents declared receiving support from other employees (n=71, 62.8%), 42 respondents did not receive support (n=42, 37.2%). 28 people believed that they experienced occupational burnout (n=28, 24.8%), and 44 people that they did not (n=44, 38.9%). 41 respondents had no opinion on this issue (n=41, 36.3%). 68 respondents stated that they apply the principles of preventing burnout (n=68, 60.2%), 45 did not confirm the implementation of any form of prevention (n=45, 39.8%). 106 respondents confirmed experiencing professional stress while performing their professional duties (n=106, 93.8%), 7 people declared that they did not experience such stress (n=7, 6.2%). Many respondents believed they experienced aggression

and demanding behavior from their patients (n=109, 96.5%), only 4 respondents did not experience such attitudes and behavior from their patients (n=4, 3.5%). When asked about feeling overloaded with professional duties in the HED, 110 respondents chose an affirmative answer (n=110, 97.3%), and only 3 negative ones (n=3, 2.7%). 25 people were satisfied with the atmosphere at work (n=25, 22.1%), 61 were partially satisfied (n=61, 54.0%), and 27 were not at all satisfied (n=27, 23.9%). 79 respondents undertook activities related to the reduction of tension and stress in their free time (n=79, 69.9%), and 34 did not undertake such prevention (n=34, 30.1%).

2.2. MBI Burnout Questionnaire

Using the MBI Burnout Questionnaire, the level of burnout among the respondents was examined. It was shown that 53 respondents were characterized by low (n=53, 46.9%), 46 medium (n=46, 40.7%), and 14 high level of occupational burnout (n=14, 12.4%) (Table 1).

Table 1. Characteristics of respondents according to the level of occupational burnout.

Professional burnout level	N	%
low (22-44 points)	53	46,9
medium (45-66 points)	46	40,7
high (67-88 points)	14	12,4
Total	113	100,0

Source: own research, n – number of responses

2.3. Meister's Mental Burden Questionnaire

Based on the answers given by the respondents in the Meister Mental Burden Questionnaire, it was shown that 39 respondents were characterized by low (n=39, 34.5%), 55 medium (n=55, 48.7%) and 19 high levels of mental burden (n=19, 16.8%) (Table 2).

Table 2. Characteristics of the respondents according to the level of mental burden.

Mental load level	N	%
low (10-17 points)	39	34,5
medium (18-34 points)	55	48,7
high (35-50 points)	19	16,8
Total	113	100,0

Source: own research, n – number of responses

2.4. Research analysis

The conducted research shows that occupational burnout and mental burden were not determined by place of residence (p=0.91 vs. p=0.23), gender (p=0.42 vs. p=0.10), seniority (p=0.59 vs. p=0.06), preventive measures (p=0.10 vs. p=0.44) or age (p=0.21 vs. p=0.81). Statistically significant differences were observed in determinants such as: number of jobs (p<0.001) (Table 3 and 4), satisfaction with remuneration (P=0.001) (Table 5 and 6) and support from colleagues (p=0.01) (Table 7 and 8).

Table 3. The impact of the number of jobs on the level of professional burnout among respondents.

Number of jobs	Professional burnout level			Total n, %
	Low n, %	Medium n, %	High n, %	
1	48	37	4	89
	42,5	32,7	3,5	78,8
more than 1	5	9	10	24
	4,4	8,0	8,8	21,2
Total	53	46	14	113
n, %	46,9	40,7	12,4	100,0
Statistical analysis: $Chi^2$25,574, p<0,001				

Source: own study, n – number of responses, p – level of significance

Table 4. The impact of the number of jobs on the level of psychological burden among the respondents.

Number of jobs	Professional burnout level			Total n, %
	Low n, %	Medium n, %	High n, %	
1	35	47	7	89
	31,0	41,6	6,2	78,8
more than 1	4	8	12	24
	3,5	7,1	10,6	21,2
Total	39	55	19	113
n, %	34,5	48,7	16,8	100,0
Statistical analysis: Chi^2=24,244, p<0,001				

Source: own study, n – number of responses, p – level of significance

Table 5. Impact of satisfaction with remuneration on the level of professional burnout among respondents.

Feeling satisfied with the salary	Professional burnout level			Total n, %
	Low n, %	Medium n, %	High n, %	
Yes	34	11	4	49
	30,0	9,7	3,5	43,4
No	19	35	10	64
	16,8	31,0	8,8	56,6
Total	53	46	14	113
n, %	46,9	40,7	12,4	100,0
Statistical analysis: Chi^2=17,658, p=0,001				

Source: own study, n – number of responses, p – level of significance

Table 6. Impact of satisfaction with remuneration on the level of psychological burden among respondents.

Feeling satisfied with the salary	Mental load level			Total n, %
	Low n, %	Medium n, %	High n, %	
Yes	26	16	7	49
	23,0	14,2	6,2	43,4
No	13	39	12	64
	11,5	34,5	10,6	56,6
Total	39	55	19	113
n, %	34,5	48,7	16,8	100,0
Statistical analysis: Chi^2=13,514, p=0,001				

Source: own study, n – number of responses, p – level of significance

Table 7. Impact of receiving support from other employees on the level of professional burnout among respondents.

Receiving support from other employees	Professional burnout level			Total n, %
	Low n, %	Medium n, %	High n, %	
Yes	40	26	5	71
	35,4	32,0	4,4	62,8
No	13	20	9	42
	11,5	17,7	8,0	37,2
Total	53	46	14	113
n, %	46,9	40,7	12,4	100,0
Statistical analysis: Chi^2=8,819, p=0,01				

Source: own study, n – number of responses, p – level of significance

Table 8. Impact of receiving support from other employees on the level of psychological burden among respondents.

Receiving support from other employees	Professional burnout level			Total n, %
	Low n, %	Medium n, %	High n, %	
Yes	28 24,8	37 32,7	6 5,3	71 62,8
No	11 9,7	18 15,9	13 11,5	42 37,2
Total n, %	39 34,5	55 48,7	19 16,8	113 100,0
Statistical analysis: Chi^2=9,753, p=0,007				

Source: own study, n – number of responses, p – level of significance

3. DISCUSSION

The conducted research shows that most of the respondents were characterized by low and average level of mental burden and occupational burnout. It depended on the number of jobs, satisfaction with remuneration, receiving support from loved ones. The research showed no relationship between gender, age, place of residence, work experience and the use of prophylaxis and the development of professional burnout and mental burden.

A similar topic was taken up by Rezmerska, who analyzed the nursing staff employed in various hospital wards. The group of respondents in her research consisted of 70 employees, dominated by women aged 41-50, with at least 20 years of work experience, employed in a 12-hour system, with secondary education. Most of the respondents experienced burnout at an average level. For comparison, this research was also dominated by women, aged 31-40 and 41-50, with 11-20 years of work experience, with a bachelor's degree, employed in a shift system. Both Rezmerska's research and the research presented in this paper confirmed a low and medium level of occupational burnout [Rezmerska et al. 2016].

Slightly different data were obtained by Łopatkiewicz, who studied 85 nurses from psychiatric wards [Łopatkiewicz and Sypniewska 2019]. As in the research presented in this paper, the author's questionnaire and the MBI occupational burnout questionnaire were used for the research. The author showed that the nursing staff was characterized by a high level of professional burnout, which depended on the level of education, seniority, age, and health condition. Similar results were confirmed by Stępień and Szmigiel, who conducted research among 100 nurses of the Upper

Silesian Children's Health Center in Katowice. The authors also confirmed the high level of occupational burnout in the study group, which was determined by seniority [Stępień and Szmigiel 2017].

Dębska analyzed the mental burden and professional burnout among 156 professionally active nurses employed in various departments. It proved that the surveyed nurses were characterized by a high level of mental burden, which correlated with depersonalization and emotional exhaustion. In addition, as the author showed, the psychological burden depended on education, work experience and place of employment [Dębska et al. 2013]. The results obtained by her were confirmed by Jarzynkowski et al. [Jarzynkowski et al. 2019].

According to the research conducted so far, higher education is a predictor of professional burnout syndrome. It should protect against burnout. Theoretically yes. Nurses who have the knowledge, appropriate qualifications and experience should have the skills to act to protect themselves from the development of burnout. Unfortunately, the reason is probably not in professional qualifications, but in the situation that takes place after obtaining them [Markiewicz and Markiewicz 2015a; Markiewicz and Markiewicz 2015b]. A significant number of nurses believe that higher vocational education will contribute to changes in their careers and better salaries. Very often, such expectations do not necessarily take place, although in recent years the situation related to the remuneration of nurses has improved. And although there have been legal acts imposing on medical institutions a specific system of financing employees' salaries depending on their education, unfortunately, freedom in this respect is still the reason for the lack of arbitrary decisions. The lack of an unambiguous legal interpretation means that the nursing staff is unable to enforce their rights, which results in: frustration, passive attitude, lack of commitment, reluctance towards patients, treating them as objects [Tomaszewska et al. 2008; Kadłubowska et al. 2010; Chang et al. 2009; Arnetz and Hasson 2007].

This is confirmed by the results of the obtained research, which show how great importance in reducing the professional burnout syndrome is satisfaction with the remuneration obtained, often obtained from several places of employment. However, it should be remembered that the work of nursing staff entails huge health, financial and family costs, as well as many personal sacrifices. While for an active and healthy nurse working in several places is not a problem, it is debatable whether this situation is correct. Stress at work, the complexity of the functions performed by nursing staff and the requirements resulting from the provision of optimal care imply an urgent need to create a stable and uniform organizational structure that considers professional qualifications. Similar conclusions were obtained

in studies conducted in Sweden, Iran, Iceland, and New Zealand [Sveinsdottir et al. 2006; Zarea et al. 2012; Fourie et al. 2005].

Failure to use the professional potential of nurses supported by education, specialization and experience, lack of recognition from the employer, controversial rules regarding minimum employment standards are threats to the profession and the basis for reorganizing the working conditions of this professional group. Similar postulates are presented in studies of professional satisfaction of nurses in the United States [Rambur et al. 2005; Lapane and Hughes 2007; Jourdain and Chenevert 2010; Madathill et al. 2014; Van Bogaert et al. 2010; Wang et al. 2015; Edwards et al. 2005].

4. CONCLUSIONS

1. The respondents were mainly characterized by a low and medium level of professional burnout and mental burden.
2. Socio-demographic characteristics, work experience and burnout prevention did not affect the level of mental burden and burnout in the study group.
3. Respondents employed in more than one workplace more often experienced a higher level of mental strain and occupational burnout than those working in only one workplace.
4. Respondents who felt satisfied with their remuneration and received support from other employees were characterized by a lower level of professional burnout and mental burden.

5. IMPLICATIONS

1. There is a need to organize training for nursing staff aimed at learning how to reduce stress, how to deal with traumatic situations, and how to use crisis intervention (professional and non-professional).
2. It is advisable to take actions aimed at determining the requirements of the workplace, considering the personality predispositions of employees. It seems justified to conduct pilot psychological research verifying predispositions to a profession with a specific branch profile and leadership style as an important feature in work organization.
3. There is a need to develop standards and procedures for dealing with various patients with various clinical problems (aggressive, with suicidal intentions, with extensive oncological pain). Their use will contribute to the introduction of behavioral algorithms, cascading actions,

and quick identification of threats to solve the problem in a planned and rational manner.

4. It is justified to implement adequate behavioral strategies aimed at providing comprehensive assistance to people at risk of burnout syndrome (Balint groups, supervision, psychodrama, supervision of organizational theory, topic-focused supervision, Gestalt supervision, supervision of systems theory and behavioral therapy). This assistance should include activities carried out by the employer for both the employee and his family. The authors of the studies emphasize the special impact of organizational and institutional (holistic) support on job satisfaction and the quality of care provided.
5. There is a need to improve occupational safety by ensuring optimal staffing, equipment, and security of emergency departments. Research shows that aggressive behavior displayed by patients, suicide attempts and other emergencies are often encountered in the work of nursing staff, and their early identification and elimination are extremely important. Limiting the development of the burnout syndrome requires intervention at the organizational, i.e. basic, level.
6. It is important to conduct training in communication and mediation at work, both with patients and colleagues. Skillful dialogue, assertive behavior and appropriate interpersonal relationships are the basis for providing professional patient care. Improving self-efficacy and developing professionalism result in reducing stress factors. Achieving this goal is possible by using various forms of influence and conducting adequate training.

6. LIMITATIONS

The limitation of the work is the analysis of a selected group of nurses employed in hospital emergency departments. In the future, it would be worth conducting a comparative analysis of the level of burnout among nurses employed in other departments, e.g. oncology, psychiatry, or intensive care units. Monitoring the level of burnout would undoubtedly enable early interventions and corrective actions.

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A MODEL OF THE OPTIMAL FIT OF RESOURCE DISTRIBUTION TO THE EQUILIBRIUM OF LIFE ATTITUDES AMONG PARTICIPANTS OF HOSTILITIES IN UKRAINE

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Abstract. The article aims to analyse the model of optimal adaptation of resource distribution to the equilibrium of life attitudes among participants of hostilities in Ukraine. The multidimensional concept of meaning and purpose proposed by Gary Reker was used to define the equilibrium of life attitudes. In this context, the equilibrium of life attitudes is constituted by six dimensions of the experience of the meaning of one's own existence: purpose, coherence, life control, acceptance of death, existential void and goal seeking. The model of optimal fit of resource distribution to the life attitudes equilibrium was developed on the basis of Stevan Hobfoll's Conservation of Resources Theory (COR). The model of optimal fit of resource distribution to the equilibrium of life attitudes included the experience of resource gains in five dimensions: resourcefulness, social status resources, resilience resources, family resources and growth resources, while reducing losses in growth resources.

Keywords: resources loss; resources gain; Conservation of Resources Theory (COR); equilibrium of life attitudes

1. INTRODUCTION

The equilibrium of life attitudes described in this article is a concept embedded in the multidimensional meaning of life and purpose in life by Gary Reker, drawing from Viktor Frankl's logotherapy and a three-element construct of existential attitudes.

1.1. Equilibrium of life attitudes

Based on logotheory, we can embrace several important assumptions in the concept of the equilibrium of life attitudes proposed by Viktor Frankl.

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Firstly, the psychological meaning of life is a state of subjective satisfaction for the individual, resulting from purposeful and value-oriented actions. Man is not the creator of meaning, but possesses the ability to discover it in the reality that is given to him. Attaining subjective satisfaction depends to a large extent on perceiving values in the surrounding world, distancing oneself from life experiences, and attributing meaning to one's own existence (existential meaning) [Frankl 1998, 69].

Secondly, the striving to find meaning in one's own life constitutes a powerful motivational need for humans, partly because their life task is to find the significance of their own existence and to fill one's existence with unique content. Only a person who believes in subjective "will to meaning" can create hierarchy of values that gives strength, joy, and the satisfaction of needs [Frankl 2010, 112; Idem 2021, 60].

Thirdly, only a person can and must fulfill his or her own existence by discovering and realizing values that make it worth living or dying for. In logotherapy, three ways of finding meaning in human existence are emphasized: 1) a unique mission motivating one to undertake specific tasks, 2) love determining the ability to sacrifice oneself others, 3) suffering determining growth (e.g., by gaining moral strength or transforming personal tragedy into the triumph of the human spirit) and maturation (gaining internal freedom despite external dependencies) [Frankl 2012, 118].

Gary Reker's multidimensional concept of the meaning of life also reflects elements of existential attitudes, in which cognitive components are responsible for giving meaning to life experiences. As individuals create a system of personal beliefs, they seek to understand the significance/value of unfolding events. Emotional and motivational elements, based on individual's value system, play a decisive role in life choices (e.g. goals to choose and how to pursue them in order to derive a sense of satisfaction and life fulfillment from the decisions made). Behavioral components, on the other hand, are linked to actions aimed at achieving set goals, the fulfillment of which leads to the strengthening of the meaning of one's existence [Reker and Wong 1998, 214-46; Reker 2000, 39-55; Idem 2001, 42-64].

The multidimensionality of the meaning of life, as conceptualized by Gary Reker, can also be measured through the construction of the Life Attitude Profile (LAP-R) tool [Reker 1992]. Its Polish version, developed by Ryszard Klamut [2010], allows for the description of six dimensions of experiencing the meaning of one's own existence [Reker 1992; Klamut 2010]:

- *purpose* – the person has a sense of fulfillment in achieving life goals, possessing a significant life mission that gives direction to one's existence, having clarity in goals, and satisfaction in their accomplishment, perceiving future intentions as ones filled with satisfying and positive events;

- *coherence* – the person perceives meaning in the surrounding world, recognizes the significance of the purposefulness of human life, creates justifications for the meaning of one's own existence, and possesses a unifying life philosophy characterized by coherence and organization of various elements and/or dimensions of one's being;
- *life control* – the person has a sense of directing his own life and controlling events, puts effort into achieving successes, feels autonomous in making decisions (especially in the context of key choices), notices the connections between the decisions made decisions and their multidimensional consequences, accepts responsibility for the life choices;
- *death acceptance* – the person is not afraid of death, does not worry about this fact and does not look forward to the moment of its arrival, but treats death as a natural part of life and as one of the important life experiences;
- *existential void* – the person feels the lack of significant life goals (while concurrently attempting to identify them), assigns diminishing value to presently pursued aspirations, experiences decreasing interest in ongoing tasks, struggles to find a direction in life, prefers defensive attitudes manifested through withdrawal from life activities, apathy, boredom, and interprets unfolding events in terms of monotony;
- *goal seeking* – the persona has a need for achieving goals in a future time perspective, experiencing generalized anxiety, seeking new experiences, desiring the intensity of impressions derived from fulfilling the content of one's past life and/or disrupting routine activities, and treating current life circumstances as elements activating future goals.

The equilibrium of life attitudes in Reker's concept constitutes the linkage of the aforementioned aspects of life meaning in such a way that it is formed by a high intensity of four existential attitude dimensions – purpose, internal coherence, life control, and acceptance of death, while simultaneously exhibiting a low intensity of two of them – existential void and goal seeking [Reker 1992; Klamut 2010].

1.2. The resource distribution and the equilibrium of life attitudes

One of the elements of Stevan Hobfoll's Conservation of Resources Theory (COR) is the model of optimal fit of human resources to the demands imposed by the internal and external environment of life. Relating the main assumptions of this model to the preference for equilibrium in life attitudes reveals three essential regularities. Firstly, humans have a limited amount of resources. Secondly, preferring balanced life attitudes requires the adjustment of possessed assets, mainly through the distribution of gains and losses in specific resources. Thirdly, if a person does not have the distribution

of assets crucial for their fit with equilibrium in life attitudes, they will experience stress resulting from the perception of disturbances/difficulties in finding meaning in life e.g. in dimensions such as reduced purposefulness of existence, internal coherence, life control, and/or acceptance of death, as well as an increase in two areas, i.e. existential void and/or goal seeking [Hobfoll 2006, 70; Niewiadomska 2022, 17-33].

Due to the fact that the article analyzes the issue of the model of optimal fit of resource distribution to the equilibrium of life attitudes among participants in the hostilities in Ukraine, the second assumption of the model will be presented in detail. This assumption takes into account both the functions of resource distribution and the categories of resources.

The model of optimal fit of resources to prefer a equilibrium of life attitudes is associated with the occurrence of two mechanisms described in the COR theory. The first involves reducing resource losses that generate psychological stress, and the second involves strengthening resource gains that shape psychological resilience in situations of experiencing difficulties.

The reduction of resource losses is a process described in the first principle of the COR theory – the primacy of loss – indicating that capital losses are strongly felt by individuals because, in a short period, they lead to stress and/or its negative consequences [Hobfoll, Hall, Horsey, et al. 2011, 253-63; Hollifield, Gory, Siedjak, et al. 2016; Hobfoll, Halbesleben, Neveu, et al. 2018, 103-28; Niewiadomska and Jurek 2022, 13-29]. Based on the presented relationship, it can be stated that the equilibrium of life attitudes is conducive to low stress intensity, which is the result of reducing resource losses. Achieving an equilibrium of life attitudes is facilitated by an increase in psychological resilience, which is shaped according to the mechanisms outlined in the second principle of the COR theory: investing in resources. The essence of this rule is that individuals must invest resources in order to protect against resource loss, recover from losses, and gain resources to effectively cope with current and/or future challenges [Hobfoll, Halbesleben, Neveu, et al. 2018, 103-28; Niewiadomska and Jurek 2022, 13-29].

The gains and losses described above relate to different categories of resources. The conducted empirical analyses allowed for the identification of the following resource categories utilized by individuals experiencing chronic stress due to a high risk of social marginalization [Chwaszcz, Bartczuk, and Niewiadomska 2019, 194-95]:

- *global resourcefulness*: various resources contribute to the growth of adaptive capabilities, including subjective managing resources, social status resources, resilience resources, family resources, material status resources, growth resources, and community resources.

- *management resources*: indispensable for managing one's life and essential for managing other resources such as sense of control over one's life, acting as a leader, and organizational skills; sense of humor; good communication skills;
- *social status resources*: encompassing aspects like financial stability, satisfying earnings, adequate status at work, savings or money to use in unforeseen situations;
- *resilience resources*: encompassing personal qualities and conditions that allow people to function optimally and increase their resilience: family stability, sense of emotional closeness, vitality/stamina, sense of self-worth, hopefulness, sense of self-efficacy, sense of achievement, self-pride, optimism, etc.;
- *family resources*, encompassing aspects like a good marriage, good relationships with one's children, helping to look after children, healthy children, healthy spouse/partner, feeling of closeness to spouse/partner, and provision of essential resources for children;
- *material status resources*: including the following: necessary household equipment, a home larger than necessary, a home that meets one's needs, suitable clothing, more clothes than necessary, and proper furnishing of the home. These resources include the aspects of consumer culture that determine one's material social status;
- *growth resources*: including money for personal development, membership in organisations where people can share their interests, and involvement in church life/a religious community. It also encompasses development of competences, knowledge, and skills which can be bought with money (e.g., a postgraduate course of study, vocational course, etc.); development of one's interests (e.g., in a chess club); interpersonal, social, or religious development;
- *community resources*: covering the health of family members, loved ones, and friends, collogues; health of family/close friends etc.

In the search for the model of optimal fit of resource distribution to the equilibrium of life attitudes, mechanisms derived from the principle of the primacy of loss (the first rule of the COR theory) and the resource investment principle (the second rule of the COR theory) will be considered in relation to eight categories of resources – global resourcefulness, management resources, social status resources, resilience resources, family resources, material status resources, growth resources, and community resources. The conducted statistical analysis will serve to verify the hypothesis which states that the equilibrium of life attitudes among participants in the hostilities in Ukraine is determined by the mutual arrangement of gains and losses in specific resources.

2. MATERIALS AND METHOD

The study was conducted on a group of 323 participants involved in military actions in Ukraine, including 22.9% women and 77.1% men. The average age was 34 years (18-74). A detailed characteristic of the studied group is presented in Table 1.

A cross-sectional design was employed and participants were asked to complete a set of questionnaires. The respondents were informed about the purpose of the study, and any questions they had were clarified by the researcher. The study was conducted in 2019 in in towns located in the Donbass, a region in eastern Ukraine, where an armed conflict has been going on since 2014 between pro-Russian separatists and the Russian Federation supporting them, and the army representing the legal authorities of Ukraine. Displaced people from Donbas, who were temporarily living in the central or western parts of Ukraine, also participated in the research.. Responses were provided in the presence of trained Ukrainian interviewers. The study was supervised by staff from the Institute of Psychology and the Institute of Sociological Sciences at the John Paul II Catholic University of Lublin. The procedure was approved by the Research Ethics Committee at the Institute of Sociological Sciences at the John Paul II Catholic University of Lublin (protocol code: KEB-IS-3/2019).

Table 1. Characteristics of the study group.

Characteristics		**N/ M**	**% / SD**
Age		34.25	9.85
Sex	Female	74	22.9
	Men	249	77.1
Marital status	Single	93	28.8
	Married	153	47.4
	Separated	5	1.5
	Informal relationship	9	2.8
	Divorced	29	9.0
	Widow/widower	28	8.7
	Clergy person	6	1.9
Eduaction	Primary	1	.3
	Junior high school	32	9.9
	Vocational	72	22.3
	Secondary	68	21.1
	Higher	150	46.4

Place of residence	Village	75	23.2
	City (Up to 5,000 residents)	35	10.8
	City (5,000-20,000 residents)	33	10.2
	City (21,000-50,000 residents)	30	9.3
	City (51,000-100,000 residents)	49	15.2
	City (Over 100,000 residents)	101	31.3

Two research tools were used in the study:

1) Distribution of resources was measured with the COR-E questionnaire. The questionnaire contains a list of 74 resources. Our study utilized the Polish adaptation [Chwaszcz, Barczuk, and Niewiadomska 2019, 185-202]. The participants responded to individual items by choosing their answers on a 5-point scale (from 1 = Not at all to 5 = To a great degree) in two categories: gain and loss. Cronbach's alpha for the reliability of individual dimensions of the COR-E was acceptable for all dimensions and measurements. In the first round of the cross-sectional research, it ranged from $\alpha = 0.69$ to $\alpha = 0.99$. In the second round of the cross-sectional research, it ranged from $\alpha = 0.70$ to $\alpha = 0.98$. In the longitudinal survey, reliability ranged from $\alpha = 0.64$ to $\alpha = 0.99$ for the first measurement and from $\alpha = 0.63$ to $\alpha = 0.98$ for the second measurement.
2) Life Attitude Profile (LAP-R) (Polish adaptation developed by Ryszard Klamut) is a self-rating questionnaire consisting of 48 items. The participant evaluates on a 7-point Likert scale the extent to which they are true in relation to themselves. A score of 1 is defined as "completely untrue," and 7 is defined as "completely true." The higher the score for the measured factor, the more intensely the participant exhibits a given existential attitude. Life Attitude Profile (LAP-R) demonstrates satisfactory psychometric properties. The Cronbach's α coefficient for individual scales is as follows: Purpose $\alpha = 0.77$; Coherence $\alpha = 0.74$; Life Control $\alpha = 0.72$; Death Acceptance $\alpha = 0.83$; Existential Void $\alpha = 0.70$; Goal Seeking = 0.71; Personal Meaning $\alpha = 0.87$; Equilibrium of Life Attitudes $\alpha = 0.85$ (Klamut 2010).

Data were analyzed using SPSS, v. 28. Deviations and normality were checked with the Shapiro–Wilk test. Homogeneity of variance was assessed using Levene's test of equality of variance. Multiple linear regression analysis (stepwise method) was employed to test hypotheses. The assumptions of linearity and homogeneity of variance were checked using scatter plots and no heteroscedasticity/no clear pattern was found in the plots. Skewness was within ±1. Multicollinearity was checked and the minimum and maximum variable inflation factor (VIF). A general F-test and an adjusted R-square were considered. Standardized Beta coefficients (β) were calculated to assess the level of association and statistical significance

in the multiple regression analysis. The obtained results of the analysis were assumed to be statistically significant at $p < 0.05$.

3. RESULTS

The assessment of the relationship between resource distribution and the equilibrium of life attitudes among participants of the hostilities in Ukraine presented in Table 2. The equilibrium of life attitudes was positively associated with gains in social resources (β = 0.391; p=0.002), gains in resilience resources (β = 0.304; p=0.013), gains in family resources (β = 0.206; p=0.048), gains in growth resources (β = 0.200; p=0.024), and global resourcefulness (β = 0.198; p=0.016). Negative associations were found with losses in growth resources (β = – 0.249; p=0.004).

Table 2. The results of multiple linear regression analysis for the relationship between resource distribution (COR-E) and equilibrium of life attitudes (Life Attitude Profile; LAP-R) among participants of the hostilities in Ukraine.

Model **Dependent variable – equilibrium of life attitudes**	**B**	**SE**	**Beta**	**t**	**p**
(Intercept)	**59.548**	**11.339**		**5.252**	**<.001**
Management resources (gain)	5.338	3.744	.159	1.425	.156
Social status resources (gain)	**10.508**	**3.409**	**.391**	**3.083**	**.002**
Resilience resources (gain)	**10.583**	**4.240**	**.304**	**2.496**	**.013**
Family resources (gain)	**5.614**	**2.827**	**.206**	**1.986**	**.048**
Material status resources (gain)	.085	2.716	.003	.031	.975
Growth resources (gain)	**4.386**	**1.930**	**.200**	**2.273**	**.024**
Community resources (gain)	-.961	3.077	-.033	-.312	.755
Resourcefulness (gain)	**.119**	**.049**	**.198**	**2.425**	**.016**
Management resources (loss)	3.227	2.967	.136	1.088	.278
Social status resources (loss)	.664	2.639	.030	.252	.802
Resilience resources (loss)	-3.375	2.921	-.149	-1.155	.249
Family resources (loss)	1.877	2.490	.091	.754	.452
Material status resources (loss)	-2.458	2.144	-.117	-1.147	.253
Growth resources (loss)	**-5.446**	**1.874**	**-.249**	**-2.905**	**.004**
Community resources (loss)	-2.884	2.482	-.131	-1.162	.247
Resourcefulness (loss)	.035	.087	.064	.403	.687

The above-mentioned model (F (16; 206) = 4.638; p < 0.001) explained 21% of the variance in the dependent variable (R2 = 0.265; Adjusted R2 = 0.208)

4. DISCUSSION

The results of our own research provide the basis for positively verifying the hypothesis, which stated that the equilibrium of life attitudes among participants in the hostilities in Ukraine is determined by the mutual arrangement of gains and losses in specific resources. In the model of optimal fit of resource distribution to the equilibrium of life attitudes constituted by a high level of: 1) purpose in life, 2) internal coherence, 3) life control, 4) acceptance of death; with simultaneous low intensity of: 1) existential void, 2) goal seeking). Two mechanisms can be identified: a) the first mechanism is related to the principle of loss primacy – reducing losses in growth resources; b) the second mechanism is related to the resource investment principle – increasing perceived resource gains in five dimensions: global resourcefulness, social status resources, resilience resources, family resources, and growth resources.

The presented regularities align with the results of empirical analyses conducted within the framework of the COR theory. Specifically, the association between the equilibrium of life attitudes and reducing losses in growth resources indicates that individuals who can curb occurring losses are less susceptible to subsequent losses. In addition, initial losses do not lead to further losses [Hobfoll, Halbesleben, Neveu, et al. 2018, 103-28]. The findings of our research also confirm the principle that reducing resource losses increases the likelihood of constructively coping with difficulties [Niewiadomska and Jurek 2022, 13-29]. The ability to reduce resource losses also reduces the risk of exacerbating the negative effects of stress, including symptoms of depression, anxiety, PTSD, burnout, interpersonal conflicts, and isolation [Gerhart, Hall, Russ, et al. 2014, 365-72; Hall, Murray, Galea, et al. 2015, 561-68]. The obtained results also confirm the potential to reduce negative feedback, whereby resource losses generate increased stress, and its high intensity leads to further resource losses [Heath, Hall, Russ, et al., 2012, 679-95; Hou, Hall, and Hobfoll 2018, 111-33].

The positive associations between maintaining the equilibrium of life attitudes and the increase in resource gains in five dimensions directly confirm the mechanisms outlined in the second principle of the COR theory. Firstly, resource investment serves not only as a defense against losses but also as a means to achieve personal goals. It was found that an increase in resource gains contributes to maintaining the equilibrium of life attitudes. Secondly, the initial increase in resources contributes to the generation of further gains, which, on the one hand, increase the availability of resources and, on the other hand, create the opportunity to invest them – including maintaining the equilibrium of life attitudes, enabling individuals to better cope with current and/or anticipated stress [Chen, Westman, and Hobfoll

2015, 95-105; Hobfoll, Stevens, and Zalta 2015, 174-80]. Thirdly, the relationships between resource gains and the equilibrium of life attitudes confirm that investing in resources promotes long-term development of stress resilience [Hobfoll, Hall, Horsey, et al. 2011, 253-63]. Fourthly, the obtained results confirm data from the literature indicating that perceived resource gains generate internal motivation to engage in activities aimed at achieving tasks related to long-term goals [Gorgievski and Hobfoll, 2008, 1-17; Wu and Lee 2020].

CONCLUSION

1. The results of empirical analyzes allowed for the identification of the model of optimal fit of resource distribution to the equilibrium of life attitudes among participants in the hostilities in Ukraine.
2. The obtained model marks the simultaneous occurrence of two mechanisms: an increase in resource gains generating increased resilience to stress, while reducing psychological capital losses/ reducing the risk of stress.
3. The equilibrium of life attitudes is favored by increasing gains in specific resources: global resourcefulness, social status resources; resilience resources; family resources; growth resources.
4. The equilibrium of life attitudes significantly coexists with the reduction of losses in growth resources.

Limitations: The conducted research serves only an exploratory purpose. In subsequent analyses concerning the presented research problem, it is advisable to focus on two aspects. Firstly, attention should be directed towards the relationships between personal engagement in military actions and the maintenance of life attitudes equilibrium. Secondly, identification of moderating and/or mediating factors in the relationships between the multidimensional consequences of participation in military activities and the occurrence of life attitudes equilibrium is recommended [Niewiadomska, Jurek, Chwaszcz, et al. 2021; Niewiadomska, Jurek, Chwaszcz, et al. 2023, 479-99].

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TELEMEDICINE AS A NEW FORM OF MEDICAL SERVICES – LEGAL ASPECT*

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Abstract. Telemedicine, a rapidly evolving field enabled by telecommunications technology, is transforming healthcare on a global scale. It offers new avenues for accessing medical services and redefines the patient-physician relationship, encompassing diagnosis, treatment, and health condition monitoring. However, this transformative force in healthcare is accompanied by intricate legal and regulatory complexities that warrant profound exploration. This article delves into the legal facets of telemedicine, examining its regulation, patient data protection, physician liability, and global variations. It also underscores the paramount importance of safeguarding patient privacy in the digital age of healthcare. This comprehensive analysis illustrates the profound influence of legal considerations on healthcare quality and patient safety, and how they shape the course of technology-driven healthcare.

Keywords: healthcare; medicine; patient safety; telemedicine

1. BACKGROUND

Telemedicine has surged to the forefront of healthcare, fundamentally reshaping the way we access medical services and interact with healthcare providers. As this innovative field continues to evolve, it brings to the fore an array of legal and regulatory challenges that have far-reaching implications for patient care and safety. In this article, we embark on an insightful

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journey into the legal intricacies surrounding telemedicine, shedding light on how legal regulations govern its practice, ensure patient data protection, and define physician accountability. We also delve into the global variations in telemedicine regulations and explore the impact of technology on the ever-evolving landscape of healthcare law. Emphasizing the paramount importance of safeguarding patient privacy in the digital era, this article serves as a valuable resource for healthcare professionals and patients navigating the dynamic realm of telemedicine.

1.1. The Significance of Telemedicine in Healthcare

Telemedicine, as a rapidly evolving field based on telecommunications technology, plays a crucial role in transforming healthcare worldwide. It opens up new possibilities for accessing medical services and changes the way patients and healthcare providers communicate, diagnose, treat, and monitor health conditions.

The significance of telemedicine extends to several key areas: 1) accessibility: telemedicine provides an innovative way for patients, particularly those in remote or underserved areas, to access healthcare services. It breaks down geographical barriers, enabling individuals to connect with healthcare professionals without the need for travel; 2) convenience: telemedicine offers a convenient option for patients who may have difficulty attending in-person appointments due to work, family commitments, or transportation issues. Patients can receive care from the comfort of their homes; 3) efficiency: telemedicine can streamline healthcare delivery by reducing waiting time and enabling quicker access to care. It also facilitates follow-up appointments and monitoring, improving overall healthcare efficiency; 4) cost-effectiveness: telemedicine can potentially reduce healthcare costs for both patients and providers. It can limit the need for physical infrastructure and staffing associated with traditional healthcare settings; 5) healthcare professional collaboration: telemedicine fosters collaboration among healthcare professionals, allowing specialists to consult on complex cases and share expertise with their peers; 6) remote monitoring: telemedicine supports the remote monitoring of patients with chronic conditions, enabling healthcare providers to track health indicators and intervene when necessary; 7) emergency care: in emergency situations, telemedicine can be a lifeline, connecting patients with emergency medical specialists for immediate assistance; 8) global health: telemedicine has applications in global health initiatives, such as teleconsultations for disease management and healthcare capacity-building in underserved regions.

As telemedicine continues to evolve, it plays a significant role in improving healthcare accessibility, efficiency, and patient outcomes. However, as it

becomes more integrated into healthcare systems, important legal and regulatory challenges must be addressed to ensure its safe and effective implementation.

Preventive examinations of workers, like any other medical examinations, should be conducted in accordance with existing regulations, professional ethics, and the guidelines of current medical knowledge.[1] What's more, Article 1 of the Act on Occupational Medicine[2] emphasizes that as part of health monitoring, workers receive medical information and medical recommendations regarding ways to prevent adverse changes in their health. Article 18 of this Act underscores the importance of the quality of preventive examinations, identifying this element as one of the main areas of control for the basic unit of occupational medicine conducted by the regional center of occupational medicine.

1.2. Legal and Regulatory Challenges in Telemedicine

As telemedicine continues to play an increasingly vital role in healthcare, it faces important legal and regulatory challenges that impact its development and application. The use of telecommunications technology to deliver medical services raises numerous legal and ethical questions that require careful consideration.

Key legal and regulatory challenges in telemedicine include issues related to licensure and practice across state or national borders, patient data protection, physician liability, reimbursement policies, and the overall standard of care. For instance, when healthcare providers offer telemedicine services to patients located in different states or countries, questions arise regarding which laws and regulations apply and how healthcare professionals can practice within the confines of legal and ethical boundaries.

Data privacy and security are paramount concerns in telemedicine. Safeguarding patient information in digital formats is critical, and healthcare providers must comply with data protection regulations and standards. This entails addressing issues related to data transmission, storage, and access while ensuring the confidentiality and integrity of patient data.

Physician liability is another significant challenge. When providing remote healthcare services, healthcare professionals must adhere to the same standards of care and ethical guidelines as in traditional clinical settings.

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[1] Announcement of the Marshal of the Sejm of the Republic of Poland of January 13, 2022 on the announcement of the uniform text of the Act on the Occupational Health Service, Journal of Laws item 437.

[2] Regulation of the Minister of Health and Social Welfare of May 30, 1996 on medical examinations of employees, the scope of preventive health care for employees and medical certificates issued for the purposes provided for in the Labor Code, Journal of Laws No. 69, item 332.

This necessitates clear protocols for informed consent, documentation of telemedicine encounters, and the ability to provide a comparable quality of care to that of in-person visits.

Reimbursement policies present their own complexities in the telemedicine landscape. The billing and reimbursement framework for telemedicine services varies between regions and healthcare systems. These policies have a direct impact on the financial viability of telemedicine practices and the accessibility of care for patients.

The overall standard of care is a critical consideration in telemedicine. Ensuring that the quality of care provided through telemedicine is consistent with in-person care is of paramount importance. Medical boards and regulatory bodies must establish guidelines and best practices to maintain a high standard of care in the evolving field of telemedicine.

In this article, we delve deeper into these legal and regulatory challenges, offering insights into how they impact the telemedicine sector and the steps taken to address them. Understanding these challenges is essential for both healthcare professionals and patients who utilize telemedicine services to navigate this health care field in a safe and effective way.

2. UNDERSTANDING TELEMEDICINE

2.1. Defining Telemedicine

Telemedicine services, delivered over the internet, essentially consist of providing advice, lectures, guidelines for exercises, their assessment, monitoring, and consultations related to health education. These actions cannot be considered medical care. Medical care services require, at the very least, as inferred from the principles of experience, a thorough assessment to determine their necessity for achieving the intended goal. It is, therefore, necessary to evaluate the patient's health status to make a proper diagnosis and prescribe a suitable therapeutic course tailored to the specific individual [Pogorzelska, Marcinowicz, and Chlabicz 2023].

Services provided based on information received from clients may not always rely on credible, specific data that would enable proper medical care. The establishment of correct behavioral patterns cannot be equated with medical care. Telemedicine, while valuable, must grapple with the challenge of ensuring that remote consultations and recommendations are based on accurate and relevant health information, which can be especially complex in a virtual environment.

To understand what telemedicine is, an essential reference point is a judgment from the Administrative Court in Krakow: "Telemedicine

services provided via the internet essentially involve giving advice, lectures, providing guidance on exercise routines, their assessment and monitoring, as well as consultations regarding health education. These activities cannot be considered medical care. Medical care services require, at the very least, as inferred even from the principles of experience, a thorough determination that it is necessary to achieve the intended goal. It is therefore essential to assess the patient's health in order to make a proper diagnosis and prescribe an appropriate therapeutic course tailored to the specific individual. Services based on information provided by clients may not always rely on credible, specific data that enables proper medical care. Establishing correct behavioral patterns should not be equated with medical care."[3]

It is crucial to distinguish between the guidance and information offered through telemedicine and the comprehensive medical care provided in a traditional clinical setting. Telemedicine, by its nature, often operates in a sphere that is more advisory and informative. It can offer guidance, share knowledge, and encourage healthy behaviors, but it may not be a direct substitute for a full medical examination and the development of precise medical treatment plans.

For many medical conditions, a hands-on evaluation is necessary to make an accurate diagnosis and develop a comprehensive treatment plan. Telemedicine can play a supportive and supplementary role in healthcare, providing a platform for remote discussions and initial assessments, but it might not replace the in-depth, in-person evaluations carried out in a traditional clinical setting.

The challenge, then, is to find a balance between the convenience and accessibility of telemedicine services and the necessity for comprehensive medical care that involves physical examinations and face-to-face interactions with healthcare professionals. Recognizing the strengths and limitations of each approach is crucial in optimizing patient care and ensuring that telemedicine complements, rather than replaces, traditional medical practices.

2.2. Telemedicine vs. Traditional Clinical Care

The necessity of in-person evaluation and its differences from telemedicine are critical aspects to consider. In traditional clinical care, a patient visits a healthcare facility, and through a series of physical examinations, laboratory tests, and consultations, a healthcare professional can make a comprehensive assessment of the patient's health.

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[3] Judgment of the Provincial Administrative Court in Kraków of June 23, 2015, ref. no. I SA/Kr 721/15, Lex no. 1813436.

However, telemedicine operates differently. It relies on remote communication technologies to connect patients and healthcare providers. Telemedicine can provide valuable services like initial assessments, remote monitoring, and consultations. Still, it often lacks the ability to perform in-depth physical examinations that are fundamental in traditional clinical care.

In traditional clinical care, healthcare professionals can physically examine patients, utilizing various diagnostic tools and techniques. They can assess vital signs, inspect physical conditions, and conduct in-person tests and procedures. This hands-on approach is crucial for many medical conditions, especially those requiring precise diagnosis and tailored treatment plans.

Telemedicine, on the other hand, primarily functions in a virtual environment, making it more suitable for providing guidance, sharing information, and encouraging healthy behaviors. It is an invaluable tool for remote patient education, consultation for minor health concerns, and initial assessments. However, it may not fully substitute the in-person evaluations conducted in traditional clinical settings.

To provide the best possible care, it is essential to recognize the strengths and limitations of both telemedicine and traditional clinical care. Finding a balance between these two approaches is crucial to ensure that patients receive appropriate care, taking advantage of the convenience and accessibility of telemedicine while recognizing its constraints in cases where physical examinations are indispensable.

3. BALANCING TELEMEDICINE AND IN-PERSON CARE

3.1. The Necessity of In-Person Evaluation

For many medical conditions, a hands-on evaluation is necessary to make an accurate diagnosis and develop a comprehensive treatment plan. Telemedicine can play a supportive and supplementary role in healthcare, providing a platform for remote discussions and initial assessments, but it might not replace the in-depth, in-person evaluations carried out in a traditional clinical setting [Pogorzelska, Marcinowicz, and Chlabicz 2023].

3.2. Finding a Balance for Optimal Patient Care

The challenge, then, is to find a balance between the convenience and accessibility of telemedicine services and the necessity for comprehensive medical care that involves physical examinations and face-to-face interactions with healthcare professionals. Recognizing the strengths and limitations of each approach is crucial in optimizing patient care and ensuring

that telemedicine complements, rather than replaces, traditional medical practices.

3.3. The Committee on Medical Ethics

The Committee on Medical Ethics underlines that it is the physician's responsibility to decide whether a teleconsultation is suitable in a given clinical context. If a teleconsultation is deemed appropriate, the patient must be informed about the extent to which the physician can provide assistance and the limitations associated with remote consultations.

Crucially, the feasibility of conducting teleconsultations is determined by medical criteria, not by the preferences or commercial interests involved. The Committee asserts that remote consultations should not be provided to patients who have not been previously examined and treated by the responsible physician or for patients presenting new health concerns.

For patients under a specific physician's care, teleconsultations can provide continuity of treatment, the opportunity for consultation, and a sense of security in therapy. It is essential to remember, however, that if the patient's reported symptoms necessitate a physical examination, an in-person visit to the physician is required. Issuing documents such as prescriptions or medical certificates without a physical examination may be considered a failure to meet the standard of due diligence [Nittari et al. 2020, 1436].

The professional, civil, and criminal responsibilities associated with telemedical services are no different from those for other medical services, and patients are entitled to all the rights they would have in any medical context.

The Committee on Medical Ethics of the National Medical Council, after a detailed examination of numerous instances of fee-based online prescription and certificate issuance, critically evaluates this phenomenon, especially in cases where: 1) minimal patient input, such as completing a survey that does not meet the criteria for a physical examination, is sufficient for prescription or certificate issuance; 2) the initiation of the process requires a payment; 3) there is no direct patient-physician interaction; 4) the offers for prescription and certificate issuance solely serve their commercial sale, bearing characteristics of advertising, and may, for example, offer special discounts for survey completion; 5) the service's finalization, as per the offer, is an extremely brief (3-5 minutes) process, suggesting a lack of due diligence; 6) the patient has not been previously examined and treated by the issuing physician for on-demand prescriptions or certificates.

Physicians issuing prescriptions and certificates in the described manner expose themselves to professional liability due to violations of various

articles of the Medical Code of Ethics:[4] a) Article 8 – Failing to exercise due diligence and dedicate adequate time to the patient; b) Article 9 – Failing to define exceptions when remote consultation is permissible; c) Article 10 – Exceeding one's professional capabilities when issuing certificates outside of one's medical specialty; d) Article 11 – Failing to ensure appropriate patient care quality; e) Article 40 – Issuing certificates without a physical examination and/or suitable documentation.

4. MEDICAL ETHICS AND THE COMMERCIAL ISSUANCE OF CERTIFICATES

4.1. Teleconsultations vs. Issuance of Certificates

The Medical Ethics Committee, in its critical stance toward the commercial issuance of medical certificates, highlights a misinterpretation of the principles governing telemedicine. This misinterpretation involves the commercial online issuance of medical certificates and prescriptions upon request. The National Medical Council's Medical Ethics Committee expresses particular concern when situations arise where minimal patient input, such as completing a brief survey, triggers the process, and payment is required for the issuance of the document.

4.2. Responsibilities and Rights of Physicians and Patients

To begin, the committee emphasizes the importance of distinguishing between teleconsultations and the sale of prescriptions and certificates on demand. According to the established definition, teleconsultation constitutes a healthcare service provided remotely through teleinformatic or communication systems. The responsibilities of a physician and the rights of a patient remain consistent, regardless of whether the medical consultation is conducted through telemedicine or in-person. Therefore, the principles governing teleconsultations using telemedical technology and face-to-face consultations are fundamentally the same.

The Committee on Medical Ethics underlines that it is the physician's responsibility to decide whether a teleconsultation is suitable in a given clinical context. If a teleconsultation is deemed appropriate, the patient must be informed about the extent to which the physician can provide assistance and the limitations associated with remote consultations.

Crucially, the feasibility of conducting teleconsultations is determined by medical criteria, not by the preferences or commercial interests involved.

[4] Code of Medical Ethics.

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The professional, civil, and criminal responsibilities associated with telemedical services are no different from those for other medical services, and patients are entitled to all the rights they would have in any medical context.

5. LEGAL GUIDELINES FOR TELEMEDICINE IN THE EUROPEAN UNION

5.1. The Impact of COVID-19 on Telemedicine

The COVID-19 pandemic prompted an increased utilization of telemedicine visits, but the legal framework regarding their implementation and reporting standards remained relatively limited. The Act on Medical Activity grants the Minister of Health the authority to establish organizational standards for specific medical fields and services, as outlined in Article 22, Section 5 of the Act on Medical Activity,[5] which states that "the minister responsible for health matters can define healthcare organizational standards in selected medical fields or specific medical entities to ensure the quality of healthcare services." These standards, when issued as regulations, are legally binding and mandatory, requiring medical entities to adhere to them when providing healthcare services in the designated medical field or activity.

5.2. Privacy Concerns in Telemedicine

Historically, the regulations for telemedicine services were confined to the Minister of Health's organizational standards for radiology and diagnostic imaging performed through teleinformatics systems.[6] It wasn't until

[5] Announcement of the Speaker of the Sejm of the Republic of Poland of March 16, 2021 on the announcement of the uniform text of the Act on medical activities, Journal of Laws item 711.

[6] Regulation of the Minister of Health of April 11, 2019 on organizational standards of health

August 29, 2020, that organizational standards for primary healthcare telemedicine visits came into effect.[7] However, no specific provisions addressing specialist healthcare teleconsultations were established under Article 22, Section 5 of the Act on Medical Activity.[8]

Given this absence of dedicated regulations for specialist healthcare teleconsultations, it is recommended to apply the regulations designed for primary healthcare telemedicine to specialist teleconsultations. These organizational standards encompass various formal aspects of telemedicine implementation that are common to both primary and specialist healthcare services. These shared elements encompass criteria for patient qualification for remote services, the mode of telemedicine visits, patient identity verification, appointment cancellations, and medical entity responsibility for service-related issues.

5.3. European Commission's Recommendations

To ensure patient identity confirmation in compliance with the principles specified in Article 50, Sections 2-2b of the Act on Healthcare Benefits Financed from Public Funds, patients can use various methods such as presenting identification documents (e.g., ID card, passport, driving license), school cards, or electronic documents displayed on mobile device screens.[9] Alternatively, patients can verify their identity through electronic patient health accounts, created through personally confirmed identification or electronic identification means issued within the electronic identification system.

Regarding eligibility verification for healthcare services financed by public funds during telemedicine visits, patients can verbally confirm their eligibility by stating, "I am entitled to use healthcare services financed from public funds," as outlined in Article 50, Section 7 of the Act on Healthcare Services Financed from Public Funds.[10] The teleconsultation should also be documented in the individual medical record, including information on the use of teleinformatics systems or other communication systems,

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care in the field of radiology and imaging diagnostics performed via ICT systems, Journal of Laws item 834.

[7] Regulation of the Minister of Health of August 12, 2020 on the organizational standard of teleconsultation within primary health care, Journal of Laws item 1395.

[8] Announcement of the Speaker of the Sejm of the Republic of Poland of March 16, 2021 on the announcement of the uniform text of the Act on medical activities, Journal of Laws item 711.

[9] Act of August 27, 2004 on health care services financed from public funds, Journal of Laws No. 210, item 2135.

[10] Ibid.

patient awareness of teleconsultation limitations, and instructions for in-person visits in case of deteriorating health.

5.4. Role of the European Data Protection Board

Additional aspects addressed in the organizational standards include the postponement of certain examinations, informing patients about the need for in-person care if necessary, appointment cancellations due to connectivity issues, and guidance on using e-prescriptions and e-referral services. Notably, an adjustment in the organizational standards for primary healthcare telemedicine services limits remote services to children aged six and older, with exceptions for ongoing treatment. A similar approach is suggested for specialist care teleoncology services, extending these to patients aged six and older, except in cases involving treatment plan monitoring or routine procedures affecting treatment quality. In alignment with the March 5, 2021, regulation,[11] specialist care telemedicine services should not be provided when patients or their legal representatives decline remote services, when the visit is for certificate acquisition, or when patients with chronic conditions experience worsening or changing symptoms. Finally, the entity providing telemedicine services is obligated to maintain medical records in accordance with the regulations governing record type, scope, format, and processing methods,[12] storing them as stipulated in Article 29, Section 1, Points 1-4 of the Act on Patients' Rights and Patients' Spokesman Rights,[13] depending on the document type. It's crucial to note that recording audio and video during teleconsultations does not replace the comprehensive medical record, which has its own specific scope and management guidelines detailed in the referenced regulation.

The COVID-19 pandemic brought about significant legal and regulatory challenges for the European Union and its member states, impacting not only public health but also the realm of telemedicine. The Polish Society of Occupational Medicine, in its statement published on April 9, 2020, underscored the importance of physician discretion in providing healthcare services through teleinformatics.[14] Physicians were entrusted with the responsibility of assessing whether remote services were safe and suitable

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[11] Regulation of the Minister of Health of August 12, 2020 on the organizational standard of teleconsultation within primary health care, Journal of Laws item 1395.

[12] Regulation of the Minister of Health of April 6, 2020 on the types, scope and templates of medical documentation and the method of its processing, Journal of Laws item 666.

[13] Announcement of the Speaker of the Sejm of the Republic of Poland of May 4, 2020 on the announcement of the uniform text of the Act on Patient Rights and the Patient Ombudsman, Journal of Laws item 849.

[14] See https://ptmp.org.pl/wp-content/uploads/2020/04/Badania-profilaktyczne-telemedycyna.pdf [accessed: 04.12.2023].

for the patient in question.[15] They could conduct health assessments, offer medical advice, and issue certificates through digital means while being cautious of patient safety and their own liability.

Moreover, the Act of March 2, 2020, provided flexibility in terms of conducting periodic medical examinations, acknowledging the need to adapt to the unique circumstances of the pandemic.[16] The pandemic's impact on telemedicine also spurred the European Commission into action. On April 8, 2020, they issued a recommendation emphasizing the role of digital technologies in the fight against COVID-19, particularly mobile applications assisting health authorities. Ensuring the privacy and security of personal data while harnessing the potential of telemedicine was paramount. The Commission emphasized the necessity of user trust, compliance with fundamental rights, and data security in the development and use of telemedicine applications, establishing legal and regulatory standards for both member states and app developers. These standards highlighted the importance of respecting individual rights and privacy in the context of telemedicine. Telemedicine's role in the pandemic response was further validated by the European Data Protection Board (EDPB), which recognized the need to address privacy concerns in geolocation and contact tracing tools. In summary, the legal guidelines provide a framework for balancing telemedicine's essential role in the fight against COVID-19 with the critical need to protect data and individual privacy.[17]

6. THE EVOLUTION OF TELEMEDICINE IN POLISH HEALTHCARE

6.1. Pre-2015 Legal and Ethical Framework

Before the act dated 9th October 2015, amending the act on information systems in health care, was enforced on the 12th of December 2015,[18] the use of information and communication technology (ICT) in healthcare services was primarily guided by individual legal regulations and ethical principles. The Medical Code of Ethics, for instance, stipulated that a physician could initiate treatment only after a physical examination of the patient,

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[15] Act of December 5, 1996 on the professions of doctor and dentist, Journal of Laws of 1997 No. 28, item 152.

[16] Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them, Journal of Laws item 374.

[17] Communication from the Commission Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection 2020/C 124 I/01, Official Journal, C 124, 1-9.

[18] Act of October 9, 2015 amending the Act on the health care information system and certain other acts, Journal of Laws item 1991.

with exceptions for situations where remote medical advice was the only option [Król-Całkowska, Walczak and Szymański, 2022, 127].

6.2. The Act of December 2015[19]

Although the Medical Code of Ethics was not a binding legal document, it was recognized that ethical norms could be incorporated into the legal system. The Act on Medical Chambers incorporated the norms from the Medical Code of Ethics, allowing its principles to guide healthcare practices. Consequently, the application of these ethical principles in providing healthcare services without personal contact with the patient was deemed acceptable in certain exceptional cases, subject to a physician's discretion [ibid.].

6.3. Use of ICT in Healthcare Services

Telemedicine, which encompasses the use of ICT in healthcare, was an evolving field and had been discussed in literature for over a decade. It found application in various medical contexts, including teleconsultations for severe poisoning, cardiac rehabilitation, and monitoring the health status of diabetic patients.

6.4. Telemedicine During the COVID-19 Pandemic

A significant change came with the revision of Article 42, Section 2 of the Act on the Profession of Doctor and Dentist on the 5th of December 1996.[20] This revision explicitly allowed physicians to assess a person's health either through an in-person examination or using teleinformatic systems or communication systems, broadening the scope of remote healthcare services [Rudowski, 2003, 219-21; Sołomacha et al. 2022, 115].

6.5. Regulations for Specific Medical Contexts

When considering healthcare services provided remotely, it is vital to distinguish between "personal contact" and "direct contact." The use of ICT by a physician to interact with a patient does not prevent direct contact, but it does limit personal contact, which involves physical meetings. This differentiation has implications for matters like determining the eligibility for sickness benefits.

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[19] Ibid.

[20] Act of December 5, 1996 on the professions of doctor and dentist, Journal of Laws of 1997, No. 28, item 152.

Exceptions to the rule of personal examination were also outlined in the Mental Health Protection Act,[21] which mandated a personal examination before decisions regarding a patient's mental health could be made.

The Act on Medical Activity[22] recognized the general admissibility of using ICT in healthcare services, emphasizing that medical services could be provided through teleinformatic or communication systems. This definition encompassed a wide range of healthcare activities aimed at maintaining, restoring, improving health, and other medical activities, regardless of the specific services offered.

Telemedicine gained more prominence during the COVID-19 pandemic. However, it was worth noting that the legal framework for remote healthcare services was already in place before the pandemic. Telemedicine specifically referred to services provided through teleinformatic systems related to suspected or confirmed cases of COVID-19.

7. REGULATORY FRAMEWORK FOR TELEMEDICINE SERVICES

7.1. The Impact of COVID-19 on Telemedicine Utilization

The COVID-19 pandemic prompted an increased utilization of telemedicine visits, but the legal framework regarding their implementation and reporting standards remained relatively limited [Pogorzelska, Marcinowicz and Chlabicz, 2023].

7.2. Minister of Health's Authority to Establish Organizational Standards

The Act on Medical Activity grants the Minister of Health the authority to establish organizational standards for specific medical fields and services, as outlined in Article 22, Section 5 of the Act on Medical Activity,[23] which states that "the minister responsible for health matters can define healthcare organizational standards in selected medical fields or specific medical entities to ensure the quality of healthcare services." These standards, when issued as regulations, are legally binding and mandatory, requiring medical entities to adhere to them when providing healthcare services in the designated medical field or activity [Haleem et al. 2021; Furlepa et al. 2021, 1221].

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[21] Act of August 19, 1994 on mental health protection, Journal of Laws No. 111, item 535.

[22] Act of April 15, 2011 on medical activities, Journal of Laws No. 112, item 654.

[23] Announcement of the Speaker of the Sejm of the Republic of Poland of March 16, 2021 on the announcement of the uniform text of the Act on medical activities, Journal of Laws item 711.

7.3. Historical Regulations for Telemedicine Services

Historically, the regulations for telemedicine services were confined to the Minister of Health's organizational standards for radiology and diagnostic imaging performed through teleinformatics systems.[24]

7.4. Organizational Standards for Primary Healthcare Telemedicine

It wasn't until August 29, 2020, that organizational standards for primary healthcare telemedicine visits came into effect.[25] However, no specific provisions addressing specialist healthcare teleconsultations were established under Article 22, Section 5 of the Act on Medical Activity[26] [Furlepa et al. 2022, 1221].

7.5. Absence of Specific Regulations for Specialist Healthcare Teleconsultations

Given this absence of dedicated regulations for specialist healthcare teleconsultations, it is recommended to apply the regulations designed for primary healthcare telemedicine to specialist teleconsultations. These organizational standards encompass various formal aspects of telemedicine implementation that are common to both primary and specialist healthcare services. These shared elements encompass criteria for patient qualification for remote services, the mode of telemedicine visits, patient identity verification, appointment cancellations, and medical entity responsibility for service-related issues [Furlepa et al. 2022; Rudowski 2003, 219-21; Sołomacha et al. 2022, 115].

7.6. Applying Primary Healthcare Standards to Specialist Teleconsultations

To ensure patient identity confirmation in compliance with the principles specified in Article 50, Sections 2-2b of the Act on Healthcare Benefits Financed from Public Funds,[27] patients can use various methods such

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[24] Regulation of the Minister of Health of April 11, 2019 on organizational standards of health care in the field of radiology and imaging diagnostics performed via ICT systems, Journal of Laws item 834.

[25] Regulation of the Minister of Health of August 12, 2020 on the organizational standard of teleconsultation within primary health care, Journal of Laws item 1395.

[26] Announcement of the Speaker of the Sejm of the Republic of Poland of March 16, 2021 on the announcement of the uniform text of the Act on medical activities, Journal of Laws item 711.

[27] Act of August 27, 2004 on health care services financed from public funds, Journal of Laws No. 210, item 2135.

as presenting identification documents (e.g., ID card, passport, driving license), school cards, or electronic documents displayed on mobile device screens. Alternatively, patients can verify their identity through electronic patient health accounts, created through personally confirmed identification or electronic identification means issued within the electronic identification system.

7.7. Patient Identity Verification and Eligibility Confirmation

Regarding eligibility verification for healthcare services financed by public funds during telemedicine visits, patients can verbally confirm their eligibility by stating, "I am entitled to use healthcare services financed from public funds," as outlined in Article 50, Section 7 of the Act on Healthcare Services Financed from Public Funds.[28] The teleconsultation should also be documented in the individual medical record, including information on the use of teleinformatics systems or other communication systems, patient awareness of teleconsultation limitations, and instructions for in-person visits in case of deteriorating health.

7.8. Documentation Requirements for Teleconsultations

Additional aspects addressed in the organizational standards include the postponement of certain examinations, informing patients about the need for in-person care if necessary, appointment cancellations due to connectivity issues, and guidance on using e-prescriptions and e-referral services.

7.9. Limitations on Specialist Care Telemedicine Services

In alignment with the regulation[29] specialist care telemedicine services should not be provided when patients or their legal representatives decline remote services, when the visit is for certificate acquisition, or when patients with chronic conditions experience worsening or changing symptoms [Haleem et al. 2021; Król-Całkowska, Walczak and Szymański 2022; Sołomacha et al. 2022, 115].

[28] Ibid.

[29] Regulation of the Minister of Health of August 12, 2020 on the organizational standard of teleconsultation within primary health care, Journal of Laws item 1395.

7.10. Maintenance of Medical Records in Telemedicine

Finally, the entity providing telemedicine services is obligated to maintain medical records in accordance with the regulations governing record type, scope, format, and processing methods,[30] storing them as stipulated in Article 29, Section 1, Points 1-4 of the Act on Patients' Rights and Patients' Spokesman Rights,[31] depending on the document type. It's crucial to note that recording audio and video during teleconsultations does not replace the comprehensive medical record, which has its own specific scope and management guidelines detailed in the referenced regulation [Sołomacha et al. 2022, 115].

CONCLUSION

The dynamic realm of telemedicine has witnessed rapid growth and profound impacts on healthcare worldwide. Yet, this transformative field operates within the confines of complex legal and regulatory landscapes. As we conclude this exploration of telemedicine's legal dimensions, it is evident that these regulations not only safeguard patient rights but also shape the quality of healthcare, underscoring the importance of telemedicine in the future of healthcare. While telemedicine offers unprecedented convenience and accessibility, it is not a wholesale substitute for in-person evaluations, and its strengths and limitations must be understood and balanced. This article has provided a comprehensive view of the legal aspects of telemedicine, empowering healthcare professionals and patients to navigate the intricacies of this technology-driven healthcare revolution.

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COMMUNICATION IN MEDICAL TEAMS: A LITERATURE REVIEW

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Abstract. Teamwork based on proper communication, social skills of interdisciplinary team members and proper division of roles has a direct impact on the quality of patient care. Incorrect interpretation of messages or delayed reaction to the received message cause significant problems in a teamwork. Nurses and doctors are two of the most important healthcare providers. They perform separate but complementary tasks in health care. An electronic literature search was conducted in the PubMed and ScienceDirect databases with the aim of analysing research on cooperation in healthcare teams, with a particular focus on the aspect of mutual communication between doctors and nurses. Empirical evidence may indicate that formal practices that strengthen communication and relationships among providers through participation in joint training have the potential to increase physicians' awareness of teamwork and thereby support effective team behaviours. Of the studies reviewed, some were conducted using unvalidated survey instruments. Some examined the opinions of only one professional group, without comparing them with the opinions of other groups involved in the collaborative process. Consequently, the present findings are inadequate as a reliable foundation for scientific conclusions.

Keywords: communication; cooperation in the medical team; nurses; doctors; teamwork; medical teams

INTRODUCTION

Teamwork has a direct impact on the quality of patient care. It is particularly important in healthcare, where there are interdisciplinary teams operating in changing conditions, often under time pressure. Interdisciplinary teams not only improve patient health, but also reduce the sense of burnout among healthcare workers [O'Leary, Ritter, Wheeler, et al. 2010, 119].

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Leadership is critical to improving patient outcomes, and a shared leadership role is the most effective team approach [Ezziane, Maruthappu, Gawn, et al. 2012, 434]. Proper leadership encourages the use of open communication, which leads to a sense of team membership among employees [Armstead, Bierman, Bradshaw, et al. 2016, 180].

Communication is the process of transferring information between two or more parties [Frydrychowicz 2020, 14]. The sources in the communication process are people who are the senders and receivers of information. When communicating, there should be either feedback or a message confirming the receipt of the information. Therefore, the sender is at the same time the receiver of the message, which the receiver sends back, becoming the sender of the feedback [Wajda 2006, 154]. Signs are an important element of communication, and in specific medical terminology also professional expressions, which constitute a kind of code that is not always legible to the recipient. The key factors in this process are the ability of both the sender and the recipient to understand the transmitted content and, consequently, to use it appropriately. Clear communication is the basis for effective teamwork. Interpersonal communication in patient care uses verbal and non-verbal forms, e.g. written. Disruptions in this area of interpersonal communication can result in wrong decisions, which will burden the patient the most [Kuriata-Kościelniak 2020, 130].

Nurses and doctors are two of the most important healthcare providers. They perform separate but complementary tasks in health care. They are expected to cooperate effectively in order to provide quality services to patients.

Cooperation is an active process that requires perseverance and effort from all parties pursuing a common goal, but also personal motivation, education and information sharing. All of these aspects of the daily work of cooperating parties in patient care can be difficult to achieve [Zwarenstein, Goldman, and Reeves 2009, 4]. However, collaboration between nurses and physicians involves sharing responsibility for problem-solving and decision-making regarding the formulation and implementation of patient care plans [Ushiro 2009, 1499].

Cooperation between nurses and doctors can be influenced by factors: systemic, organizational, interactional and variables that characterize the staff themselves [Bender, Connelly and Brown 2013, 169]. Systemic factors are outside the organization and are elements of social, cultural, educational and professional systems [Brown, Lindell, Dolansky, et al. 2015, 208]. Organizational factors include the facility's mission, management structure, and administrative and clinical leadership [Regan, Laschinger and Wong 2016, 57]. Interactional factors refer to the attitudes of professionals toward each other during the work process, i.e., effective communication, mutual

respect, and willingness to cooperate [Bender, Connelly, and Brown 2013, 165-74]. Staff characteristics include educational level, length of service, and employee personality traits.

An electronic literature search was conducted in the PubMed and ScienceDirect databases with the aim of analysing research on cooperation in healthcare teams, with a specific focus on the aspect of mutual communication between doctors and nurses. The search strategy was based on headings: communication skills, cooperation in the medical team, nurses, doctors, teamwork, medical teams.

1. TEAMWORK IN THE OPERATING ROOMS AND INTENSIVE CARE UNITS

One of the topics of research on teamwork in terms of communication is errors and their consequences in the evaluation of teamwork in the operating room. Teamwork in the operating room between two groups: one comprised solely of surgeons, and the other consisting of surgeons and nurses was assessed. Surgeons among themselves rated the quality of cooperation and communication as high or very high in 85% of cases. In contrast, nurses rated their cooperation with surgeons as high or very high in only 48% of cases [Makary, Sexton, Freischlag, et al. 2006, 749].

In the opinion of most nurses, frequent interruptions in communication between doctors and nurses generate failures in teamwork related to communication and are significant sources of errors in the operating room [Hu, Arriaga, Peyre, et al. 2012, 39; Teunissen, Burrell, and Maskill 2019, 68; Sillero and Buil 2021, 775].

Similar results were found in other studies that evaluated the relationship between interruptions, team familiarity and miscommunication. A positive correlation was found between the number of intraoperative breaks and the number of miscommunications by the medical team [Gillespie, Chaboyer, and Fairweather 2012, 584]. Incorrect interpretation of messages or delayed reaction to the received message cause significant problems in teamwork [Soemantri, Kambey, Yusra, et al. 2019, 153].

Other results show that 56% of intraoperative and postoperative complications result from communication errors.[1] Inadequate communication in the operating room has also been identified as the most common behavioural factor contributing to events such as wrong surgical site/side, wrong implant, retained foreign object, or wrong procedure [Thiels, Lal,

[1] The Joint Commission. Sentinal Event Data – Root Causes by Event Type – 2004 to third quarter 2011, https://www.nerc.com/pa/rrm/hp/2012%20Human%20Performance%20Conference/Chuck%20Mowll%20Joint%20Commision%20Healthcare.pdf [accessed: 07.11.2023].

Nienow, et al. 2015, 518; Schuenemeyer, Hong, Plankey, et al. 2017, 855]. Good communication is therefore essential for both incident prevention and incident recovery [Siu, Maran, and Paterson-Brown 2016, 126].

A study in Sri Lanka found that surgeons in the surgical team have a poor sense of shared identity with other professions. Most surgeons consider surgical assistants, anaesthesiologists, and nurses as separate teams working in the same operating room. Moreover, operating physicians believe that they play a more important role in the operating room compared to other colleagues [Jayasuriya-Illesinghe, Guruge, Gamage, et al. 2016, 61].

Another study found that the greatest obstacle to creating effective relationships between doctors and nurses is the lack of doctors' recognition of the professional role of nurses [Matziou, Vlahioti, Perdikaris, et al. 2014, 529]. Problems include a lack of clarity about the role of each team member and conflicting views on appropriate interaction in operating rooms [Weldon, Korkiakangas, Bezemer, et al. 2013, 1684]. Most conflicts in operating rooms usually occur between nurses and surgeons. The existence of a hierarchy among health care workers makes nurses working in operating rooms feel that they are not fully perceived as members of surgical teams [Laflamme, Leibing, and Lavoie-Tremblay 2019, 307].

In case of improper teamwork between specialists, the risk of surgical complications is approximately five times higher [Mazzocco, Petitti, Fong, et al. 2009, 681]. A study conducted in an operating theatre simulation setting with surgeons, anesthesiologists and nurses identified barriers to communication in the work of such teams. These included lack of cordiality, low commitment to their duties and inappropriate role hierarchy [Shi, Marin-Nevarez, Hasty, et al. 2020, 239].

Improper communication between doctors and other healthcare providers has direct consequences for patients, such as delays in the provision of care, a reduction in its quality and, consequently, dissatisfaction of recipients [Norgaard, Ammentorp, Kyvik, et al. 2012, 95]. Most of these errors occur in wards where intensive care is provided in a fast-moving, dynamic environment, where proper communication, cooperation and coordination of activities are essential for providing effective care [Courtenay, Nancarrow, and Dawson 2013, 57].

Nurses and junior doctors working in the intensive care unit had different views on the extent of cooperation in the team. Nurses described the degree of collaboration as insufficient, while junior doctors were satisfied with this collaboration. The views between the groups were most divergent when it came to overall satisfaction with the team's decisions [Nathanson, Henneman, Blonaisz, et al. 2011, 1819].

A study was conducted in intensive care units and found that members of different professions behaved differently during team meetings. Although the researchers found that teamwork was reasonably effective, there were significant differences in perceptions of cooperation between doctors and non-doctors. They found that a lack of communication between members of the healthcare team remains a common cause of errors in patient care [McCulloch, Rathbone, and Catchpole 2011, 475].

Statistically significant differences were observed between physicians' and non-physicians' perceptions of teamwork [Walter, Schall, DeWitt, et al. 2019, 15].

Communication in medical teams was assessed. At joint meetings of interdisciplinary teams, physicians spoke longer than other team members – for an average of 83.9% of the duration of each meeting while non-physicians spoke for an average of 9.9%. This can be interpreted as the dominant role of the physician at the meeting [Lingard, Vanstone, Durrant, et al. 2012, 1764].

2. COOPERATION IN AN INTERDISCIPLINARY TEAM

Another study looks at the relationships between doctors, nurses and unlicensed support staff. Unlicensed support staff are important members of healthcare, possessing a high level of experience and skill. These include nursing assistant, nursing auxiliary, patient care technician, home health aide/assistant, geriatric aide/assistant, psychiatric aide.

The findings show that most of the time doctors, nurses and unlicensed assistive personnel act as separate providers who hardly talk to each other. Doctors consider themselves the main decision makers in patient care. Doctors and nurses consult with each other on patient care issues. In contrast, unlicensed ancillary staff are rarely included in discussions about patients. Lack of agreement between these groups can interfere with interdisciplinary communication and collaboration. An appropriate model of patient care in a hospital should recognize the contributions of physicians, nurses and unlicensed assistive personnel to care; promote better communication and collaboration and thereby enhance patient safety [Lancaster, Kolakowsky-Hayner, Kovacich, et al. 2015, 281].

3. FACTORS THAT MAKE COOPERATION DIFFICULT

However, effective direct and indirect exchange of patient information is only one dimension of good team communication. Poor communication is cited as a leading cause of poor patient outcomes and healthcare errors.

Clear communication is especially important when discharging a patient from the hospital [Scotten, Manos, Malicoat, et al. 2015, 898].

When a patient is discharged from the hospital, there should be standards for communication and handling of processes that require inter-institutional cooperation [Pinelli, Papp, and Gonzalo 2015, 1304]. This is particularly important for patients in intensive care units [Goldman, Reeves, Wu, et al. 2016, 7].

In China, the influence of interactional factors (effective communication, perceived respect and willingness to cooperate) on the perception of cooperation between nurses and doctors was investigated. Cooperation between nurses and doctors was assessed as moderate. According to the nurses' opinion, the main factor determining proper cooperation is perceived respect, the second factor is effective communication, and the weakest element is the willingness to cooperate. Effective communication was at a medium-high level [Wang, Wan, Guo, et al. 2016, 76].

This result is consistent with other empirical studies [Collette, Wann, Nevin, et al. 2017, 476; Luetsch and Rowett 2016, 462] in which collaboration has been correlated with timeliness of communication and accuracy in collaboration. Timely communication allows team members to stay updated on the progress of patient care [Havens, Vasey, Gittell, et al. 2010, 935] and contributes to achieving work coordination [Rundall, Wu, Lewis, et al. 2016, 94]. Accuracy and understanding of the information received prevents errors and delays and contributes to patient safety.

According to some nurses, some doctors attach importance only to treatment and believe that a nurse is not necessary in this process. In the nurses' opinion, this view also exists at the management level. Nurses pointed out the lack of formal communication processes and proper exchange of information between the two groups; for example, nurses do not attend morning meetings of doctors where patients' cases are discussed, and after these meetings they are not provided with information on the further management plan for the patient. The main communication between doctors and nurses is through verbal exchange of information during shift work and patient records. The findings described were based solely on the observations of doctors and nurses. It would be reasonable to expand these analyses, to include the opinions of other members of the interdisciplinary team related to health care, as well as the patients themselves [Morag and Zimerman 2021, 78].

The aim of the research conducted in Greece was to learn the views of doctors and nurses on communication and cooperation in the medical team, as well as the factors that may influence them. Significant factors differentiating the nurses' opinions were work experience, clinic size and education. In the case of doctors, gender was an additional differentiating variable.

Nurses and doctors do not share the same views on the effectiveness of communication and the role of nurses in the decision-making process regarding patient care. The most important barrier in building good relations between these groups of professions was the lack of recognition of the professional role of nurses. The study also found that a lack of inter-institutional collaboration may result in more errors and omissions in patient care. Therefore, in everyday practice, both nurses and doctors should be aware of the importance of effective communication in patient care. They should also develop principles of mutual interinstitutional cooperation in this area. Nurses must continually strengthen their role in decision-making and patient care, especially in countries with a limited culture of inter-institutional cooperation. Additionally, factors that improve physicians' attitudes toward collaboration and effective communication need to be further explored [Matziou, Vlahioti, Perdikaris, et al. 2014, 526-33].

Other studies pointed to a lack of communication and cooperation between the medical team. During daily rounds, some doctors did not provide nurses with sufficient patient information. This also applies to incorrect explanation of medical orders, which is the basis for generating many errors at the stage of issuing a prescription, transcription, recording the wrong drug or the wrong dose [Farzi, Irajpour, Saghaei, et al. 2017, 162]. The nurse-doctor relationship is significant, and the main goal of these two related professions is to ensure patient safety and quality care. Conflict between members of the medical team can jeopardize patient safety and reduce the quality of care [Fassier and Azoulay 2010, 662]. 60% of adverse events result from lack of communication between members of the medical team [Martin, Ummenhofer, Manser, et al. 2010, 5].

A survey in Hong Kong found that doctors and nurses perceive open communication differently in their clinical environment [Ng, Pun, So, et al. 2017, 8]. Lack of open communication may be due to limited opportunities and time to discuss patient care among medical teams. Therefore, introducing training for medical teams on team action strategies and tools used to increase efficiency and patient safety could be a way to educate all members of the health care team in proper communication [Clapper 2018, 243].

CONCLUSIONS

This paper presents a review of empirical evidence on work in medical teams, with particular emphasis on the aspect related to mutual communication between doctors and nurses. This evidence has been obtained mainly in the last decade. Although the evidence is limited and fragmentary due to the small number of scientific reports on selected aspects, leaders have provided some indication of what would need to be done. The data provide

evidence that collaboration requires different efforts by the professionals involved in teams.

Healthcare teams face several challenges that non-healthcare teams do not necessarily have to address. These challenges include the need to share professional roles and expertise, planning and decision-making while providing quality care for patients in various health/disease states.

If the team is to succeed, communication must be a priority, and barriers to communication must be identified and removed. Effective communication among health care professionals is the foundation for good collaboration. Hospital administrators and department managers could lead efforts to improve effective communication between nurses, doctors and other members of medical teams.

Strategies such as team training to better understand teamwork and collaboration can improve professional understanding of each other's roles and values. Despite working together as a medical team, doctors and nurses rarely participate in training together. To develop mutual understanding and trust, collective education through various forms of training, such as role-playing and discussions, is necessary. Communication processes will be supported by a large number of formal opportunities for information exchange such as training in simulated conditions, team-building meetings, information and knowledge exchange forums, organisational arrangements that provide opportunities for mutual learning.

Management should develop tools to accurately assess collaboration in medical teams. Knowledge of barriers to interpersonal communication and their effective identification should be an important part of organisational management.

The awareness that the messages sent may not be understood by the recipients allows for very frequent monitoring by senders. The immediate reaction of senders will prevent conflicts in the organisation. Errors in communication between sender and receiver will be reduced the stronger the motivation for their mutual understanding.

The issue of communication in interdisciplinary medical teams made up of people of different ages may present a new challenge for organisational managers. The authors of this study found no scientific reports on cooperation and mutual communication in intergenerational medical teams. It is worth including the aspect of generational differences in future research.

Of the studies reviewed, some were conducted using unvalidated survey instruments. Some examined the opinions of only one professional group, without comparing them with the opinions of other groups involved in the teamwork process. Therefore, the current evidence cannot be used as a solid basis for scientific inference. The quality of scientific data

on teamwork and communication was moderate to poor. The different measurement techniques used reduce the comparability of the research and confidence in the validity of the findings and the generalizability of the results.

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PSYCHOPHYSICAL PROBLEMS OF PERI– AND POSTMENOPAUSAL WOMEN – AN URGENT PUBLIC HEALTH CHALLENGE

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Abstract. The peri – and postmenopausal period is one-third of the average woman's life. Despite its physiological nature, it is usually associated with a number of ailments that consequently weaken a woman's psychophysical condition. The emergence of disorders in the psychological and somatic spheres can make it more difficult among women to perform social, domestic and professional functions, including those falling under labour law. The appearance of symptoms of anxiety and depression is much more common among women than men, and the duration of the COVID-19 epidemic has exacerbated health problems, often causing new difficulties especially in the aspect of mental health of postmenopausal women, creating a new and urgent challenge for state bodies responsible for prevention programs to create a comprehensive pilot project in this area of public health.

Keywords: menopause; disorders; insomnia; mental health; COVID-19

INTRODUCTION

With advances in medicine and the development of a social economy, women's life expectancy continues to increase, thanks to which the population of older women in many countries is becoming increasingly large. The number of peri-menopausal women (aged 45-55) in Poland is about 2.6 million – which is a population that is experiencing changes related

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to the decline of ovarian hormonal function.[1] However, the topic of menopause also applies to women who have already gone through it – the lack of estrogen causes changes in the body leading to the appearance of many diseases: hypertension, diabetes, hypercholesterolemia, obesity, dementia, vaginal atrophy, osteoporosis. Moreover, nowadays women in their 50s are required to be fully physically, intellectually and socially active. According to a World Health Organization (WHO) report, by 2030 the number of peri-menopausal women will reach 1.2 billion. It is estimated that about one-third of a modern woman's life is spent after menopause [Hill 1996; Afshari, Bahri, Sajjadi, et al. 2020].

According to the nomenclature of the North American Menopause Society (NAMS), menopause is defined as the cessation of menstruation resulting from the loss of ovarian hormonal function. It is diagnosed after 12 months of amenorrhea, with the exclusion of all possible disorders that may be responsible for the prolonged absence of menstruation. The Stages of Reproductive Ageing Workshop's (STRAW) seven-phase model characterizing reproductive status in healthy women treats menopause as a reference point for five stages before its onset and another two after its onset: 1) stages – 5 to – 3 contain the reproductive phases, when menarche occurs, followed by a regular menstrual cycle, 2) stage – 2 is the early menopausal transition, the menstrual cycle remains regular, but there are changes in its length, 3) stage – 1 is a late menopausal transition, characterized by the occurrence of two or three missed menstrual periods and at least one interval between menstrual periods of at least 60 days, 4) stage +1 is early menopause, refers to 4 years after the last menstruation, 5) stage +2 is late menopause, representing a period of subsequent years [Santoro and Taylor 2011; Harlow, Gass, Hall, et al. 2012].

The timing of the onset of menopause is individual to each woman, and appears to be to the greatest degree, genetically determined [Kaczmarek 2007]. To some extent, the timing of menopause may be determined by factors such as; race, economic and social status, BMI, or comorbidities [Gold 2011; Schoenaker, Jackson, Rowlands, et al. 2014]. It has also been speculated that smoking, post chemotherapy status or pelvic irradiation may accelerate its onset.

Determining the age at which women go through menopause poses some difficulties, since studies are usually retrospective, and data is obtained using a survey questionnaire. Comparing the age of menopause of women from Poland and other countries in Europe, the US, and Australia, it seems that the age of natural menopause is similar. However, when juxtaposing the population of Polish women with women from African and Asian

[1] See https://demografia.stat.gov.pl/Baza Demografia/Tables.aspx [accessed: 24.03.2023].

countries (excluding Japan), the results indicate that women in Poland go through menopause at an older age [Rumianowski, Brodowska, Karakiewicz, et al. 2012].

A cross-sectional histological study of ovaries showed that, along with chronological aging, the stock of ovarian follicles (ovarian reserve) decreases from a peak of 500,000-1,000,000 primary follicles at birth to about 1,000 at menopause [Gougeon, Ecochard, and Thalabard 1994]. According to reports, the rate of decline in the number of non-growing follicles progressively increases with age-for example; loss of ovarian follicles occurs more rapidly between the ages of 38-39 than between 30-31 [Hansen, Knowlton, Thyer, et. al. 2008].

Menopause is associated with a number of disturbances in the psychological and somatic spheres, which can impede the performance of social, professional and family functions. In the peri-menopausal period, there are specific symptoms associated with hormonal changes (e.g., hot flashes, sweats), non-specific somatic symptoms (muscle and joint pain, dizziness, numbness) and psychological symptoms characteristic of anxiety (e.g., anxiety, agitation, sleep disturbances) and depression (e.g., sadness, tearfulness, loss of energy). The severity and duration of symptoms vary individually, depending largely on a woman's mental state and the subjective meaning attributed to menopause [Paramsothy, Harlow, Nan, et al. 2017].

The most common problems of the peri-menopausal period are vasomotor symptoms, atrophic changes in the genitourinary system, osteoporosis, cardiovascular disease, neoplasms, cognitive disorders and sexual problems. Vasomotor (night sweats, hot flashes) and psychological (lowered mood) complaints are referred to as menopausal syndrome symptoms [Hamoda, Panay, Pedder, et al. 2020; O'Neill and Eden 2012].

Statistically, as many as 80% of women experience menopausal transition symptoms, and for a third of them they are of an aggravated character [ibid.]. Most commonly mentioned are vasomotor symptoms (hot flashes and night sweats), dyspareunia, frequent urination, urinary urgency, incontinence, brain fog, joint pain, dry skin/eyes, and adverse changes in skin and hair. It appears that the earlier development of these complaints during the menopausal transition may mean a longer duration of troublesome symptoms [Talaulikar 2022; Paramsothy, Harlow, Nan, et al. 2017].

1. VASOMOTOR SYMPTOMS

Among Caucasian women, hot flashes and night sweats are the most common menopausal symptoms, and their severity and frequency can be individually variable [Hamoda, Panay, Pedder, et al. 2020]. Studies show that

Asian women are least likely to experience vasomotor symptoms [O'Neal and Eden 2012; Martín-Salinas and Lopez-Sobaler 2017]. It seems that vasomotor symptoms specifically contribute to a reduced quality of life due to sleep disturbances, chronic fatigue, and lowered mood [Gracia and Freeman 2018]. In addition, the presence of severe and persistent vasomotor symptoms is associated with an increased risk of the appearance of cardiovascular disease [El Khoudary and Thurston 2018; Szmuilowicz, Manson, Rossouw, et al. 2011]. The duration of exposure to vasomotor symptoms for most women is in the range of 1-6 years, but sometimes (10-15% of women) may experience them for up to 15 years or longer [Avis, Crawford, Greendale, et al. 2015].

Besides racial and ethnic differences, the frequency/severity of hot flashes can be influenced by genetic predisposition, socio-cultural differences, and a diet rich in soy-which has a protective effect. Among factors that can exacerbate symptoms are included smoking, obesity and physical inactivity [Martín-Salinas and Lopez-Sobaler 2017; O'Neill and Eden 2012].

2. GSM – GENITOURINARY SYNDROME OF MENOPAUSE

In 2013, experts from two scientific societies, The North American Menopause Society (NAMS) and the International Society for the Study of Women's Sexual Health (ISSWSH), proposed a new terminology for postmenopausal atrophic changes, introducing the term – genitourinary syndrome of menopause (GSM).

Appearing alongside the menopausal transition, gradual estrogen deficiency leads to atrophic changes, i.e.; atrophy of the vaginal epithelium, decreased elasticity and size of the vagina, changes in the vaginal bacterial flora, increased vaginal pH, vulvar and clitoral atrophy, atrophic changes in the urethral epithelium, decreased filling of the periurethral venous plexus and increased activity of the bladder detrusor muscle [Baranowski, Dębski, Paszkowski, et al. 2011]. Nearly 50% of menopausal women experience bothersome symptoms of urogenital atrophy (UGA) in the form of pruritus and burning of the vulvar area, dyspareunia, recurrent vaginal and urinary tract infections or dysuria [Wielgoś, Mazanowska, and Pietrzak 2013; Capobianco, Wenger, et al. 2014; Alvisi, Gava, Orsili, et al. 2019; Hamoda, Panay, Pedder, et al. 2020].

Moreover, under physiological conditions Lactobacilli species constitute the predominant bacterial flora of the vagina while being the host's innate defense against pathogens. The function of estrogen is to stimulate the proliferation of Lactobacilli in the vaginal epithelium, which reduces the pH and prevents the colonization of the vagina by bacteria from

the Enterobacteriaceae groups, the main pathogen of urinary tract infections [Capobianco, Wenger, et al. 2014]. The vaginal microbiome of postmenopausal women resembles in many respects that observed in women of childbearing age with bacterial vaginosis – both groups of women have a high pH [Roy, Caillouette, Roy, et al. 2004], higher bacterial diversity [Brotman, Ravel, Cone, et al. 2010] and abnormal Nugent scores [Cauci, Driussi, De Santo, et al. 2002]. However, in many women with GSM, these abnormalities reflect a decrease in lactic acid bacilli rather than an increase in pathogenic microorganisms [ibid.; Gliniewicz, Schneider, Ridenhour, et al. 2019].

3. PSYCHOLOGICAL SYMPTOMS, COGNITIVE FUNCTION AND SLEEP DIFFICULTIES

Research clearly indicates an increased risk of depressive symptoms and disorders in peri-menopausal or post-menopausal women compared to pre-menopausal women [O'Neal and Eden 2012].

The SWAN study demonstrated an association between lower estrogen levels during menopause and sleep problems, hot flashes, anxiety as well as depressive symptoms [ibid.; Vivian-Tailor and Hickey 2014]. Research also suggests that women whose peri-menopausal period is prolonged may be at higher risk of depression. However, the occurrence of a number of psycho-emotional disorders during the peri-menopausal period can be attributed to factors other than just hormonal changes, i.e.; individual predisposition in terms of personality type, or socio-cultural factors related to lifestyle [Kravitz, Ganz, Bromberger, et al. 2003].

Deterioration of cognitive function (described by women as brain fog) is an ailment that is particularly severe during the menopausal transition, and some studies indicate that such a condition continues even after menopause [Karlamangla, Lachman, Han, et al. 2017; Santoro and Taylor 2011].

With the hormonal changes of the peri-menopausal period as well as advancing metric age, women are at risk for insomnia and are more likely to experience poorer sleep quality. In addition, disorders such as obstructive sleep apnea (OSA), restless legs syndrome (RLS), and a range of symptoms of depressed mood and anxiety appear.

The prevalence of sleep disorders ranges from 16% to 47% in the peri-menopausal period and 35-60% in the postmenopausal period. Insomnia, sometimes accompanied by feelings of anxiety, a depressed state, as well as mood disorders and depression are among the more common symptoms reported by menopausal women [Kravitz, Ganz, Bromberger, et al. 2003; Hsu and Lin 2005]. Epidemiological studies show that sleep difficulties and depressive symptoms are characteristic of women during

significant changes in sex hormones, not only during menopause but also during puberty [Morssinkhof, Wylick, Priester-Vink, et al. 2020; O'Neal and Eden 2012].

Obstructive sleep apnea (OSA), the essence of which is recurrent pauses in breathing during sleep and shallow breathing, despite preserved respiratory muscle function, also significantly impairs sleep quality and function in women.

Obstructive apnea is caused by impaired airflow through the upper airways, which in fact most often means the collapse of their lumen at the level of the throat [Perger, Mattaliano, and Lombardi 2019]. Factors that increase the risk of occurrence of OSA in postmenopausal women include high BMI and abdominal obesity [Naufel, Frange, Andersen, et al. 2018]. When making a comparison between pre/perimenopausal and postmenopausal women in the context of sleep difficulties and the occurrence of obstructive sleep apnea (OSA), it can be seen that postmenopausal women are more often affected. In contrast, the groups do not differ significantly in terms of symptoms such as dissatisfaction with the quality of sleep, feelings of daytime sleepiness, or the occurrence of restless legs syndrome [Zolfaghari, Yao, Thompson, et al. 2020].

Sleep-related disorders during menopause are a common phenomenon and their etiology is multifactorial. They may be part of the physiological aging process determined by the decline in estrogen levels or, alternatively, occur due to other conditions, such as, for example, restless legs syndrome (RLS) anxiety, co-morbidities, medications used, pain and/or psychosocial factors. In this context, it seems necessary to pay special attention to the care/support aspect of peri-menopausal women, as insomnia is a factor that further increases the risk of depression in this already vulnerable population [Guidozzi 2013; Kalmbach, Cheng, Arnedt, et al. 2019].

Furthermore, data from the literature clearly indicates that a factor that significantly alleviates/reduces menopausal symptoms in women, is psycho-emotional support in the broadest sense [Yazdkhasti, Keshavarz, Khoei, et al. 2012; Zhao, Liu, Feng, et al. 2019].

4. MENTAL HEALTH PROBLEMS OF MENOPAUSAL WOMEN IN THE SETTING OF THE COVID-19 PANDEMIC

The COVID-19 pandemic has exacerbated health problems for people around the world, often causing new difficulties especially in the aspect of mental health.

In general, the experience of anxiety and depression symptoms is much more common in women than in men.[2] It has been suggested that the reasons for these differences may be due to fluctuations in sex hormones and a decline in estrogen levels [Albert 2015]. Undoubtedly, the psychological and socioeconomic consequences resulting from the duration of the COVID-19 pandemic may be contributing to the deterioration of women's mental health.

Of the factors analyzed it was shown that high levels of anxiety, stress and depression were most often observed among women, young people and those with children [Babicki and Mastalerz-Migas 2020; Milton, Ellis, Davenport, et al. 2017; Wu, Lee, Sze, et al. 2022; Verma and Mishra 2020; Huang and Zhao 2020; Alkhamees, Alrashed, Alzunaydi, et al. 2020; Benke, Autenrieth, Asselmann, et al. 2020; Pedrosa, Bitencourt, Fróes, et al. 2020; Smith, Jacob, Yakkundi, et al. 2020].

Taking into account gender differences, it was noted that not only a higher incidence of depression, but also the more frequently stated concerns about daily functioning issues during the COVID-19 pandemic involved women [Du, Wang, Yin, et al. 2020; Mazza, Ricci, Biondi, et al. 2020]. Taking into account the individual stages of menopause, it can be seen that postmenopausal women are particularly vulnerable to the onset of depression [Jasik, Jaślikowska, Zbrojkiewicz, et al. 2016; First, Okanli, Kanbay, et al. 2021; Pala, Ünsal, Arslanta, et al. 2020]. It should be noted here that more than 20% of the world's population over the age of 60 is living with a mental disorder or neurological disease, with dementia, depressive disorders and anxiety being the most prevalent.[3]

In addition, a cited risk factor for mental disorders is a lower socioeconomic status and lack of psycho-emotional support [Du, Wang, Yin, et al. 2020; Özdin and Özdin 2020; Li, Qin, Sun, et al. 2020; Lei, Huang, Zhang, et al. 2020; Zhou, Zhang, Wang, et al. 2020].

Thus, it seems key to take measures to maintain the mental health of postmenopausal women, especially considering the characteristics of those who already had mental disorders, as well as those who only developed them during the COVID-19 pandemic.

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[2] See https://www.who.int/news/item/02-03-2022-covid-19-pandemic-triggers-25-increase-in-prevalence-of-anxiety-and-depression-worldwide [accessed: 24.03.2023].

[3] See https://www.who.int/en/news-room/fact-sheets/detail/mental-health-of-older-adults [accessed: 24.03.2023].

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TABLE OF CONTENTS

Canon Law

Medical Biology

Health Sciences


Societas Alumnorum et Amicorum Facultatis Iuris Catholicae Universitatis Lublinensis
KATOLICKI UNIWERSYTET LUBELSKI
JANA PAWŁA II