



INTERNATIONAL
NETWORK
OF DOCTORAL
STUDIES IN LAW

3rd International Conference of PhD Students and Young Researchers

SECURITY AS THE PURPOSE OF LAW

CONFERENCE PAPERS

9 – 10 April 2015
Vilnius University Faculty of Law
Vilnius, Lithuania

Information about the Conference:

Venue: Vilnius University Faculty of Law, Vilnius, Lithuania

Date: 9-10 April 2015

Scientific Committee of the Conference:

- Prof. Dr. Tomas Davulis, Dean of the Faculty of Law, Vilnius University
- Dr. Indrė Isokaitė, Faculty of Law, Vilnius University
- Dr. Justas Namavičius, Faculty of Law, Vilnius University
- Assoc. Prof. Dr. Vīgita Vėbraitė, Faculty of Law, Vilnius University

Organisational Committee of the Conference:

- Gintarė Tamašauskaitė-Janickė, Faculty of Law, Vilnius University
- Assoc. Prof. Dr. Vīgita Vėbraitė, Faculty of Law, Vilnius University

Conference Papers Edition composed by

- Skirmantė Makūnaitė, Faculty of Law, Vilnius University
- Jurgita Randakevičiūtė, Faculty of Law, Vilnius University
- Gintarė Tamašauskaitė-Janickė, Faculty of Law, Vilnius University
- Assoc. Prof. Dr. Vīgita Vėbraitė, Faculty of Law, Vilnius University

ISBN 978-609-459-481-6

© Vilnius University, 2015

© Authors of Conference Papers, 2015

FOREWORD BY THE ORGANISERS

We are happy to present you already the third edition of international conference papers of the PhD students and young researchers. This year our international conference is once again devoted to very extensive topic and is called „Security as the purpose of Law“. Personal security, security of groups of individuals as well as countries is one of main purposes of legal regulation on various levels and this topic is discussed broadly nationally and internationally. It is quite difficult to anticipate proper functioning of legal order and expect economic growth without ensuring security for the society.

Papers in this publication present diverse topics on security and cover all main branches law: from theory of law to various aspects of human rights; from criminal law to bioethics; from labour law to banking stability. Conference papers are presented by PhD students and young researchers from Czech Republic, France, Germany, Hungary, Italy, Kazakhstan, Latvia, Lithuania, Poland, Russia, Spain and Ukraine.

This international conference is a convincing proof that last year established International Network of Doctoral Studies in Law by Vilnius University Faculty of Law, Frankfurt am Main J.W. Goethe University Faculty of Law, Paris Ovest-Nanterre-La Défense University Faculty of Law and Lodz University Faculty of Law and Administration creates an international platform to develop academic and scientific activities, enhances quality of doctoral studies in law and helps to interchange information, stimulates discussions and exchanges among PhD students.

We are grateful that scholars from International Network of Doctoral Studies in Law Partners Faculties of law and invited guests moderated separated sessions of the conference and in such way provided deeper insights to the presentations and discussions afterwards. Keeping in mind the aims of the conference and our Network, the readers of the papers are encouraged to consider papers as interactive and contact authors with their insights and questions.

CONTENTS

SECURITY OF HOME. ACTIONS AMOUNTING TO THE SEARCH OF THE HOUSEHOLD	8
Teresa Bedulskaja	
NATIONAL MINORITIES' RIGHT TO EDUCATION: HOW SECURITY CAN BE ACHIEVED VIA THE NATIONAL EDUCATION IN THE LIGHT OF INTERNATIONAL AND EU EXPECTATIONS?.....	14
Dóra Bogárdi	
SECURITY AND LEGAL CERTAINTY IN DIFFERENT CONCEPTS OF LAW	20
Claudia Caria	
THE CASE OF TERRORISM: SECURITY AS PURPOSE OF CRIMINAL LAW?	26
Vasiliki Chalkiadaki	
DEFAMATION AS A CRIMINAL OFFENCE IN THE CONTEXT OF THE PROTECTION OF FREEDOM OF EXPRESSION.....	36
Aušra Dambrauskienė	
INSTAGRAM MANIA - PERSONAL SAFETY AND PRIVACY CHALLENGED BY A SOCIAL NETWORK	44
Endre Dudás	
INTERNATIONAL LEGAL FRAMEWORK TO COMBAT TRAFFICKING IN PERSONS AS AN EXAMPLE OF A RESPONSE TO SECURITY THREATS POSED BY TRANSNATIONAL ORGANIZED CRIME	50
Anna Głogowska-Balcerzak	
RULE OF LAW IS THE BASIS FOR SECURITY. CONVERGENT PHILOSOPHY BETWEEN THE WEST AND THE MIDDLE-EAST	57
Malek Hamad	
PEACEKEEPING: AN ASSET OR A RISK TO INTERNATIONAL SECURITY	64
András Hárs	
POLICE DOGS – SERVICING THE SECURITY	69
Orsolya Horváth	
THE USE AND TRANSFER OF PNR TO ENSURE SECURITY	77
Dalma Gabriella Hubay	
CASE STUDY ON FUNDAMENTAL RIGHTS VS. PUBLIC INTEREST - MILITARY RADAR CONSTRUCTION	81
Fruzsina Dóra Hubay	
SOCIAL SECURITY AS THE MAIN GOAL IN TRANSFORMATION OF COMPETITION LAW	84

Konstantin Ivanov	
SECURITY AS A LEGITIMATE REASON FOR CREATING DOUBLE STANDARDS ON HUMAN RIGHTS? .88	
Miroslav Kaštyl	
MAINTENANCE OF SECURITY OF EMPLOYERS AND EMPLOYEES WITHIN SOCIAL PARTNERSHIP IN LABOUR: KAZAKHSTAN'S EXPERIENCE AND PERSPECTIVES FOR DEVELOPMENT94	
Muslim Khassenov	
EU ELECTION OBSERVATION A TOOL FOR BUILDING STABLE SECURE DEMOCRACIES 100	
Gergő Kocsis	
PROTECTION OF THE RIGHT TO THE COMPANY'S NAME IN THE POLISH CIVIL LAW..... 105	
Justyna Kopałka – Siwińska	
DEFENSE OF CRIME VICTIMS: SOME ASPECTS 111	
Anton Liutynskii	
STATE LIABILITY IN INTERNATIONAL COMMERCIAL ARBITRATION 115	
Nėrika Lizinska	
CRIME OF ILLICIT ENRICHMENT AS A THREAT TO PUBLIC SECURITY 120	
Skirmantė Makūnaitė	
PRINCIPLE OF DISTINCTION IN REMOTE WARFARE: "LONG LIVE THE KING!" 126	
Neringa Mickevičiūtė	
LABOUR LAW AS A TOOL FOR RISK AND SECURITY DISTRIBUTION. THE CASE OF POST-CRISIS POLAND 134	
Karol Muszyński	
LEGAL SECURITY AS THE PURPOSE OF POST-ARBITRATION LITIGATION – PERSPECTIVE OF POLISH AND SWEDISH ARBITRATION LAWS..... 141	
Aleksandra Orzeł	
WILL MIFID II/MIFIR INCREASE SECURITY ON CAPITAL MARKETS?..... 147	
Mateusz Pacak	
LEGAL JUSTIFICATION UNDER CONDITIONS OF UNCERTAINTY: EPISTEMOLOGY OVER-DEMANDED 153	
André de Paula	
THE UN SECURITY COUNCIL'S TARGETED SANCTIONS REGIME AND THE ISSUES OF RESPONSIBILITY UNDER INTERNATIONAL LAW 161	
Gintarė Pažereckaitė	

MANDATED DISCLOSURES IN THE INFORMATION AGE AND THE INFORMATION OVERLOAD PROBLEM.....	168
Ricardo Pazos	
ACHIEVING BANKING STABILITY THROUGH LAW OF EUROPEAN UNION	176
Lenka Petrusková	
SECURITY OF THE CIVILIAN POPULATION FROM THE CONSEQUENCES OF AERIAL WARFARE IN THE LIGHT OF THE HAGUE RULES OF AERIAL WARFARE OF 1923.....	182
Mateusz Piątkowski	
SAFEGUARD OF CHILDREN RIGHTS IN THE INTERCOUNTRY CHILD ADOPTION	190
Ana Pliner	
ENERGY SECURITY: THE CONCEPT AND THE MAJOR PROBLEMS ENCOUNTERED IN RELATION TO ITS IMPLEMENTATION	197
Justinas Poderis	
HUMAN SECURITY AND THE DEVELOPMENT OF BIOMEDICAL SCIENCE.....	202
Jurgita Randakevičiūtė	
THREE CRITIQUES OF SECURITY NATURALISATION, SECURITISATION & LIBERAL POLITICAL RATIONALITY.....	208
Cara Röhner Maximilian Pichl	
CURRENT ISSUES OF LEGAL REGULATION OF OCCUPATIONAL SAFETY IN UKRAINE.....	216
Olena Rym	
LEGAL MEASURES OF JOB SECURITY UNDER THE EUROPEAN AND POLISH LABOUR LAW – HOW EFFECTIVE IS THE LAW INTERFERENCE INTO THE RELATION BETWEEN THE EMPLOYER AND EMPLOYEE?	225
Anna Stokłosa	
EUROPEAN CIVIL PROCEDURE IN MAINTAINING SECURITY OF PRIVATE RELATIONS	230
Victor Terekhov	
ADOPTION AND REJECTION OF THE PRINCIPLE NULLA POENA SINE LEGE: HISTORICAL AND THEORETICAL ANALYSIS.....	238
Evgeny Tikhonravov	
ENVIRONMENTAL PROTECTION VS ENERGY SECURITY IN SHALE GAS ACTIVITIES	245
Jonas Urbanavičius	

GENDER SECURITY AS THE MAIN PURPOSE OF LAW	255
Anna Useinova	
EMERGENCY, LAW AND SECURITY	260
Aušra Vainorienė	
REGULATION OF LIBERAL PROFESSIONS: PUBLIC PROTECTION OR RESTRICTIONS ON COMPETITION	268
Evelina Agota Vitkutė	
COULD THE LEGISLATOR REPLACE THE COMMON SENSE OF A PATIENT?	278
Joanna Wiszniewska	
ANNEX 1. CONFERENCE PROGRAM	284

SECURITY OF HOME. ACTIONS AMOUNTING TO THE SEARCH OF THE HOUSEHOLD

Teresa Bedulskaja¹

Abstract

The main aim of this article is to discuss the personal safety of the individuals subject to criminal proceedings. The purpose of criminal justice is to ensure protection for the fundamental rights and freedoms of individuals. On the other hand implementation of its provisions can and in most cases leads to the restrictions of these rights. These restrictions are considered justifiable when they are imposed in accordance with the constitutional principles of criminal procedure, on the reasonable grounds and do not deny the right itself.

Strictly speaking, the person has the right to be safe from unreasonable governmental intrusion into his private life. This right can be restricted and there are different limits of how far the state can interfere within depending on the severity of the measure to be applied by the government. The nature of the legal value to be interrupted can also set certain requirements for the justification of government's actions.

Among the measures applied during criminal proceedings search of the property is one with the highest level of intrusiveness within person's privacy, especially when the search of the home occurs. The home is considered as a shelter, where person can be free from the interference of the state. The person has reasonable expectation of privacy while in his household, his most intimate and familiar space.

The search of the home is mainly understood as a physical entry to the place. It is probably undeniable, that in this case the police should have either a court warrant, or in some justified cases, prosecutor's grant to conduct a search. However, in modern times technical progress offers the ways to penetrate spaces without physically entering them and some of these techniques used can be as intrusive as the physical search itself.

Legal practice and theory has evaluated the usage of these techniques and some of them (i.e. dog sniff or usage of thermo image device) were considered as amounting to the search. The author of this article would like to discuss these decisions and offer a critical review of the topic. Although the reviewed legal practice comes from USA courts, the reasoning would be important from comparative perspective.

Keywords: search of house, thermal imagers, dog sniff, US Supreme Court

Introduction

The purpose of criminal justice is to ensure protection for the fundamental rights and freedoms of individuals. On the other hand implementation of its provisions can and in most cases leads to the restrictions of these rights. These restrictions are considered justifiable when they are imposed in accordance with the constitutional principles of criminal procedure, on the reasonable grounds and do not deny the right itself.²

With the advent of advanced technology in the war against crime, some fundamental rights and freedoms have recently come under fierce attack.³ The legal norms and principles protecting individuals have been created and are interpreted by legal practice as limiting government's agents' powers with regard to the physical trespass. It is undeniable, that i.e. police officers cannot search a private property without a court warrant based on reasonable evidence. However, nowadays, law enforcement agencies use modern technology that provides them the ability to "see" through clothing and walls, in order to determine whether an

¹Master in Law, Master in Economics 1st year, seeking PhD degree, Vilnius University Faculty of Law. Research interests: Criminal justice, EU Criminal Justice, Comparative criminal justice, Criminalistics, Economics, Economics analysis of the law. Scientific activities: research in the field of human trafficking and EU criminal law. Position: New agent coordinator, AML Compliance, Western Union Processing Lithuania.

² G. Goda „Vertybinių prioritetų baudžiamajame procese“. Registrų centras, Vilnius 2014, p.252

³ A. Larks-Stanford' „The Warrantless Use of Thermal Imaging and "Intimate Details": Why Growing Pot Indoors and Washing Dishes are Similar Activities under the Fourth Amendment“. Catholic University Law Review , Volume 49, Issue 2 Winter 2000., P. 573-612

individual possesses weapons, drugs, or other objects.⁴ In most cases there is no longer any need to physically intrude within private property. As stated by legal scholars, "What many people only vaguely perceive- particularly those who have never crossed paths with the criminal justice system-is the degree to which technology may represent an invasive, even threatening, force in our lives".⁵

This article is aimed to discuss some of most controversial and mostly discussed by legal practice decisions of USA Supreme Court related with the usage of sophisticated technological advances and their legal definition. Two cases involving a measure not in general public use are discussed. In both cases the use of these measures was declared to be a search, causing members of the legal profession to elaborate on the topic, whether the person could claim also right to privacy of heat or smell emanating from one's home.

1. US v. Kyllo – does the heat of the house constitute one's privacy?

Quite a number of criminal activities are conducted in a closed environment, away from public view. Naturally, law enforcement officers always sought to overcome the obstacles and be able to detect these hidden activities. One of the modern technologies, that allow police officers "see" through the walls, is thermal imaging. Special cameras detect differences in the surface temperature of targeted objects and display those differences in varying shades of gray and white. Thermal imagers are like video cameras because they bring into range infrared rays coming from structures and convert them into visual images that are fuzzy and unclear. Thermal imagers measure heat temperature by scanning infrared wave lengths of the electromagnetic spectrum. Because the infrared section of the spectrum occurs at a much lower speed than that of visible light, the human eye cannot see it.⁶ Law enforcement agencies use thermal imaging to detect a variety of criminal activity, but the majority of cases challenging the constitutionality of this law enforcement practice have dealt with the use of thermal imagers to detect indoor cultivation of marijuana,⁷ and can therefore be considered as impacting the right of the person to "retire to his home and there be safe from the intrusion of the government".⁸

The use of thermal images has been evaluated by many courts. Legal scholars are pointing out that the debate on the topic has grown from null prior to 1991 into a number of cases afterwards.⁹ At first, there was a tendency to decide that use of thermal imagers does not constitute a search. These court decisions were based on the relative non-intrusiveness of the measures applied.¹⁰

Legal scholars argued that the mere fact that a particular search technique causes minimal embarrassment, however, is not sufficient grounds to declare it admissible and nonintrusive. They suggested four criteria the Court should consider when evaluating emerging search technologies:

- 1) the area subject to surveillance;
- 2) the type of information the technology can disclose;
- 3) the level of public awareness surrounding the search technique; and
- 4) the nature and degree of intrusion that the technology can present.¹¹

The US Supreme court had declined to opine on the legal nature of the thermal imaging for quite a long period of time. Finally, the case of *Kyllo* was admitted for review, based upon the need to unify district court practice on the topic, as several courts, contrary to the usual practice, had declared thermal imaging as a search.

⁴ M. G. Wilson, "The Prewarrant Use of Thermal Imagery: Has This Technological Advance in the War against Drugs Come at the Expense of Fourth Amendment Protections against Unreasonable Searches?" 83 KY. L.J. 891, 896-98 (1995)

⁵ A. Larks-Stanford, "The Warrantless Use of Thermal Imaging and 'Intimate Details': Why Growing Pot Indoors and Washing Dishes are Similar Activities under the Fourth Amendment" . Catholic University Law Review , Volume 49, Issue 2 Winter 2000. p 573-612

⁶ John Gibeaut, High-tech Heat Seeking: Warrantless Use of Detection Device Splits Appeals Courts, 89 A.B.A J. (1998);p.34.

⁷ Id. P. 34

⁸ Florida v. Jardines, 569 U.S. ____ (2013), <https://www.law.cornell.edu/supremecourt/text/11-564> [last viewed on 2015-03-08]

⁹ J. Todd Laba, "If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment," 84 Cal. L. Rev. 1437 (1996). P 1475-1485.

¹⁰ See more in J. Todd Laba cit. op. p. 1465-1467

¹¹ See more in J. Todd Laba, "If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment," 84 Cal. L. Rev. 1437 (1996). P 1475-1485.

Factual background of the case could be summarized as following: suspicious that marijuana was being grown in petitioner Kyllo's home in a triplex, agents used a thermal imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth.¹² Search warrant was granted by court on the base of the findings made by the thermal imaging device, and indoor plantation of marijuana was discovered. The defendant argued in court that the warrantless use of the thermal imaging is an unlawful search of the house, and all the information obtained by the use of this device should be inadmissible. The case reached US Supreme Court, who decided that use of thermal imaging is indeed a search.

In his judgment the Court departed from the physical interference within the household as the criterion whether a police action amounts to the search. Given the advance of technological expansion, the court stated the following: "the question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy".¹³ Under this view, any government activity that infringes on an individual's reasonable expectation of privacy, which in turn must be one that society is willing to recognize as reasonable, equals to a search.

The Court concentrated not on the device or procedure used by law enforcement to gather information, but rather on the content of the information revealed.¹⁴ The test, referred as a "intimate details" standard was adopted. Under mentioned method of analysis, the Court focused on whether a given surveillance technique has revealed human activities often done within the privacy of one's own home.¹⁵ As defined in literature, thermal imaging devices can, under certain circumstances, detect the presence of a person standing next to a curtained window or behind a wall made of a thin material such as plywood, in effect "see[ing] through the walls of the home". Some of these devices are sensitive enough to identify the heat generated by a heartbeat.¹⁶ These facts certainly demonstrate the level of intrusiveness the device possesses. In the light of this information and also based upon a fact that the thermal imaging allows obtaining by sense-enhancing technology an information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area", it is not surprising, that use of thermal imaging was declared as amounting to a search.

As the main argument against this decision is used the fact, whether the technology reveals 'intimate details.' If the thermal imager did not reveal such intimate details within the scanned structure, then its warrantless usage does not constitute any violation.¹⁷ But as one of the courts reasoned even prior to US Supreme court's decision in Kyllo,; key question is not whether the defendants have a reasonable expectation of privacy into the waste heat emanated from their homes, but whether they have an expectation of privacy in activities within their homes, which could be revealed by their heat signatures. The court reasoned that the true value of the thermal imager was what it revealed about the inside of the defendant's home, not merely that it could measure the heat emitted from it.¹⁸ Therefore, the thermal imaging interferes within private life not because it collects the measure of heat, but because the data collected allows the government to monitor these daily activities that produce significant amounts of heat.

2. Florida vs Jardines - privacy for smell emanating from one's house.

Dog sniff technology is clearly an old technology – it dates back to prehistory, when ancient man took advantage of the domesticated dog's ability to seek out prey for their mutual benefit¹⁹. Nowadays the canine is more and more often employed in police work in order to find contraband, people or bodies. Its usage has also

¹² Kyllo v. United States, 533 U.S. 27 (2001), <https://www.law.cornell.edu/supct/html/99-8508.ZS.html> [last viewed on 2015-03-08]

¹³ Cit op. Kyllo v. United States, 533 U.S. 27 (2001),

¹⁴ Cit. op. Kyllo v. United States, 533 U.S. 27 (2001),

¹⁵ Cit. op. Kyllo v. United States, 533 U.S. 27 (2001),

¹⁶ S. Moore, Note and Comment, Does Heat Emanate Beyond the Threshold?: Home Infrared Emissions, Remote Sensing, and the Fourth Amendment Threshold, 70 Cm.-KNrr L. REV. 803 (1994); p. 810

¹⁷G. Gomez „Comment: Thermal Imaging and the Fourth Amendment: the Role of the Katz Test in the ftermath of Kyllo v. United States“ http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/11/46-1.2.Gomez_.pdf [last viewed on 2015-03-08]

¹⁸ United States v. Cusumano 67 F.3d 1497 (10th Cir. 1995), vacated on other grounds, 83 F.3d 1247 (10th Cir. 1996) (en banc). <http://openjurist.org/67/f3d/1497> [last viewed on 2015-03-08]

¹⁹ Andrew E. Taslitz, Does the cold nose know? The unscientific myth of the dog scent lineup, 42 Hastings L.J. 1,23 (1990)

become a subject of interest for many courts. Different aspects of dogs being involved in criminal investigations are analyzed, but in this article only one issue will be discussed – mainly if it does constitute a search and therefore must be conducted according to all procedural rules as for example obtaining a search warrant before performing a sniff, or is it a different measure?

A number of United States courts have been considering the question if the dog sniff constitutes a search under Fourth amendment. Three schools of thought have emerged:

- A dog sniff of a dwelling is a search which can be only conducted pursuant to a warrant
- A dog sniff can only be conducted if there is a reasonable, articulable suspicion of drug activity in the residence, but no warrant is required.
- A dog sniff is not a search and can be conducted without a warrant and without reasonable suspicion²⁰.

In the previous rulings of US Supreme Court, there was a tendency to declare this measure as not amounting to the search. In *Illinois v. Caballes*²¹ the court held that because a dog sniff detects only contraband, and because no one has legitimate interest in contraband, a dog sniff is not a search under the Fourth Amendment²². The court adopted so called *plain smell doctrine*²³, and concluded that like the evidence in the plain view of officers may be searched without a warrant, the evidence in the plain smell may be detected without a warrant, as long as sniffing canine is legally present at the place.²⁴

However, in the most recent decision on the topic, mainly *Florida v. Jardines*²⁵, decided in March 2013, the Court took completely different view.

A short summary of factual background. Police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis.²⁶ He argued that the dog sniff is a search and is unconstitutional when warrantless. The US Supreme Court affirmed this reasoning and held that the government's use of trained police dogs to investigate the home and its immediate surroundings is a search.

In order to support the judgment, the Court in part relied on the doctrine of the reasonable expectation of privacy. Privacy of one's home was revoked.²⁷ However, bearing in mind previous decisions with regard to the legitimacy and non-intrusiveness of dog sniff, the Court has returned to the physical interference as criterion for deciding if a search has occurred. The court stated that there is "no need decide whether the officers' investigation of Jardines' home violated his expectation of privacy [...]. One virtue of the Fourth Amendment's

²⁰ *State v. Jardines*, case No.3D07-1615 (State of Florida Third District Court of Appeal) <http://caselaw.findlaw.com/fl-district-court-of-appeal/1253690.html> [last viewed on 2015-03-08]

²¹ *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) <https://casetext.com/case/illinois-v-caballes-3> [last viewed on 2015-03-08]

²² The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

²³ The discovery of evidence during a warrantless search under the plain view as exception to the warrant requirement is not necessarily limited to what the police officer sees. In the typical plain smell case, the officer will reach some point and detect some odor that will provide him or her with probable cause to believe that an offense has been or is being committed. Common examples are the smell of marijuana (burning or otherwise) If the officer's conduct in performing the search meets the three requirements (which are the same as under the plain view exception, a suspicious odor may provide sufficient probable cause to invoke a more thorough search. Briefly, the three requirements under the plain view exception are

- 1) at the time of the viewing of the evidence, the officer was in a location where he or she had a legal right to be;
- 2) the officer discovered the evidence inadvertently, meaning that he or she did not know in advance where the evidence was located and did not intend to beforehand seize it; and
- 3) there was probable cause to associate the items seen in plain view with evidence of criminal activity.

Cit. Op. <http://www.njcriminaldefenselawblog.com/2008/01/articles/traffic-stops/the-plain-smell-doctrine-as-an-exception-to-the-warrant-requirement/>

²⁴ T.Bedulskaja "Police Canines, Usage, Concerns and Legal Nature of this Measure". In *Teisės mokslo pavasaris* 2013. p. 479-397.

²⁵ *Florida v. Jardines*, 569 U.S. (2013), <https://www.law.cornell.edu/supremecourt/text/11-564> [last viewed on 2015-03-08]

²⁶ Cit. op. *Florida v. Jardines*, 569 U.S. (2013)

²⁷ Cit. op. *Florida v. Jardines*, 569 U.S. (2013)

property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."²⁸

One might ask how the dog sniff could constitute a physical intrusion. The canine did not enter the house. However, in Court's view, the officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner. As stated by the court, their behavior objectively revealed a purpose to conduct a search. The dissent argued that gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach the front door of a residence and seek to engage in what is termed a “knock and talk,” i.e., knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point.²⁹ It was also pointed out that there is no rule, restricting the entry to the property to the persons without dogs.

Generally, in this judgment, the Court has refused to analyze the “technique” used to detect the odor of narcotics. According to the Court “It is not the dog that is the problem, but the behavior that here involved use of the dog”. Therefore, as pointed out by dissenting judges, the holding of the Court is based on what the Court sees as a “physical intrusion of a constitutionally protected area”. As a result, it does not apply when a dog alerts while on a public sidewalk or street or in the corridor of a building to which the dog and handler have been lawfully admitted.³⁰ So, the question, whether the person has a right to privacy of the smell emanating from his house in all the cases remains open.

Conclusion

After the discussion on both cases some similarities and differences can be noticed. In both cases the special means were used to detect smell or heat emanating from one's house. In both cases the police made the assumptions about the inside of the house without physically entering it. And in both cases the activity police engaged in was declared as amounting to a search.

There are also some differences. The case which involved dog sniff was declared unconstitutional only because the officers stepped into the curtilage of home, while in the case with thermal imagers the point the officer was standing, was of none importance. Also, it should be noticed, that two measures completely different by their nature were compared, mainly thermal imaging device, unlike the trained drug dog, does not have the ability to distinguish between legal and illegal activities occurring within the home based upon the amount of extraneous heat detected.

One could argue that the person who committed a crime (as in these both cases – having a plantation of marijuana in the house), cannot claim any reasonable expectation of privacy in his criminal activity. Furthermore, it could be added that these means are less intrusive than a physical search. The answer could be the following. As discussed above, the thermal imager gives an ability to supervise daily activities that otherwise would be private, thus constitutes a huge interference within one's privacy. With regard to the dog's sniff, the measure in itself is not so interruptive; however, it has to be borne in mind that based on positive result; as the logical consequence comes a physical search.

To sum up, as a tool for protecting personal privacy, preserving personal security, and safeguarding the rights of law-abiding citizens, technology is a double-edged sword. On one side, technological advancements are a great help in terms of assisting law enforcement officers in their efforts to fight crime. Technology also provides methods of crime control that offer greater protection for the law-abiding public. On other side, many search technologies allow the police to search undetected from afar, and to collect information that may have little to do with the crime under investigation, not even speaking about fundamental unfairness to the people, who are being watched unknowingly.

²⁸ Cit. op. Florida v. Jardines, 569 U.S. (2013)

²⁹ Cit. op. Florida v. Jardines, 569 U.S. (2013), Alito J. dissenting,

³⁰ Cit. op. Florida v. Jardines, 569 U.S. (2013), Alito J. dissenting,

Bibliography

Case law:

1. Florida v. Jardines, 569 U.S. ____ (2013), <https://www.law.cornell.edu/supremecourt/text/11-564> [last viewed on 2015-03-08]
2. Florida v. Jardines, 569 U.S. ____ (2013), <https://www.law.cornell.edu/supremecourt/text/11-564> [last viewed on 2015-03-08] Alito, J. Dissenting.
3. Illinois v. Caballes, 543 U.S. 405, 408 (2005) <https://casetext.com/case/illinois-v-caballes-3> [last viewed on 2015-03-08]
4. Kyllo v. United States, 533 U.S. 27 (2001), <https://www.law.cornell.edu/supct/html/99-8508.ZS.html> [last viewed on 2015-03-08]
5. State v. Jardines, case No.3D07-1615 (State of Florida Third District Court of Appeal) <http://caselaw.findlaw.com/fl-district-court-of-appeal/1253690.html> [last viewed on 2015-03-08]
6. United States v. Cusumano 67 F.3d 1497 (10th Cir. 1995), vacated on other grounds, 83 F.3d 1247 (10th Cir. 1996) (en banc). <http://openjurist.org/67/f3d/1497> [last viewed on 2015-03-08]

Books, articles:

7. E.Taslitz, Does the cold nose know? The unscientific myth of the dog scent lineup, 42 Hastings L.J. 1, 23 (1990)
8. Larks-Stanford' „The Warrantless Use of Thermal Imaging and "litimate Details": Why Growing Pot Indoors and Washing Dishes are Similar Activities under the Fourth Amendment“. Catholic University Law Review , Wolume 49, Issue 2 Winter 2000,. P. 573-612
9. G. Goda „Vertybinaiai prioritetai baudžiamajame procese“. Registrų centras, Vilnius 2014
10. G. Gomez „Comment: Thermal Imaging and the Fourth Amendment: the Role of the Katz Test in the ftermath of Kyllo v. United States“ http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/11/46-1.2.Gomez_.pdf [last viewed on 2015-03-08]
11. J. Gibeaut, High-tech Heat Seeking: Warrantless Use of Detection Device Splits Appeals Courts, 89 A.B.A J. (1998);
12. J. Todd Laba, „If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment,“ 84 Cal. L. Rev. 1437 (1996). P 1475-1485.
13. M. G. Wilson, “The Prewarrant Use of Thermal Imagery: Has This Technological Advance in the War against Drugs Come at the Expense of Fourth Amendment Protections against Unreasonable Searches?” 83 KY. L.J. 891, 896-98 (1995)
14. S. Moore, Note and Comment, Does Heat Emanate Beyond the Threshold?: Home Infrared Emissions, Remote Sensing, and the Fourth Amendment Threshold, 70 Cm.-KNrrr L. REV. 803 (1994); p 803-860
15. T.Bedulskaja “Police Canines, Usage, Concerns and Legal Nature of this Measure”. In Teisės mokslo pavasaris 2013. p. 479-397.

Internet sources:

16. <http://www.njcriminaldefenselawblog.com/2008/01/articles/traffic-stops/the-plain-smell-doctrine-as-an-exception-to-the-warrant-requirement/> [last viewed on 2015-03-08]

NATIONAL MINORITIES' RIGHT TO EDUCATION: HOW SECURITY CAN BE ACHIEVED VIA THE NATIONAL EDUCATION IN THE LIGHT OF INTERNATIONAL AND EU EXPECTATIONS?

Dóra Bogárdi¹

Abstract

Security. What does it mean exactly? It may depend on the individual, how his/her area of science treats it. Therefore security may have many aspects. In my research I took into consideration the security of national minorities via their education.

Over the years international treaties have been created regarding the protection of national minorities, including the significance of education. These treaties ensure the right of national minorities to establish and operate their own educational and training institutions; furthermore treaties provide the availability of native language education.

The Charter of Fundamental Rights of the European Union declares the right to education, as well as prohibits the discrimination based on – inter alia – race, ethnic origin and the membership of national minority; and respectively respects cultural, religious and linguistic diversity.

The member states, group of national minorities and mother countries ought to pay attention to the international and EU law to ensure legitimate operation and thus achieve security. Hence it should be necessary to ensure the different rights of national minorities in member states to allow them to become equal members of society; in addition, a good relationship and cooperation are essential among member states and mother states.

Education covers a wide spectrum of the rights of national minorities – culture, religion, language – providing excellent basis for cooperation, development. Therefore member states, group of national minorities, mother countries and schools should strive for quality education. However, this area struggles with more deficiency.

The purpose of the paper is to discover legal and practical problems in the field of national minorities' education, especially in Hungary. The paper provides academic analysis of the organisation of this field of education, whether it concerns to international and EU expectations.

Keywords: national minorities, nationality education, mother tongue, legal certainty

This publication only reflects the views of the author.

Introduction

Security. What does it mean exactly? People use this expression in their everyday life. They pay attention to security when they look for an area in the city to settle down. Parents watch their children nervously when they first go to school alone, worried about their security.

However, in addition to the everyday terminology security appears as often as not in the area of science. Thus we could mention the different dimensions of security such as political, environmental, economics, IT, social and military.² Regarding social security important elements are financial and social

¹ PhD candidate, *iuris doctor*. Currently Dóra Bogárdi works as a lawyer, civil servant in Hungary and she deals with human rights' protection in the field of rights of national minorities. She is also a doctoral student in law. She writes her thesis on the right to education with special concerns for national minorities based on her every day job. However, she would like to cross the borders; therefore she would like to compare regulation and practice of Hungary and its neighbouring countries. University of Pécs, Faculty of Law, Doctoral School, Department of International and European Law, Hungary.

² Ürmösi Károly, 'A biztonság és a biztonság fogalma (Security, concept of security) [2013] *Hadtudományi Szemle* 6. évfolyam 4. szám

security, employment opportunities for the citizens and the system of social and healthcare, education, cultural opportunities. Essential components are human rights, legal certainty, equality and public safety.³

Jurisprudence and lawyers deal with primarily with the legal certainty when they hear the word "security". Legal certainty is a very general area, but at the same time very vulnerable because it could be easily infringed by any measure which does not satisfy the requirements prescribed by the law.

The first goal of the paper is to give a general overview about the regulation of national minorities' rights within international and EU law. Moreover, I would like to introduce a collection of the main legal sources in connection with nationality education in Hungary. The paper would also like to point out some examples to show what the problems are that nationality education has to struggle with every day in order to enforce the right to nationality education. Finally, I would like to answer the question whether security can be achieved via national education in light of international and EU expectations? Or is it even available in Hungary?

1. Expectations under the international and EU law

Over the years international treaties have been created regarding the protection of national minorities, including the significance of education. These treaties ensure the right of national minorities to establish and operate their own educational, training institutions;⁴ furthermore treaties provide the availability of native language education.⁵

Concerning Hungary these rights are strengthened by the "good neighbourhood and cooperation agreements" which includes the bilateral, national minorities' protection provisions contracted with the neighbouring countries of Hungary⁶. In these agreements the state parties have engaged to cooperate in the field of education.⁷

The Charter of Fundamental Rights of the European Union declares the right to education⁸, as well as prohibits discrimination based on – inter alia – race, ethnic origin and membership of national minorities⁹; as well as respecting cultural, religious and linguistic diversity¹⁰.

Furthermore, the European Union has a supporting competence to contribute to the development of quality education while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.¹¹

2. Legal regulation (Hungarian law)

In Hungary, the Fundamental Law (the Hungarian constitution) declares in its National Creed that national minorities living in Hungary form a constituent part of the Hungarian political community and the State. Furthermore, the National Creed is also committed to protect and cherish the language and culture of national minorities living in Hungary.

Regarding fundamental rights the Fundamental Law also sets out that fundamental rights are guaranteed for everyone by Hungary, without any discrimination, in particular regarding race, colour, language, religion or nationality. Based on this law, persons belonging to different national minorities are entitled to fundamental rights.¹² National minorities living in Hungary are entitled to use their own language, individual

³ Ürmösi (n1)

⁴ Framework Convention for the Protection of National Minorities (Council of Europe) [1995] CETS No.: 157, Article 12

⁵ European Charter for Regional or Minority Languages (Council of Europe) [1992] CETS No.: 148, Article 8

⁶ Bruhács János, 'Nemzetközi jog II. Különös rész'(Budapest, Dialóg Campus Kiadó 2008) 163

⁷ Act XLV of 1995 on the Republic of Hungary and Ukraine on the basics of good neighbourhood and cooperation in Kiev, signed the sixth day of the month December 1991 announcement of the Treaty

⁸ Charter of Fundamental Rights of the European Union (the European Parliament, the Council and Commission) [2010] 2010/C 83/02, Article 14

⁹ Charter of Fundamental Rights of the European Union, Article 21

¹⁰ Charter of Fundamental Rights of the European Union, Article 22

¹¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] 2012/C 326/01, Article 165 (1)

¹² Based on this law persons belonging to different nationalities is entitled to have fundamental rights.

and community names in their own language, and nurture their own culture and also the right to education in their mother tongue. These rights are regulated by the Act on the rights of nationalities (hereinafter: Act).¹³

The preamble of the Act also reinforces that Hungary protects nationalities, ensures the fostering of their culture and the use of their mother tongues, provides education in their mother tongues, enables them to use names in their own languages and promotes the attainment of their cultural autonomy and guarantees the right of their actual communities to self-administration.¹⁴

After the widely general legal overview about the rights of national minorities it is necessary to get to know who they in Hungary are. It is regulated by the Act immediately in its first paragraph: "All ethnic groups resident in Hungary for at least one century are nationalities which are in numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of cohesion that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities". Pursuant to this definition there are 13 nationalities in Hungary: Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Ruthenian, Serbian, Slovak, Slovene and Ukrainian.¹⁵

The Act provides the rights to education in their mother tongue under individual and collective nationality rights. This means that persons belonging to national minorities have a right to learn their mother tongue, to attend public education, education and cultural heritage events in their mother tongue and to equal opportunities in education and to cultural services which the State shall promote with effective measures. Moreover, national minorities have the right to establish and operate institutions and to take over institutions from other agencies within the statutory boundaries, to kindergarten education, elementary education, nationality boarding services, secondary and grammar school education, vocational education and higher education, and are further entitled to initiate the establishment of the conditions necessary for supplementary nationality education by way of their nationality self-government with nation-wide competence and to participate in the formulation thereof.¹⁶

3. The regulation in practice

As it can clearly be seen, education of minorities is very widely regulated by the Hungarian legal instruments, which ensure the necessary conditions. The law provides for them to establish and operate their own educational institutions; to provide an opportunity for education in their mother tongue. National public educational institutions are supported to maintain contact with their mother countries. However, in practice this is achieved differently. In order to explore the practical issues concretely, I will rely on the reports of the Hungarian ombudsman from 2011 and 2012 in which different practical problems were discovered; these issues are also – to some extent or as a whole – part of the current educational system.

The Act provides various forms of implementation of national education, thus children may take part in education in their mother tongue, in nationality bilingual education, in nationality language education or Roma nationality education. Roma nationality education may also be conducted solely in Hungarian – however, based on the parents' needs, the operator of the institution shall also provide for the teaching of the Roma language (Roma or Beás). The system is completed by the additional/complementary national education.^{17 18}

School classes should be maintained, if it is requested by the parents of eight students who belong to the same national minority.¹⁹ Before making the choice, parents should be informed about the form and contents of the education and they have to declare their intent in writing via a special (application) form.

However, the necessary information is not part of the application form; it is missing most of the time. This has significance in the Roma nationality education. In this case parents are also likely to be under-

¹³ Act CLXXIX of 2011 on the Rights of Nationalities

¹⁴ Act CLXXIX of 2011 on the Rights of Nationalities, Preamble

¹⁵ Act CLXXIX of 2011 on the Rights of Nationalities, 1st appendix

¹⁶ Act CLXXIX of 2011 on the Rights of Nationalities. 19.§

¹⁷ 17/2013. Regulation (III. 1) EMMI, Directive on kindergarten education and school education of the national minorities

¹⁸ Additional/complementary national education: it ensures the education of national literature, grammar and ethnography during the school lessons.

¹⁹ Act CXC of 2011 on Public Education, 89. § (2)

educated, to live at the periphery of society and are not in a situation to balance their opportunities, thus they fill the form applied to (Roma) nationality education. The maintainers exploit this situation and use nationality education to achieve separation of students creating segregation. This phenomenon could be observed e.g. in Jászapáti where nationality education existed only on paper.²⁰ The topic of segregation is very wide and its analysis is not the goal of this paper, however it is necessary to show how it is possible to misinterpret the law and how nationality education sometimes cannot be used for its intended purpose.

Even if nationality education fulfils the statutory requirements, there can be certain factors which threaten national minorities' right to education in their mother tongue. To achieve the quality of public education in minority educational institutions, the educational system does not have adequate textbooks and teacher guides. The existing ones are only available in very small numbers for teachers and in most of cases they are made by mirror translation and do not meet with the needs of the era or the age-group, including the absence of digital technology. Minority teachers aim to eliminate this defect in teaching in different ways, by making their own notes, using their former lecture notes and textbooks from their university studies or by help received from their respective mother countries.²¹

In most cases, the lack of financial resources has been identified as the reason of existing problems. It was intended to be replaced by an EU-funded tender²² in 2012, in which successful applicants could develop and improve educational materials for national minorities. However, these materials ultimately have not been included in the current textbook list so it is not allowed to teach from them.²³ This problem has been existed since the 1990's and it is still threatening the right of minorities to be involved in education in their mother tongue and in achieving quality education.²⁴

Nowadays, in the majority of families belonging to national minorities, the process of passing on the language has broken down, and the Hungarian language is becoming dominant. The different dialects spoken by the minorities do not lend themselves to regular refreshment, and thus their role in social communication is waning. It makes the role of the school as a vehicle for passing on the native language all the more important.²⁵ However, teaching as a profession is becoming less attractive to young people facing career choices and they do not have adequate training for all teachers from different nationality in Hungary (Rusyn, Slovenian, nowadays Greek) thus endangering the supply of teachers.²⁶

It is also worth noting that in national education at 5th-12th grade schools teachers, for example, who teach general education subjects in the language of national minority have to have a qualification in that subject and it is required a qualification in language teaching primary school teacher or teacher or language teacher qualifications or it is necessary to have a state-recognized language exam from that language in which the pedagogue teaches. Moreover, in the case of naturalized degree it is also required to have teaching qualification and skills in that subject which is taught by the teacher corresponding to the language of education.²⁷

This may lead to the attenuation and in the worst case to the disappearance of adequate teachers in the national educational system threatening the proper level of mother tongue education and its effectiveness.

Moreover, the Ombudsman also drew attention to the lack of teaching of ethnography. This subject would be important because it could encourage the development of nationality identity. Furthermore, there is deficiency in support for visits to mother countries or accepting guest teachers. According to the Ombudsman, the profit of such initiatives could appear in the quality of education in a short time.²⁸

²⁰ Report (Ombudsman) [2012] AJB-1956/2012

²¹ Report (Ombudsman of Minorities) [2011] NEK-411/2011

²² Promotion of national minorities' education II. Section, /TÁMOP 3.4.1 11/1

²³ Minister of Human Recourses, <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/hirek/balog-zoltan-cel-hogy-a-nemzetisegi-szoszolak-erdemi-munkat-tudjanak-vegezni>, 8th March 2015

²⁴ Report (Ombudsman of Minorities) [2011] NEK-411/2011

²⁵ Ministry of Foreign Affairs, Hungary 'The national and ethnic minorities in Hungary, Fact sheets on Hungary' [2011] Ministry of Foreign Affairs Budapest, No. 3/2000., <http://www.mfa.gov.hu/NR/rdonlyres/9F2D180E-538E-4363-AA5E-3D103B522E3B/0/etnlang.pdf>, 8th March 2015

²⁶ Report (Ombudsman of Minorities) [2011] NEK-411/2011

²⁷ Act CXC of 2011 on Public Education, 4th appendix

²⁸ Report (Ombudsman of Minorities) [2011] NEK-411/2011

4. Implementation of international and EU law

As noted above, the Hungarian Fundamental Law guarantees everyone (thus national minorities as well) that they may exercise their fundamental rights without any discrimination. Furthermore, the Fundamental Law provides the right to national minorities to participate in education in their mother tongue satisfying the expectations of the Charter of Fundamental Rights of the European Union (Article 21) and European Charter for Regional or Minority Languages (Article 8).

The Act details these rights more exhaustively corresponding to higher-level legislation. Moreover, the opportunity of nationalities to create and maintain their own institutions ensures implementation of Framework Convention for the Protection of National Minorities (Article 12).

Despite all of this, the practical side does not show this correlation. In most of the cases the “real” actors of nationality education cannot fulfil the legal requirements thus they get around or avoid them. Sometimes they do not have any other opportunity. Furthermore, they present new challenges to the legislator as the lack of appropriate legislation appears in their everyday life.

These deficiencies draw attention to the fact that there are phenomena or problems which are not covered or addressed by the law.

However, this does not concern to international and EU expectations, obligations so it (may) endangers legal certainty.

5. Legal certainty under the Hungarian law

According to Article B) (1) of the Hungarian Fundamental Law, Hungary is an independent, democratic constitutional state. Based on the previous constant practice of the Hungarian Constitutional Court, legal certainty is an essential element quality of the rule of law. It is an item often referred to by the Constitutional Court that legal certainty in the state – and especially in legislation – requires all to ensure that all of the law, individual parts and pieces of legislation are clear and unambiguous; its operation is predictable and foreseeable to the addressees of the norm.

The requirement of legal certainty requires not only the clarity of certain standards, but also the predictability of the operation of each legal institution. The Constitutional Court's decision has drawn attention to the rule of law in several components, one of the most important requirement from the principle of the rule of law is the public power, subordination of administration to law: organs with public power in running order established by the law carry out their activities within the limits which are known and predictable for citizens.

In connection with the legislation, the principle of clear norms is derived from the principle of the rule of law/legal certainty. The interpretation of these principles is included - among other things – in Decision 814/B/2004 AB. In its reasoning, the Court stated: “The unconstitutionality will determine due to infringement of the clarity of norms if the rule is unintelligible or provides different interpretations for law enforcement and consequently the effect of norm is unpredictable, it creates unforeseen situation for recipients, respectively due to the too general formulation of norm's text gives free vent to subjective, arbitrary law enforcement.”²⁹

Conclusion

Throughout his life, everybody becomes a part of the educational system, in which he or she could receive a proper education according to his or her nationality. In order to implement the legitimate interests of the right to education, as well as national identity of individuals not to be prejudiced and comply with the regulations of different levels, both the legislature and law enforcement should work together.

In my opinion, there is a kind of dichotomy, but rather a contrast in the field of national primary education in Hungary. On one hand, the legal system is consistent with all that is expected by higher levels of legislation and if we only look at this side, the expectations of legal certainty are not infringed. On the other hand, the laws that regulate the education of national minorities are determined expansively like the

²⁹ Report (Ombudsman) [2014] AJB-909/2014

international or EU sources of law. However, it may cause a kind of confusion in everyday life as practical examples show that creating different interpretations may lead the recipients to unforeseen situations.

Therefore, I have drawn the conclusion that on the one hand, yes, it is possible to create security and legal certainty in the area of national education but on the other hand, it is not. Resolving the conflict would require that legislature and all those in the decision-making positions in the field of nationality education should listen to and hear from the practical side, in order to solve the exploited problems and to avoid the creation of new ones in the future.

Bibliography

1. Bruhács János, 'Nemzetközi jog II. Különös rész'(Budapest, Dialóg Campus Kiadó 2008) 163
2. Ürmösi Károly, 'A biztonság és a biztonság fogalma (Security, concept of security) [2013] Hadtudományi Szemle 6. évfolyam 4. szám
3. Ministry of Foreign Affairs, Hungary: The national and ethnic minorities in Hungary, Fact sheets on Hungary, Ministry of Foreign Affairs Budapest, No. 3/2000., <http://www.mfa.gov.hu/NR/rdonlyres/9F2D180E-538E-4363-AA5E-3D103B522E3B/0/etniang.pdf>, 8th March 2015
4. Minister of Human Recourses, Hungary: <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/hirek/balog-zoltan-cel-hogy-a-nemzetisegi-szoszok-erdemi-munkat-tudjanak-vegezni>, 8th March 2015
5. Framework Convention for the Protection of National Minorities (Council of Europe) [1995] CETS No.: 157
6. European Charter for Regional or Minority Languages (Council of Europe) [1992] CETS No.: 148
7. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] 2012/C 326/01
8. Charter of Fundamental Rights of the European Union (the European Parliament, the Council and Commission) [2010] 2010/C 83/02
9. Fundamental Law (Hungarian Constitution)
10. Act CXC of 2011 on Public Education
11. Act CLXXIX of 2011 on the Rights of Nationalities
12. Act XLV of 1995 on the Republic of Hungary and Ukraine to the basics of good neighbourhood and cooperation in Kiev, signed the sixth day of the month December 1991 announcement of the Treaty
13. 17/2013. Regulation (III. 1) EMMI, Directive on kindergarten education and school education of the national minorities
14. Report (Ombudsman) [2014] AJB-909/2014
15. Report (Ombudsman) [2012] AJB-1956/2012
16. Report (Ombudsman of Minorities) [2011] NEK-411/2011

SECURITY AND LEGAL CERTAINTY IN DIFFERENT CONCEPTS OF LAW

Claudia Caria¹

Abstract

The objective of security is closely related to the topic of legal certainty. The security of citizens, in criminal matters, be they victims or perpetrators of crime, goes through the possibility to predict the penalty corresponding to the accomplished violation of a given norm. According to civil law tradition, the concept of legal certainty is, in fact, related to the predictability of judicial decisions. The ways in which it is understood and implemented, in a philosophical-legal perspective, depends on the very concept of law.

As long as Law was conceived as a finite system of rules, as it was in legal positivism, the predictability of judicial decisions depended on the use of formal-logical structures - the syllogism- which allows to connect the concrete fact to the general abstract rule, thus deriving a special rule for the case, without the need for discretionary choices.

With the crisis of legal positivism and the impossibility to reduce legal reasoning to logical operations, a new conception of law as speech and behaviour makes its way. According to this current reconstruction, the validity and application of the law depend on argumentative processes. How to combine then, the need for certainty with the finding that the law is not an object, but an area of experience? How to make decisions that are not the result of discretionary choices and therefore unpredictable, at the expense of the whole community?

The objective of this work is to show how current theories of argumentation try to offer an answer to this question, through a combination of rhetorical-argumentative instruments and formal logic. In particular, the reference is to the studies of Atienza, who recognizes the necessary presence in legal reasoning of three dimensions (formal, material and pragmatic) in order to protect the certainty, justice and acceptability of judicial decisions all at the same time.

Keywords: legal certainty, legal reasoning, predictability and controllability of judicial decisions.

Introduction

The concepts of safety and legal certainty are polysemic and need to be qualified and specified.

In a philosophical perspective, the security of citizens can be understood as the need to live in a regulated environment and safeguarded by the existence of rules and sanctions, which limit and circumscribe social unrest. The concept of "public safety" identifies the "psychological state of the community that feels secure both in person and in their possessions"².

It is the legal phenomenon that ensures stability and security, creating an expectation in the community and representing the proper condition for the possibility of social action³. In this dimension, the concepts of security and certainty find their strongest common ground.

In a "safe" society, members can easily recognise the standards of legitimate behaviour, there is no ambiguity in the meaning of the norm, an intervention of the judge is predictable *ex ante*, there is stability in legal regulation, it is possible to control and predict decision-making processes of the relevant bodies and the

¹ PhD in Law and Economics, University of Sassari, Faculty of Law, with a dissertation on "The legal reasoning in the systems of dispute resolution. Logic of judgment and logic of mediation". Mediator and Teaching assistant for the chair of Mediation and Conciliation at the University of Sassari, Faculty of Law.

² A. Pace, 'La funzione di sicurezza nella legalità costituzionale' (2014) Quaderni costituzionali n. 4, 991.

³ S. Berteà, 'Certezza e argomentazione giuridica' (Soveria Mannelli: Rubbettino 2002) 45.

respect of fundamental rights is guaranteed⁴. In other words, the condition of existence of a safe society is the presence of a certain law.

The concept of legal certainty, as we see, has a plurality of distinct meanings; for this reason, lawyers and general theorists felt not only impossible but also undesirable, to identify a general concept of legal certainty, preferring to highlight the variety of aspects in it and focussing on a specific profile each time.

In this paper I will focus on the translation of the social need for security in the necessity that the legal phenomenon be not reduced to unpredictable and arbitrary assessments. Therefore, the concept of certainty will be interpreted as the need to predict and control the decisions of the court.

1. The predictability of judicial decisions in the ideology of legal positivism

The ability to predict with a good approximation that to a given fact corresponds a clear legal response by the competent bodies is a fundamental value of modern legal systems. The ways in which this is expressed, however, are closely related to the concept of law on which they are grounded. I will start from the ideology of legal positivism that is a perspective of objective investigation, together with jusnaturalism and realism, to get to what we might call “post-positivism”, developed from the end of the 1950s by the modern theories of argumentation, which configures a non-objectivist perspective⁵.

The expressions objectivism and non-objectivism are used by several researchers to identify two ways of interpreting the Law: in the first case, as a ready-made reality, built and completed, without any interpretation; in the second case, as a “work in progress”, an argumentative and interpretative social activity, consisting in finding a reasonable solution to each concrete case.

How does the concept of certainty change depending on the perspective of the investigation?

Can one establish the certainty of the law if working not with objective but with experiential data? In the ideology of legal positivism, the term “law” is considered in a value-free sense: it is a fact and not a value, it is valid *per se*, regardless of its content.

This is the so-called “theory of legal formalism”, according to which the validity of the law is based on criteria relating to the formal structure of the rules, or to the ways in which they are issued, regardless of their content⁶.

The idea is to apply a scientific approach to the study of legal phenomenon, which is objective and consists in statements of fact and not of value, similar to that of physical sciences and mathematics.

This concept is developed in the framework of a theory of the sources of law that sees the law as the sole origin of qualification⁷. In legal positivism there is no other law outside the positive norm, resulting in the exclusion of the customary sources from the law. In the same way, the role of the judge changes and goes from being the main source of production of the law, as it was in the Common Law, to being the mere mechanical executor of the rules defined by the legislator. The law is, therefore, designed as a finite system of rules, grounded in a coherent, comprehensive or self-completing legal system⁸.

In this perspective, legal certainty is considered a supreme and unavoidable value. It is identified as the ability to predict and control the judicial decisions through the use of a formal-logical tool - the syllogism - that allows the court to mechanically apply the rule to the case⁹. The Aristotelian syllogism is the “perfect reasoning” because its conclusion is the consequence that flows necessarily from the antecedent¹⁰.

The first formulation of the Aristotelian syllogism in legal terms was proposed by Cesare Beccaria. The Milanese jurist, in the second half of the 18th century, in his “*Dei Delitti e delle Pene*”, is the first to wish for the possibility of using this instrument in the courtroom: “In every crime a perfect syllogism should be formulated

⁴ G. Gometz, ‘La certezza giuridica come prevedibilità’ (Torino: Giappichelli 2005) 14; P. Comanducci, R. Guastini, ‘L’analisi del ragionamento giuridico’ (Torino: Giappichelli 1987) 233-242; L. Gianformaggio, ‘Certezza del diritto’, in Id., ‘Studi sulla giustificazione giuridica’ (Torino: Giappichelli 1986) 157-169; L. Lombardi Vallauri, ‘Saggio sul diritto giurisprudenziale’ (Milano: Giuffrè 1967) 567 ss.

⁵ S. Berdea, op. cit., 13-26.

⁶ N. Bobbio, ‘Il positivismo giuridico’ (Torino: Giappichelli 1996) 133.

⁷ Ivi, 163.

⁸ G. Fassò, ‘Storia della filosofia del diritto, vol. III’ (Roma-Bari: Laterza 2012) 17.

⁹ G. Tarello, ‘Storia della cultura giuridica. Assolutismo e codificazione del diritto’ (Bologna: Il Mulino 1998) 470.

¹⁰ G. Reale, ‘Introduzione ad Aristotele’ (Roma-Bari: Laterza 2008) 181.

by the judge: the major (premise) must be the general law, the minor (premise) the action conforming or not to the law, the conclusion freedom or punishment. When the judge is forced to, or decides to contemplate more than one syllogism, a door to uncertainty is opened¹¹.

In the ideology of legal positivism that developed in the 19th century, the age of codification, such an instrument became the explanatory model of acting in judicial terms; it is interpreted as a “demonstrative syllogism”, to equate it to the models of reasoning of the exact sciences (mathematics and natural sciences)¹². The subordination of the judge to the law and the use of the syllogism guarantee the safety of the law, so that citizens know exactly if their behaviour conforms to the norm or not¹³. Every need of society, and of the individual in particular, is delegated to the legislator¹⁴.

It was believed that the judges actually thought in terms of major and minor premises and the decision was nothing more than the result of deductive inference. According to the School of Exegesis, founded to carry out a review of the code just issued, judges did not need another tool other than the code, to reach a decision, because the positive legal system was considered complete or self-completing¹⁵. Therefore, in the absence of a norm for a concrete case, due to gaps or lack of clarity regarding the applicable rule, it was possible, through logic, to produce a new law by applying the discipline of similar cases, and thus safeguarding the principle of completeness¹⁶.

The judicial function is conceived as an activity of logical deduction in a complete system, in which certain conditions are connected to certain consequences. The judge's ruling reflects the result of a declarative process and is purely informative, and not the result of a discretionary choice¹⁷. The law is seen as an autonomous entity with respect to the historical, cultural, socio-economic context.

The development of the syllogistic judgment was possible because the 19th century was basically a static age of economic and social stability, where the law could still be considered immutable¹⁸.

However, as early as the turn of the century, this rigid and abstract instrument was subject to harsh criticism. The profound social and economic changes, the product of the industrial revolution, created, in fact, significant changes in the legal field, revealing the inadequacy of codes to cope with arising problems¹⁹. The new living conditions and developments in the economy, gave rise to new economic relations, which required different protections. Meeting the need to create new institutions and legal relations could not have been surely easy work for a code built on legal concepts belonging to a bygone era. For these reasons, towards the end of the century, there were different reactions to the rigidity of formalistic legal positivism, in favour of a law that reflected the practical reality of a changing society.

One of the major objections to the concept of logical deductive reasoning of the judge comes from the so-called “anti-formalist theories” that developed in different ways in France, Germany and the United States, all sharing the rejection of formalism and the idea that any legal gap must be bridged by the judge, through discretionary powers which enable him to adapt the law to the new needs of society²⁰. A comprehensive body of laws is not conceivable and state law must be supported by a “free law” which is the product of the courts' judgments and of legal science.

This criticism climaxes with American realism, which considers legal certainty a myth that persists despite legal reality continues to prove otherwise. According to Jerome Frank, a judge's work is totally arbitrary and dependent on personal factors²¹. It is impossible to predict judicial decisions, as they are always the result of subjective considerations and dependent on the personality of the judge.

¹¹ C. Beccaria, 'Dei delitti e delle pene', (Milano: Bur 1997) 69.

¹² D. Canale, 'Il ragionamento giuridico' in G. Pino, A. Schiavello, V. Villa (a cura di), 'Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo' (Torino: Giappichelli 2013).

¹³ N. Bobbio, op. cit., 31.

¹⁴ L. Lombardi Vallauri, 'Saggio sul diritto giurisprudenziale', cit., 204.

¹⁵ G. Fassó, op. cit., 17.

¹⁶ L. Lombardi Vallauri, 'Corso di filosofia del diritto' (Padova: Cedam 1981) 51.

¹⁷ D. Canale, op. cit., 323.

¹⁸ Ivi, 188.

¹⁹ C. Faralli, 'Il diritto alla certezza nell'età della decodificazione', in AA.VV. 'Scritti giuridici in onore di Sebastiano Cassarino' (Padova: Cedam 2001) 623-634.

²⁰ C. Faralli, 'Le grandi correnti della filosofia del diritto' (Torino: Giappichelli 2011) 69.

²¹ J. Frank, 'Law and modern mind' (Gloucester: Peter Smith 1970) 46.

The criticism to the syllogism, however, did not only come from anti-formalists, but also by legal positivists, including Hans Kelsen. The German jurist, after having supported the impossibility to carry out logical operations with statements of prescriptive content – as are the norms –, said that “what makes the special rule applicable, is not the result of deductive inference, but the fact that the court is authorized to enact it”²².

The constitutive rather than declaratory character both of the premises and consequently of the same conclusion of the syllogism, force the theories of legal reasoning to a new vision of the decision-making process. It calls for a new mode of decision control, to prevent the value of legal certainty from becoming something utopian and unattainable.

2. The concept of certainty in legal argumentation theories

The year 1958 is considered the “argumentative” turning point for theories on legal reasoning. According to Perelman’s original idea, practical reasoning (both prescriptive and evaluative) needs a new kind of logic, the logic of argument, based on the preferable, acceptable and reasonable and not on formally correct deductions²³. This is not a “rational” logic in the scientific sense, but it is “reasonable” because its validity is based on the criterion of consent.

Early argumentation theories are aimed at the construction of a concept of argument that is opposed to the notion of logical-deductive argument: Perelman opposes rhetoric to deductive logic, Toulmin opposes an “operational” logic adequate for the different areas of argumentation, and Viehweg, the topical²⁴.

Since the seventies an evolution of argumentation theories rises, which does not aim to overcome the notion of logical-deductive argument anymore, like the previous ones, but looks for an integration of different notions of argument: Alexy, Peczenik, Aarnio²⁵ and MacCormick, are the authors of this new line of study, called “standard theory of argumentation” by Atienza²⁶. A good argument, in light of this theory, will be one that reflects both the rules of formal logic (consistency of the premises, compliance with the rules of inference), and that of the rules of practical rationality (universality, consistency, etc.)²⁷.

This new conception of legal reasoning implies a different vision of law, no longer understood as a predetermined object, but as a set of argumentative processes, as a social activity governed by rules. It is, as aforementioned, a non-objective prospect of investigation that, with an emphasis on language, considers the law as a discourse, a social behaviour.

According to Barberis, the law designates an area of expertise in which it is necessary to distinguish between two sets of rules: the “rules of law” (objective), that are used by jurists as sources of their decisions and are established by the authority, and the “rules in law” (meaning the experiential field) represented by the argumentative and interpretative practices regarding legal reasoning²⁸. To solve a case, the judge must refer to the “rules of law”, but their identification and application require the use of the “rules in law”.

It is clear that in this context the concept of legal certainty takes on new meanings.

It can no longer be a knowable *ex ante* judicial decision, but a justification *ex post*. It is, therefore, not an arbitrary and discretionary system, but it is conducted within a legal system in which rationally coherent argumentative procedures operate.

What may seem like a weakening of the concept of legal certainty is actually a strengthening. Even if before it was considered predictable and controllable, it was solely based on objective legal parameters: therefore, its adequacy for the case in question could not be assessed, thus lessening the specificity of the particular case²⁹.

²² H. Kelsen, ‘Teoria generale delle norme’, (Torino: Einaudi 1979) 378.

²³ C. Perelman, L. Olbrechts-Tyteca ‘Trattato dell’argomentazione. La nuova retorica’ (Torino:Einaudi 2001) *passim*.

²⁴ M. Atienza, ‘Diritto come argomentazione. Concezioni dell’argomentazione’ (Napoli: Editoriale scientifica 2012) 62.

²⁵ A. Aarnio, R. Alexy, A. Peczenik, ‘I fondamenti del ragionamento giuridico’ in P. Comanducci, R. Guastini, ‘L’analisi del ragionamento giuridico. Materiali ad uso degli studenti, vol. I’ (Torino: Giappichelli 1987).

²⁶ M. Atienza, *op. cit.*, 62.

²⁷ *Ivi*, 63.

²⁸ M. Barberis, *op. cit.*, 217.

²⁹ S. Berteà, *op. cit.*, 114.

In the argumentative perspective, however, the idea of predictability decreases, but the concept of control is broadened; it becomes not only legal, but also rational. The decision should not, therefore, conform to legal parameters only, but it must be appropriate from the point of view of substance³⁰.

3. Atienza's proposal. The three dimensions of legal reasoning

How to combine, therefore, the need for a judgment that is not only correct in form, but also rationally appropriate?

An interesting summary of the positions of modern theories of argumentation is proposed by Atienza who believes that legal reasoning it is necessary to recognise the existence of three different perspectives, namely "formal", "material" and "pragmatic" (rhetoric and dialectic).

From a "formal" perspective reasoning is seen as a set of propositions that, regardless of their interpretation and therefore their true content, are treated as patterns of arguments (deductive or inductive), governed by rules of inference.

In legal reasoning, Atienza, isolates three patterns: "subsumption", "adaptation or finalist reasoning" and "pondering"³¹. Within these general patterns, other schemes are employed that sometimes have a clear logical structure (as the argument *a pari*, *a contrario*, *a fortiori*, *reductio ad absurdum*), sometimes not (as the coherence, psychological, historical, teleological, systematic topic, etc.)³².

From the "material" perspective, the essence of the argument lies not in the form of reasoning, but in what makes it true or correct. We need a theory of the premises that allows us to determine the conditions under which certain reasons prevail over others.

Lastly, the "pragmatic" outlook considers the reasoning as a type of linguistic activity, seeking to obtain the consent of an audience through rhetorical and dialectical tools. Atienza claims that the two components, rhetoric and dialectic, are fundamental and often inseparable in legal reasoning, because the former allows you to reach an accepted decision, the second involves the rational path through which to justify it.

In conclusion, legal reasoning cannot ignore any of the three perspectives mentioned above, because each matches and guarantees the protection of a fundamental value in legal systems. The formal perspective is obviously linked to the requirements of legal certainty, the material one to truth and justice, the pragmatic to acceptability and consensus.

The ideal of judicial reasoning is, therefore, a decision containing "good reasons, in the appropriate form, so that you can obtain persuasion"³³.

Conclusions

The concept of certainty is closely linked to the very definition of law and has acquired different meanings in time, depending on the framework of reference.

In a non-objective view, characteristic of contemporary theories of argumentation, the concept of certainty comes to be defined as the set of non-arbitrariness (controllability), legal accuracy and justice of the decision.

To ensure that a conception of certain law which does not include *ex ante* predictability of judicial decisions be still associated with an idea of security of the citizens, it is necessary that the legal reasoning include different dimensions, as outlined by Atienza: a formal perspective that takes into account the rules of law, and a pragmatic and material one that takes into account the rules in law.

The consideration of the law as a field of experience and as an activity governed by rules brings with it a concept of certainty and, therefore, of safety, meant in substantial and not only in formal sense.

The fulfilment of every citizen's need to know and predict the mode of action of the judicial system is even more poignant, as it becomes a concrete need for a response of Justice, designed on the unique characteristics of each particular case.

³⁰ Ibidem.

³¹ M. Atienza, op. cit., 232.

³² M. Atienza, 'Robert Alexy e la "svolta argomentativa" nella filosofia del diritto contemporanea' (2010) *Ars Interpretandi* n.1, 44

³³ M. Atienza, 'Diritto come argomentazione', cit., 95.

Bibliography

1. Aarnio, R. Alexy, A. Peczenik, 'I fondamenti del ragionamento giuridico' in P. Comanducci, R. Guastini, 'L'analisi del ragionamento giuridico. Materiali ad uso degli studenti, vol. I' (Torino: Giappichelli 1987).
2. R. Alexy, 'Teoria dell'argomentazione giuridica', (Milano: Giuffrè 1998).
3. M. Atienza, 'Robert Alexy e la "svolta argomentativa" nella filosofia del diritto contemporanea' (2010) *Ars Interpretandi* n.1, 37-48.
4. M. Atienza, 'Diritto come argomentazione. Concezioni dell'argomentazione' (Napoli: Editoriale scientifica 2012).
5. M. Barberis, 'Il diritto come discorso e comportamento' (Torino: Giappichelli 1990).
6. Beccaria, 'Dei delitti e delle pene', (Milano: Bur 1997) .
7. S. Berteà, 'Certeza e argomentazione giuridica'(Soveria Mannelli: Rubbettino 2002).
8. N. Bobbio, 'Il positivismo giuridico' (Torino: Giappichelli 1996).
9. Canale, 'Il ragionamento giuridico' in G. Pino, A. Schiavello, V. Villa (a cura di), 'Filosofia del diritto. Introduzione critica al pensiero giuridico e al diritto positivo' (Torino: Giappichelli 2013).
10. P. Comanducci, R. Guastini, 'L'analisi del ragionamento giuridico. vol. 1 e 2' (Torino: Giappichelli 1987)
11. Faralli, 'Il diritto alla certezza nell'età della decodificazione', in AA.VV. 'Scritti giuridici in onore di Sebastiano Cassarino' (Padova: Cedam 2001).
12. C. Faralli, 'Le grandi correnti della filosofia del diritto' (Torino: Giappichelli 2011).
13. G. Fassò, 'Storia della filosofia del diritto, vol. III' (Roma-Bari: Laterza 2012).
14. J. Frank, 'Law and modern mind' (Gloucester: Peter Smith 1970).
15. G. Gometz, 'La certezza giuridica come prevedibilità' (Torino: Giappichelli 2005).
16. H. Kelsen, 'Teoria generale delle norme', (Torino: Einaudi 1979).
17. L. Lombardi Vallauri, 'Saggio sul diritto giurisprudenziale' (Milano: Giuffrè 1967).
18. L. Lombardi Vallauri, 'Corso di filosofia del diritto' (Padova: Cedam 1981).
19. A. Pace, 'La funzione di sicurezza nella legalità costituzionale' (2014) *Quaderni costituzionali* n. 4.
20. C. Perelman, L. Olbrechts-Tyteca 'Trattato dell'argomentazione. La nuova retorica' (Torino: Einaudi 2001).
21. G. Reale, 'Introduzione ad Aristotele'(Roma-Bari: Laterza 2008)
22. G. Tarello, 'Storia della cultura giuridica. Assolutismo e codificazione del diritto' (Bologna: Il Mulino 1998).
23. Viola, G. Zaccaria, 'Diritto e interpretazione' (Roma-Bari: Laterza).

THE CASE OF TERRORISM: SECURITY AS PURPOSE OF CRIMINAL LAW?

Vasiliki Chalkiadaki¹

Abstract

The paper briefly describes the means of criminal law used to prevent terrorist attacks in Germany and the United Kingdom (England & Wales). It shows how the socio-political demand for security has influenced criminal law, which is the area of law typically associated with a strict dogma of reaction to certain forms of (penalized) violent behaviour, incorporating the concept of prevention only in parts. Thus, security in the sense of means to avoid risks before they cause harm to legal interests is typically not a primary purpose of criminal law. This presentation examines whether security constitutes a purpose of criminal law, and, if so, whether this amounts to a shift in the criminal law dogmatic towards a so-called “security criminal law”.

Keywords: Counterterrorism strategy, security, preparatory acts, (extension of) criminal liability

Introduction

More than a decade after September 11, 2001, which redefined the political, economic, and social conditions internationally and consequently the national, supranational, and international legal systems, societies remain haunted by the question whether legislators and law enforcers have efficiently addressed the demand for security against serious violence. Their constant efforts to fulfill this task generated sophisticated national strategies for the prevention of several forms² of violence by means of law – mainly criminal and administrative – as well as by police practices, with counterterrorism strategy being their most prominent example.

This paper briefly describes the counterterrorism strategy in Germany as well as in England & Wales³ with regard to the criminal law provisions. The main body is structured in two parts for each of the two legal orders and involves a brief presentation of the criminal law provisions regarding terrorism, preceded by a short reiteration of the historical background that led to their enactment. This common structure makes it possible to discern the similarities and differences in the approach to counterterrorism between the two legal orders, despite their different legal and historical background. The paper, however, does not claim to provide a comprehensive approach to the counterterrorism provisions in criminal law but rather to highlight specific norms with a serious impact on the dogmatic of criminal law as we know it.

¹ *Doctoral candidate at the Law School of the University of Freiburg (Germany) and a qualified attorney at law in Athens (Greece). She studied law at the National and Kapodistrian University of Athens, and holds the degrees of “Master of Laws (LL.M.)”, “Master of Law”, and “Master II – Droit et Études Européennes” from the Universities of Freiburg (Germany), Basel (Switzerland) and Strasbourg (France), respectively. She is a member of the International Max Planck Research School for Comparative Criminal Law. Her research focuses on risk prevention at national and international level both with regard to the legal framework (criminal law and police law) and the relevant police practice. More information on her projects: <https://www.mpicc.de/en/home/chalkiadaki.html>. For this paper, the relevant legislation has been taken into consideration as it stood on 23 March 2015.*

² Primarily targeted are the disruption at major sports events, terrorism, violence of young persistent offenders, sexual violence and domestic violence. It is not always easy to establish, whether a concrete strategy has been initiated by the legislator and developed by the police or vice versa; in some cases, the legislator provided the ground for new police practices, designed to meet the legislator’s demands and comply with their rules, whereas in others the police practices preceded the legal reaction to a (criminal) phenomenon, as the police had been struggling with it already over a period of time and had already implemented relevant concrete strategies.

³ England and Wales are two different parts of the United Kingdom basically having one legal order in common. For the purpose of simplicity, in this paper they will be briefly referred to as “England”, except for cases of legal provisions that refer exclusively to the Welsh legal order.

Counterterrorism provisions in the criminal law of Germany and England

Germany

1. Historical background

Germany was first confronted with terrorism at the end of the 1960s, a time when the student movement had reached its peak. From among its most radical circles the German left-wing terrorist organization *Rote Armee Fraktion* (“Red Army Fraction”/RAF) was formed. The RAF members engaged in urban guerilla warfare as they considered their activities a fight against the socio-economic conditions of the Federal Republic of Germany, which, in their mind, was promoting a “national-socialist policy”.⁴ Their activities started in the early 1970s with bomb attacks in public places, banks and shopping malls and continued with kidnappings and targeted killings of politicians and “system stakeholders”. Ultimately, their leaders committed suicide in prison and the most prominent members of their so-called first generation were arrested. This led to a de-escalation of their activities by the beginning of the 1980s, a time that saw the rise of more right-wing and nationalist terrorist movements, whose actions were, comparatively, of minor impact.⁵ In response to the RAF, the German legislator introduced extensive reforms of the criminal law and criminal procedure; however, they were especially tailored to the needs of the situation and were principally considered to be emergency laws.⁶ The most important reform of this period was the criminalization of the formation of a terrorist group. When, in 1998, the remaining RAF members declared their activities terminated, there were debates whether to abolish the legislation against terrorism. This, however, never happened due to the terrorist attacks in the USA on September 11, 2001, marking a new era of legislative “war”, this time on Islamic terrorism.⁷ The most fundamental characteristic of this era is the combination of criminal and administrative law measures to maximize the effectiveness and efficiency of the strategy: where strict dogma and, consequently, the limited spectrum of the criminal law prove insufficient to address the new form of terrorism, new measures have to ensure that “an eye can be kept” on terrorists and terrorist suspects in order to curb any potential plans for a new terrorist attack.

The German Penal Code does not contain a genuine definition of the term “terrorism” describing the objective and subjective aspects of the offence. Instead, the legislator refers to it in adjective form with the term “*terroristische Vereinigungen*” (*terrorist organizations*) in the provision on membership in a terrorist organization. The latter is defined as the organization whose purpose or activities are aimed at the commission of certain common offences listed in the aforementioned provision (the so-called “*Katalogstraftaten*”, catalogue offences). What is implied in this provision is that terrorism constitutes the commission of these common offences by a terrorist organization; nonetheless, the problems arising from this “definition” are not discussed in this paper. In addition, the German legislator has criminalized in several separate provisions a series of conducts as “acts of terrorism”, in a way that further concretizes the perception of “terrorism”: making a terrorist group, financing, training (in terror camps), possessing objects with the purpose of using them in terror attacks, and encouragement of terrorism. The relevant provisions were gradually introduced to the German Penal Code and repeatedly revised before they got their present form.

⁴ See for instance the communiqués of the organization: http://www.germanguerilla.com/red-army-faction/documents/71_04.html (April 1971), http://www.germanguerilla.com/red-army-faction/documents/72_04.php (April 1972), http://www.germanguerilla.com/red-army-faction/documents/82_05.html (May 1982) [Last retrieved: 10/3/2015].

⁵ Ph. Schulte, ‘Terrorismus und Anti-Terrorismus-Gesetzgebung: Eine rechtssoziologische Analyse’ (Münster: Waxmann 2008) 51; Bundesministerium des Innern, Verfassungsschutzbericht (Berlin 2012) 52–148.

⁶ Gesetz zur Ergänzung des Ersten Gesetzes zur Reform des Strafverfahrensrechts (1974); Gesetz zur Änderung des StGB, der StPO, des GVG und des StVollzG (1976); Gesetz zur Änderung des EGGVG (1977); Gesetz zur Änderung der StPO (1978); Gesetz zur Bekämpfung des Terrorismus (1986); Gesetz zur Änderung des StGB, der StPO, des VersG und zur Einführung einer Kronzeugenregelung bei terroristischen Straftaten (1989); Gesetz zur Bekämpfung des internationalen Terrorismus (2002); 34. Strafrechtsänderungsgesetz - § 129b StG (2002).

⁷ Ph. Schulte, ‘Terrorismus und Anti-Terrorismus-Gesetzgebung: Eine rechtssoziologische Analyse’ (Münster: Waxmann 2008) 51; S. Herbert, ‘Grenzen des Strafrechts bei der Terrorismusgesetzgebung’ (Freiburg: Duncker & Humblot 2014), 6–7.

2. Criminal law provisions for countering terrorism

The German Penal Code (*Strafgesetzbuch*, StGB) comprises the following provisions used to prosecute terrorism:

– The formation of and the membership in a terrorist organization (art. 129a StGB): The creation of a terrorist organization, no matter whether the organization is successful in committing the attack planned or not, is the only offence referring explicitly to terrorism (albeit in adjective form). As most legal orders have similar provisions, the content of art. 129a StGB will not be further discussed in this paper for reasons of length requirements.⁸

– The preparation of a terrorist attack as an action posing a serious threat to the security of the state (art. 89a StGB): The legal description of the preparation of the attack includes: instructing and being instructed in the production or use of specific objects mentioned in the same provision, such as weapons and explosives; the production, sale to a third party, safekeeping, and assignment to a third party of these objects; buying and safekeeping of materials necessary to the production or manufacturing of weapons used in the attacks; the collection or the making available of “not insignificant” property assets. Especially the wording in case of “instructing and being instructed” and “collection of not insignificant assets” speaks for a very broad spectrum of activity criminalized by this provision. In the first case, the legislative attempt to contain activities varying from religious terrorist teachings on martyrdom for Allah and for honour to training potential terrorists in training camps may also lead to prosecutions in the case of mere religious teaching of Islam in mosques, related neither to terrorism nor to any other criminal activity, in the not so unlikely event of unreasonably extensive interpretation.⁹ The second case of broad wording (“collection of not insignificant assets”) refers to the financing of terrorist attacks. The financing is the most crucial part in organizing a terrorist attack and requires tremendous effort in terms of logistics, time and personnel. For these pragmatic reasons, financing is most difficult to pursue. Before the introduction of art. 89a StGB, the financing of a terrorist organization could only be prosecuted on the grounds of money laundering (art. 261 StGB); however, in view of the fact that the financing of terrorism usually takes place years in advance of the attack, it was often near impossible to establish the required connections between specific transactions and the terrorist cause of an organization. These are the kind of challenges the legislator targeted by introducing art. 89a StGB.¹⁰

– Establishing or maintaining contact with a terrorist organization (art. 89b StGB): Establishing contact means that the offender intends to have both a mental and an actual relationship over time with members of the terrorist organization (whether ringleaders or mere active supporters). The means of communication to establish contact is not defined, neither is the content of such contacts; though it goes without saying that the content needs to be interpreted according to the letter and spirit of the provision, meaning that it is clear for all contact persons that the established connection relates to the goals of the terrorist organization. The maintaining of the contact, namely the maintaining of the particular mental and actual relationship, must be evident in every action supposed to promote the existing relationship.¹¹

Apart from these provisions, which are either specifically targeted at terrorism (art. 129a StGB) or more generally at violent acts against the security of the state (Arts. 89a, 89b StGB), there are several other general provisions targeting terrorist propaganda as a whole, though segregated as follows: public provocation to commit terrorist offences (by means of art. 111 StGB), sedition (by means of art. 130 StGB), incitement to terrorist offences (per art. 130a StGB or, more specifically, art. 91 StGB for the incitement to offences

⁸ For a comprehensive approach see M. A. Zöller, „Terrorismusstrafrecht – Ein Handbuch“ (Heidelberg: C.F. Müller 2009) 517–532. See also BK – StGB – Fischer, § 129, points 6–20 (the term „kriminelle Vereinigung“ in art. 129 StGB as reference for the term „terroristische Vereinigung“); LK-StGB-Krauß, § 129 points 104–115, § 129a points 18–38; NK – StGB-Ostendorf, § 129 points 11–14, 17, 18, §§ 129a, 129b, point 6a. Relevant cases: BGH, NJW 1954, 1254; BGHSt 18, 296; BGHSt 29, 288–298.

⁹ Instead of requiring a common goal for both teacher and student, namely the “enlightenment” to the jihadi-principles, as a necessary precondition for the application of the provision. M. A. Zöller, „Terrorismusstrafrecht – Ein Handbuch“ (Heidelberg: C.F. Müller 2009) 569–570.

¹⁰ M. A. Zöller, „Terrorismusstrafrecht – Ein Handbuch“ (Heidelberg: C.F. Müller 2009) 574; see also N. Gazeas/Th. Grosse-Wilde/A. Kießling, ‘Die neuen Tatbestände im Staatsschutzstrafrecht – Versuch einer ersten Auslegung der §§ 89a, 89b, und 91 StGB [2009] NStZ 593 (599).

¹¹ NK-StGB-Paefgen, § 89b points 4–8a. See also BK-StGB-Fischer, § 89b points 4–6.

jeopardizing state security), glorification or endorsement of terrorist offences (per art. 131 StGB or 140 StGB). The aforementioned provisions facilitate, for instance, the prosecution of general incitement to join the jihadi cause of war on the infidel nations through internet fora, the incitement to a specific terrorist act by dissemination of documents instigating hatred, video presentations showing beheadings of hostages of terrorist groups, along with speeches on the terrorist cause and applauding the martyrdom for Allah, or offering financial and other benefits to the families of suicide bombers.¹²

The aforementioned provisions (mainly arts. 129a, 89a, 89b StGB) indicate the eagerness of the German legislator to extend the threshold of criminal liability to a very preliminary stage (the so-called “Vorverlagerung der Strafbarkeit”) with respect to the actual terrorist attack. In order to avoid the discussion whether these specific conducts could be perceived as mere preparatory acts to already criminalized behaviour (inchoate offences) or not – in other words, whether there is sufficient (causal) connection between these acts and the terrorist attack –, the legislator chose to extend criminal liability through surplus legislative action; thus, to ensure that these specific conducts would be prosecuted. For example, acts such as travelling to Afghanistan in order to participate in a training camp, or posting a video showing the beheading of an ISIS hostage with an approving comment, criminalized pursuant to arts. 89a and 131 StGB, respectively, certainly show terrorist potential; still, does this necessarily mean that they are preparatory acts for a specific terrorist attack? Part of the doctrine would argue that they could constitute preparatory acts, namely they could be prosecuted under the previous regime (that is, before the introduction of arts. 89a, 89b StGB) as inchoate offences; others would say that these acts are the “preparation of the preparation” of an attack that may or may not happen years later and that a causal connection could not be established. Consequently, as the legislator wanted to make sure that those actions would definitely be prosecuted, he opted to penalize such conduct in order to “secure” state security as much as possible.

England & Wales

1. Historical background

England has been confronted with terrorism since the beginning of the 20th century due to the activity of the Irish Republican Army (IRA). As such, the type of terrorism England had to face was different from the German left-wing terrorism and is usually referred to as “separatist-nationalist” terrorism.¹³ Although the IRA actions focused on Northern Ireland and practically shaped its legal framework, they also influenced the pertinent framework of England until the end of the 1980s, giving rise to a series of emergency laws¹⁴ mainly focused on procedural rules, which actually legalized the practice of the law enforcement authorities regarding the arrest and custody of IRA terrorists or terrorist suspects.¹⁵ Fundamental in this period were the provisions

¹² For a detailed analysis of these provisions see M. A. Zöller, „Terrorismusstrafrecht – Ein Handbuch“ (Heidelberg: C.F. Müller 2009) 381–383, 395–396, 398–401, 401–403 (with examples from the practices of Hamas, Hisbollah, and Al-Qaida). On the objective and subjective aspects of art. 111 StGB see: H-H-StGB-Dallmeyer, § 111, point 4; S/S-StGB-Eser, § 111 point 4; BK-StGB-Fischer, § 111 point 3; NK-StGB-Paeffgen, § 111 points 13–14; LK-StGB-Rosenau, § 111 points 33–34. Relevant cases: OLG NJW 1988, 1101 (1102); BGHSt 32, 310 (310–313). On the various forms of art. 130 paras. 1, 2 StGB see BK-StGB-Fischer, § 130 points 8–10a; LK-StGB-Kraus, § 130 points 38–42; NK-StGB-Ostendorf, § 130 point 11; H-H-StGB-Rackow, § 130, point 15. On the meaning of the term “Schriften” (documents): BK-StGB-Fischer, § 130 point 19; LK-StGB-Kraus, § 130 points 78, 84, 85; NK-StGB-Ostendorf, § 130 point 20; H-H-StGB-Rackow, § 130, points 21–23. On the subjective elements of art. 130 StGB see BK-StGB-Fischer, § 130 point 42; LK-StGB-Kraus, § 130 points 122–131; NK-StGB-Ostendorf, § 130 point 37; H-H-StGB-Rackow, § 130, point 41; S/S-StGB – Sternberg-Lieben, § 130 point 24. Relevant cases: BHG NSTZ-RR 2009, 13 (14). On the objective and subjective aspects of art. 91 StGB see: BK-StGB-Fischer, § 91, point 3; NK-StGB-Paeffgen, § 91 point 15; MüKoStGB/Schäfer § 91 points 10–11. Regarding art. 131 StGB, see BK-StGB-Fischer, § 131, points 8–13; LK-StGB-Kraus, § 131 point 14; MüKoStGB/Schäfer, § 131 points 35–40; S/S-StGB-Sternberg-Lieben, § 131 point 11. On the glorification or endorsement of terrorism see MüKoStGB/Hohmann, § 140 points 10–24; NK-StGB-Ostendorf, § 140, point 13; S/S-StGB-Sternberg-Lieben, § 140 point 7.

¹³ In case of the IRA, the term “nationalist” is not accurate, which is why this paper uses the term “IRA-separatist”.

¹⁴ These laws were the so-called Emergency Provision Acts for Northern Ireland, enacted between 1973 and 1988, as well as the Prevention of Terrorism (Temporary Provisions) Acts for England, enacted between 1974 and 1989.

¹⁵ The most important (procedural) change brought by the Emergency Provision Acts was the introduction of special courts without jury („Diplock Courts“). For more, see J. Jackson/S. Doran, ‘Judge without Jury. Diplock Trials in the Adversary System.’ (Oxford:

on “proscribed organizations”, which refer to a list of organizations characterized as terrorist, whose members would be characterized as terrorists and be subjected to the rule of the so-called *Exclusion Orders*¹⁶. The introduction of counterterrorism laws continued intensively in the 1990s: the English legislator seemed to be following the doctrine of confronting terrorism by means of criminal justice. Highlight of this period was the enactment of the Terrorism Act 2000 (hereafter: TA 2000). This Act comprises a series of material and procedural law provisions aimed not as an emergency law (as was the case with the former legislation), but as a permanent basis for England’s counterterrorism strategy. For the first time, an Act was not exclusively oriented at IRA-separatist terrorism but at all kinds of terrorism. The most groundbreaking changes this Act brought about was the definition of terrorism and the prosecution of its financing. It also included the updated list of proscribed organizations. Along with the Terrorism Act 2006 (hereafter: TA 2006), these acts form a rigid set of rules consisting of specific precursor offences, as will be shown next.

2. Criminal law provisions for countering terrorism

The counterterrorism statutes gradually enacted over the past decades depict the on-going legislative effort to create a special system of counterterrorism rules within the English criminal law, which emphasizes the criminalization of certain aspects of terrorist activity. The implementation of the *Diplock Report*¹⁷ of 1972 pointed out the importance of criminal justice (and, consequently, of the inherent criminalization of specific conducts) as a means to combat terrorism against the usual administrative measures implemented at that time (e.g., the *internment* practice, namely a form of police custody without trial for suspected terrorists, allegedly used exclusively in “emergency cases”). In this vein, the various counterterrorism acts entail “scheduled offences”. These are lists of specific common offences such as murder, offences against the integrity of the body of another person, extortion or offences related to weapons and explosives, which constitute the core of terrorist activity. If these offences are perpetrated, these Acts are implemented, thereby ensuring that neither the (potential) terrorists will profit from the special (more lenient) treatment reserved for political offenders, nor will they be deprived of the guarantees for a fair trial.

Taking a closer look at the criminal law provisions of the counterterrorism legislation, one cannot help but note the predominance of the so-called *precursor offences*¹⁸, namely offences aimed at the intervention of criminal law at a most early stage of (criminal) activity to prevent future terrorist attacks. This category of offences is highly controversial both in the doctrine and in the practice of criminal law, due to weaknesses inherent in the offence definitions, such as their vagueness, or the procedural obstacles they imply, mainly regarding the admissibility of evidence (most often, confidential intelligence sources) and the standard of proof. In particular, these offences are:

Clarendon Press 1995) 1–286; D. Korff, ‘The Diplock Courts in Northern Ireland: A Fair Trial?’ (Utrecht: Studie- en Informatiecentrum Mensenrechten 1985) 17–100. On the custody of IRA terrorists (“internment”) see C. Delisle, ‘Leading to Peace: Prisoner Resistance and Leadership Development in the IRA and Sinn Fein.’ (Ottawa: UMI Dissertation Services 2012) 107–115; F. Foley, ‘Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past.’ (Cambridge: Cambridge University Press 2013) 19–20; A. Oehmichen, ‘Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France.’ (Antwerp: Intersentia 2009) 146–147. Relevant case: *o’Hara v UK*, Appl. no. 37555/97 [2001] ECtHR. On the so-called “supergrass strategy”, that is the police practice of using already arrested paramilitary group members as informants (“supergrasses”) to acquire information that would lead to the arrest of suspected IRA terrorists (in exchange for legal benefits for the informants), see D. Bonner, ‘Combating terrorism: Supergrass trials in Northern Ireland.’ [1988] 1 MLR 23 (31–35).

¹⁶ The implementation of an exclusion order meant that it was prohibited for an individual to move from one part of the UK to another. See A. Oehmichen, ‘Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France.’ (Antwerp: Intersentia 2009) 148–149.

¹⁷ The Diplock Report analysed the effectivity of a counterterrorism strategy which would focus on the prosecution of terrorist organization members (in other words: treatment within the criminal justice system) and not on their internment (or other measures of administrative nature), as it was the case at the time. See Diplock Report, Ch. 3 paras. 1, 27–34.

¹⁸ Or “predicate crimes”, as the term appears in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Art. 1e).

– The membership in (art. 11 TA 2000) and the support of (art. 12 TA 2000) a terrorist organization: Membership is defined in art. 11 TA 2000 as “to belong or to profess to belong” to one of the *proscribed organizations*¹⁹ according to Schedule 2 of the TA 2000. Of special importance is the fact that directing a terrorist organization is not treated as a subform of membership but separately, as a distinct offence, in art. 56 TA 2000, with a relatively low standard of proof (sufficient evidence to prove that an individual acts as the director of the organization in general, though not in concrete terrorist acts).²⁰ This provision will not be further discussed here for the same reasons already mentioned in the German part.

– The provision of, reception of or invitation (to a third party) to receive instruction or training to the making or use of weapons (arts. 54, 55 TA 2000, 6 TA 2006): Such instruction or training was initially conceived to comprise various types of weapons (firearms, explosives, radioactive material, chemical, biological or nuclear weapons) but was later extended with the TA 2006 to include any noxious substance that could be used as a weapon, as well as any method or technique that could be used for terrorist purposes.²¹ The latter implies, for instance, instructions on the technique to set a bomb in order to cause the deadliest explosion possible, to manufacture a bomb that would accelerate the dissemination of a virus, or even to cause a situation of mass panic.²²

– The possession of articles (art. 57 TA 2000) or the collection of information (arts. 58, 58A TA 2000) for terrorist purposes: In order to capture all possible stages of preparation for a terrorist attack, the criminalization of terrorist activity starts with these two norms at the point of acquisition of “everyday” items (e.g. plastic gloves, overalls, wires, scales of great precision, batteries) and substances with a view to manufacture weapons to be used in a forthcoming terrorist activity. Essential quality of these objects is that they “(...) give rise to a reasonable suspicion that [their] possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism”. The connection to the commission of an act of terrorism may be direct or indirect; a typical example of an indirect connection to a terrorist act is the safekeeping of items brought to an individual by another member of the organization until the items are actually used in the preparation of the attack.²³

Turning to the question of information useful for the commission or preparation of an act of terrorism, the TA 2000 criminalizes not only its collection and recording, but also the (mere) possession of a document or record containing this kind of information. This variation explicitly includes the possession of photographs or electronic media containing such information. The norm also includes rules on the burden of proof since its vague wording can easily cause the prosecution of journalists who investigate terrorism cases, or even of individuals who own military handbooks for general knowledge and have in fact nothing to do with terrorist groups.²⁴

– The preparation of terrorism (art. 5 TA 2006): Any conduct for the preparation of the commission of an act of terrorism or the preparation of the assistance to another to commit such an act constitutes a terrorist offence. Since neither the norm itself nor the Explanatory Notes provide any further clarification on the meaning of “conduct”, it may be assumed that this provision implies literally every activity an individual undertakes as an immediate follow-up of their membership in the terrorist organization. As may be expected, an extremely comprehensive provision such as this has since been extensively applied. Typical examples are the offer of accommodation to a member of a terrorist organization, where the person making the offer is

¹⁹ For the updated list of proscribed organizations see Home Office (Ed.), ‘Proscribed Terror Groups or Organisations.’ (London 2014) 3–14, and online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324603/20140627-List_of_Proscribed_organisations_WEBSITE_final.pdf [Status: 23.1.2015].

²⁰ TA 2000, Explanatory Notes: Sections 11–12, 13; F. Foley, ‘Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past.’ (Cambridge: Cambridge University Press 2013) 200, 201; C. Walker/K. Reid, ‘The offence of directing terrorist organisations.’ [1993] CLR 669 (670–674); C. Walker, ‘Terrorism and the Law.’ (Oxford: Oxford University Press 2011) points 5.33–5.41. Relevant cases: R v Martin and Morrison [1992] 5 NIJB 1; R v Morrison [2009] NICA.

²¹ The new provision was introduced in accordance to Art. 7 of the Council of Europe Convention on the Prevention of Terrorism.

²² C. Walker, ‘Terrorism and the Law.’ (Oxford: Oxford University Press 2011) points 5.10–5.18, 5.24–5.26).

²³ See R v Omar Altimini [2008] EWCA Crim 2829. C. Walker, ‘Terrorism and the Law.’ (Oxford: Oxford University Press 2011) points 5.44–5.45.

²⁴ C. Walker, ‘Terrorism and the Law.’ (Oxford: Oxford University Press 2011) points 5.68, 5.81–5.86.

aware of the other's membership in the organization, or committing credit card fraud to assist in providing a living for terrorists.

– The encouragement of terrorism (art. 1 TA 2006) and the dissemination of terrorist publications (art. 2 TA 2006): Punishable are statements expressed (not privately, but) to members of the public and encouraging the commission or preparation of acts of terrorism, directly or indirectly. “Encouragement” is understood to mean the glorification of acts of terrorism or any statement for which one could reasonably believe that it implies the emulation of such acts by (members of) the public; the encouragement is inferred not only from the content of the statement but also from the circumstances under which it was undertaken. In the same vein, it is also punishable to disseminate terrorist publications in any of the forms the norm provides (distribution of such publications, sale, loan, offer for sale or loan, making available through service or gift, electronic transmission or possession with a view to fulfill the aforementioned actions). The commission of such acts through the internet is explicitly criminalized in a separate provision. In this way, the legislator attempts to put an end to the radicalization and recruitment of individuals prone to accept extremist views.²⁵

With the norms mentioned above, the English legislator has extended the threshold of criminal liability to a very preliminary stage with respect to the actual terrorist attack. As in the case of Germany, England has embraced the logic of criminalizing the “preparation of the preparation” of an attack which may or may not happen in the future to ensure that such conduct is prosecuted in order to provide for the security of the state.

Conclusion

The description of the criminal law aspect of the legal arsenal against terrorism in Germany (provisions incorporated in the German Penal Code) and in England (provisions in special Acts) results in the following elements common to both approaches:

– The criminalization of the preparation of terrorist acts, in other words, the logistical planning of terrorist attacks: This covers a very broad spectrum of activities including financing, possessing objects (not only weapons or explosives but any item that might be useful during an attack, e.g. cars, mobile phones, batteries, plastic gloves, wire, overalls) and/or information (in written or electronic form) for terrorist purposes as well as getting trained in a training camp abroad.

– The criminalization of terrorist propaganda, with a view to annihilate the radicalization of specific individuals prone to radicalization and recruitment by terrorist groups. The incitement to commit (or to participate in) a terrorist attack is an independent provision in both countries and covers a vast spectrum of activities, from the mere glorification of terrorism to the mass instigation to a concrete terrorist attack (as part of the war on the infidels of the West). Ordinary sympathizers are generally exempted from the scope of this provision, although it depends on the specific circumstances whether an individual will be punished or not.

– The criminalization of participation in a terrorist group, which implies both the membership (whether active or passive) in a terrorist group and the support (with material means) of the group. The membership may also refer to the position of the ringleader; however, in England, this constitutes a separate provision.

Based on these provisions, it follows that the legislator in both countries has focused on the prevention of terrorist attacks by all available means, as the most effective way to avoid the extensive damage to legal interests of individuals and the public that an attack causes, and where the mere (repressive) reaction of criminal law fails to achieve much. Apart from its primarily repressive nature, namely the response to harm already done, criminal law also exhibits a preventive aspect: By means of the threat, imposition and execution of fair penalties, criminal law serves the purpose of preventing future harm. This idea is present in the theories on the purpose of the criminal penalty: By means of the penalty, criminal law creates a codex of behaviour acceptable for society (positive general prevention) and causes potential offenders to refrain from their plan of committing an offence due to the fear of punishment (negative general prevention). In addition, criminal law aims directly at a preventive effect on the offender, as the penalty promotes their respect for the law and the legal order with a view to re-socialize the offender (positive special prevention theory) and to protect the public from them (negative special prevention).

²⁵ A. Staniforth, ‘Preventing Terrorism and Violent Extremism.’ (Oxford: Oxford University Press 2014) 158–161.

However, in some areas of crime, the most prominent of which is terrorism, the legislator in both countries chose not to rely only on the preventive character of the criminal sanction but to create offences explicitly aimed at the prevention of terrorist attacks (“acts of terrorism” in StGB, “precursor offences” in TA 2000, TA 2006). To this end, the threshold for criminal liability was extended to include an earlier stage so as to allow the intervention of criminal law at the very moment of the genesis of those criminal offences (“acts of terrorism”, “precursor offences”) that are typical preconditions for the commission of others consisting in the terrorist attack (e.g. multiple murders by use of vast amounts of explosives). This is the new so-called “prevention-oriented” criminal law.²⁶

The field of terrorism is the most prominent example for this new trend, chosen by the legislator in order to overcome the “inherent vice” of criminal law. The legislator aims to provide for the security of society and this is why the limits of criminal liability are more and more extended to cover the preparatory act of the preparatory act of the terrorist offence. Parts of the doctrine react to this new trend that includes security as one of the purposes, or at least the aims, of criminal law, but the trend does exist as a legal policy, though up to a certain extent, in order not to mess up with the primarily repressive nature of criminal law.

Nevertheless, this trend needs to be addressed with utmost caution, since, the more security the legislator aims for, the more unlimited the criminal liability becomes. Ultimately, such a broadening of the purposes of criminal law may lead to the introduction of “thought offences” under criminal law. For this reason, it is incumbent upon the legislator, even in the context of security through criminal law, to insist on the precondition of harm done with purpose to legal interests: this means that the essential requirement (for the extension of criminal liability) is the harm to legal interest(s) that already has happened (in the past), which is imputable to the offender who has acted culpably to provoke this harm. Moreover, criminal law involves safeguards and guarantees that stand out from the guarantees offered by other measures of intervention. In other words, the choice of a preventive regime within criminal law entails strict preconditions for its implementation, unlike in the case of administrative law measures, for example.²⁷

The need for extra security in the field of terrorism can and is actually provided by other areas of law whose threshold of implementation is lower than that of criminal law. In Germany, there is the so-called “Law of Risk Prevention” (*Gefahrenabwehrrecht*) as one area of law that guarantees security. It is a branch of administrative law, part of which is the law of the federal and regional police (*Polizei des Bundes und der Länder*), and whose object is an imminent and concrete risk threatening public safety and public order. The law of the secret services is another branch of administrative law essential for purposes of security (especially of the State); these are the statutes that provide for the structure and duties of each of the German secret services.²⁸ The so-called “Law for the Counterterrorism Database” (*Antiterrordateigesetz*) belongs in this category, a law that covers the largest German search machine for terrorists and terrorist suspects or affiliates. England, on the contrary, does not have “law of Risk Prevention”; instead, England has implemented special statutes for specific non-criminal-law measures against terrorists, such as the preventive detention of foreigners as terrorists suspects (applied between 2001–2005), and the various orders to control the life of terrorist suspects and to enable their surveillance by the police (“control orders” between 2005 and 2008 and the “Terrorism Preventions and Investigation Measures” currently in force). Part of this category is also the so-called “asset-freezing order” to prevent the financing of terrorism.

To sum up, security has de facto become a purpose of criminal law, despite the fact that this contradicts the traditional doctrine of primarily, if not almost exclusively, repressive purposes, allowing the idea of a so-called “security criminal law” to gain ground. However, the demand for security within criminal law is subject to requirements arising from the safeguards and guarantees of criminal law as a strictly dogmatic field of law. For this reason, the purpose of security in counterterrorism strategies is also pursued by measures of administrative law with a lower threshold of implementation, and even with police practices. It is for future legislators to decide, whether administrative law-like measures will be incorporated in the criminal law, what

²⁶ Whether this prevention-oriented criminal law acquires a special legitimation is an entirely new topic that cannot be developed in this paper.

²⁷ U. Sieber, ‘Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt.’ [2009] 7 NSTZ 353 (356).

²⁸ Bundesnachrichtendienstgesetz, Verfassungsschutzgesetz, Gesetz über den militärischen Abschirmdienst.

the requirements will be, and whether this may eventually lead to an erosion of its repressive character as we know it.

Bibliography

1. Bundesministerium des Inneren (Ed.), Verfassungsschutzbericht (Berlin 2012).
2. Commission on Legal Procedures to deal with terrorist activities in Northern Ireland (Hrsg.), Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland (Chairman: Lord Diplock). London: Her Majesty's Stationery Office, 1972. [Diplock Report]
3. David Bonner, Combating terrorism: Supergrass trials in Northern Ireland. *Modern Law Review* 1988/1, 23–53.
4. Jens Dallmeyer, § 111 StGB. In: Bernd von Heintschel-Heinegg (Ed.), *Strafgesetzbuch – Kommentar*. Munich: Beck, 2010. [Cited as: H-H–StGB–Contributor, § point no.]
5. Claire Delisle, *Leading to Peace: Prisoner Resistance and Leadership Development in the IRA and Sinn Fein*. Ottawa: UMI Dissertation services, 2012.
6. Albin Eser, § 111 StGB. In: Adolf Schönke (Ed.)/Horst Schröder (Ed.)/Albin Eser (Contr.), *Strafgesetzbuch – Kommentar*. Munich: Beck, 2014. [Cited as: S/S–StGB–Contributor, § point no.]
7. Thomas Fischer, *Beck'sche Kurz-Kommentare: Strafgesetzbuch mit Nebengesetzen*. Munich: Beck 2014 (61st ed.) [Cited as: BK – StGB – Fischer, § point no.]
8. Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*. Cambridge: Cambridge University Press, 2013.
9. Nikolaos Gazeas/Thomas Grosse-Wilde/Alexandra Kießling, Die neuen Tatbestände im Staatsschutzstrafrecht – Versuch einer ersten Auslegung der §§ 89a, 89b, und 91 StGB. *NStZ* 2009, 593–604.
10. Sarah Herbert, *Grenzen des Strafrechts bei der Terrorismusgesetzgebung*. Freiburg: Duncker & Humblot, 2014
11. Olaf Hohmann, § 140 StGB. In: Wolfgang Joecks/Klaus Mießbach (Eds.), *Münchener Kommentar zum Strafgesetzbuch* (Vol. 3: §§ 80–184g StGB). Munich: Beck 2012 (2nd Ed.) [Cited as: MüKoStGB/Contributor, § point no.]
12. Home Office (Ed.), *Proscribed Terror Groups or Organisations*. London, 2014.
13. John Jackson/Sean Doran, *Judge without Jury. Diplock Trials in the Adversary System*. Oxford: Clarendon Press, 1995.
14. Douwe Korff, *The Diplock Courts in Northern Ireland: A Fair Trial?* Utrecht: Studie- en Informatiecentrum Mensenrechten, 1985.
15. Matthias Krauß, § 129, 130, 131 StGB. In: Ruth Rissing-van Saan/Klaus Tiedemann/Heinrich Wilhelm von Laufhütte (Eds.), *Strafgesetzbuch - Leipziger Kommentar* (Vol. 5). Berlin: De Gruyter Recht, 2009 (12th ed.). [Cited as: LK–StGB–Contributor, § point no.]
16. Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*. Antwerp – Oxford – Portland: Intersentia, 2009.
17. Heribert Ostendorf, § 129a, 129b, 130, 140. In: Urs Kindhäuser/Ulfrid Neumann/Hans-Ullrich Paeffgen (Eds.), *NomosKommentar Strafgesetzbuch*, Vol. 2. Baden-Baden: Nomos, 2013 (4th ed.) [Cited as: NK–StGB–Contributor, § point no.]
18. Hans-Ullrich Paeffgen, § 89b, 91, 111 StGB. In: Urs Kindhäuser/Ulfrid Neumann/Hans-Ullrich Paeffgen (Eds.), *NomosKommentar Strafgesetzbuch* (Vol. 2). Baden-Baden 2013 (4th ed.) [Cited as: NK–StGB–Contributor, § point no.]
19. Peter Rackow, § 130 StGB. In: Bernd von Heintschel-Heinegg (Eds.), *Strafgesetzbuch – Kommentar*. Munich: Beck, 2010. [Cited as: H-H–StGB–Contributor, § point no.]
20. Henning Rosenau, § 111 StGB. In: Ruth Rissing-van Saan/Klaus Tiedemann/Heinrich Wilhelm von Laufhütte (Eds.), *Strafgesetzbuch - Leipziger Kommentar* (Vol. 5). Berlin: De Gruyter Recht,

- 2009 (12th ed.) [Cited as: LK-StGB-Contributor, § point no.].
21. Jürgen Schäfer, § 91, 131 StGB. In: Wolfgang Joecks/Klaus Miebach (Eds.), Münchener Kommentar zum Strafgesetzbuch (Band 3: §§ 80–184g StGB). Munich: Beck, 2012 (2nd ed.) [Cited as: MüKoStGB/Contributor § point no.].
 22. Philip Schulte, 'Terrorismus und Anti-Terrorismus-Gesetzgebung: Eine rechtssoziologische Analyse', Münster – New York – München – Berlin: Waxmann, 2008
 23. Ulrich Sieber, 'Legitimation und Grenzen von Gefährungsdelikten im Vorfeld von terroristischer Gewalt.' [2009] 7 NStZ 353–408.
 24. Andrew Staniforth, Preventing Terrorism and Violent Extremism. Oxford: Oxford University Press, 2014.
 25. Detlev Sternberg-Lieben, § 130, 131 StGB. In: Adolf Schönke (Ed.)/Horst Schröder (Ed.)/Albin Eser (Contr.), Strafgesetzbuch – Kommentar. Munich: Beck, 2014 (29th ed.) [Cited as: S/S-StGB–Contributor, § point no.].
 26. Clive Walker/Kiron Reid, The offence of directing terrorist organisations. Criminal Law Review 1993, 669–677.
 27. Clive Walker, Terrorism and the Law. Oxford: Oxford University Press, 2011.
 28. Mark Alexander Zöller, 'Terrorismusstrafrecht – Ein Handbuch'. Heidelberg: C.F. Müller, 2009

DEFAMATION AS A CRIMINAL OFFENCE IN THE CONTEXT OF THE PROTECTION OF FREEDOM OF EXPRESSION

Aušra Dambrauskienė¹

Abstract

By means of the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the case-law of the European Court of Human Rights, the recommendations and criticism of the international human rights organisations, the paper analyses legal regulation on defamation in the Criminal Code of the Republic of Lithuania. It argues that the criminalisation of defamation has not yet been fully valid and legitimate when considering the international commitments, namely those related to the protection of freedom of expression and the nature and purpose of criminal law, as well as the principle of criminal liability, as the last resort (*ultima ratio*). This paper does not only aim to emphasise that it is necessary to decriminalize partially the defamation in the Republic of Lithuania but also attempts to encourage further discussions on this issue.

Keywords: freedom of expression, defamation, criminal offence, criminal law

Introduction

While the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention on Human Rights, the Convention) and the Constitution of the Republic of Lithuania guarantee the right to the defence of personal honour and dignity, it does not specify in which ways and means this right can be exercised. Therefore, the states themselves can choose appropriate remedies in the light of the moral rules established in the society on this matter, the defence priorities, economic conditions, the position of legislature, and other factors.

In Lithuania a person's honour and dignity alongside the remedies in civil law and administrative law shall also be defended by criminal legal remedies, and defamation is considered to be a criminal offence. How it should be perceived? To what extent the person's honour and dignity must be defended in a democratic society? What protective measures should be used? Are the means (criminal sanctions) in Lithuania appropriate, valid and legitimate? All these questions are addressed in this paper.

The objective of this paper is to set out the situation of the legislation on defamation in the Republic of Lithuania, to make a global analysis in respect of this legislation in the light of the relevant case-law of the European Court of Human Rights. The report also aims at gathering information about international trends in respect of decriminalisation of defamation.

1. Legal background

After the personal dignity has been fixed in the Universal Declaration of Human Rights² as a basic civil right common to all human beings, commitment to defend the personal dignity (later on and the honour) was proclaimed by many international acts (the International Covenant on Civil and Political Rights adopted in

¹ PhD student, Department of Criminal Justice, Vilnius University Faculty of Law. Sauletekio av. 9, Vilnius, Lithuania, e-mail: ausracipkaite@yahoo.com. The candidate currently is preparing doctoral thesis "The Implementation of the Ultima Ratio Principle in Criminalising Relevant Offences in the Criminal Code of the Republic of Lithuania". Research interests of the author include the main part of criminal law (criminal policy) and the special part of criminal law.

² The United Nations, The Universal Declaration of Human Rights [1948] at <http://www.un.org/en/documents/udhr/>.

1966, the International Covenant on Economic, Social and Cultural Rights³ adopted in 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950 and others), national constitutions and other legal acts. The personal honour and dignity was found to be among the top values (as an independent object of law) in the catalogue of the fundamental human rights.

Article 21 of the Constitution of the Republic of Lithuania⁴, on personal dignity, reads as follows:

2. "Human dignity shall be protected by law."

Article 2.24 of the Civil Code of the Republic of Lithuania⁵ regarding the protection of honour and dignity reads as follows:

"1. A person shall have the right to demand the refutation, in judicial proceedings, of publicised data which abase his honour and dignity and which are erroneous, as well as the redress of pecuniary and non-pecuniary damage incurred by the public announcement of the said data. Data which has been made public shall be presumed to be erroneous unless the publisher proves the opposite to be true.

2. Where erroneous data have been publicised in the mass media (press, television, radio, etc.) the person about whom those data were published shall have the right to file a correction and demand that the media publish the said correction free of charge, or make it public in some other way [...].

[...]

4. Where the mass media refuse to publish the correction or to make it public in some other way [...] the [aggrieved] person has the right to apply to a court in accordance with the procedure established in paragraph 1 of the given Article. The court shall establish the procedure and the terms of the refutation of the erroneous data which prejudiced that person's reputation.

5. The mass media which have publicised erroneous data prejudicing a person's reputation shall provide redress for any pecuniary and non-pecuniary damage incurred by that person only in cases when they knew, or should have known, that the data were erroneous, including those cases where the data were made public by their employees or [...] anonymously, and the media refuse to name their source.

[...]

6. The person who publicly disseminates erroneous data shall be exempted from civil liability in cases when the publicised data relate to a public person and his State or public activities and the person who made them public can demonstrate that his actions were in good faith and intended to introduce the person and his activities to the public."

The Criminal Code of the Republic of Lithuania⁶ defends personal honour and dignity too and says that:

1. "Any person who spreads false information about another person or a group of people, which could arouse contempt for that person or persons, undermine trust or humiliate them, shall be punished by fine or restriction of liberty, or imprisonment for a term for up to 1 year.

2. Any person who defamed another person about felony through the use of the mass media or the press, shall be punished by a fine, or detention, or imprisonment for a term of up to 2 years.

3. Prosecution for the acts specified in paragraphs 1 and 2 of this Article shall be instituted subject to a complaint being filed by the victim." (Art. 154).

Article 214⁶ of the Code of Administrative offences⁷ provides for liability for the defamation or insult of the President of the Republic, which is punishable up to three thousand litas (868 EUR). The relevant sections of the Law on the Provision of Information to the Public⁸ read about personal honour and dignity too (Art. 4, 13, 15, 19, 42, 44, 50).

However, Article 10 of the European Convention on Human Rights⁹ on freedom of expression reads as follows:

³ The United Nations, International Covenant on Civil and Political Rights [1966] at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, The United Nations, International Covenant on Economic, Social and Cultural Rights [1966] at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁴ Lietuvos Respublikos Konstitucija [1992] Žin. 33-1014.

⁵ Lietuvos Respublikos civilinis kodeksas [2000] Žin. 74-2262.

⁶ Lietuvos Respublikos baudžiamasis kodeksas [2000] Žin. 89-2741.

⁷ Lietuvos Respublikos administracinių teisės pažeidimų kodeksas [1985] Žin. 1-1.

⁸ Lietuvos Respublikos visuomenės informavimo įstatymas [1996] Žin. 71-1706.

⁹ The Council of Europe, The European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Therefore, the protection of personal honour and dignity depends on the scope and protection of the freedom of expression. The main task in a situation, where personal honour and dignity and freedom of expression meet, is to strike the balance between these both values. Most importantly, it is essential to find out the means for the protection of personal honour and dignity and the freedom of expression. This is a task, first of all for the legislature when creating or changing the content of such regulation which involves these rights, and secondly, for the court which, in a given situation, must take such a decision to ensure a balanced protection of these two values. Giving unfounded priority to one of these subjective rights, another right would be violated in essence. The paper attempts to focus on the first aspect (legislature) only.

2. International trends

Under the European Convention on Human Rights (Art. 10) and the Constitution of the Republic of Lithuania (Art. 25) in some cases, freedom of expression can be restricted. Such limitations may be made in cases where they are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of *the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

When the European Court of Human Rights examines defamation cases, it undertakes a textual and contextual analysis of the circumstances of the case before it and, as its case-law has developed, the Court has refined the criteria governing that analysis at all stages of case examination (the existence of interference and tests of quality of the law, legitimacy of action and the necessity of interference in a democratic society)¹⁰.

Where this first stage of examination is concerned, based on the notion of “chilling effect”, the Court believes that even when the execution of a sentence or the judgment is suspended, the mere fact of having been prosecuted may mean that a person has suffered interference in their freedom of expression. In line with this evolving case-law, the Court recently concluded that there had been interference in a case where the applicant had not even been actually prosecuted in court. A real risk that a person might be prosecuted under a law that had been drafted and interpreted by domestic courts in a vague manner, in the particular circumstances of the case, prompted the Court to find, first, that there had been interference and, second, a violation of the applicant’s right to freedom of expression¹¹.

In a number of judgments, the Court has concluded that interference, regardless of the form and extent, was disproportionate to the aim sought¹². Talking of criminal sanctions, it has been stressed by the Court that the mere fact that a sanction is of a criminal nature has in itself a disproportionate chilling effect¹³. The Court has also laid strong emphasis on the adverse effect of criminal sanctions themselves, and particularly the potential impact of a criminal record on an individual’s future¹⁴. A criminal sanction with restriction of liberty is a fortiori a grave restriction of freedom of expression. Indeed, it appears that the Court has never recognised that imposing a prison sentence is well-founded or acceptable in defamation cases. It has stated that “although

¹⁰ *The Sunday Times v. The United Kingdom*, application no. 6538/74 [1979]; *Alithia publishing company LTD & Constantinides v. Cyprus*, application no. 17550/03 [2008].

¹¹ For example, *Erdogdu v. Turkey*, application no. 25723/94 [2000]; *Altug Taner Akcam v. Turkey*, application no. 27520/07 [2001].

¹² *Dammann v. Switzerland*, application no. 77551/01 [2006].

¹³ *Cumpănă and Mazăre v. Romania*, application no. 33348/96 [2004]; *Azevedo v. Portugal*, application no. 20620/04 [2008].

¹⁴ *Scharsach and News Verlagsgesellschaft mbH v. Austria*, application no. 39394/98 [2003].

sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence¹⁵.

The Court has heavily stressed "the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern"¹⁶. It follows, as previously mentioned, that "the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media"¹⁷.

However the Court has remarked that, in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued¹⁸. In order to respond properly to denigratory invalid or unfair charges, while ensuring public order, measures of criminal law nature are possible in this case.

Consequently, the European Court of Human Rights consider that in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, application of criminal liability at the base for a significant, is in fact possible. The case-law of the Court essentially leads to the conclusion that the custodial sentence appointment when defending the honour and dignity is compatible with the freedom of expression guaranteed by Article 10 of the Convention only in exceptional circumstances, namely: a fundamental violation of other fundamental rights, such as the case of incitement to hatred or violence. This principle applies regardless of whether the penalty involving deprivation of liberty was actually performed.

International human rights organisations such as The United Nations International Covenant on Civil and Political Rights, Council of Europe, The Organization for Security and Co-operation in Europe (OSCE) basically follow the trend of decriminalisation of the offences that interfere with person's honour and dignity. This position refers to the abuse of legislation on defamation as one of the traditional threats to freedom of expression and states that all criminal defamation laws are problematic. There is a general consensus among the different specialised bodies of international and regional organisations that not only the application of criminal sanctions but also the mere fact that such sanctions could be applied has substantial undesirable effects on freedom of expression and information. Further, it is considered that the application of custodial sentences for acts of defamation is in principle disproportionate. Beyond the necessary decriminalisation of the defamation, this highlights the paramount importance of implementing the principle of proportionality as conceived in the case-law of the European Court of Human Rights¹⁹.

¹⁵ *Cumpănă and Mazăre v. Romania*, application no. 33348/96 [2004].

¹⁶ *Barfod v. Denmark*, application no. 11508/85 [1989].

¹⁷ *Castells v. Spain*, application no. 11798/85 [1992].

¹⁸ *Radio France and Others v. France*, application no. 53984/00 [2004].

¹⁹ The United Nations International Covenant on Civil and Political Rights Human Rights Committee, General comment No. 34 [2011] at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>; The Council of Europe Parliamentary Assembly, Resolution 1577 Towards decriminalisation of defamation [2007] at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>; Warsaw Declaration of the Organization for Security and Co-operation in Europe Parliamentary Assembly [1997] at <http://www.oscepa.org/publications/declarations/1997-warsaw-declaration/182-1997-warsaw-declaration-eng/file>; Bucharest Declaration of the Organization for Security and Co-operation in Europe Parliamentary Assembly [2000] at <http://www.osce.org/pa/37758?download=true>; Paris Declaration of the Organization for Security and Co-operation in Europe Parliamentary Assembly [2001] at <http://www.oscepa.org/publications/declarations/2001-paris-declaration/214-2001-paris-declaration-eng/file>; The Organization for Security and Co-operation in Europe Parliamentary Assembly, Report in the Fourth Winter Meeting in Vienna [2005] at <http://www.oscepa.org/meetings/winter-meetings/585-2005-winter-meeting-vienna>; The Organization for Security and Co-operation in Europe, Ending the chilling effect. Working to repeal criminal libel and insult laws [2004] at <http://www.osce.org/fom/13573>; The Council of Europe Secretariat General Directorate General of Human Rights and Legal Affairs Information Society Department, Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality [2012] at http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI%282012%29Misc11Rev2_en.pdf.

3. National condition

In the Republic of Lithuania, as has been seen in the Part I, a person's honour and dignity alongside the remedies in civil law and administrative law shall also be defended by criminal legal remedies, and defamation is considered to be a criminal offence, carrying a maximum sentence of two years' imprisonment.

But there is a general consensus among the different specialised bodies of international and regional organisations that not only the application of criminal sanctions but also the mere fact that such sanctions could be applied has substantial undesirable effects on freedom of expression and information. Further, it is considered that the application of custodial sentences for acts of defamation is in principle disproportionate.

By means of legislation on defamation as one of the traditional threats to freedom of expression, that all criminal defamation laws are problematic, and that in practice, in Lithuania, criminal penalties are rarely applied to defamation²⁰, it is negotiated whether the criminalisation of defamation in the Criminal Code of the Republic of Lithuania is necessary, valid and legitimate.

On the other hand, in some countries in Europe where defamation has been decriminalised, there has been a sharp increase in the number of civil lawsuits and excessive awards of damages, frequently higher than the fines imposed under criminal law. Journalists in certain countries have pointed out that criminalisation affords guarantees in terms of a fair trial which the media does not enjoy under civil procedure. Accordingly, they fear that decriminalisation will have adverse effects, by depriving them of the safeguards they need to protect their rights²¹.

Beyond the necessary decriminalisation of the defamation, this highlights the paramount importance of implementing the principle of proportionality as conceived in the case-law of the European Court of Human Rights. Implementing fully the principle of proportionality, which has far more to it than merely gauging the nature and severity of sanctions, contains the major component of respect for a fair trial (see Part II above). It means that criminal liability for defamation can be applied only in exceptional circumstances, such as: fundamental violation of other fundamental rights, such as the case of incitement to hatred or violence, negative results experienced by the aggrieved party, such as a loss of work, a criminal prosecution, etc.

Also, the opinions exist that the requirement of the decriminalisation of defamation is only the recommendation of the international human rights organisations and do not have a peremptory character²². However, it should be noted that this requirement arise not only from the international human rights organisations but also from the Convention and partially the case-law of the European Court of Human Rights, which are obligatory. The legislator is obliged to take account of the consensus on the decriminalisation of defamation in international organisations and attend to the quality of the law governing defamation, so that citizens may foresee the consequences which a given action may entail and regulate their conduct. The laws must also include the necessary procedural safeguards to provide proper protection for the exercise of the right to freedom of expression. In other terms "(...) any regulation should itself comply with the requirements set out in Article 10 of the European Convention on Human Rights and the standards that stem from the relevant case law of the European Court of Human Rights"²³.

Lastly, the choice of Lithuania to consider defamation a criminal offence raises doubts with regard to its compatibility with the nature and purpose of criminal law, as well as the principle of criminal liability, as the last

²⁰ The Supreme Court of Lithuania decision adopted on 22 November 2005 in criminal case No. 2K-7-645/2005; The Supreme Court of Lithuania decision adopted on 29 June 2007 in criminal case No. 2K-7-408/2007; The Supreme Court of Lithuania decision adopted on 18 December 2012 in criminal case No. 2K-638/2012; The Supreme Court of Lithuania decision adopted on 2 April 2013 in criminal case No. 2K-171/2013; The Supreme Court of Lithuania decision adopted on 7 May 2013 in criminal case No. 2K-219/2013; The Supreme Court of Lithuania decision adopted on 29 April 2014 in criminal case No. 2K-174/2014.

²¹ The Council of Europe Secretariat General Directorate General of Human Rights and Legal Affairs Information Society Department, Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality [2012] at http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI%282012%29Misc11Rev2_en.pdf.

²² Conclusion of the Supreme Court of Lithuania on the draft law No XIIP-1420 on the amendments to the name of Chapter XXII, Article 152, and Articles 155, 232 and 290 repealed of the Criminal Code of the Republic of Lithuania and the draft law No XIIP-1421 on the amendments to Article 187 of the Code on Administrative Offences of the Republic of Lithuania [2014].

²³ The Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media adopted by the Committee of Ministers [2011], para 4, at <https://wcd.coe.int/ViewDoc.jsp?id=1835645>.

resort (*ultima ratio*), because the “straightforward” defamation cases (Art. 154 (1) of the Criminal Code of the Republic of Lithuania) are the same as the violation of honour and dignity under the Civil Code of the Republic of Lithuania (Art. 2.24). It only depends on the aggrieved party, as he assesses the offence and what kind of responsibility he will require from the offender. If public denial of the offence or the damage compensation is important to the aggrieved party, he will bring a civil action, and if the public bar of the offence of offender and the punishment of offender is more important and compensation for the loss is only an additional factor, he will call for a criminal prosecution. It complicates the application of criminal liability (criminal law) and poses a threat of unjust prosecution and punishment. Therefore, criminal law, being the strongest remedy of the state and defence of a person’s honour and dignity in criminal legal means, becomes questionable and dangerous both for the individual to whom this remedy is applied (also for his future) and the general public (for economics, condition of criminality, system of imprisonment, general prevention etc.).

In the consideration of the argument, it can be concluded that it is necessary to discuss whether the criminalisation of defamation, especially in the “straightforward” defamation cases in the Criminal Code of the Republic of Lithuania is valid and legitimate. It is considered that it is necessary to decriminalize partially the defamation in the Republic of Lithuania, leaving the criminal liability for defamation in exceptional circumstances (the case of incitement to hatred or violence, etc.), defamation making a serious action, vol. y. a criminal offence.“

Conclusion

1. The protection of personal honour and dignity are concerned also with the scope and protection of the freedom of expression. The main task in a situation, where personal honour and dignity and freedom of expression meet, is to strike the balance between these both values and the means of their protection, falls to both the legislature which creates or changes the content of such regulation and the court which must take such a decision in a given situation to ensure the protection of these two values balance. Giving unfounded priority to one of these subjective rights, other right would be violated in essence.

2. The European Court of Human Rights has not prescribed criminal provisions on defamation, but it has unequivocally criticised the use of criminal sanctions in response to acts considered to be defamatory. According to the Court, the custodial sentence for defending honour and dignity is compatible with the freedom of expression guaranteed by Article 10 of the Convention only in exceptional circumstances (the principle of proportionality).

3. There is a general consensus among the different specialised entities of international and regional organisations that not only the application of criminal sanctions but also the mere fact that such sanctions could be applied has substantial undesirable effects on the freedom of expression and information. International human rights organisations basically follow the trend of decriminalisation of the offence that interferes with a person’s honour and dignity.

4. The choice of Lithuania to consider defamation a criminal offence raises doubts with regard to the international commitments, especially to the protection of freedom of expression also, its compatibility with the nature and purpose of criminal law, as well as the principle of criminal liability, as the last resort (*ultima ratio*). The criminal liability for defamation (especially in the “straightforward” defamation cases) in Lithuania doubles the civil liability for the violation of honour and dignity and it is necessary to decriminalize partially the defamation in the Republic of Lithuania, leaving the criminal liability for defamation in exceptional circumstances (the case of incitement to hatred or violence, defamation making a criminal offence, etc.).

Bibliography

Legislation:

1. The United Nations, The Universal Declaration of Human Rights [1948] at <http://www.un.org/en/documents/udhr/>;
2. The United Nations, International Covenant on Civil and Political Rights [1966] at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>;

3. The United Nations, International Covenant on Economic, Social and Cultural Rights [1966] at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>;
4. The Council of Europe, The European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf;
5. Lietuvos Respublikos Konstitucija [1992] Žin. 33-1014;
6. Lietuvos Respublikos administracinių teisės pažeidimų kodeksas [1985] Žin. 1-1;
7. Lietuvos Respublikos baudžiamasis kodeksas [2000] Žin. 89-2741;
8. Lietuvos Respublikos civilinis kodeksas [2000] Žin. 74-2262;
9. Lietuvos Respublikos visuomenės informavimo įstatymas [1996] Žin. 71-1706;

Case-law:

1. *The Sunday Times v. The United Kingdom*, application no. 6538/74 [1979];
2. *Barfod v. Denmark*, application no. 11508/85 [1989];
3. *Castells v. Spain*, application no. 11798/85 [1992];
4. *Erdogdu v. Turkey*, application no. 25723/94 [2000];
5. *Altug Taner Akcam v. Turkey*, application no. 27520/07 [2001];
6. *Scharsach and News Verlagsgesellschaft mbH v. Austria*, application no. 39394/98 [2003];
7. *Cumpănă and Mazăre v. Romania*, application no. 33348/96 [2004];
8. *Radio France and Others v. France*, application no. 53984/00 [2004].
9. *Dammann v. Switzerland*, application no. 77551/01 [2006];
10. *Alithia publishing company LTD & Constantinides v. Cyprus*, application no. 17550/03 [2008];
11. *Azevedo v. Portugal*, application no. 20620/04 [2008];
12. The Supreme Court of Lithuania decision adopted on 22 November 2005 in criminal case No. 2K-7-645/2005;
13. The Supreme Court of Lithuania decision adopted on 29 June 2007 in criminal case No. 2K-7-408/2007;
14. The Supreme Court of Lithuania decision adopted on 18 December 2012 in criminal case No. 2K-638/2012;
15. The Supreme Court of Lithuania decision adopted on 2 April 2013 in criminal case No. 2K-171/2013;
16. The Supreme Court of Lithuania decision adopted on 7 May 2013 in criminal case No. 2K-219/2013;
17. The Supreme Court of Lithuania decision adopted on 29 April 2014 in criminal case No. 2K-174/2014.

Other sources:

1. The United Nations International Covenant on Civil and Political Rights Human Rights Committee, General comment No. 34 [2011] at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>;
2. The Council of Europe Parliamentary Assembly, Resolution 1577 Towards decriminalisation of defamation [2007] at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>;
3. The Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media adopted by the Committee of Ministers [2011], para 4, at <https://wcd.coe.int/ViewDoc.jsp?id=1835645>;
4. Warsaw Declaration of the Organization for Security and Co-operation in Europe Parliamentary Assembly [1997] at <http://www.oscepa.org/publications/declarations/1997-warsaw-declaration/182-1997-warsaw-declaration-eng/file>;
5. Bucharest Declaration of the Organization for Security and Co-operation in Europe Parliamentary Assembly [2000] at <http://www.osce.org/pa/37758?download=true>;

6. Paris Declaration of the Organization for Security and Co-operation in Europe Parliamentary Assembly [2001] at <http://www.oscepa.org/publications/declarations/2001-paris-declaration/214-2001-paris-declaration-eng/file>;
7. The Organization for Security and Co-operation in Europe Parliamentary Assembly, Report at The Fourth Winter Meeting in Vienna [2005] at <http://www.oscepa.org/meetings/winter-meetings/585-2005-winter-meeting-vienna>;
8. The Organization for Security and Co-operation in Europe, Ending the chilling effect. Working to repeal criminal libel and insult laws [2004] at <http://www.osce.org/fom/13573>;
9. The Council of Europe Secretariat General Directorate General of Human Rights and Legal Affairs Information Society Department, Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality [2012] at http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI%282012%29Misc11Rev2_en.pdf;
10. Conclusion of the Supreme Court of Lithuania on the draft law No XIIP-1420 on the amendments to the name of Chapter XXII, Article 152, and Articles 155, 232 and 290 repealed of the Criminal Code of the Republic of Lithuania and the draft law No XIIP-1421 on the amendments to Article 187 of the Code on Administrative Offences of the Republic of Lithuania [2014].

INSTAGRAM MANIA - PERSONAL SAFETY AND PRIVACY CHALLENGED BY A SOCIAL NETWORK

Endre Dudás¹

Abstract

Personal safety and privacy are closely related terms. The essence of privacy itself is hardly defined in this modern world. Nowadays, what is public and what is private depends on each individual's perspective. As a result, the boundary between public and private became very dubious. For example, along with the usage of smartphone, virtual social networks, cloud applications and other high-tech devices, the term privacy in a traditional way lost its meaning. There is an urgent need of redefining the privacy in accordance with the current trends. Without an appropriate definition of privacy the personal safety of the man is at stake. This research will aim to explore the photo sharing application "Instagram" and its terms of use, privacy policy, in order to compare it and check its compliance with the norms of civil and criminal law of the Croatian legal system. Suggested methods are analysis and systematic review. With in-depth analysis we can reach to the core of the privacy policy and terms of use; with systematic review we can observe its compliance with the Croatian legal system. With more than 300 million active users monthly, 20 billion media already shared, this application sets an exceptional research target. Privacy and security will be examined from the moment of downloading the application through starting to use it and getting addicted to it. (1) Is downloading an application already a green light for the public use of the uploaded content? (2) Do people need to reconsider the concept of such applications, and what can an ordinary user expect while uploading moments of his personal life to a cloud service where billions of other moments are shared by other users? (3) Can the social network craze harm the personal safety of a single individual? (4) Are children safe using these kinds of applications, what about the parental consent? This paper will tend to, but not limited to, answer these questions and explore the legal background from the point of civil and criminal law as well. As a conclusion, a set of measures are recommended to allow and insure the personal safety in a newly defined social media world approachable. This study makes a good demonstration for future research with bigger scope and extended comprehension including national and supranational legislation.

Keywords: *privacy, safety, Instagram, social network, photo-sharing.*

Introduction

Every day we witness evolution an on-going process of modification, adjustment, finding better solutions, which surrounds us even though it passes by unnoticed. As the world changes around us we thrive to improve, to adjust ourselves to the environment. Recently these changes are so rapid, innovations, improvements appearing daily, that it's difficult for people to keep up with this process. In the past fifty years our environment changed drastically, technological improvements were introduced on daily basis to improve the quality of life, to facilitate the living of an ordinary individual. One of the biggest leaps was the development of the internet, which opened a new field of communication, an easier way for the information to collide and to circle the World much faster than before. Today our everyday life is unimaginable without the variety of

¹ Endre Dudás received his Master Diploma in Law at Faculty of Law Osijek, University Josip Juraj Strossmayer, Croatia. He is currently a PhD student at the Doctoral School of University of Pécs, Hungary. His main focus and research topic is minority protection. Besides, this young researcher is interested in privacy policy, constitution law, international relations as well. His latest work was published in *Osteuropa Recht (Timea Drinóczi/Mirela Župan (eds.), Law – Regions – Development – Review. 3/2014)*; his review of a recent Constitutional Court decision about the Cyrillic script will be published in *Vienna Journal on International Constitutional Law* in 2015. Enthusiastic about the challenges of the modern world he would like to explore and solve the upcoming temptations in a present-day society. Email: endre.dudas@gmail.com.

programs and features based on the internet. While the development of the internet is still booming, people will thrive to improve his quality accordingly. With this on-going progress the legal environment must be modified accordingly as well. Due to the changes introduced in our lives on the daily basis, the definitions and formulations in legal texts must be updated. Innovative regulations must be provided for the corresponding factual changes in the environment.

The questions raised with the surrounding everlasting evolution are if we are capable to protect ourselves, can our safety be challenged by the innovations we introduce? This paper will focus on exploring a new surrounding created by the uncountable social networks released in the recent years. The public craze for the virtual identity developed a new form of life, a new perspective to the classical term of privacy and safety. An average individual on a daily basis uses several different apps from different social networks. The exact same individual never reads² the terms and conditions when applying for an account or when downloading the application. This ignorance can result in serious issues later on, when consumer finds himself in the middle of legal terms and new era formulated texts when trying to remove his account or delete some content he would not like to display any more.

Privacy and security in the 21st century

The privacy as a term is defined in several international documents³ correspondingly these definitions are implemented in the national legislation⁴ of member states. The formulation of privacy both in international documents and national legislation are limited to a very traditional view of privacy which can be easily described as having curtains on the windows, which will stop the passers-by to see what is happening inside. Referring to the rapid changes in the modern world, the traditional curtain is not adequate anymore⁵ to protect the privacy and safety of the average individual. Privacy is a key and one of the most important civil rights in the 21st century. Nowadays the protection of privacy must be provided in the internet-based community as well. The identity of an average individual changed drastically. In the cyber world a whole new identity of an „internet user“ is created which may differ in many ways from the individual in real life. According to the differences in the identities, a new privacy and security policy must be introduced to cover the deviation between these aspects. Privacy as a term by its entire means should be the right of the man to control what details of their lives will stay inside the house, and what information will go „public“.⁶

² In a recent research in the United Kingdom it was investigated that only 8% of the users actually read the „Terms and conditions“ when signing up for a social network or application. Usually these terms are hard to understand for an ordinary user, most of them skip it or just check it to move on with the registration, those who actually try to read it, find it too complicated and too scientifically formulated to be comprehensible. For further information about this research: <http://www.theguardian.com/money/2011/may/11/terms-conditions-small-print-big-problems>, [accessed: 27.02.2015.]

³ For example article 8 of *European Convention on Human Rights* defines privacy as follows „Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.“, Council of Europe, *European Convention on Human Rights* (ECHR), 1953, source: <http://www.hri.org/docs/ECHR50.html#C.Art8> [accessed: 08.03.2015.]

Article 17 of *International Covenant on Civil and Political Rights* also defines privacy in the following words „No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.“, United Nations, *International Covenant on Civil and Political Rights*, 1966, source: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed: 08.03.2015.]

⁴ The *Constitution of The Republic of Croatia* do not define privacy per se, but gives several approaches regarding this topic, therefore in the article 34. it states that „The home is inviolable.“, article 35. states „Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed.“ And in article 36. „The freedom and privacy of correspondence and all other forms of communication shall be guaranteed and inviolable.“, The Constitution of the Republic of Croatia, Official Gazette, NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 source: <http://www.sabor.hr/fgs.axd?id=17074> [accessed: 08.03.2015.]

⁵ Considering the fact that these definitions were introduced over a half decade ago their obsolescence is obvious. Our environment evolved drastically therefore these definitions need to be amended according to the corresponding changes.

⁶ S. Garfinkle, 'Database Nation: The Death of Privacy in the 21st Century' (Boston: O'Reilley, 2000) 4.

With the use of the internet based applications the boundary between public and private became dubious. People tend to share moments from their private lives that previously would only stay inside their homes. They have an urge to impress their “on-line” friends, followers, viewers with pictures, statuses and various other media. In this urge people tend to forget and cross the boundary between public and private putting on stake their safety. Publicly displaying personal information, pictures from private life may not endanger safety directly but in certain occasion may lead to unwanted consequences. Even though every internet based application or website has “*Terms & conditions*” as well as “*Privacy policy*” which shall be read before completing a registration, most of the users tend to skip this step to complete the registration as fast as possible. By skipping this step in the registration process it may lead to unsolicited consequences. If the user is not familiar with the exact policy of the used network his behaviour on the network might not be in accordance with the rules applicable to all of the registered accounts. From another point of view if the user is not aware of the exact rules applying to his information provided at the registration, and his uploaded and shared content he might consider that he is the sole owner of it, while in many cases it is not completely true. This is the most important reason why the user should first get familiar with the rules applying to the certain social network, before sharing any content or personal details. Some of the networks may claim a form of ownership⁷ of the uploaded content which may be a possible threat to security and privacy of the owner.

As we can see, privacy and safety, as closely related terms, are not defined clearly according to the current needs of society. With the definitions provided in the international documents and national legislation, it covers only a small area where an ordinary man would need protection. The urgent need of redefining the terms in our core documents is in correspondence with the current trends of spending most of our time “on-line”.⁸

Instagram, a social network challenging personal privacy and safety

*Instagram*⁹ is a free photo sharing application that enables its users to take photos, apply filters, and easily share them on the application, as well as other social networks such as *Facebook*, *Twitter*, *Foursquare*, *Tumblr*, *Flickr*, and *Posterous*. It allows its users to capture and customize their photos and videos with several custom-built filter effects. This San Francisco based company was founded by *Kevin Systrom* and *Mike Krieger* in 2010, and then in 2012 acquired by Facebook, the internet giant star, with a price of over one billion U.S. dollars. The core value of this app relies on its more than 300 million monthly active users, and more than 20 billion media already shared and this number is rising drastically each day.¹⁰

The fully functioning application is accessible solely through mobile platform; the desktop version does not allow uploading or sharing any content. In order to create an account it has to be downloaded to the users smartphone or tablet computer. While downloading, it will ask the user to accept the “*Terms & conditions*” which includes the “*Privacy policy*” as well. It gives an option to read the terms, but most of the users just check the box as read and continue with the installation process. The first question shall be raised here, is downloading an application already a green light for the public use of the uploaded content? The terms and conditions of the application states the following “*Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service*”¹¹. That means that the application does not claim ownership, but reserves the right to use not just the content uploaded to, but uploaded through the service, which means that it has an exclusive right to use all the media that went through its system. In the Croatian legal system it is defined that the *copyright belongs, by its*

⁷ For further explanation see the next chapter.

⁸ „The Internet has moved from an occasional tool to one of the principal ways we communicate, entertain ourselves, and do work. The Internet has radically transformed the way we live our lives. The net changes in consumer surplus and economic activity, however, are difficult to measure because some online activities, such as obtaining news, are new ways of doing old activities while new activities, like social media, have an opportunity cost in terms of activities crowded out.“ S. Wallsten, ‘What Are We Not Doing When We’re Online’, (NBER Working Paper No. 19549, 2013)

⁹ Hereinafter referred to as “*application*”.

¹⁰ Source: <https://www.crunchbase.com/organization/instagram> [accessed: 08.03.2015.]

¹¹ Instagram terms of use, source: <https://help.instagram.com/478745558852511> [accessed: 08.03.2015.]

nature, to the natural person who has created a copyright work.¹² The media uploaded to the application by its all means fits the description of a copyright work.¹³ The mentioned provision gives a right to the application to re-use the shared content in campaigns, ads, on other social media services promoting the application, and to provide it to third party services for further use without any fees and any legal liability.

The application unilaterally limited the liability to *one hundred U.S. dollars (\$100)*. This limitation is applicable for all the damages caused by the application or any loss or damages experienced while using it.¹⁴ The Croatian Civil Code¹⁵ states the following “*The liability for intent or gross negligence cannot be pre-contract excluded or limited. But the court may at the request of the contracting parties undo any contractual provision on the exclusion and limitation of liability for ordinary negligence, if such an agreement stemmed from a monopoly position of the debtor, or even from an uneven relationship of the parties.*”¹⁶ Furthermore for the damages caused by unauthorized use or violation of a copyright work a legal person may be punishable, according to the Croatian legal provisions, from 5,000.00 to 50,000.00¹⁷ Croatian kuna.¹⁸

Furthermore the application reserves the right to modify or terminate the service or access to the service for any reason, without notice, at any time, and without liability to user.¹⁹ The user can deactivate his account by logging into the service and completing a form available on the application. If the application terminates the users access to the service or the user uses the form to deactivate his account, his photos, comments, likes, friendships, and all other data will no longer be accessible through his account, but those materials and data may persist and appear within the service. That means if the user deletes the account every detail connected to his account and all the content shared will be still accessible for the application and could be used in accordance with their rights mentioned above.²⁰

¹² Law on Copyright and Related Rights, Official Gazette of Croatia 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, source: <http://www.zakon.hr/z/106/Zakon-o-autorskom-pravu-i-srodnim-pravima> [accessed: 08.03.2015.]

¹³ It is defined in the *Law on Copyright and Related Rights* that „A copyright work is an original intellectual creation in the literary, scientific and artistic domain, having an individual character, irrespective of the manner and form of expression, kind, value or purpose, unless this Act provides otherwise. Copyright works are in particular: ...*Photographic works and works produced by a process similar to photography...*“

¹⁴ “*Under no circumstances will the Instagram parties be liable to you for any loss or damages of any kind (including, without limitation, for any direct, indirect, economic, exemplary, special, punitive, incidental or consequential losses or damages) that are directly or indirectly related to: (a) the service; (b) the Instagram content; (c) user content; (d) your use of, inability to use, or the performance of the service; (e) any action taken in connection with an investigation by the Instagram parties or law enforcement authorities regarding your or any other party's use of the service; (f) any action taken in connection with copyright or other intellectual property owners; (g) any errors or omissions in the service's operation; or (h) any damage to any user's computer, mobile device, or other equipment or technology including, without limitation, damage from any security breach or from any virus, bugs, tampering, fraud, error, omission, interruption, defect, delay in operation or transmission, computer line or network failure or any other technical or other malfunction, including, without limitation, damages for lost profits, loss of goodwill, loss of data, work stoppage, accuracy of results, or computer failure or malfunction, even if foreseeable or even if the Instagram parties have been advised of or should have known of the possibility of such damages, whether in an action of contract, negligence, strict liability or tort (including, without limitation, whether caused in whole or in part by negligence, acts of god, telecommunications failure, or theft or destruction of the service). In no event will the Instagram parties be liable to you or anyone else for loss, damage or injury, including, without limitation, death or personal injury. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you. In no event will the Instagram parties total liability to you for all damages, losses or causes or action exceed **one hundred united states dollars (\$100.00)**.”, source: <https://help.instagram.com/478745558852511> [accessed: 08.03.2015.]*

¹⁵ The Croatian Civil Code, Official Gazette of Croatia, NN 35/05, 41/08, 125/11, source: <http://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima>, [accessed: 08.03.2015.]

¹⁶ Instagram INC. was challenged in court when they introduced the latest “*Terms & conditions*”, but the lawsuit was dismissed by the federal judge. For further reference see Lucy Fuens, individually, and on behalf of all others similarly situated vs. Instagram, Inc., a Delaware Corporation; and Instagram, LLC, a Delaware LLC, [2012], Case3:12-cv-06482-NC.

¹⁷ Based on the current currency index on the 8th of March 2015 5,000.00 kuna equals 658.717 euro, while 50000,00 kuna equals 6,586.58 euro.

¹⁸ Article 189. Of Law on Copyright and Related Rights, Official Gazette of Croatia 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, source: <http://www.zakon.hr/z/106/Zakon-o-autorskom-pravu-i-srodnim-pravima> [accessed: 08.03.2015.]

¹⁹ Not to mention that if the users store some media on the service it may cause him irreversible damage if the application terminates the access without any further notice.

²⁰ Instagram terms of use, source: <https://help.instagram.com/478745558852511> [accessed: 08.03.2015.]

The application limits the age of the users to at least 13 years.²¹ The question raised how can the application check the age of the user? There is no way to check it, the application will be working with the data provided at the registration regardless if they are accurate or not. Therefore children younger than 13 years may use it without any consequences if they modify their data provided at registration. In that case the same set of rights will be applicable to their content and the application will have a right for further distribution. Parents may end up seeing their children's shared media in some commercials or other on line content depending on the applications needs.

All these examples examined from the applications "*Terms & conditions*" display a certain aberration from the Croatian legal system. The privacy of a user is at stake since all his content can be redistributed by the application without any further notice. Only by ticking the box of the "*Terms & conditions*" while downloading, the user gives permission for his content to be re-used by the application. The application limited his liability as well, and even though according to the norms of the Croatian legal system it should be responsible up to a much higher amount of damage, while accepting the terms the user accepts this deviation from the norms in force. Parental consent is not needed, even though it would be necessary since the parents are the legal representatives and guardians of the underage person. They should be entitled to control, to give consent or at least to be notified about the legal transmission of their children's copyright work, which may happen if the application decides to redistribute the underage children's shared content.

An average user may not think about these terms, and may not give attention to the complicatedly written and scientifically structured text. Every user should reconsider the use of the application since their private media, uploaded content will become public and redistributable the moment they upload it to the application.²² Personal safety is at great danger in the social media world. The core terms of the legal system providing protection to privacy and safety must be redefined according to the current needs to provide corresponding protection to the individuals who engage in *the social network craze*.

Conclusion

Instagram is just one of the examples of the dozens of social network applications being used daily. Without any thinking users gave consent to several regulations in the applications "*Terms & conditions*" which are not in accordance with the Croatian legal system and the norms in force. Solely based on this fact the users safety is in great potential danger because his private contents can be redistributed without any notice which may cause not only confusion, but real damage as well. Not only Instagram, but the dozens of other social networks represent a potential harm on the users safety and privacy without any appropriate regulation. The current core provisions in the Croatian legal system regarding privacy and personal safety do not regulate the field of social networks. There is an urgent need of the introduction of new norms that will clearly regulate the users privacy and safety in the modern social media world approachable.

The users should be re-educated to be more careful when signing up to social networks, to be responsible and read the terms and conditions of the service. From another point of view there is a pressing need to create new terms and conditions which would be more user friendly, and more understandable for a person without any legal knowledge. Parents of underage children should be more aware of what may happen if they give a free will to their children. They should be more cautious with all the social media their children might use. Even though we promote free will a basic form of control should be provided for the personal safety of the underage person.

Furthermore the social media craze represents a potential damage not only to those who use the applications, but also for all those who may appear on the shared media, since they cannot control the distribution of the media they appear on. With the sole right of free distribution this potential damage is even greater. The corresponding authorities must provide a more suitable form of protection and redefine the current provisions in force in order to protect their citizens. Regardless of the consent the users must be educated how to use properly this application to avoid future harm. As mentioned above, Instagram is just one of the applications with potentially harmful "*Terms & conditions*". There are dozens other social media

²¹ *Ibid.*

²² And not only the application, but other users can as well redistribute the shared content.

networks which the average individual uses daily that might represent even greater harm to the safety and privacy.

Bibliography

1. S. Garfinkle, 'Database Nation: The Death of Privacy in the 21st Century' (Boston: O'Reilly, 2000)
2. S. Wallsten, 'What Are We Not Doing When We're Online', (NBER Working Paper No. 19549, 2013)
3. Lucy Fuens, individually, and on behalf of all others similarly situated vs. Instagram, Inc., a Delaware Corporation; and Instagram, LLC, a Delaware LLC, [2012], Case3:12-cv-06482-NC
4. Council of Europe, European Convention on Human Rights (ECHR), 1953, source: <http://www.hri.org/docs/ECHR50.html#C.Art8>
5. United Nations, International Covenant on Civil and Political Rights, 1966, source: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
6. The Constitution of the Republic of Croatia, Official Gazette, NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 source: <http://www.sabor.hr/fgs.axd?id=17074>
7. Law on Copyright and Related Rights, Official Gazette of Croatia 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, source: <http://www.zakon.hr/z/106/Zakon-o-autorskom-pravu-i-srodnim-pravima>
8. The Croatian Civil Code, Official Gazette of Croatia, NN 35/05, 41/08, 125/11, source: <http://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima>
9. Instagram terms of use, source: <https://help.instagram.com/478745558852511>
10. Terms and conditions: not reading the small print can mean big problems, source: <http://www.theguardian.com/money/2011/may/11/terms-conditions-small-print-big-problems>

INTERNATIONAL LEGAL FRAMEWORK TO COMBAT TRAFFICKING IN PERSONS AS AN EXAMPLE OF A RESPONSE TO SECURITY THREATS POSED BY TRANSNATIONAL ORGANIZED CRIME

Anna Głogowska-Balcerzak¹

Abstract

The second half of twentieth century has witnessed a change in the perception of security - the concept evolved to acknowledge contemporary threats such as terrorism, organized crime or natural disasters. The suppression of transnational criminal activities has recently become one of the main challenges for the international community. Globalized world creates countless opportunities - in the past decades, the opening up of world markets has facilitated the movement of capital, goods, services and people. Among actors who have benefited from these developments are also those engaging in illicit activity, such as trafficking in drugs, arms, corruption and trade in human beings. Unfortunately, new methods of communication, faster means of transportation and increasing global competition have rendered the exploitation of human beings easier and more profitable. Trafficking in persons is a severe crime and a serious human rights violation, it affects nearly all states in the world. The paper focuses on the international framework to combat trafficking in persons developed by the United Nations, with the emphasis on the measures that can contribute to combat other forms of transnational organized crime, as many of illicit activities often occur contemporaneously. Brief analysis of Trafficking Protocol will lead to the question about the effectiveness of this instrument, its limitations and possible future developments.

Keywords: trafficking in persons, human trafficking, transnational organized crime, transnational criminal law

Introduction: Human security and Transnational organized crime

In the twentieth century traditional concept of security that used to be perceived in terms of territory proved to be too narrow. Perception of security has gradually evolved to include security of the individuals and not only of states - as it is demonstrated by the example of North Korea, territorial security does not necessarily equals human security.² Among most serious contemporary threats there are phenomena such as terrorism, organized crime and natural disasters.³ This broad idea of security has given rise to the concept of Human Security that was developed after the end of Cold War era, when the threat of armed conflict between Western and Eastern Bloc diminished.⁴ Although the very idea of Human Security is not universally accepted, nor clearly defined and still requires further attention, it serves as a starting point to indicate, that there are different threats to the security not necessarily related to armed conflicts and threats to the territorial integrity of states.

Organized crime and the inherent violence connected with it pose a major threat to security of human beings worldwide. That is why suppression of transnational criminal activities has recently become one of the main challenges for the international community - not without a reason the phenomenon of cross-border

¹ Doctoral candidate at the Chair of international law and international relations, Faculty of Law and Administration, University of Lodz, legal adviser at Women's Rights Centre and a regional partner of La Strada foundation against slavery and trafficking in persons.

² G. Michałowska, 'Bezpieczeństwo ludzkie' [in:] J. Symonides (ed.) 'Świat wobec współczesnych wyzwań i zagrożeń' (Warsaw: Scholar, 2010) 227-234

³ It is also important to note that contemporary security threats are often intertwined - organized criminal activities are being used as a source of income for funding of rebel groups or terrorists, posing a threat not only to individuals but also to state authorities.

⁴ G. Michałowska, 'Bezpieczeństwo ludzkie ...' *op. cit.*, 227

organized crime is often termed as "the dark side of globalization".⁵ Globalized world creates countless opportunities - in the past decades, the opening up of world markets has facilitated the movement of capital, goods, services and people. Among actors who have benefited from these developments are also those engaging in illicit activities, such as trafficking in drugs, arms, corruption and trade in human beings. Unfortunately, new methods of communication, faster means of transportation and increasing global competition have rendered the exploitation of human beings easier and more profitable.

Transnational criminal law

International response to organized crime form a part of a new area of law - transnational criminal law. Although many years ago Phillip Jessup spoke about transnational law,⁶ it has found its way into treaty usage in the year 2000, namely in Transnational Organized Crime Convention (hereinafter: UNTOC).⁷ From this moment we can observe emergence of transnational criminal law - a branch of international law that deals with "indirect suppression, through domestic laws and measures, of criminal activities which have actual or potential cross-boundary effects".⁸ Most important feature of suppression conventions is the obligation to criminalize certain acts in the domestic legal systems of state-parties. That is why, unlike in the area of international criminal law, a person who commits a crime in an object, not a subject of given convention.⁹ As Crawford and Olleson put it: "pirates do not acquire international legal personality by being hanged at the yardarm"¹⁰

Conventions dealing with crimes of transnational nature date back way into nineteenth century. Most obvious historical examples of such treaties are those concerning piracy or slave trade, but the list of suppression conventions created over the years is much longer and more diverse (including *inter alia* crimes such as drug trafficking, unlawful seizure of aircraft or corruption). Between 1904 and 1933 four treaties concerning trafficking of women and girls were adopted, but the understanding of what constitutes trafficking was different from contemporary definition of this crime. In 1949 all of them were replaced by Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others,¹¹ which reflected abolitionists tendencies towards prostitution and therefore did not gained recognition by some of the states. Despite its low ratification rate for many years it has influenced perception of trafficking as "procuring, enticing or leading away, for purposes of prostitution".¹²

Contemporary international legal framework to combat human trafficking is a result of a broader UN efforts to strengthen global response to organized crime that started in the seventies of twentieth century and intensified with the establishment of the Commission on Crime Prevention and Criminal Justice in 1991.¹³ The process was finalized in 2000 with the adoption of UNTOC, which entered into force in 2003, after receiving forty ratifications.¹⁴ UNTOC sets out general rules to suppress organized crime and is often referred to as "parent convention" as it is supplemented by three protocols dealing with specific types of crimes: illicit manufacturing and trafficking in firearms, trafficking in persons and smuggling of migrants.¹⁵ In addition, the UNTOC itself establish four categories of offences: participation in an organised criminal group, money laundering, corruption and obstruction of justice.

⁵ Z.W. Galicki, 'Transnational organized crime' in: A. Łazowski, R. Ostrihansky (eds.) 'Współczesne wyzwania europejskiej przestrzeni prawnej' (Zakamycze: 2005) 659

⁶ P. C. Jessup, 'Transnational Law' (New Haven: Yale UP 1956) 3

⁷ R. Clark, 'Reflections on International Criminal Law and on Jurisdiction' (2012) 5

⁸ N. Boister, 'Transnational Criminal Law?' EJIL [2003] vol. 14, nr 5 p. 955.

⁹ R. Clark, 'Reflections on International Criminal Law and on Jurisdiction' (2012) 4-5

¹⁰ J. Crawford, S. Olleson, 'The Nature and Forms of International Responsibility' in: M. Evans (ed.) 'International Law' (Oxford: Oxford University Press 2003) 447

¹¹ Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others [1949] 96 UNTS 271.

¹² *Ibid.*, art. 1(1)

¹³ Z.W. Galicki, 'Transnational organized crime' in: A. Łazowski, R. Ostrihansky (eds.) 'Współczesne wyzwania europejskiej przestrzeni prawnej' (Zakamycze: 2005) 660

¹⁴ UN Convention against transnational organized crime [2000] 2225 UNTS 209, art. 38

¹⁵ A. Schloenhardt, 'Transnational organised crime' in: N. Boister, R.J. Currie (eds.) 'Routledge Handbook on Transnational Criminal Law' (New York and London: Routledge 2015) 410

Trafficking in persons

Trafficking in human beings is a severe crime, which - in one form or another - affects nearly all countries in the world.¹⁶ It also constitutes a serious violation of human rights, as this practice runs contrary to the prohibition of slavery, servitude and forced labour which can be found in most fundamental human rights treaties.¹⁷ The paper will focus on the international framework to combat trafficking in persons, with the emphasis on the measures that can contribute to combating other forms of transnational organized crime, as many of illicit activities often occur contemporaneously. The closer study of Trafficking Protocol will lead to the question about the effectiveness of this instrument, its limitations and possible future developments.

Until the adoption of Trafficking Protocol there was no internationally agreed definition of "trafficking in persons". At the end of twentieth century different actors attributed different meaning to this term, often one best suiting their agenda. The lack of definition led to uncoordinated and sometimes even contradictory actions of national authorities that hampered effective cross-border cooperation between states. The situation before the adoption of the Protocol was perfectly summarized by R. Coomaraswamy, the Special Rapporteur on violence against women:

"At present, there is no internationally agreed definition of trafficking. The term 'trafficking' is used by different actors to describe activities that range from voluntary, facilitated migration, to the exploitation of prostitution, to the movement of persons through the threat or use of force, coercion, violence, etc. for certain exploitative purposes."¹⁸

Situation has changed with the adoption of Trafficking Protocol, according to which: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁹ The definition consists of three elements (the act, the means and the purpose of exploitation) and is very broad. It was designed to embrace all persons engaging in trafficking process and simultaneously to recognize that trafficking occurs in various forms (most importantly, that it is not limited to the exploitation of prostitution as it was perceived for almost a century). The definition of trafficking in children consists of only two elements, as it is not required for any of the means to be employed by trafficker.²⁰ Therefore whichever of listed actions undertaken with the intent to exploit a person under the age of eighteen should qualify as trafficking within the meaning of the Protocol. It also provides that the consent of a victim is irrelevant because the second element of the definition serves to vitiate any assent given, which is explicitly stated in art. 3(b).

Palermo Protocol has entered into force in December 2003 and currently has 166 state-parties. For many of them decision to become bound by this instrument has resulted in many changes in domestic legislation. According to Global report on trafficking in persons, as a result of adoption of Palermo Protocol 45% state-parties thereto have introduced the crime of trafficking in persons into their laws for the first time. It

¹⁶ Either as a source, destination or transit country.

¹⁷ "In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention." *Rantsev v. Cyprus and Russia*, application no 25965/04 [2011] ECHR.

¹⁸ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68 [2000] 8

¹⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing UN Convention against Transnational Organized Crime [2000] 2237 UNTS 319 (hereinafter: Trafficking Protocol) art. 3(a)

²⁰ Trafficking Protocol, *op. cit.*, art. 3(c) and (d)

also induced many changes in criminal legislations of those states, who already criminalized at least some aspects of conduct described by the definition of trafficking in persons.²¹

In the course of analysis of Trafficking Protocol it is important to take into account its relationship with the parent convention - provisions of UNTOC apply *mutatis mutandis* to the protocols and therefore its general rules constitute a part of anti-trafficking framework.²² According to the article 3 of UNTOC Convention it applies to the prevention, investigation and prosecution of certain offences that are "transnational in nature and involve an organized criminal group". This provision has led to uncertainty regarding the scope of application of this instrument and even has caused strong criticism.²³ None the less, to get the whole picture it is necessary to invoke article 34 of UNTOC, according to which the offences established in accordance with this Convention and its Protocols "shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group." Therefore the Protocol is not only a mean to combat trans-boundary instances trafficking in persons, but it also serves as a tool to harmonize criminal law of state-parties, requiring criminalization of this crime in their domestic legal systems. In fact obligation to criminalize trafficking is the central and mandatory obligation of all states that ratified that instrument.²⁴

In order to effectively suppress transnational instances of trafficking in persons the Protocol and its parent convention establish broad range of measures facilitating cooperation between state-parties. Standard procedures such as extradition or mutual legal assistance are supplemented by mechanisms establishing joint investigations and creating possibility of transferring of criminal proceedings. In addition, Trafficking Protocol sets forth specific provisions on boarder measures, as well as arrangements concerning legitimacy and validity of identity documents. The purpose of the Protocol stated in art. 2 is often referred to as "4P" paradigm: prevention, protection, prosecution and promotion of cooperation. Unfortunately not all of those objectives received equal attention from the drafters of this instrument - whereas provisions dealing with prosecution and cooperation among states are well developed, those concerning assistance and protection of trafficked persons are not satisfactory. This conclusion leads to the criticism of the UN anti-trafficking framework, that will be briefly presented in the last part of this paper.

Critique

Trafficking in persons is a compound phenomenon and there are many important aspects to be taken into account when responding to it. It is often pointed out that existing mechanisms focus on perpetrators of that crime, shifting attention away from the root causes of exploitation, such as poverty and deepening inequalities between societies.²⁵ More and more authors argue that any effort to combat trafficking in persons requires a response that will address the welfare of human beings in addition to the standard criminal justice response.²⁶ What is more, it has been pointed out that the strengthening of border measures required by Palermo Protocol can have adverse effect on the rights and freedoms of victims of trafficking and others.²⁷ Particularly vulnerable groups include migrants, refugees and internationally displaced persons.²⁸

²¹ United Nations Office on Drugs and Crime, 'Global report on trafficking in persons' [2009] 24

²² Trafficking Protocol, *op. cit.*, art. 1(2)

²³ J.C. Hathaway, 'The Human Rights Quagmire of Human Trafficking' [2008] Virginia Journal of International Law vol. 49 nr 1, 9-10

²⁴ UN Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (New York and Geneva: 2010) 186

²⁵ "Extreme exploitation is a structural problem, not a problem of human nature. Unless we deal with the 'root causes', which I locate in inequality, then it will continue." B. Andersons, 'Extreme exploitation is not a problem of human nature' [2014] article available at: <<https://www.opendemocracy.net/beyondslavery/bridget-anderson/extreme-exploitation-is-not-problem-of-human-nature>>; see also: B. Anderson, 'Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates' (Centre on migration, policy and society working paper no. 48, University of Oxford 2007) 4

²⁶ S. Okubo, L. Shelley (eds.), 'Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspectives' (New York and London: Routledge 2011)

²⁷ J.C. Hathaway, 'The Human Rights Quagmire of Human Trafficking' [2008] Virginia Journal of International Law vol. 49 nr 1, 6

²⁸ UN Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (New York and Geneva: 2010) 83

Although, as indicated in article 2 of the Protocol, one of the aims of this instrument is to provide protection and assistance to victims of trafficking in persons with full respect for their human rights, provisions dealing specifically with these issues are rather scarce. As A. Gallagher pointed out, the emphasis of the Protocol remains firmly on the interception of traffickers rather than the identification and protection of victims.²⁹ Most of the provisions dealing with protection of victims are phrased as recommendations and do not impose any obligations on state-parties. This is one of the weakest points of the Protocol. Paradoxically it can impact negatively its main area of interest, *i.e.* prosecution of traffickers because in many instances victims are the only witnesses that could provide valuable evidence. Without proper assistance however they may be less willing to cooperate with authorities. And even those rudimentary rights contained in the Protocol depend on the willingness and ability of state's officials to identify victims of trafficking in persons as they should, instead of treating them as economic migrants who has been smuggled across the borders.³⁰ Unfortunately, as reports of many states show identification of victims encounters numerous obstacles - law enforcement officials are not properly trained or simply unwilling to identify a person as trafficking victims because of the difficulties connected with prosecution of this particular crime.³¹

Conclusion

In the wake of adoption of Palermo Protocol there has been many new instruments devoted to suppression of trafficking in Persons. Most of them adopted same legal definition, which makes anti-trafficking framework more coherent.³² Most importantly however, the post-Palermo developments have moved towards a human rights-based approach to trafficking, which is a welcome change. Positive developments have occurred especially on the regional level. In 2005 Council of Europe adopted Convention on Action against Trafficking in Human Beings, which deal with the issue of trafficking in a comprehensive manner, avoiding some of the flaws of Palermo Protocol.³³ Also European Union developed its own anti-trafficking legislation, with the Directive 2011/36/EU in the foreground.³⁴

To conclude, it must be stressed that this short paper is only an introduction to the topic, containing summary of part of my research in this field and therefore it was impossible to avoid certain simplifications. Its aim is to point at some of the most important aspects of the international response to trafficking in persons. As indicated above the legal framework to combat this crime is quite well developed. Nevertheless, despite the fact that so many states have adopted legislation criminalizing trafficking and providing basis for cooperation among them in this regard, it is often signaled that enforcement of those rules remains ineffective. Combating transnational organized crime is one of the most important tasks for the international community nowadays, combating trafficking in persons however requires special attention as it is very sensitive area, requiring not only criminal justice response, but also human rights-based approach.

²⁹ A.T. Gallagher, 'Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis' [2001] Human Rights Quarterly, vol. 23, 995.p. 994

³⁰ It is important to note, that often a situation that started as smuggling can change into severe exploitation of a migrant which will fall into the scope of trafficking in persons definition. There are many examples of individuals being exploited and forced to work off their debt, being hold against their will by his or hers smuggler or his accomplices (see for example: verdict of U.S. District Court for the Southern District of Texas in the United States v. Armando Soto-Huato case). On the distinction between trafficking in persons and smuggling of migrants see: T. Obokata, 'Trafficking and Smuggling of Refugees from a Human Rights Perspective' paper presented on the International Conference on Refugees and International Law: The Challenge of Protection (University of Oxford, Refugee Studies Centre: 2006) 4; A. T. Gallagher, 'Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis' [2001] Human Rights Quarterly, vol. 23, 995

³¹ It is often pointed out that trafficking in persons is a "difficult" crime for prosecutors and judges. Lack of evidences other than victims' testimonies, involvement of foreigners and transnational character are reasons why law enforcement officials often decide to prosecute traffickers for different crimes. Such decision deprive victims of the rights guaranteed by Palermo Protocol and subsequent anti-trafficking conventions.

³² SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution [2002] art. 1(3)

³³ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report [2005] ETS 197

³⁴ Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1

Bibliography

Books and articles:

1. Andersons B., 'Extreme exploitation is not a problem of human nature' [2014] article available at: <<https://www.opendemocracy.net/beyondslavery/bridget-anderson/extreme-exploitation-is-not-problem-of-human-nature>>
2. Anderson B., 'Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates' (Centre on migration, policy and society working paper no. 48, University of Oxford 2007) 4
3. Boister N., 'Transnational Criminal Law?' [2003] EJIL vol. 14, nr 5
4. Crawford J., Olleson S., 'The Nature and Forms of International Responsibility' in: M. Evans (ed.) 'International Law' (Oxford: Oxford University Press 2003)
5. Clark R., 'Reflections on International Criminal Law and on Jurisdiction' [2012]
6. Gallagher A. T., 'Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis' [2001] Human Rights Quarterly, vol. 23
7. Gallagher A.T., 'The International Law of Human Trafficking' (Cambridge University Press 2010).
8. Hathaway J.C., 'The Human Rights Quagmire of Human Trafficking' [2008] Virginia Journal of International Law vol. 49, nr 1
9. Jessup P.C., 'Transnational Law' (New Haven: Yale UP 1956)
10. Michałowska G., 'Bezpieczeństwo ludzkie' in: Symonides J. (ed.) 'Świat wobec współczesnych wyzwań i zagrożeń' (Warsaw: Scholar 2010)
11. Obokata T., 'Trafficking and Smuggling of Refugees from a Human Rights Perspective' paper presented on the International Conference on Refugees and International Law: The Challenge of Protection (University of Oxford, Refugee Studies Centre: 2006).
12. Okubo S., Shelley L. (eds.), 'Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspectives' (New York and London: Routledge 2011)
13. Schloenhardt A., 'Transnational organised crime' in: N. Boister, R.J. Currie (eds.) 'Routledge Handbook on Transnational Criminal Law' (New York and London: Routledge 2015)

Legal acts:

1. Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report [2005] ETS 197
2. Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others [1949] 96 UNTS 271
3. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1
4. UN Convention against transnational organized crime [2000] 2225 UNTS 209
5. UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing Convention against Transnational Organized Crime [2000] 2237 UNTS 319
6. SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution [2002]

Case law:

1. *Rantsev v. Cyprus and Russia*, application no 25965/04 [2011] 51 EHRR 1

Other sources:

1. Human Security Centre, '*Human Security Report 2005: War and Peace in the 21st Century*' (New York: Oxford University Press, 2005) VIII

2. Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68 [2000] 8
3. United Nations Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (New York and Geneva: 2010)
4. United Nations Office on Drugs and Crime, 'Global report on trafficking in persons' [2009]

RULE OF LAW IS THE BASIS FOR SECURITY. CONVERGENT PHILOSOPHY BETWEEN THE WEST AND THE MIDDLE-EAST

Malek Hamad¹

Abstract

Convergence of intelligence and philosophy between humans is a reality. Similarities diminish the thought as it will converge to only one type of thought, but fortunately, the diversity brings richness of thought as well as a mosaic painting. So, there is a link between Westerners and Arabs concerning the exchange of ideas. Before this, there has always been social connection that drove intellectual and philosophical convergence. This connection between West and East is very old and can be shown by examples such as *Susa* weddings, Cordoba's universities and more recently Mediterranean region forums. Indeed, there is a heritage of ideas from one civilization to the other. Consequently, either a deepening of some ideas will be built or ideas will be reformed.

Is there a convergence between Westerners' philosophy of rights and laws and Arabs' philosophy of rights and laws concerning the security? Also, what is the relationship between the form of the State and the law to bring security and tranquility for humans? And what are the lessons that have to be reflected on the current Arab rulers to respect humans?

Keywords: Security, Law, Rights, State.

Introduction

There is no doubt that the law aims to achieve security and this principle exists in the human conscience since the start of history, irrespective of people's beliefs or their countries. Ishtar, The king of the Sumerian city of Essen, in 1850 BC became famous for his reforming movement concerning his written law that he came up with as a sign of respect to "gods". Ishtar said "that the gods had given him the rule of Sumerians and Akkad to strengthen security and prosperity for its people, and those laws liberated the people of Sumer and Akkad of slavery imposed on them before him".

This affected Hammurabi, who made his law. This law was engraved on a pillar containing more than 280 articles, and at the top of the pillar the sun was painted, this sun symbolized their faith, this was a source of inspiration from which they derived laws. This meant that laws were not imposed by rulers. This way, people gave this city a historical high rank in respecting human laws, the pillar was highly esteemed even more than Hammurabi and the people, and the sun above them. It is a philosophy that addresses the minds of the time, and made them feel safe.

If the Hammurabi was influenced by the civilization of the Sumerians, it would make sense that Arabs were influenced by west civilization. This article, argues that this influence between east and the west is mutual intellectually and philosophically.

In the first side of the article, we will shed light on the convergence of philosophy around the right which is the basis of law. And down to the second side, which will explain the convergence of philosophy that emphasizes the philosophy of law and the right to security, linked to the nature and form of the state. We will consider philosophy that rejects that the state is above the law (the dictatorship of the State) to the philosophy of the rule of law (Democratic state) which respects human rights. Then, arriving to a conclusion which recommends the Arab regimes to respect this philosophy which is common in the Human thought through the history. That would be by enacting or activating laws and texts including Human rights.

¹ *Doctoral Candidate in Law, Reims University, France. Assistant lecturer in Criminal law at Damascus University, Syria, Faculty of Law (Currently on Leave for Phd).*

1. Philosophy of Right and sacred law in human thought

1.1. Prioritizing right is security

The philosophy 'Rights precede duties' is deeply rooted in the human conscience, from which it derives its nobility and its safety, no matter the differences between people. Before we demand that people fulfill their duties, we must enable them to take their rights, because rights precede all duties.

The philosophers of natural law, despite their differences, agree that justice requires that rights be placed before duties. The history of human rights is linked to natural law which makes rights a prerequisite for duties, given that rights are given to us by nature. The German philosopher Wolf (1679-1754) says in his book, 'Natural Law', 'when we speak of natural law, we do not mean solely a natural law, but rather the right which man enjoys by virtue of that law.' The emergence of duty, on the other hand, has been linked to the necessities of social life within the state. The authority of the state, according to the philosophers of natural law, is bound by the rules of this latter, which justifies the precedence of rights over duties².

The English philosopher John Locke (1632-1704) believed that when natural rights are bound inextricably to natural laws, and duties are based on positive laws, it is possible to say that rights take precedence over duties on the basis that natural laws take precedence over positive laws. Given that natural society precedes political society, natural rights take the form of biological needs on which human existence depends, like the right to freedom, the right to life and the right to property. This means that all duties would disappear if the right of the individual to life was lost. Locke says: 'When natural rights are necessary for human existence, then they take precedence by virtue of this nature over all duties³.'

In the third article of the Declaration of the Human Rights, published during the French Revolution in 1789 and influenced by the philosophers of natural law, it is written that 'the aim of all political association is the preservation of the natural and imprescriptible human rights. These rights are liberty, property, security, and resistance to oppression.'

We will conclude here with the point that Arab and Islamic culture also has this European idea, and agrees with the school of natural law on the precedence of rights over duties. The Caliph 'Umar, holder of executive power in the Caliphate, said: 'Since when did you enslave the people though they were born from their mothers in freedom?'⁴ The right to freedom, then, is born with the human, as is the right to life. In Sharia, in much the same way as it is not permitted to commit suicide – 'it is not permissible to put an end to his life alone'⁵ – it is not permitted for a person to violate the rights of others. In this legislation, we find two philosophies. The first is an individualist philosophy that protects the individual by forbidding suicide and mercy-killing. The second is a philosophy of protection of society by banning killing and terror.

1.2. Integrating right into the law is security

If a person possesses a natural right, he is also a social being, whether in a family, a community or a state. The state is the appearance in the life of the group.

Individuals have agreed to organize themselves in a political group. The political group is the authority and the rights of individuals are wills and benefits. Therefore, the positive law organizes their rights in accordance with the authority that the individuals accepted to interfere in their issues.

We always say that the right has a force and this force exists before the right was formulated in the law.

One example of that is the first crime in history, Cain and Abel. Their story is fixed in the three religions, Judaism, Christianity and Islam. When *Abel* said to *Cain*, "If you want to kill me, I will not do" (Abel is reminding Cain that he does not violate the right of others in living), he wants safety. He continued preaching and fearing Cain: "If you kill me, you will admit this guilt" (a reminding with the legislation that protected the right of living

² Melhem Garian, Political Thought issues, natural law, (Beirut.1982), p 45.

³ John Locke, Two articles in the civil rule Chapter VIII p. 95, translated from the English text: Majid Fakhry, the International Committee for the translation of masterpieces, Beirut 1959.

⁴ Mahmoud Aldgam, The common factor between the purposes of Islamic law and the human rights, Alhyat-alandounyah, 2005.number: 15341.

⁵ Suicide and Islam", Archives of suicide research: official journal of the International Academy for Suicide Research 10.

that he will not abandon)⁶. Right is accompanied by force. Application of law is by authority; the authority that individuals have founded and accepted is the activation of force.

The human, while researching for security, needs law form on one side and authority from the other side. Western and Arab cultures meet here around the nature of the relationship that humans developed. These relationships that built the authority and let it enact laws. It is inherent in the idea of the social contract in the West, while in the Arab and Islamic culture, it is found in the idea of the mandate.

“Doneau” said that it should consider the law as a system of rights⁷.

Legislation in the Islamic and Arab culture has the same meanings of the word “law”, considering it as the criteria for the public and individual behavior.

The German-American philosopher Leo Strauss showed his fascination with the moderate Arab Islamic legislative system through its extension in Judaism. He described it as a moderate enlightenment movement. This contradicts with the radicalism that effaces happiness. Then he talks about the particularity of Jewish-Arab philosophy on the grounds that the law is based on the natural right.

These rules focused so much on security of humans, so any legislation must take into account protecting money (right of having a property), life (right to live), mind, sex and belief. Therefore, Islamic law won an international recognition in a number of scientific and international conferences⁸.

International and Comparative Law at The Hague in 1932

The Hague Conference 1937

International Conference Washington 1947

Rights Division of the International compels of Comparative Law in Paris in 1951.

Alfred Kramer says: «The Arabs are the only nation during the early Middle Ages, which has been able to develop the law to achieve the aims of outstanding achievements. Arabs showed greatness as equally as the work achieved by the Romans law makers in the world.

Laws and rights are ongoing. The « positive law » in the nineteenth and twentieth century passed over 3 generations, the first generation of dedicated civil and political rights against the State, then the second generation was specialized in economic, social and cultural rights, to end up with the third generation which is the modern so-called freedoms and people's rights.

2. The environment of the secured law

Having seen the convergence of the culture and its proximity of the liberal ideology about the initial natural right, and about the role of law enshrining the right and aiming at reassuring, we find that law needs an environment where it can work in order to achieve security. In the Arab countries, we find legal texts comparable to developed countries. But sometimes the citizens do not feel the presence of law or do but feels that they can not use it for the sake of natural rights. So Occidental and Arab Thought tight around the idea of the contrast between the law and the authoritarian state on one hand, and on the innate conviction and philosophical state represent the power and stand on an equal footing as well as above the law, not on the other.

Under this heading we will discuss that there is a system disrupting the law and ignoring it, while on the other hand, we find that there is a system that respects the law in order to achieve security for the citizens as worthy as the system describing the state of law.

2.1. The State above the law and security

In Socialism, rights can be achieved only through «class struggle». The victorious class in this conflict declares legally its interests or willingness. Marxists say: «law is the will of the ruling class that turned into a

⁶ Holy Quran, Surah Al-Ma'ida 27-23.

⁷ Fathi Drani, The Right and the role of the state to restrict the Right, Jordan, 1997, P113.

⁸ Marwan Abdel Mawla, Islamic law and positive law, Journal of civilized dialogue, 2012, number 3596.

legal action⁹) and therefore right and wrong do not exist. In another way, there is no justice or injustice. «Every dictatorship is the suspension of the law» says Ernst Block. In this way, the legal system should be like this. It is either to shrink to the interests of the political power or it transcends to an abstract idea or a moral call, and in both cases, ceases to be a law¹⁰.

In fact, "in fascist and communist dictatorships, those in power look at law contempt. Each government of this model is trying to demean the law to the policy level and look to the courts as an operational tool for the will of the system and the decisions of the ruling dictator. When the dictatorship fails to manipulate the judges and subject them to its will, it usually ignores the courts, and steps over them using direct trials by the police and the executive authorities and detention centers and at best it transfers civilians to the state security courts¹¹.

The state and the government reflect the physical strength, while the courts and the law reflect moral force¹². And the recognition of the moral force of the law and the courts would be offset by the physical power of the state, and the implicit recognition of the superiority of the idea on things and the superiority of the mind on the matter. Therefore, 'the principle of the independence of the courts and the independence of the judiciary power does not fit with the state of the dictatorship of the tyrannical system' says Izzat Bijovic¹³.

This superiority to the authority over the law passed through different stages throughout history: the philosophers and thinkers, and legal scholars in the Middle Ages promoted the will of the absolute ruler in the legislation of laws, including the Italian thinker Machiavelli (1469-1527) besides to the French thinker Jean Bodin (1530-1596), who stressed the need to integrate authority and the state represented by the will of the absolute ruler in legislating laws to consolidate his power neglecting people's demands. And later British philosophers such as Thomas Hobbes (1588-1679) and scholars such as John Aston (1790-1859), were in the same direction in the glorification of the will of the kings and rulers. Those ideas found their bases in German National ideology in the 19th century through the Hegelian philosophy (1770-1838), which came to glorify the power of the state, which had an impact on the emergence of monotheism movement led by Bismarck in the late nineteenth century. Also, other German philosophers appeared such as Ohernk (1818-1892), who developed and deepened this theory called "Herrschoft theory". This theory became the basis for Nazi ideas to implement their goals without worrying about the simplest human rights. On the other hand, Marxism crystallized its ideas across the Communist Manifesto of 1848, where it diagnosed the nature of the state as the embodiment of the power of the dictator, and it is a tool of oppression and injustice. However, the alternative to Marxism came to devote merging the power and the state through the one-party control under the leadership of "dictatorship of the proletariat," which has become the ultimate power to legislate as a true representative of the will of the people - in the words of Marxism. The experience in the world assures that the political systems built on the basis of merging the ruling party or the ruler as an authority in the state, and taking immediate laws as bases for the consecration of domination and oppression and waste of human rights.

Moreover, an arabic-persian philosophy comes back to the tenth century where one of the philosophers of that period *Al maourdi* said that the Sultan is above the State. He was best known and influenced in researching the origin of the *Sassanian State* which gloried the governing authority. He linked its ideas with the jurisprudence until the emergence of the concept of *Sultan State* which was so close to the meaning of *Sassanian State*¹⁴.

This philosophy has influenced the Arab countries, and it is one of the undesirable and negative sides , it has produced in Iraq previously and in Syria, currently the so-called Baath Party, leader of the state and society, and these parties come to power through military coups d'état and produced a number of groups which is above the law, so the law beyond the formulation of a myriad of exceptional measures and exceptional laws such as the emergency law, in the very insistence on the abolition of the human right to be

⁹ Abdul Wahab, Independence of the judiciary, the Second Conference of the Supreme Courts in the Arab countries, Morocco, 18.9.2011, p. 5.

¹⁰ Yad Juma, Dictatorship Industry Act, 10.30.2014, voice of reason Journal, 14692.

¹¹ Mohamed Alkaissi, Law in light of the philosophy of conflict, 2013, Arab commission for Human Rights journal, N.779.

¹² Yan Rand, human rights, the Human Rights Center of Israel, April 1964, p.1.

¹³ Alija Izetbegovic, Mohammad Adas's translation, Islam between East and West, Kuwait .1994, P.223.

¹⁴ Burhan Ghalioun, criticism of politics: state and religion, the Arab Foundation for Studies and Publishing, 1991 p. 60.

tried by an ordinary court. So people of the region lived and still live in a state of congestion and not in a state of safety. So a revolution on these ideas erupted through liberal philosophy in Europe, and the rejection of these law breaking ideas, met the so-called Arab Spring expanding from Tunisia to Syria in an effort to achieve a freedom drawn by a system applying the law and achieving safety.

2.2. The State of law and security

Against that authoritarian thought, liberal ideas became more and more deep based on the natural right and respect for the law. So this brought philosophers, such as the British John Locke (1632-1704) and the French Jean-Jacques Rousseau (1712-1778), to call for the separation of power and restrict the authorities of the Governor. Rousseau developed a theory of social contract (in the West).

Then, *Alan Turin* believed that political power is inextricably linked with the strength of democratic regime. He believed that the strength of democracy is subject to respect of civil and social rights. Democracy is the only political system that allows creating social players and provides them with free participation opportunities. That to illustrate the goal of democracy is no longer limited to face a new pattern of practices that adopt modernity and sheltering by people, without allowing people to any opportunities for free initiatives. Therefore, democracy became forced to fight military dictatorships, especially as there are those who exploit the concepts of democracy, either to create authoritarian regimes or to work on breeding individualism economic practices based on market economy and pushing towards rotting of state. Thus, the democratic system principals consist in recognition of social rights and the legitimacy of leadership, and the sense of citizenship, concluded Turin.

However, Paul Ricoeur opined that the fact of state reflects in its ability to combine what is rational and economical. As rationality makes state rely on two types of institutions: constitutional institutions and others restraining. That means that the state plays the role of educator through school, university and the media, but it also depends on the strength and have to resort to restraining measures. And that was maybe what pushed Max Weber to integrate legitimate violence as an essential ingredient of the state, the matter which Paul Ricoeur rejected, because he believed that the state does not accept the definition only through the exercise of power and sovereignty¹⁵. It is the duty of the state to consist inharmonious bureaucracy, an independent judiciary, and security monitoring and breeding of individuals to free discussion. These principles constitute some of the standards of the state of the right, in which the government plays the role of observer.

At the same intellectual context, Jacqueline Ross confirmed that the state becomes a crucial reality and no longer an abstract entity. The state of the right reflects in reasonable practice of the authority, and seeks to provide individual freedoms and development of public freedoms. Because state exists to serve the individual (and not vice versa), since it considers them the fundamental value¹⁶.

Therefore, the state occupies the rank after the human being, as they represent the highest standard, and the state of the right's authority takes three features: the law, the right, and the separation of powers. There can be no right without a fair and honest law. Moreover, performance of the right is impossible without the separation of powers (the legislature authority, the executive authority, and the judiciary authority).

It seems significant to point to the fact that these ideas harmonize with Arab intellectuals as *Ibn Khaldun*¹⁷ believed that political power should be based on moderation and treating people gently. And the last one does not pay attention to neither physical qualities of the ruler nor his/her mental abilities. In actual fact, people are only interested in what they can experience of the impact of government on their lives: If ruling was

¹⁵ Ricœur Paul. *Éthique et politique*. In: *Autres Temps. Les cahiers du christianisme social*. N°5, 1985. pp. 58-70.

¹⁶ Jacqueline RUSS: *les théories du pouvoir*, librairie générale française, paris 1994.

¹⁷ *Ibn Khaldūn*, born the May, 27th 1332 in Tunis and died March, 17th 1406 in Cairo. He is best known for his book *Muqaddimah* ("Introduction", known as *Prolegomena* in Greek). The book influenced 17th-century Ottoman historians like *Katip Çelebi* and *Mustafa Naima* who used the theories in the book to analyze the growth and decline of the Ottoman Empire. 19th-century European scholars also acknowledged the significance of the book and considered *Ibn Khaldun* as one of the greatest philosophers to come out of the Muslim world.

based on tyranny and stalking people, the governor should expect betrayal of his flock when he/she needs them. On the other hand, if he was patient and loving, they would forget his/her disadvantages and love him¹⁸.

Furthermore, Muslim scholars have agreed, except that the Shia, that Imamate should be achieved by choice and, the relationship between the rulers and the ruled people is based on a contract, which is allegiance pact.

In the twentieth and the twentieth the first centuries, there are many Arabs who accept democracy with its mechanism, and refuse both theocratic and police, dictatorship states¹⁹. Among of them al-Qaradawi, who says, that the essence of democracy is from the heart of Islam²⁰.

Lastly, in our opinion, the essence of democracy is the meanings that reject tyranny and blind obedience. There is an intellectual movement link between one of the basic principle of the Islamic political system and democracy through a new expression appeared in the end of the twentieth century, called *Shura-Cracy*, where ALSHURA is compatible with the mechanics of democracy like the multi political parties and the election system etc.

Liberal democracy, also, won the admiration of many Arab philosophers as Jawdat Saeed, the founder of philosophy of non-violence in the Arab world²¹.

So, we conclude that there is a philosophical rapprochement between the Arabs and the West about the rule of law to release dignity and security for the Human.

Conclusion

Lack of respect for the law led to religious extremism and to the absence of the concept of moderation, which came by Islamic Sharia.

Lack of respect for the law led to the economic downturn and poverty and thus an increase in crime regularly.

Lack of respect for the law led political deterioration through denial intellectual pluralism due to the conversion of the constitutional institutions to formal structures disrupted the right of citizens to participate in political decision-making.

Lack of respect for the law led to the escalation of sectarian and confessional.

The rule of law is security. It is clear that it is a convergent philosophy and ideology tight between the Arabs and the Westerners, both people have philosophers and theorists defenders of law and right. And this, as indicated above, is measured on the extent of the state to respect human rights.

* For Arab States the challenge is first to respect this common human thought, and second initiative would be concrete political reforms through the separation of powers, and especially the separation of the civil power from the military power, and independence of the judiciary, and allowing multiple parties. Through this they will gain respect for human dignity.

* Initiative to issue laws respects human rights. Actually, Arab Constitutions include provisions relating to the rights and freedoms as Article 6 of the Constitution of Jordan, Article 39 of the Constitution of Algeria and Article 14 of the UAE Constitution. But these texts lack guarantees. For example, in a special case or emergency, these laws would be let aside under the pretext of the war against Israel or under the pretext of fighting terrorism.

In this regard Arab States must secure human rights and fight extremism in a limited short-term period.

* To show tranquility in the Arab region as a guarantee to respect the rights, it must uncover the truth with regard to violations of human rights. It is a legal concept under many of the conventions and resolutions of international judicial decisions. As adopted by the Commission on Human Rights of the United Nations, at its sixty-first decision 66/2005 m, which recognizes the importance of respecting and ensuring the right to know the truth, in order to contribute to ending impunity and the promotion and protection of human rights.

¹⁸ Riyad Hadi, The concept of the state with Ibn Khaldun, 2006, Journal of political science, University of Baghdad, Issue 37.

¹⁹ Oraib Rantawi, Civil and Democracy, 2013, Constitution journal, number 17112.

²⁰ Al-Qaradawi, the position of Islam from Democracy, Qaradawi site, December 16, 2014 02:15.

²¹ Jawdat Said, Non-violence for change, 2014, Arabs journal, No. 9477.

In this regard also, Amnesty International called on the international community to take necessary measures to ensure respect for human rights in the Arab region. This cannot be permanent and durable peace only on the basis of human rights. The organization has indicated that, if the sacrifice of human rights in the search for peace and security, is the aim, neither peace will be achieved nor security.

Bibliography

1. Melhem Garian, Political Thought issues, natural law, (Beirut.1982) p. 45.
2. John Locke, Two articles in the civil rule Chapter VIII p. 95, translated from the English text: Majid Fakhry, the International Committee for the translation of masterpieces, Beirut 1959.
3. Mahmoud Aldgam, The common factor between the purposes of Islamic law and the human rights, Alehiahallindenah 2005.number: 15341.
4. Suicide and islam *Archives of suicide research: official journal of the International Academy for Suicide Research*10 (1): 77–97. doi:10.1080/13811110500318489. PMID 16287698.
5. Holy Quran, Surah Al-Ma'ida 27-23.
6. Marwan Abdel Mawla, Islamic law and positive law, Journal of civilized dialogue, 2012, number 3596.
7. Fathi Draini, The Right and the role of the state to restrict the Right, Jordan, 1997, P113.
8. Abdul Wahab, Independence of the judiciary, the Second Conference of the Supreme Courts in the Arab countries, Morocco, 18.9.2011, p. 5
9. Yad Juma, Dictatorship Industry Act, 10.30.2014, voice of reason Journal, 14692.
10. Yan Rand, human rights, the Human Rights Center of Israel, April 1964, p.1.
11. Alija Izetbegovic, Mohammad Adas's translation, Islam between East and West, Kuwait .1994, P.223.
12. Jacqueline RUSS: les théories du pouvoir, librairie general francaise, paris 1994.
13. Ricoeur Paul. Éthique et politique. In: Autres Temps. Les cahiers du christianisme social. N°5, 1985. pp. 58-70.
14. Burhan Ghalioun, criticism of politics: state and religion, the Arab Foundation for Studies and Publishing, 1991 p. 60.
15. Moulay Sabir Abdul Samad, The concept of the State, Septemper 2014, Momenon without limits, 2059.
16. Riyad Hadi, The concept of the state with Ibn Khaldun, 2006, Journal of political science, University of Baghdad, Issue 37.
17. Al-Qaradawi, the position of Islam from Democracy, Qaradawi site, December 16, 2014 02:15.
18. Oraib Rantawi, Civil and Democratcy, 2013, Constitution journal, number 17112.
19. Jawdat Said, Non-violence for change, 2014, Arabs journal, No. 9477.

PEACEKEEPING: AN ASSET OR A RISK TO INTERNATIONAL SECURITY

András Hárs¹

Abstract

Ever since it was first employed in 1948 peacekeeping has played a pivotal, although sometimes undervalued role ensuring international peace and security. 69 peacekeeping operations have been launched since then, the majority of which was a quiet but important success. Besides overwhelming successes, peacekeeping faces great challenges as well, like the lack of funds, manpower, and attention of the international community or clear mandates. However the single most devious factor is the lack of responsibility in peacekeeping operations, because it seriously damages the image and public confidence in peacekeepers and the UN in general.

Who are the perpetrators and what can be done to call them to account? The main actors are the UN, the state sending peacekeeping forces and the peacekeepers themselves. The current legal background enables stating the responsibility of both states (ILC: Responsibility of States for Internationally Wrongful Acts – 2001) and international organizations (ILC: Articles on the Responsibility of International Organizations – 2011), while national criminal law would make it possible to begin procedures against peacekeepers. In practice however this is rarely the case. Peacekeepers are protected by legal immunity while states and international organizations are doing their utmost to shift responsibility to each other.

National and international tribunals are struggling to solve this Gordian Knot inventing new attribution tests with which they can decide whether a party can be deemed responsible for a conduct. As judicial forums turn towards jurisprudence for answers, international legal experts must be prepared to address the issue. Are there sufficient legal remedies to counter the seeming impunity of peacekeepers? Is peacekeeping still a valid tool for protecting the rights of individuals and the interests of the international community – as is its purpose - or has it become a liability which needs to be reformed from its very core?

Keywords: international responsibility, international organizations, peacekeeping, attribution

Peacekeeping: an asset or a risk to international security

The United Nations Security Council set up the mandate of the first peacekeeping mission in 1948 to monitor the armistice agreement between Israel and its Arab neighbours.² The Security Council chose to fulfil its duty of safeguarding international peace and security utilizing a peacekeeping mission, because it was deemed to be the best possible solution. During the following 67 years a lot of circumstances have changed in the world of international law and international relations, but peacekeeping has gradually evolved and adapted to the changes.³ After the fiasco of Rwanda and Srebrenica peacekeeping mandates have become more robust, with mandates that encompass a wide area of tasks, such as the disarmament of militant groups, monitoring elections, helping to train the local police and rebuilding the justice system of nations that have fallen on hard times – just to name a few. Secretary General Boutros-Boutros Ghali's 1993 Agenda for Peace set the grounds for these multidimensional or third generation peacekeeping missions.⁴ We can state that in most cases peacekeeping has fulfilled its original purpose as the instrument of ensuring peace and security in areas where it was mostly needed.

¹ PhD student at the Doctoral School of the University of Szeged, Hungary at the Department of International Law and European Law. The main area of his research is the responsibility of international organizations particularly the field of international responsibility invoked in connection with peacekeeping operations.

² United Nations Security Council, Res. 50. Art. 6.

³ For the effort shown in protecting international peace and security, the United Nations Peacekeeping forces were awarded a Nobel Peace Prize in 1988. http://www.nobelprize.org/nobel_prizes/peace/laureates/1988/press.html (downloaded: 06. March 2015.)

⁴ Boutros-Boutros Ghali, 'An Agenda for Peace'

The situation is nonetheless far from ideal. The international community is showing less and less interest and the Department of Peacekeeping Operations is finding itself in a difficult position to retain the favour of troop contributing countries. Financing has always been a critical issue. The approximately 8 billion dollars per year is hard to deduct from the UN's budget, however even this seemingly gigantic amount shrinks in comparison with the world's global expenditure on arms, which exceeds it 200 times.⁵ Analysts therefore raise the question of how effective peacekeeping can be if it can muster 0.5% of the global expenditure on arms. The lack of clear and well-defined mandates proved to be another setback for peacekeeping missions. The rules on whether or not to use force, what the expectations from the mission are would be instrumental in achieving success.⁶

The scope of the present article however is limited to the legal difficulties presented by peacekeeping missions. Namely what happens when an internationally wrongful act occurs during the peacekeeping mission? These wrongful acts can be acts or omissions, breaches of international obligations or even crimes committed by peacekeepers such as sexual exploitation and abuse.

There are three sides involved in the legal issue: the United Nations, the troop-contributing countries and the peacekeepers themselves. The legal status as well as the rights and obligations of each party are regulated by different parts of international law. The responsibility of states is regulated in the International Law Commission's 2001 The Responsibility of States for Internationally Wrongful Acts (RSIWA), which enables the state committing the act to be called to account.⁷ As of 2011 the International Law Commission has regulated the responsibility of international organizations in its Articles on the Responsibility of International Organizations (ARIO).⁸ Unfortunately as both of these documents were accepted by UN General Assembly and the Assembly only advised states to take it into consideration these documents are not legally binding as international treaties. However based on the widespread use of the RSIWA by the international community, it can be argued that it has become part of the customary international law. On the other this cannot be said about the ARIO. Its reception by scholars of international law was quite mixed and the four years since its creation has not been sufficient to deem it as part of customary international law. It has successfully made the first steps and has been widely quoted by international and national tribunals. It can be stated here that peacekeepers are protected by total immunity under international law, as they are protected by both the Charter of the United Nations⁹ and the 1946 Convention on the Privileges and Immunities of the United Nations.¹⁰ Moreover the Status of Forces Agreements (SoFA) also ensure that during a peacekeeping operation criminal jurisdiction remains at the hands of the troop-contributing country.

The practice is therefore the following. Peacekeepers cannot be called to account but rather labelled *persona non grata* by the UN and repatriated.¹¹ The troop-contributing country can then decide to prosecute the person or not. There is scarce evidence that allegations of criminal activity or other wrongful acts are thoroughly prosecuted at home. The UN and the troop-contributing country could theoretically both be considered responsible, however the UN is protected by its immunity and the ARIO doesn't state which tribunal would have jurisdiction in deciding cases where an international organization is involved. It is the practice of international law - laid down by the International Court of Justice in the Monetary Gold principle¹² - that it has no jurisdiction in cases where not every party is involved. As the UN cannot be sued at the Court, the ICJ can dismiss these claims based on the aforementioned principle. This means that the only party which can be liable for a breach of international obligations is the state. During a legal process all the state needs to prove is that the peacekeeping mission was organized under the auspices of the UN, therefore the acts committed during the mission are attributable to the UN. Such a legal stance is however rather debatable. The

⁵ <http://www.un.org/en/peacekeeping/operations/partnerships.shtml#partners> (downloaded: 06. March 2015.)

⁶ United Nations Security Council and General Assembly, A/55/305-S/2000/809 also known as 'Brahimi report'

⁷ International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' General Assembly Resolution 56/83. 2001. Art. 4.,5.,6.,47.

⁸ International Law Commission, 'Articles on the Responsibility of International Organizations' General Assembly Resolution 65/26. 2011. Art 6.,7.,33.,48.

⁹ 'Charter of the United Nations' San Francisco, 26 June 1945. Art. 105. (2);

¹⁰ 'Convention on the Privileges and Immunities of the United Nations' New York, 13 February 1946. Art. 18. (a)

¹¹ R. S. Burke, 'Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law' (Leiden: Martinus Nijhoff Publishers 2014) 82.

¹² ICJ: Case of the Monetary Gold Removed from Rome in 1943. 15 June 1954.

goal of international responsibility is that someone must bear the burden of responsibility so that 'shifting the bucket of responsibility' won't lead to impunity.¹³

A few words must be said of the practice of tribunals, namely the European Court of Human Rights and the recent verdicts of the Dutch courts. The ECHR is viewing the question from the side of attribution: that party is responsible for a conduct, to which the act is attributable. The Court employed various attribution tests to decide the question. When the Court first faced the problem during the *Behrami and Saramati v. France, Norway and Germany* in 2007, it resolved the question with a simple answer: the UN had overall control over the mission in question as the authorization came from the Security Council and the operation was conducted in the interest of the United Nations, in order to protect international peace and security.¹⁴ The judgment caused great uproar among the scholars of international law as according to this reasoning the international organization would always be held responsible and because of the lack of jurisdiction no one would bear responsibility. The 2011 *Al-Jedda* decision turned this solution upside down. In its judgment the court argued that the Security Council had no ultimate control over the acts of the officers of troop-contributing countries and therefore effectively it's the troop-contributing country that should be responsible for the conduct.¹⁵ The verdict merely stated another axiom and shifted responsibility to the states while granting impunity to international organizations. A different reasoning arose, when in November 2014 the Court pronounced judgment in the *Jaloud* case. Here the ECHR argued that the troop-contributing country had retained full control i.e. criminal jurisdiction over the peacekeepers and this factor is the basis of its responsibility.¹⁶ Once again, criminal jurisdiction always remains at the hands of troop-contributing countries, so this reasoning is insufficient to determine where responsibility lies. Much more remarkable are the decisions of certain courts in the Netherlands. The Supreme Court of the Netherlands found in 2013 in the *Nuhanovic v. the Netherlands* case that the Netherlands was responsible for certain actions of its military at Srebrenica, as government officials gave direct orders to the military officers in the field.¹⁷ The verdict was reinforced in 2014 by The Hague District Court in the *Mothers of Srebrenica v. the Netherlands*, also stating that it may be feasible that the immunity of the UN be waived in certain cases.¹⁸ These cases are remarkable because they show a shift towards a better understanding of the depths of international law by various tribunals as well as moving towards a legal regime, where states and international organizations can both be held responsible.

It is the interest of the international community that peacekeeping remains a valuable tool to protect international peace and security. However, at present its reputation is stained by the scandals of sexual exploitation and abuse committed by some of the peacekeepers. The damaged reputation and broken trust that may result from the wrongful acts committed during peacekeeping missions can have serious detrimental results. It can undermine the credibility of the UN and hinder the success of the mission by alienating the very population the organization strives to defend. News of outrageous conduct by the peacekeepers like in the Democratic Republic of the Congo¹⁹ or Haiti²⁰ caused the confidence in peacekeeping missions to plummet. However the situation is not as bad as it seems.

Reports show that out of approximately 120.000 peacekeepers being deployed in the field, 50-120 cases of misconduct were reported per year. When translated to percentages it means around 0.04-0.1% of peacekeepers could potentially be responsible for misconducts²¹. Compared to the criminal

¹³ G. Gaja, 'First report on the responsibility of international organizations' 2003. http://legal.un.org/ilc/documentation/english/a_cn4_532.pdf (downloaded: 06. March 2015.)

¹⁴ Case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*. (2007) ECHR application no. 71412/01., 78166/01.

¹⁵ Case of *Al-Jedda v. United Kingdom*, (2011) ECHR application no. 27021/08.

¹⁶ Case of *Jaloud v. the Netherlands*, (2014) ECHR application no. 47708/08.

¹⁷ Case of *Nuhanović v. the Netherlands*. (2013) Supreme Court of the Netherlands Case no. 12/03324

¹⁸ Case of *Mothers of Srebrenica v. the Netherlands*. (2014) Hague District Court Case no. C/09/295247 / HA ZA 07-2973

¹⁹ The scandal started with a news article in the Independent magazine in 2005: <http://www.independent.co.uk/news/world/africa/sex-and-the-un-when-peace-makers-become-predators-6155183.html> (downloaded: 06. March 2015)

²⁰ News of peacekeeper abuses have resurfaced as recently as 2012: <http://www.un.org/apps/news/story.asp?NewsID=41538#.VP7tHXyG8uE> (downloaded: 06. March 2015.)

²¹ The latency of these conducts is unusually high due to the nature of the crimes in question. <https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsforAllCategoriesofPersonnelPerYearSexualExploitationandAbuse.aspx> (downloaded: 06. March 2015.)

activity in states this number is infinitely small. Nevertheless, all possible measures must be taken to strive to eliminate that number. Not even one incident of sexual misconduct is acceptable among peacekeepers. Unfortunately the UN's zero-tolerance policy, promoted by Secretary Generals Kofi Annan and Ban Ki-moon presents a goal, rather than a result.²²

The reason why scandals were so widespread and loud is because media attention is directed towards 'sensation' in a negative sense. It is glad to report sexual abuses and failures on the part of the UN, however the multitude of successful missions remain silent. Of course this doesn't mean that there isn't a problem. The misconduct of peacekeepers during missions must be addressed by the UN and firm steps must be made to reduce the number of wrongful acts committed. One of such steps was the 2005 report of Jordanian prince Zeid Ra'ad Al Hussein, who served as the special representative of the Secretary General in the Democratic Republic of the Congo, 2005. Prince Zeid revealed in his report that there are serious problems – among others - in the prevention, alert systems and investigation mechanisms of peacekeeping missions and argued for a multidimensional change in the mentality concerning allegations of misconduct during peacekeeping missions.²³ Unfortunately after 10 years of accepting his report, a lot of tasks remain undone.²⁴

Does this mean that peacekeeping presents a danger to international security? The answer to this question is definitely not. Peacekeeping has been an invaluable tool of the international community in handling dangerous situations and helping countries in a desperate state. However it is not a system without errors and therefore must be strengthened and reformed. There are several important factors to consider when dealing with misconduct in peacekeeping operations. First of all an able preventive and alert system needs to be set up in order to handle allegations should they arise. The lesson of past operations shows that as allegations were investigated by the very people who are sometimes responsible it leads to dismissing these claims. An independent investigative and report organ has to be set up, with gender officers to reduce the latency of criminal conducts of sexual nature. This coupled with training programs for peacekeepers and victim support programs could prove to be a promising first step in reaffirming confidence in peacekeepers. Evaluation of the implemented changes and cataloguing the persistent challenges is also necessary for constant development. Secondly the UN must be prepared to face these allegations however uncomfortable a situation this may result. The United Nations cannot be seen in the eyes of the international community as an organization which condones these misconducts. Last but not least a firm political will is essential from both the UN and troop-contributing countries so that the prosecution of individuals charged with criminal activity is ensured. These steps are not easy and may very well create serious political tension; however they are absolutely necessary so that peacekeeping can fulfil its role as an indispensable tool for protecting international security.

Bibliography

United Nations Documents:

1. Charter of the United Nations San Francisco, 26 June 1945
2. Convention on the Privileges and Immunities of the United Nations' New York, 13 February 1946.
3. International Law Commission, 'Articles on the Responsibility of International Organizations' General Assembly Resolution 65/26. 2011.
4. International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' General Assembly Resolution 56/83. 2001
5. United Nations General Assembly, A/59/710 2005.
6. United Nations Security Council, S/801
<http://unispal.un.org/unispal.nsf/d744b47860e5c97e85256c40005d01d6/6b76f035cd9c4a36852560c200599bb7?OpenDocument> (downloaded: 06. March 2015.)
7. United Nations Security Council and General Assembly, A/55/305-S/2000/809

²² <https://cdu.unlb.org/Policy/SexualExploitationandAbusePolicy.aspx> (downloaded: 06. March 2015.)

²³ United Nations General Assembly: Report of the Secretary General's Special Advisor, Prince Zeid Ra'ad Al-Hussein on 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' A/59/710 2005.

²⁴ J. Stern: Reducing Sexual Exploitation and Abuse in UN Peacekeeping (2015) Civilians in Conflict Policy Brief No. 1. 1-23

8. <http://www.un.org/documents/ga/docs/55/a55305.pdf> (downloaded: 06. March 2015.)

Books and Articles:

9. Boutros-Boutros Ghali, 'An Agenda for Peace'
<http://www.un.org/en/peacekeeping/operations/partnerships.shtml#partners> (downloaded: 06. March 2015.)
10. R. S. Burke, 'Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law' (Leiden: Martinus Nijhoff Publishers 2014) 82.
11. G. Gaja, 'First report on the responsibility of international organizations' 2003.
http://legal.un.org/ilc/documentation/english/a_cn4_532.pdf (downloaded: 06. March 2015.)
12. J. Stern: Reducing Sexual Exploitation and Abuse in UN Peacekeeping (2015) Civilians in Conflict Policy Brief No. 1.

Cases:

13. Case of Al-Jedda v. United Kingdom, (2011) ECHR application no. 27021/08.
14. Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway. (2007) ECHR application no. 71412/01., 78166/01.
15. Case of Jaloud v. the Netherlands, (2014) ECHR application no. 47708/08.
16. Case of Mothers of Srebrenica v. the Netherlands. (2014) Hague District Court Case no. C/09/295247 / HA ZA 07-2973
17. Case of Nuhanović v. the Netherlands. (2013) Supreme Court of the Netherlands Case no. 12/03324
18. Case of the Monetary Gold Removed from Rome in 1943. (1954) ICJ

Other

19. Independent Article <http://www.independent.co.uk/news/world/africa/sex-and-the-un-when-peacemakers-become-predators-6155183.html> (downloaded: 06. March 2015)
20. Nobel Peace Prize http://www.nobelprize.org/nobel_prizes/peace/laureates/1988/press.html (downloaded: 06. March 2015.)
21. UN Conduct and Discipline Unit – Policy
<https://cdu.unlb.org/Policy/SexualExploitationandAbusePolicy.aspx> (downloaded: 06. March 2015.)
22. UN Conduct and Discipline Unit – Report
<https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsforAllCategoriesofPersonnelPerYearSexualExploitationandAbuse.aspx> (downloaded: 06. March 2015.)
23. UN News Centre – Haiti <http://www.un.org/apps/news/story.asp?NewsID=41538#.VP7tHXyG8uE> (downloaded: 06. March 2015.)

POLICE DOGS – SERVICING THE SECURITY

Orsolya Horváth¹

Abstract

Since the human recognized the perfect smell of dogs, they used it for acquiring advantages. In the ancient Roman time, they were used for hunting and security. Besides the hunting tasks, dogs were trained for police work in the 20th century, therefore the English used dogs with the case of Jack the Ripper in 1888. The using practice was soon adapted elsewhere by the law enforcement. The fields of tracking broaden with other special tasks, such as the using of trailing method, and searching special materials in the last century. With the globalization and the appearance of special social problem which encountered with new crimes (e.g. drug imports, bomb outrage), the necessity bring the latest type of police dogs into being. Nowadays, we are not surprised at the airport when sniffer dogs search baggage, or work on smuggling cases. Not only are they used in crime detection but are also applied in crime prevention.

In this paper the Hungarian police dogs are highlighting with classification by special tasks. After the introduction of the legal regulation and application, I would like to attract attention the new possible fields of using police dogs in the future. The proposals based on the requisition of a security society, when the criminals are a step ahead of us.

Keywords: police dog, law enforcement, scent, crime detection

Introduction

Human and dog close connection has already taken over thousands of root. It is well-known from the behavioural literature that the conception of social attachment of animal is very important in the group dynamic; this is a determining factor of social behaviour.² Contact with the human is a special note for dogs, which is the form of adaptation to nature. The dog and its owner attachment, which measures with the method of human psychology for the parents and their children, reinforce this finding.³ Besides this statement, if we stint the social attachment with human of dog (for example in shelter circumstances), they react with extended demand of contact. In this situation, the attachment between human and dog sets up quickly.⁴ It is also known from the ethological studies that, there are four basic representative kinds of behaviours in leading social life animal such as the social attraction, the cooperation in the common purpose, the altruism and the communication.⁵ During the training method of police dogs, the candidate dog almost looks up for the dog handler like its fellow kind and it would be suitable for them. Consequently, the basic of the training method is exhausting the maximum the existing basic behaviours of dogs in order to work them in favour of human interest.⁶

¹ Doctoral student at University of Pécs, Department of Criminal Procedure Law and Forensic Sciences. Her theme is the role of police dogs during the criminal procedure, especially regarding to the scent identification dogs. Contact email: horvath.orsolya@ajk.pte.hu.

²J. Bowlby, 'Attachment' (Middlesex: Penguin Book 1972)

³Topál et al., 'Attachment behaviour in the dogs: a new application of the Ainsworth's Strange Situation Test' [1998] Journal of Comparative Psychology, Vol. 112. No. 3. 219-229.

⁴Gácsi et al., 'Attachment behaviour in adult dogs living in rescue centres: Forming new bonds' [2001] Journal of Comparative Psychology, Vol. 115. No. 4. 423-431.

⁵ While in the life of different species, the four basic behaviours appear in variant intensity, and show different roles in their life, until the human, all of them are highly advanced. In the origin of civilization, the dogs lived beside the humans, helped them for the hunting, transporting, as well as protecting against the cold. By the genetically evolution with their domestication, they had to be able to understand the human's instruction.

⁶Csányi V. 'Kis etológia' (Budapest: Kossuth Kiadó 2002) 44-45.

The domestication of dogs

When – as conception stand – the human (*Homo sapiens*) and wolf (*Canis lupus*) met each other about 150.000 years ago, it was born a connection that evidenced mutual benefits. Supposedly, they hunted the same species of animals and their life area was also the same, they were not real concurrent. The cause of low population of ancient humans and the plenty of preys was not a necessary the competition. Therefore, the two species gave each other mutual advantages. While LORENZ found earlier that certain types of canines originated from the golden jackal (*Canis aureus*), nowadays it is well-known – evidenced by taxonomical, anthropological and genetically research – that the dog (*Canis familiaris*) ancestor was the wolf (*Canis lupus*). Not just proved for the genetically (DNA) examination⁷ that the dog originated from the wolf, not from the golden jackal, but it was confirmed that the dogs and wolfs came apart from each other was started about 135.000 years ago, not a few thousands of years ago. The first bones which originated undoubtedly from dog are 14.000 years old,⁸ but in China and Siberia, 20.000 years old bones were found, and researchers looks at it as a residuum of “bland wolf”.⁹ During the domestication, it was a huge milestone that the ability of changing dominance was evolved, and the aggression with the new group members were decreased gradually. Supposedly, these individuals stayed besides the human, which had the best ability of the social attraction, capable to integrate into the group, had aptitude for cooperation and were the best in communication situations. According to the hypothesis, dogs living around us, is a result of conscious selection.

Short history of police dogs

Over one hundred years ago, dogs were used by law enforcement. After the modernization of police, gave a chance for using police dogs in an organised way.¹⁰In 1888, the Scotland Yard also used tracking dogs in the case of Jack the Ripper,¹¹ and appointed patrol dogs besides the police officer, who served in London. The exact training of police dogs started in Gent, in Belgium, 1899. In Hungary, scientific papers were published about the using of police dogs in the late of 19th century. The Hungarian Police Dog Association was established in 1913, and after one year later, the first training of police dogs was performed in Esztergom. After the First World War, the tasks of police dogs were defined.¹²Gendarmerie and police canine unit were established. In the 50s, institution were setting, who dealt with breeding and the training of dog-handlers in a gendarmerie and police way. Thanks to the specialization, patrol, tracking and from the 70s, scenting dogs were trained at the National Canine Centre under the control of Interior Government, at Dunakeszi.¹³Nowadays this institute concerns the direction of National Police Headquarter. In the next part, I show circumstantially the tasks of certain kind of police dogs in Hungary.

Police dogs in Hungary

Following the certain kind of tasks based on the current – 17/2009. (OT. 10) National Police Headquarter Directive for the Police Dog and Horses Regulation (hereunder Directive) – national legislation.

Tracking and trailing dogs

Tracking dogs are able to detect the perpetrators, and objects, which were touched by them based on their unique scent. In order to use dogs in law enforcement, special training and motivation are necessary. Tracking dogs – such as working on special tasks – were used by the army, and police force, and were the number one specialized dogs over a long time. Nowadays, using of them fall by the wayside, when the

⁷C. Vilá et al., 'Bonobo: The forgotten ape' (Berkeley: Univ. California Press 1997) 210.

⁸G. Nobis, 'Der älteste Haushund lebte vor 14.000 Jahren' (UMSHAU: 1977) 215-225.

⁹S.J. Olsen, J.W. Olsen, 'The Chinese Wolf, Ancestor of New World Dogs' [1977] Science, Vol. 197. 533-535.

¹⁰Katona, G. 'A szagazonosítás büntetőeljárásjogi kérdései' (Dunakeszi: ORFK Kutyavezető-képző Iskola 1997) 1.

¹¹J. Marsch, 'Sir Charles Warren and the Bloodhounds' www.casebook.org/dissertations/rip-chasblood.html (2015.01.10.)

¹²German Shepherds, rottweiler and airedale terrier were used as ambulance dogs.

¹³Katona, G. 'A szagazonosítás büntetőeljárásjogi kérdései' (Dunakeszi: ORFK Kutyavezető-képző Iskola 1997) 2-3.

demand of detection dogs (drug detection, explosive dogs) are increased thanks to the global delinquency, organized crime. Urbanization, the artificial (concrete) routes made heavier the using of tracking dogs. Foreign literature take difference between the tracking (follow the clues in the ground) and trailing dogs (working with air sniffing). In Hungary, the tracking tasks are preferred by the police. The advantage of this method that during the follow of scent dog may could find trace evidence, hereby extending the border of crime scene investigation. Therefore the disadvantage of the tracking method, that in urban environment, there are some circumstances, which influence or disturb the work of dog.¹⁴ The trailing method against the tracking method assures a free process of dog. During the following of the scent, the trailing dogs do not go after the real way of perpetrator. They considering the wind patterns and locate the suspect directly. But with this method, trace evidence may excluded (if it is exists) from the criminal procedure. Other countries,¹⁵ the two methods perform by same time, so the question is in Hungary: What is more important? Find the perpetrator, or collecting is not certain existing evidence?

Scent identification dogs

In every crime scene, the perpetrator left behind his/her unique scent. The scent identification dog is able to compare and identify the perpetrator's scent from the suspect's scent. The crime scene sample and sample scents are the bases of this process. Serial crimes also defined with this method. Storage of the scents in glass jars allows preserving the human scent for a long time and hereby the latest identification process after the committing of crime. The scent identification line-up is similar technically to the police line-up.¹⁶ Pursuant to this statement, under the scent identification line-up, the similar time, place and circumstances have to secure during the collecting of other scents (decoy scents). These conditions guarantee the independence of the procedure. Scent identification line-up has no European standard method.¹⁷ The admissibility of scent line-ups – like evidence – is also changed in the United States by states before the Courts. In Hungary, the result of scent identification line-up is indirect and soft evidence.¹⁸ The problems with this method and these factors results the different judicial practice, that we do not know exactly what the dogs are doing under the identification, which are the exact compounds of human scent and which are the discriminative factors between the humans. It is important to highlight that the scent identification line-up is an investigation tool during the criminal procedure in Hungary. The results are suitable to confirm or degrade the versions, but based on only these results the excluding or highlighting version of others, is objectionable.

Drug detection dogs

Fight against the drug trafficking, handling the drug problems is more than one ways. One action against this branch of organized crime is the using of drug detection dogs. The drugs, which are taught: marijuana, hashish, heroin, cocaine, amphetamine and its other types. The place is the same during the training method. The amount of drugs and its hidden time (how long the drugs were find in a concrete place) does not influence the dogs in their working. The sensitization of drug detection dogs is the perfect way to locate the drugs, which amount are too minimal or too big, or the hidden times are too short (few minutes) or too long (more days). The negative sensitization means that the dogs learn to detect the drugs for the huge amount to the some grams. With learning positive sensitization, the drug detection dog is able to find a huge amount of drugs (kilograms). In this situation, the volatile scent compounds of drugs are emitted in the concrete area, and aggravating the exact localization.¹⁹ Disturbing circumstances are human, animal, vegetable and chemical

¹⁴Overheating of the concrete.

¹⁵In the United Kingdom tracking and trailing dog were participated at the crime scene. The circumstances defined that of which dog will be use. Mantrailing – személykövetés. www.vakkanto.hu/keresesi-eredmeny.html?ordering=&searchphrase=all&searchword=mantrailing (2015.01.25.)

¹⁶Horváth, O. 'A kriminalisztikai szagazonosítás jelene és jövője' [2013] Belügyi Szemle, 61. évf. 2. sz. 88-101.

¹⁷Horváth, O. 'A lengyel és magyar szagazonosítás összehasonlítása' [2014] <http://peme.hu/userfiles/A%20tudom%C3%A1ny%20szolg%C3%A1lat%C3%A1ban%20-%20II.%20k%C3%B6tet.pdf> 203-215.

¹⁸Tremmel, F. 'Bizonyítékok a büntetőeljárásban' (Pécs-Budapest: Dialóg Campus Kiadó 2006) 181.

¹⁹Szinák, J. 'A kábítószer-kereső kutya' (Dunakeszi: ORFK Kutyavezető-képző Iskola 1999) 61-62.

compounds in the checked area. During the training method, the drug detection dogs are accustomed to these scents. Therefore, the place, which encounters with dangerous chemicals, the using of drug detection dog is forbidden. The alerting of drug detection dogs could be active and passive. The 171th point of Directive is also regulated; the dog-handler's task is checking, preparing and securing the appropriate work of dogs. (He has to take care about the adequate ventilation, terminate the aggravating circumstances before the searching.) The legal conditions of using drug detection dogs to finding drugs and trace evidence regulated by the 23/2003 (VI. 24.) Regulation Section 54 (1) and the Act XIX of 1998 on Criminal Proceedings Section 149 (search), and Section 150 (body search). Application of search as coercive measures means several fundamental rights temporally and partial restricts, so the execution must be guarantee by law. The reasonable suspicion exist could give rise to a cause of action. Therefore, it has to be highlighted, that for the success of criminal procedure, the application of drug detection dogs without search warrant also executed as a high priority investigation action.

Explosive detection dogs

International appearance against the terrorism, bombings, and avoiding bomb outrage made the application of explosive detection dogs come alive. The Department of Defence Program has almost 500 explosive detection canines worldwide.²⁰ Personnel Screening Detection Program started in 1998, in Washington DC. National program until 2010 more than 70 authorized teams to search packages, persons and vehicles were established. In the European Union they also secured the checking crossing persons, staffs, and luggage in airports and place, which encountered with security risk. There is no instrument, which would be more effective and reliable to detect the scent compounds, which composed the materials of explosive devices than the explosive detection dogs. Detectors disadvantages are amongst their high price, false alert and huge size.²¹ Selecting the canines before the training, the excellent competence is very important. In this special field of law enforcement's tasks, the fault is not admissible. The training method is very expensive, thanks to the lot of situation practice. Dogs are trained to detect exact compounds of explosives (TNT, Paxit, Semtex-H etc.).²² According to the experience of the dog and dog-handler, as well as the environment circumstances, the accuracy rate of an explosive detection dog is between 60% and 95%.²³ Some experiments showed that certain compounds were detected more easily than others.²⁴ In pursuance of directive, explosive detection dogs, which belonging to the Hungarian Police, are usable for search buildings, vehicles and luggage.²⁵

Pursuit, guard, patrol and suspect searching and chasing dogs

Guard dogs were used in the ancient times, and they also participated in the modernized police system. The first time, when trained dogs were applicable for modern military purposes was in the middle of 19th century in France. Tentatively they bought 10 Airedale terrier, 10 rough collie in 1872, and after the good experience almost 200 canines were used as patrol dogs.²⁶ Pursuance to the current Directive, guard dogs usable for protecting humans (most of the time is the police man) and watching police objects and areas.²⁷ Against these tasks, the pursuit dogs' role is more complex. Besides the patrol function, they have to search

²⁰ K.G. Furton, L.J. Myers, 'The scientific foundation and efficacy of the use of canines as chemical detectors for explosives [2001] Talanta, Vol. 54. No. 3. 487-500.

²¹ Tomšič, U. 'Detection of Explosives: Dogs vs. CMOS Capacitive Sensors' [2013] http://mafija.fmf.uni-lj.si/seminar/files/2012_2013/DETECTION_OF_EXPLOSIVES_-_Dogs_vs._CMOS_Capacitive_Sensors.pdf 1-15. (2014.03.04.)

²² Daruka, N. 'A robbanóanyag-kereső kutyák alkalmazhatósága repülőterek átvizsgálhatósága során' [2009] Repüléstudomány Közlemények, 2. sz. 1-10.

²³ M.J. Johnston, et al. 'Canine detection odor signatures for mine-related explosives' [1998] Proc. SPIE 3392, Detection and Remediation Technologies for Mines and Minelike Targets III, Vol. 3392. 490-501.

²⁴ H. Knauf, W.H. Johnston, 'Evaluation of Explosives/Narcotics (EXNARC) Detection Dogs' Defense Technical Information Center, 1974.

²⁵ Directive 166. – 181.

²⁶ W. Mayer, 'Das Kriegshundewesen in der Österr.–Ungarischen Armee' (Kriegsarchiv, Manuskriptensammlung TIWK/186. sz)

²⁷ Directive 79. – 87.

for the hidden perpetrators (or person in interest) and catch him/her. More dogs could be used at the same time, if these dogs had participated on a special training based on the Directive.

Application of patrol dogs is also admissible under the police. Pursuance to 30/2011. (IX. 22.) Regulation for Police Service, Section 52 stated that patrol dogs on a leash are applicable as a coercive means in the situation, when the mass shows active (armed) or passive resistance. Consequently, the patrol dogs working in dangerous area, on demonstration, they secure the police actions, as well as finding perpetrators and pursuit them. Dissipating the mass, dogs' role are protecting, supporting the police besides the covering and strengthening for them.²⁸

Suspect seeking or person detection dogs are used also in outside and inside. The task is to seek the hidden person, and if there are no rescue dogs, person detection dogs search missing people. Seeking substances, which made from animals, and chemicals, person detection dogs are not applicable.²⁹

Cadaver dogs

Rules of the application of cadaver dogs are the same as in the case of detection dogs. These special trained canines are able to detect the dead bodies and human remains.³⁰ Metabolic changing under the decomposition and appearance of certain scent molecules provide the scientific background of the usage of cadaver dogs.³¹ After the death, there are 5 decomposition stages, which are separated from each other.

1. Stage: internal decomposition starts after the death, but there are no important physical changes. In some cases, the canines indicate the dead body as a live person.

2. Stage: insects appears on and all around the body. In this stadium, feeling the difference of the scents between the dead and living person is definite.

3. Stage: flesh of the body collapses and gases escape the body and cause an intensive odour thanks to the cadaverin and putrescine. The colour of body changes for dark and black appearance.

4. Stage: body starts to dry and the intensity of odours decreased, but it is feeling.

5. Stage (skeletal stage): the rest of water escaped the body and the mummification started. The scent of decomposition can be hardly detected.³²

Cadaver dogs are able to detect the corpse in all decomposition stages.³³ According to a scientific test, the reliability of cadaver dogs is between 57 to 100%.³⁴ In the United States, line-ups were performed like the scent identification line-ups, and the cadaver dogs signed car in which the dead body was hidden.³⁵

Smell of canines, the human scent and the scent identification line-ups

The excellent ability of smell of canines is well known. Recognizing that the dogs are able to distinguish the human scents was a huge milestone in the application of police dogs. The physiological difference (the olfactory system compared to human's organ also) proved that detection, identification dogs are not replaced with reliable instrument, which is able to compare and detect concrete substances. Dogs are living their life

²⁸Directive 88. – 134.

²⁹ Directive 219. – 235.

³⁰Dogs sign also human remains, not only dead body. Application under the Directive 211. – 218.

³¹Specific scent of decomposition are: putrescin and cadaverin. Vass, Á. 'Odor mortis' [2012] *Forensic Science International*, Vol. 222. No. 1-2. 234-241. and J.K. Dorriety, 'Cadaver Dogs as a Forensic Tool: An Analysis of Prior Studies' [2007] *Journal of Forensic Identification*, Vol. 57. No. 5. 717-725.

³²J. Ensminger, 'Police and Military Dogs: Criminal Detection, Forensic Evidence, and Judicial Admissibility' (Boca Raton: CRC Press 2011) 246-247.

³³ Oesterhalweg et al. 'Cadaver dogs-a study on detection of contaminated carpet squares' [2008] *Forensic Science International*, Vol. 174. No. 1. 35-39.

³⁴D. Komar, 'The use of cadaver dogs in locating scattered, scavenged human remains: preliminary field test results' [1999] *Journal of Forensic Sciences*, Vol. 44. No. 2. 405-408.

³⁵J. Ensminger, 'Police and Military Dogs: Criminal Detection, Forensic Evidence, and Judicial Admissibility' (Boca Raton: CRC Press 2011) 253.

with their nose. They have 125-300 million olfactory receptors, while humans have only 5 million of them.³⁶ Scent identification line-ups, tracking, searching people based on the human unique scent, as biological evidence. We have a little knowledge of the origin of human scent. It is well-known, that the epidermis are always changing (epithelial cells' lifetime is 36 hours), the dead cells and parts of cells reject in the environment. The skin surface contains approximately 2 billion cells. These dead cells are in the environment, and they have 4-5 bacterial cells (catalyzed by bacteria and body fluids) which (could) have connection with them.³⁷ This triad could be specific for the individual. So the human scent including 3 compounds: fluids of glands (eccrin and apocrine), loose epithelial cells and the flora of bacteria.³⁸ The unique human scent is sourced from these compounds' combination and elimination. Certain circumstances determine the unique human scent.³⁹ Certain country using the scent identification line-up, but the judicial admissibility is different. Not considering for the difference among the legal systems, there is a basic expectation: jurisdiction has to using just like criminal technique means and taking evidence – in context this is the scent identification line-up –, which was tested by examinations with natural science and appropriating for the legal certainty.⁴⁰ The subjective elements participating, the different judicial procedure must to minimize during the criminal procedure. To declare that where the place of scent identification line-up is in the criminal jurisdiction, we have to gain an appropriate level of knowledge about the topic.

Conclusion – forensic expectation of future

Showing the pyramid model of criminalistics by FENYVESI who stated that besides the basic questions,⁴¹ the roles of mediators are also important. Material residues (vegetable, animal origin, substances, objects and their parts) in endless shape and size help the identification (the peak of the pyramid), because they refer to the internal structure of the source of material.⁴² It was found – based on the above mentioned part – that the scent is a biological evidence, which in concrete case would be permit the unique identification. Certain substances (filter task) are detected by mobile electronic nose, which are spread widely. In forensic application, the solid phase micro extraction gas chromatography mass spectrometry (SPME-GCMS) is usable to analyze the volatile organic compounds from the samples (drugs, explosives, human scents).⁴³ These compounds – which are typical for the concrete materials – and are found in the upper area of samples (headspace). The aim of biometric identification could be to make distinction between the humans based on the examination of their specific features (physical and behavioural alike). Physical features would be fingerprint, palm print, retina, iris as well as the recognition of the whole face. Behavioural factors including the analyzing of the signature, the voice and keystroke. Consequently, features are suitable for the biometric analyzing, which are general, stable for a long time, unique and qualitative measured. Biometric system defines with a sample recognizing method, where the unique personnel features compare with the features of others data. Concerning to the latest publications, the SPME-GC/MS method with Spearman correlation is suitable for identify over 99% of person in interest based on his/her primary scent (genetically determined) from a scent profile. The results were true for samples which collecting under laboratory conditions, but the

³⁶ Rebmann et al. 'Cadaver Dog Handbook. Forensic Training and Tactics for the Recovery of Human Remains' (Boca Raton: CRC Press 2000). Smelling is a very complex task; it is proved with Nobel-prize in 2004, when two American researchers got this acknowledgement.

³⁷ W.G. Syrotuck, 'Scent and the scenting dog' (New York: Arner Canastota 2000)

³⁸ Janza, F. Kováts, ZS. 'A szolgálati kutya egészségétana' (Budapest: BM Tanulmányi és Propaganda Csoportfőnökség 1974) 91.

³⁹ The components of complex human scent, distinguished: (1) primary odours, which are stable and genetically determined, (2) secondary odours, which are influenced by diet, and diseases and (3) tertiary odours, which contains the external chemicals (smoking, perfumes etc.). A.M. Curran et al. 'Analysis of the uniqueness and persistence of human scent' [2004] Forensic Sci. Commun. Vol. 7. No. 2.

⁴⁰ Gárdonyi, G. 'Kógencia a bűnügyi helyszínelésben' [2011] Magyar Bűnüldöző, 2. évf. 1. sz. 47-62.

⁴¹ (what? when? where? etc.)

⁴² Fenyvesi, Cs. 'A kriminalisztika piramismodelljének második változata' [2014] Belügyi Szemle, 62. évf. 9. sz. 32-43.

⁴³ A.M. Curran et al. 'Comparison of the volatile organic compounds present in human odor using SPME-GC/MS' [2005] Journal of Chemical Ecology, Vol. 31. No. 7. 1607–1619.

forensic scientist of future look at the breakthrough, which permits for the samples collecting in crime scene would be identify.

Bibliography

1. J. Bowlby, 'Attachment' (Middlesex: Penguin Book 1972)
2. Csányi V. 'Kis etológia' (Budapest: Kossuth Kiadó 2002) 44-45.
3. A.M. Curran et al. 'Analysis of the uniqueness and persistence of human scent' [2004] Forensic Sci. Commun. Vol. 7. No. 2.
4. A.M. Curran et al. 'Comparison of the volatile organic compounds present in human odor using SPME–GC/MS' [2005] Journal of Chemical Ecology, Vol. 31. No. 7. 1607–1619.
5. Daruka, N. 'A robbanóanyag-kereső kutyák alkalmazhatósága repülőterek átvizsgálhatósága során' [2009] Repüléstudomány Közlemények, 2. sz. 1-10.
6. J.K. Dorriety, 'Cadaver Dogs as a Forensic Tool: An Analysis of Prior Studies' [2007] Journal of Forensic Identification, Vol. 57. No. 5. 717-725.
7. J. Ensminger, 'Police and Military Dogs: Criminal Detection, Forensic Evidence, and Judicial Admissibility' (Boca Raton: CRC Press 2011)
8. Fenyvesi, Cs. 'A kriminalisztika piramismodelljének második változata' [2014] Belügyi Szemle, 62. évf. 9. sz. 32-43.
9. K.G. Furton, L.J. Myers, 'The scientific foundation and efficacy of the use of canines as chemical detectors for explosives [2001] Talanta, Vol. 54. No. 3. 487-500.
10. Gácsi et al., ' Attachment behaviour in adult dogs living in rescue centres: Forming new bonds' [2001] Journal of Comparative Psychology, Vol. 115. No. 4. 423-431.
11. Gárdonyi, G. 'Kógencia a bűnügyi helyszínelésben' [2011] Magyar Bűnüldöző, 2. évf. 1. sz. 47-62.
12. Horváth, O. ' A kriminalisztikai szagazonosítás jelene és jövője' [2013] Belügyi Szemle, 61. évf. 2. sz. 88-101.
13. Horváth, O. 'A lengyel és magyar szagazonosítás összehasonlítása' [2014] <http://peme.hu/userfiles/A%20tudom%C3%A1ny%20szolg%C3%A1lat%C3%A1ban%20-%20II.%20k%C3%B6tet.pdf> 203-215.
14. Janza, F. Kováts, ZS. 'A szolgálati kutya egészségana' '(Budapest:BM Tanulmányi és Propaganda Csoportfőnökség 1974)
15. M.J. Johnston, et al. 'Canine detection odor signatures for mine-related explosives' [1998] Proc. SPIE 3392, Detection and Remediation Technologies for Mines and Minelike Targets III, Vol. 3392. 490-501.
16. Katona, G. 'A szagazonosítás büntetőeljárásjogi kérdései' (Dunakeszi: ORFK Kutyavezető-képző Iskola 1997)
17. H. Knaut, W.H. Johnston, 'Evaluation of Explosives/Narcotics (EXNARC) Detection Dogs' Defense Technical Information Center, 1974.
18. D. Komar, 'The use of cadaver dogs in locating scattered, scavenged human remains: preliminary field test results' [1999] Journal of Forensic Sciences, Vol. 44. No. 2. 405-408.
19. Mantrailing – személykövetés.
20. www.vakkanto.hu/keresesi-eredmeny.html?ordering=&searchphrase=all&searchword=mantrailing
21. J. Marsch, 'Sir Charles Warren and the Bloodhounds' www.casebook.org/dissertations/rip-chasblood.html
22. W. Mayer, 'Das Kriegshundewesen in der Österr.–Ungarischen Armee' (Kriegsarchiv, Manuskriptensammlung TIWK/186. sz)
23. G. Nobis, 'Der älteste Haushund lebte vor 14.000 Jahren' (UMSHAU: 1977) 215-225.
24. S.J. Olsen, J.W. Olsen, 'The Chinese Wolf, Ancestor of New World Dogs' [1977] Science, Vol. 197. 533-535.

25. Oesterhalweg et al. 'Cadaver dogs-a study on detection of contaminated carpet squares' [2008] *Forensic Science International*, Vol. 174. No. 1. 35-39.
26. Rebmann et al. 'Cadaver Dog Handbook. Forensic Training and Tactics for the Recovery of Human Remains' (Boca Raton: CRC Press 2000)
27. W.G. Syrotuck, 'Scent and the scenting dog' (New York: Arner Canastota 2000)
28. Szinák, J. 'A kábítószer-kereső kutya' (Dunakeszi: ORFK Kutyavezető-képző Iskola 1999)
29. Tomšič, U. 'Detection of Explosives: Dogs vs. CMOS Capacitive Sensors' [2013] http://mafija.fmf.uni-lj.si/seminar/files/2012_2013/DETECTION_OF_EXPLOSIVES_-_Dogs_vs._CMOS_Capacitive_Sensors.pdf 1-15.
30. Topál et al., ' Attachment behaviour in the dogs: a new application of the Ainsworth's Strange Situation Test' [1998] *Journal of Comparative Psychology*, Vol. 112. No. 3. 219-229.
31. Tremmel, F. 'Bizonyítékok a büntetőeljárásban' (Pécs-Budapest: Dialóg Campus Kiadó 2006)
32. Vass, Á. ' Odor mortis' [2012] *Forensic Science International*, Vol. 222. No. 1-2. 234-241.
33. C. Vilá et al., 'Bonobo: The forgotten ape' (Berkeley: Univ. California Press 1997)
34. 23/2003. (VI. 24.) BM-IM Regulation
35. 17/2009. (OT. 10) National Police Headquarter Directive for the Police Dog and Horses Regulation
36. 30/2011. (IX. 22.) Regulation for Police Service
37. Act XIX of 1998 on Criminal Proceedings

THE USE AND TRANSFER OF PNR TO ENSURE SECURITY

Dalma Gabriella Hubay¹

Abstract

The aim of the paper is to illustrate a process that began in 2001, and sped up in the last decade.

The study explores the effects of the transfer and the use of PNR (passenger name records) – as a response to terrorism – to fundamental rights.

It raises a central question: whether the transfer of PNR is adequate to the requirements of necessity and proportionality of the restriction of fundamental rights. PNR is a record of each passenger's travel requirements containing all information necessary to enable reservations to be processed and controlled by air carriers. PNR are for example the name and the gender of the passenger, passport details, the place and date of birth, payment information, and special service requests such as meal requirements etc.

There is an international agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, that was signed for the purpose of providing passenger name records from air carriers operating passenger flights to the United States Department of Homeland Security to ensure security and to protect the life and safety of the public.

The study takes into account those basic human rights, whose essence are endangered to the greatest extent by signing the international agreement.

These are the right to informational self-determination and the right to individual privacy.

Keywords: data protection, fight against terrorism, fundamental right

Introduction

11/09/2001 is not just the date, which became a part of the history books. A political superpower had been shocked. After the shock and the fear some new expressions became common, like the fight against terrorism.²

After the attacks, there were new rules at the airports and that meant new situations for the passengers. Year by year people are trying to follow the changes of airport security rules. There is also a fight between human rights groups and politicians standing under pressure. They have to compromise how to fight against terrorism, but not to completely immolate the fundamental human rights.

It is a fact that aviation security is facing new types of threats in the 21st century; threats to which the traditional security rules used at airports can not give an adequate and efficient response.

The United States of America does not really seem to be soft on fighting terrorism and the European Union tries to find the “golden mean”. But there is one thing to admit: in this new world people accept a bigger restriction of human rights, than a decade ago.

11 September started new progresses; the decision makers of crime prevention are forced to make strict decisions, against which the human rights organizations are protesting with all the power they have.

Passenger name record

¹ PhD student, University of Pécs, Faculty of Law, Doctoral School, Hungary. My research area is the effect of the fight against terrorism to the fundamental rights. I explore mostly the legislation for airport security.

² Miklósi Zoltán: A terrorizmus elleni “háború” és az emberi jogok. [The “fight” against terrorism and the human rights] In: Fundamentum, 3/2004. p. 43.

Passenger name record (in the following: PNR) is a record of each passenger's travel requirements which contains all information necessary to enable reservations to be processed and controlled by air carriers. PNR are among others the PNR record locator code, the date of reservation/issue of ticket, the date of intended travel, the name of the passenger, general remarks, including other supplementary information (in the following: OSI), special service information (in the following: SSI), special service request (in the following: SSR), passport details, the place and date of birth, payment information, ticketing information, travel agency, all baggage information and seat information.³

The use and transfer of PNR is based on an international agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, that was signed for the purpose of providing passenger name records from air carriers operating passenger flights to the United States Department of Homeland Security to ensure security and to protect the life and safety of the public.

The preamble of the agreement says that the parties desire "to prevent and combat terrorism and serious transnational crime effectively as a means of protecting their respective democratic societies and common values".⁴ It also includes that they are "convinced that information sharing is an essential component in the fight against terrorism and serious transnational crime and that in this context, the processing and use of passenger name records (PNR) is a necessary tool that gives information that cannot be obtained by other means".⁵

Informational self-determination and the right to individual privacy

According to the preamble of the agreement the United States of America and the European Union are determined "to prevent and combat terrorist offences and transnational crime, while respecting fundamental rights and freedoms and recognising the importance of privacy and the protection of personal data and information".⁶

The 5th Article of the agreement says that, the Department of Homeland Security "shall ensure that appropriate technical measures and organisational arrangements are implemented to protect personal data and personal information contained in PNR against accidental, unlawful or unauthorised destruction, loss, disclosure, alteration, access, processing or use".⁷ The Department of Homeland Security also "shall make appropriate use of technology to ensure data protection, security, confidentiality and integrity".⁸

It is not only the European law that extremely protects the right to individual privacy, but also the Fundamental Law of Hungary guarantees the protection. The right to individual privacy is a part of the right to human dignity, which is a general and subsidiary human right. The protection of the individual privacy include every situation of life, that relate to the privacy of the individual: such as the protection of private secret, the right to informational self-determination, or immunity from observation.⁹ Although the right to individual privacy is not an absolute right: the interests of the state can mean the base of the restriction of this right.¹⁰

The right to informational self-determination means, that everyone has the right to decide about the discovery and the use of her/his private secrets and personal data.¹¹ The Constitutional Court of Hungary declared in decision, that the process of the datas must be traceable and verifiable for everyone. This means that everyone has the right to know that who, where, why and for what kind of purpose uses her/his personal data. In case of a request, the data processor is obligated to inform the individual about the processed data,

3 Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security (in the following: the agreement), Annex, 14.12.2011.

4 See above n. 2. Preamble

5 See above n. 2. Preamble

6 See above n. 2. Preamble

7 See above n. 2. Chapter II, Article 5

8 See above n. 2. Chapter II, Article 5

9 Chronowski-Drinóczi-Petrétei-Tilk-Zeller: "Magyar Alkotmányjog III. Alapvető jogok"[The Hungarian Constitutional Law III. Fundamental Rights] (Dialóg Campus Kiadó, Budapest-Pécs 2006. 2008.), p. 49-50.

10 2/1990. (II.18.) AB határozat, ABH 1990. p. 18. [Decision of the Constitutional Court of Hungary]

11 20/1990. (X. 4.) AB határozat, ABH 1990. p. 69. [Decision of the Constitutional Court of Hungary]

the purpose, the legal base and the duration of the process furthermore the name and the address of the data processor.¹² The right to informational self-determination is not an absolute right¹³, so the report of personal data can be obligatory by the law.

To ensure public, national and international security requirements, the report of the personal data at the airports is legally enforceable. An agreement like this means an obvious restriction of the right to the informational self-determination.¹⁴

It should be highlighted, that in case of the restriction of the fundamental rights, the agreement shall include strict regulation about the process of the data, so the restriction will not be bigger than necessary. Problematic is the retention of the collected data. According to the 8th Article of the agreement, the Department of Homeland Security retains PNR in an active database for up to five years. After this so called active period PNR shall be depersonalised and be transferred to a dormant database for a period of up to ten years. In this dormant database PNR can still be “repersonalised” of course.¹⁵ So the duration of the retention is more than fifteen years, which time is extremely long compared to the agreement with Australia (5,5 years).

The European Union plans to sign an other PNR agreement in the future. The new agreement would be an internal EU PNR agreement. It became doubtful that the right to informational self-determination and the right to individual privacy are going to be able to keep their essence after such rough actions of the legislation.

Conclusion

The effectiveness of PNR collection in stopping terrorism is difficult to assess. The legislation shows, that the EU make real efforts to protect the fundamental rights and to ensure security at the same time. Before the agreement there already existed the 2004 EU-US PNR agreement, and the 2007 EU-US PNR agreement. Both needed new regulation for a better data protection, so the EU made efforts to change the terms. But it can happen, that people have to give up some part of their fundamental rights, and the EU may have no chance to prevent that. PNR could breach human rights. It is feared that they could breach an individual's right to privacy as laid out in the Human Rights Act. The United States has a different sight about the value of the right to the „integrity of the person”. Terrorism has clearly shown that it can strike with great brutality, anywhere in the world. That is why the police forces and the governments of the countries work together closely in the fight against terrorism. In the last few years, step-by-step, people always gave up something from their fundamental rights because of the fight against terrorism. If the ensurance of security requires after each attack more restriction of the fundamental human rights, how can the individual keep his personal integrity unharmed? Presumably at the end of this process the inviolability of the fundamental rights will change.

Bibliography

1. Chronowski-Drinóczi-Petrétei-Tilk-Zeller: “Magyar Alkotmányjog III. Alapvető Jogok” [The Hungarian Constitutional Law III. Fundamental Rights.] (Dialóg Campus Kiadó, Budapest-Pécs 2006, 2008), p. 49-50.
2. Miklósi Zoltán: “A terrorizmus elleni “háború” és az emberi jogok” [The “fight” against terrorism and the human rights] In: Fundamentum, 3/2004. p. 43.
3. Prof. Dr. Gerrit Hornung-Dr. Franziska Boehm: “Comparative Study on the 2011 draft Agreement between the Unites States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security”, Passau/Luxembourg, 14 March 2012
4. Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and

12 15/1991. (IV. 13.) AB határozat, ABH 1991. p. 40. [Decision of the Constitutional Court of Hungary]

13 2/1990. (II. 18.) AB határozat, ABH 1990. p. 18. [Decision of the Constitutional Court of Hungary]

14 The Fundamental Law of Hungary, 25 April 2011 According to the hungarian law it would be only unlawful if the terms of the agreement wouldn't respect the essence of the right to the informational self-determination.

15 See above n. 2. Chapter II, Article 8

prosecution of terrorist offences and serious crime (COM(2011) 32 final), Vienna, FRA Opinion – 1/2011, 14 June 2011

5. Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security 14.12.2011
6. Directive 95/46/EC, Data Protection Directive
7. The Fundamental Law of Hungary, 25 April 2011
8. 2/1990. (II.18.) AB határozat, ABH 1990. p. 18. [Decision of the Constitutional Court of Hungary]
9. 20/1990. (X.4.) AB határozat, ABH 1990. p. 69. [Decision of the Constitutional Court of Hungary]
10. 15/1991. (IV.13.) AB határozat, ABH 1991. p. 40. [Decision of the Constitutional Court of Hungary]

CASE STUDY ON FUNDAMENTAL RIGHTS VS. PUBLIC INTEREST - MILITARY RADAR CONSTRUCTION

Fruzsina Dóra Hubay¹

Keywords: constitutional rights vs. public interest, private and public aspect

Introduction

Today's technical developments are difficult to follow by the regulatory environment; not even adequate apparatus exists to do that. Often the legislative practice has to fill the gaps and work through areas not properly covered by the law. The same phenomenon can be said about the built environmental disputes as well.

For example, what shall one do when a military radar is going to be built over his/her city based on public interest and national security? How to validate our basic rights, how to protect our right to a healthy environment? How long will fundamental rights cover against the public interest? Can these violations be remedied by compensation? Can the right of public safety be compared to a healthy environment? Is it possible at all to invoke these rights in a civil lawsuit? Who may be the subject of the lawsuit, to begin with?

In my study I would like to exhibit the legal case mentioned above about the notorious case of the military locator never built up in Hungary at the nature conservation area in the Mecsek Mountains. The aim of the study is to demonstrate that constitutional rights have their place in every level in litigation and just because the public interest is undeniable in this case, it does not mean that all other legal requirements have to vanish.

The Pécs locator lawsuit

However, before embarking the legal case I would like to give a very brief description of the constitutional regulation of the right to a healthy environment in the Hungarian Fundamental Law.

The text of the Fundamental Law regulate the right to a healthy environment with the same wording as the previous Constitution, but in its related provisions, which declares the right to physical and mental health, the Fundamental Law has been more tolerant than it was in the Constitution, as the legislators left out the "highest level" exposure.

Thus, according to the current regulations, everyone has the right to physical and mental health, which is closely tied to the fact that Hungary recognizes and validates the individual's right to a healthy environment.

The physical and mental health does not depend solely on the existence of a healthy environment or the lack of it, but it has a very important role in it, and this is an excellent example of the abovementioned case where the individual's well-being, thus state of mind and state of health is affected by the surrounding built environment.

The case discussed below happened only a few years ago, and had quite an echo in the media as well. The so called locator lawsuit at Pécs was preceded by the formation of an international NATO's signing of the Convention, in which Hungary is committed to deploy several military radars² in the country. The obligation to

¹ PhD student, Doctoral School at Faculty of Law, University of Pécs. My research area is the presence of the constitutional rights as a legal basis in civil law suits. As an attorney my everyday work supports me in discovering new trends at this specific area of law.

² Radar is an object-detection system that uses radio waves to determine the range, altitude, direction, or speed of objects. It can be used to detect aircraft, ships, spacecraft, guided missiles, motor vehicles, weather formations, and terrain. The radar dish (or antenna) transmits pulses of radio waves or microwaves that bounce off any object in their path. The object returns a tiny part of the wave's energy to a dish or antenna that is usually located at the same site as the transmitter. (from Wikipedia)

fulfill was only partially implemented, because the southern part of the country still lacked the necessary superstructure for the protection zones.³

The initially designed radar on Zengő pike was placed over the roof of Tubes pike after a lengthy protest, which replacement caused even more public outrage. Many of the locals were deeply concerned about the issue⁴, so in order to change the mind of the decision-makers they organised several local forums against the construction. However, the authority authorized the building of the radar.

Not everyone thought the same about the locator construction – as a result the Constitutional Court also decided in the question in the Judgment of 12 May, Decision 56/2009, the summary of which is the following:

The impact of the locals' movements in Pécs was that the local government tried to avoid the installation of the radar within their respective powers, so has adopted a decree. This made it impossible for the city throughout to install a "long-range military radar" for all construction zones (Zone), with the turn added to the local building regulation, "can not be a long-range military radar.

The Constitutional Court found established the motion of the head of the South Transdanubian Regional Administrative Office which was asking for a complete review and destruction, and the judgment held that the regulation is not only in conflict with the building regulation on national level, but also with several international treaties, especially the North Atlantic Treaty.

The legal dispute has moved to the Court. The essential subject of the lawsuit was that the radar is to be built on the given spot and that the procedure of the construction permit violated the law or not.

First of all the main question was to determine whether the fact of the infringement of the constitutional right to a healthy environment established the active legitimacy in the litigation of adjacent property owners in the area, or the inhabitants in the locator impact area, as well the city residents, since their existing environmental conditions deteriorate significantly with the construction of the radar.

The Supreme Court assessed in its judgement the applicants' arguments concerning the protection of drinking water, and their interests of preserving a healthy environment in the context of the expected impact on the environment, and made it a basis for the client's position and also a fact which creates the right of legal interest.

In doing so, the Supreme Court applied the so-called necessity-proportionality test simultaneously with the interpretation of the Constitutional Court's decisions.

The object of the test was that in respect of the benefits of the protection of a fundamental right, the military, national security, and environmental protection as well as the nature conservation interests - in this case the airspace security benefits - exceed those other fundamental rights mentioned above, the extent of damage in the environment or its danger degree.

The legal position of the Court was that the airspace security benefits in this case outweigh the fundamental disadvantages or dangers.

The court took into account the Natura decree provisions as well in the assessment of the environmental and nature conservation interests, but according to the judgment of the Supreme Court, it has been misinterpreted.

Finally, the Supreme Court nevertheless upheld the applicants sought based on their references to, and repealed the offending sentences, and also the unlawful administrative decisions moreover ordered the first instance body to conduct a new procedure.

This last decision was never executed, because as the result of discussions in the meantime, the process has been completed, so the radar station won't be built in the Tubes.

Several other types of infringement needed to be relied on to support the violation of the constitutional right, but as a 'remerciement' for the development of jurisprudence, at least in this case the violation of the fundamental right was not just hidden between the lines, but played a very important role.

Conclusion

³ Cf.: Fodor László (2004): A Zengő hegyére tervezett lokátorállomás engedélyezésének környezetjogi vonatkozásai, Sectio Juridica et Politica, Miskolc, Tomus XXII., Miskolc University Press

⁴ For more information see: <http://www.cmm.hu/?cat=story&id=269> on the 10th March 2015
<http://www.cmm.hu/dokumentum/HungarianRadar.pdf> on the 10th March 2015

In conclusion, we can say that with the current constitutional operation in Hungary is needed to have a functioning body to enforce the protection of constitutional rights, whose powers must be clarified beyond doubt so the exercise of fundamental rights can be implemented without difficulties. This body should interpret fundamental rights, despite the fact that the petitioner does not support the request properly, to avoid the possibility of legal uncertainty, for example in healthy environment cases as well.

I would like to point out that it is important that the state ensure the institutional protection of the environment - and thus to a healthy environment - and necessarily must take care of it so the already developed environmental level - and so the state of a healthy environment as well - do not fall, not even for national defense, nor public interest defense.

In my opinion it is essential that the Court and also the bodies in public administration play their part on their level in the constitutional jurisdiction, because the Constitutional Court in its relevant previous interpretation saw this opportunity⁵, even though the Court does not consider separately the judging of fundamental rights with their respective powers, nor a job on the basis of which the Constitution could be directly applied.⁶

In my opinion if the Constitutional Court - in the case discussed above - does not reject the motion for expressing their right to a healthy environment, a number of legal disputes could have been avoided, since the content of the law could be clearer for everyone.

Surely, the law enforcement's situation would be easier if there were an accurate guidance to them, not least for those who wish to exercise these rights, because often the result of a lawsuits depends on – whether it's to define the customer quality, or even the merits of the decision – how the examiner (administrative body or Court) does compare with the basic rights links.

Finally, I consider it important to emphasize that in case of the radar construction the clients affected openly criticized the breach of the right to a healthy environment, not just a procedural point of view, in order to determine the client's quality, but also on the merits of the case.

Hopefully this trend will continue, as the constitutional law does have a place in addition to a civil proceeding right to a fair trial.

Bibliography

1. Hungarian Constitutional Court's Judgment of 21 October, Decision 46/1994
2. Hungarian Constitutional Court's Judgment of 12 May, Decision 56/2009
3. CHRONOWSKI-DRINÓCZI-PETRÉTEI-TILK-ZELLER: Magyar alkotmányjog III. Alapvető jogok, Dialóg Campus Kiadó Budapest-Pécs 2006, 2008
4. FODOR László (2004b): A Zengő hegyére tervezett lokátorállomás engedélyezésének környezetjogi vonatkozásai, Sectio Juridica et Politica, Miskolc, Tomus XXII., Miskolc University Press
5. PETRÉTEI József: Az alkotmányos demokrácia alapintézményei, Dialóg Campus Kiadó Budapest-Pécs 2009

⁵ Judgment of 21 October, Decision 46/1994

⁶ Chronowski-Drinóczi-Petrétei-Tilk-Zeller: Magyar alkotmányjog III. Alapvető jogok. Dialóg Campus Kiadó, Budapest-Pécs 2006. 2008. p. 36.

SOCIAL SECURITY AS THE MAIN GOAL IN TRANSFORMATION OF COMPETITION LAW

Konstantin Ivanov¹

Abstract

This article analyzes the social security as the main goal in transformation of competition law. According to supporters of competition law, it protects the economic interests of consumers and promote economic development. According to opponents, competition law is a system of property rights violations and often or even usually leads to negative consequences for consumers and the economy as a whole. Despite these contradictions, both parties agree that it is necessary to upgrade the current competition law. The author identifies social security as one of the key objectives in the process of reforming the competition law, as legislators and doctrine pay more attention to the more typical principles and competition law.

The author concludes that social security must be a *functional* one, focusing on the subject-matter the entity in question is concerned with. At the same time, the analyze relating to the concepts of "security" and "solidarity" will be made in current research. Yet, the author comes to the conclusion that on the basis of this conceptual framework the question whether health, pension and other insurance services rendered by social security schemes are of an economic nature would not appear difficult to answer. In conclusion author states that the concept of social security in competition law, however, goes beyond mere mutualisation in that it provides for a transfer of wealth - not based on insurance principles - among members of a given risk group or among different groups.

Keywords: competition law, social security, transformation

Introduction

Transformation of modern competition law is directly related to the implementation of the principles of international law. There is no doubt that here in the European region are added high standards. Moreover, in such complex in nature areas as competition is necessary to consider not only the achievements of the economy, but also special principles and modes to the existing system meets all the requirements of human rights in the 21st century. Security is seen most often in the areas of international law, international humanitarian law. Competition law is not without its importance and here it is interesting to analyze how the principle of security can be realized in the development of competition law. It is worth noting that competition law at the turn of the century, not only actively developed, but also appears in the new regions, where earlier in the political and economic way of life couldn't find place. It is crucial to analyze the experiences of new regions in the early stages of development of competition law.

The goal of modern competition law: where all roads lead?

In today's world, antitrust and conducted on the basis of its competition policy is one of the most important means of state regulation of the economy, whereby antitrust law recognizes an independent branch of law. Antitrust legislation also includes constitutional, civil, penal provisions. The former Soviet Union antitrust laws appeared only with the beginning of the transition to a market economy where competition has been recognized as a boon to society. Antitrust law is based on the concept of achieving the highest well-being of

¹ Doctor of law, associated professor. Graduated Herzen University in Saint Petersburg in 2008 and currently works in European Humanities University as associated professor and as Legal advisor for Russian Law at Dominas & Partners. The sphere of the scientific interest is the European Union law, International private law, Competition law. Konstantin Ivanov is the author of a book – "The integration of the Republic of Lithuania into EU: law and history issues" (2010, Saint Petersburg) and Formation of legal system of the Republic of Lithuania: 1990-2009 (2014, Vilnius).

citizens as a result of the economic entities to freely share of the goods and services in a competitive market that favors universal regulator of social production.

The main goals of the antitrust laws: the protection and promotion of competition, control over economic entities with dominant position in the market, control over the process of concentration of production and capital control over pricing, promotion of small and medium enterprises and protection of its interests, to protect the interests of consumers.

Among the difficulties of reforming the national economy should include the negative effects of the country's decades-existing administrative-command system of economic management. They are well known, however, consider it necessary to mention those that are directly related to the research problem: the administrative monopoly in the economy and the lack of existing economic model of competitive relations, giving impetus to accelerate the development of scientific and technological progress; low technical and economic level of production and lack of competitiveness of products on the world market; lack of conditions for the formation of a competitive environment and competitiveness of economic entities, leading to stagnation in the economy and some others.

Seriously complicated the process of reforming the economy and errors in its implementation, which led to an unprecedented decline in the world production. One of the main reasons for the prolonged crisis was immediate, economically disastrous, rupture of economic ties in connection with the collapse of the former Soviet Union, the consequences of which affect not only the economy of the Russian Federation, but also in other CIS countries. The economic crisis, complicated by political instability, inhibits the transition of the economy to a socially-oriented market economy.

The lack of economically justified state mechanisms of formation and regulation of competitive relations, as well as weak, constantly changing and highly controversial legislative framework failed to promote, and even more so, to accelerate the formation and development of market relations, a genetic trait that is competition.

The treatment of health care by European competition law encapsulates more clearly than almost any other public service a key dilemma: to what extent are public services subject to the norms of competition law and the internal market, or are they characterized by quite different principles of solidarity and citizenship, which make the application of market and competition principles inappropriate? As we shall see, neither the European courts nor the Commission has so far provided a completely clear set of answers to these questions, although important guidance recently has been apparent in case-law and Commission policy statements.²

"Security" and "solidarity" – the main trends in competition law

How can we explain the surrender of sovereignty to a supranational organization at a moment in which the European state was exercising an increasingly confident and targeted control over its domestic economy?

Internal market and competition law have an important effect on the organization of 'services of general interest', including, most importantly, social services of various kinds (arts 45–66 TFEU). Enforcement in both areas has the potential for undermining the ability of states to regulate such services in ways necessary to preserve domestic commitments to solidarity and social protection. This is especially true of those states that either have partially privatized such services or have made extensive use of 'public-private' partnerships, the effect of which is to open them up to review under competition law. To illustrate, it is commonly agreed among EU lawyers that the Court has to date employed a relatively inchoate approach to the conditions under which, for example, medical services fall under competition and public procurement rules.³

It is settled case law that every entity engaged in economic activities is an undertaking within the meaning of EC competition law. In European competition law the concept of undertaking is one of the key jurisdictional tools: it delineates the scope of these rules. How does the ECJ apply this definition to health care cases? This contribution addresses this question by making a distinction between bodies managing health care schemes and health care providers. When it comes to managing bodies, the ECJ scrutinises whether the

² T. Prosser, *The limits of competition law: markets and public services* (Oxford: Oxford University Press, 2005) p 65

³ Andrea Sangiovanni - *Solidarity in the European Union* // *Oxford Journal of Legal Studies*, (2013), pp. 23

health care scheme at issue is almost completely based on the principle of solidarity – in the sense of redistribution of wealth – or whether elements of competition are built into this scheme. If the principle of solidarity is predominant, the managing bodies are not engaged in economic activities according to the ECJ and, as a result, are not undertakings.⁴

Discusses the principle of national solidarity and its relationship to EC competition law. Describes the theoretical foundations for the compact between Member States and the Community, the delineation between the competences of the Community and the Member States, and the choices made by citizens exercising their democratic rights as to the level of services to be provided by the welfare state. Examines European Court of Justice case law on the solidarity principle, limiting the application of EC competition law to Member States' provision and regulation of social services in two ways: (1) where the need for a different distribution of a social service than could be attained on the free market in order to provide that service to citizens on a universal basis justified derogations from the EC Treaty Art.86(2); and (2) where it was legitimate for a Member State to seek to protect public spiritedness or the public ethos in its provision of public services.⁵

The other relevant principle – and one particularly characteristic of health care – is that of social solidarity. This has been noted in a number of areas of European law, and is based on a commitment to equality, notably to equal access to services irrespective of ability to pay. In this sense, the principle is based on an ideal of citizenship: that all public services are based on our inclusion in a community, not on our financial resources. It is not difficult to see that this principle may come into conflict with market-based principles. Thus, a government may wish to coordinate a health service in order to guarantee equal treatment for all, rather than enhancing consumer choice, which may further promote inequalities.⁶

Competition law in social life

As the growing number of cases before both the Court of Justice¹ and the European Commission shows, the question whether and to what extent the Treaty's competition rules apply to social security systems and their operators' activities has become increasingly topical. Elements of competition have been or are being introduced - in different ways and to different degrees - into public social security systems in a number of member States. Where does this leave the competition rules? This article - which deals solely with statutory social security - does not pretend to give the final answer to this question which, in fact, has been discussed for as long as social security schemes have existed. Rather, it attempts to highlight some central issues. It will analyse the Court's case-law relating to the concepts of "undertaking" and "solidarity" and will address issues raised by the exercise of market power of social security bodies vis-à-vis third parties on other markets.

It is inherent in the principle of an open market economy with free competition, as referred to in Article 102 a of the Treaty, that competition rules only apply to behavior which is, in the widest sense, of an economic nature. Thus, the notion of undertaking - which delimits the scope of application of the competition rules - must be a *functional* one, focussing on the subject-matter the entity in question is concerned with (as opposed to its institutional characteristics). The Court has itself adopted this approach: In *Hydrotherm/Compact* the Court had to decide whether an agreement concluded by one company with three other parties (all of which were controlled by one of the three), could be considered to be "an agreement to which only two undertakings are party" for the purpose of applying the (old) exclusive dealings block exemption. The Court held that "[i]n competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the *subject matter* of the agreement in question". The Court confirmed this functional approach in *Höfner* where it coined a phrase that henceforth was to become the standard definition: "the concept of an undertaking encompasses every entity engaged in an *economic activity*, regardless of the legal status of the entity and the way in which it is financed." The Court's substance-oriented approach - treating as irrelevant organisational

⁴ Hans Vedder – Of Jurisdiction and Justification. Why Competition is Good for 'Non-Economic' Goals, But May Need to be Restricted - 2009 Competition Law Scholarsp. 51

⁵ Boeger, N 2007, 'Solidarity and EC Competition Law'. European Law Review, vol 32 (3), pp. 320

⁶ A. Jones and B. Sufrin, EC competition law , 3rd ed. (Oxford: Oxford University Press, 2007)

features like legal status and way of funding - is clear. However, the difficulty lies elsewhere: what precisely is an "economic activity"?⁷

One way of financing the implementation of such solidarity is to grant special rights, i.e., to establish a statutory monopoly. If a competing service provider were allowed to concentrate only on the profitable part of the service - which would be equivalent to risk selection in the insurance field - the public provider, who remains under the obligation to offer the universal service, would have to raise its tariffs for the less used services, thus frustrating the social purpose of the scheme. It is precisely for that reason that the Court has protected the exclusive rights granted to a provider of postal services of general interest and that the relevant Community measures aim at ensuring that the universal postal service is being safeguarded in the course of the planned liberalisation of this sector. The parallel to solidarity in the social security field is obvious.

Conclusion

The implementation of the principle of social security is possible only with the principle of solidarity. In this important area of competition law as it is important to correctly apply this principle without breaking advances in science competition.

According to opponents, competition law is a system of property rights violations and often or even usually leads to negative consequences for consumers and the economy as a whole. Despite these contradictions, both parties agree that it is necessary to upgrade the current competition law. After brief analyze, we can identify social security as one of the key objectives in the process of reforming the competition law, as legislators and doctrine pay more attention to the more typical principles and competition law.

We can conclude that social security must be a functional one, focusing on the subject-matter the entity in question is concerned with. At the same time, the analyze relating to the concepts of "security" and "solidarity" will be made in current research. Yet, we come to the conclusion that on the basis of this conceptual framework the question whether health, pension and other insurance services rendered by social security schemes are of an economic nature would not appear difficult to answer. In conclusion we finally state that the concept of social security in competition law, however, goes beyond mere mutualisation in that it provides for a transfer of wealth - not based on insurance principles - among members of a given risk group or among different groups.

Bibliography

1. Andrea Sangiovanni - Solidarity in the European Union // Oxford Journal of Legal Studies, (2013), pp. 23
2. A. Jones and B. Sufrin, EC competition law , 3rd ed. (Oxford: Oxford University Press, 2007)
3. Boeger, N 2007, 'Solidarity and EC Competition Law'. European Law Review, vol 32 (3)., pp. 320
4. Hans Vedder – Of Jurisdiction and Justification. Why Competition is Good for 'Non-Economic' Goals, But May Need to be Restricted - 2009 Competition Law Scholars – 342 p.
5. T. Prosser, The limits of competition law: markets and public services (Oxford: Oxford University Press, 2005) p 65

⁷ Hans Vedder – Of Jurisdiction and Justification. Why Competition is Good for 'Non-Economic' Goals, But May Need to be Restricted - 2009 Competition Law Scholarsp. 57

SECURITY AS A LEGITIMATE REASON FOR CREATING DOUBLE STANDARDS ON HUMAN RIGHTS?

Miroslav Kaštyl¹

Abstract

The aim of this paper is to focus on protection of national security in relation to the creation of different types of standards of protection of human rights for a specific group of individuals, especially for returned terror suspects. In this sense, the principal question is whether the protection of national security justifies parallel regimes with different rules for these persons from a perspective of international law? The paper primarily analyses returns of unwanted persons back to their country of origin based on so-called diplomatic assurances due to national security reasons and possible responsibility of States under the principle of *non-refoulement*. One of the arguments against this practice is that it creates parallel regime for “privileged - returned” individuals based on bilateral agreements. However, the paper will argue that a similar parallel regime with its double standards is already part of international law and exists under the 1951 Convention relating to the status of refugees; refugees are saved while others are not. It will also consider whether we can defend double standards with regard to the development of international law, especially with respect to the evolution of positive obligations imposed on States to protect specific individuals and public against dangerous individuals?

Keywords: national security, double standard, human rights, non-refoulement

Introduction

Although the meaning of national security is rather ambiguous, the call of national security evokes an ominous feeling as it is nowadays more and more connected with unpleasant or controversial measures that have negative effect on some groups of individuals. At the same time, it is claimed to be positive for the protection of others. Membership in these two categories may differ or not; consider for example the status of foreigners. However, this call still seems to be out of ordinary in our daily lives, something unfamiliar, alien or strange affecting others but not us - respectable citizens. The argument that these security measures affect “others” and not “us” has been already criticised as they may create precedents for the future. In this respect, it is believed that in the end all of us – loyal or disloyal members of the community will be affected by this call.² It also resembles the Carl Schmitt’s Concept of the Political; the ultimate idea of friends and enemies presenting some individuals as a threat to our interests.³

Yet for law, or at least for some areas of law, the protection of national security seems to be indispensable and sometimes convenient purpose for dealing with intense situations or dangerous individuals. In this regard, national security intensively applies to some foreigners. It gains its momentum once the threat emerges and tests the boundaries of existing laws. Consequently, the call of national security pushes back using latest technology, political and legal arguments.

The presence of a foreigner in the territory of another State creates series of legal relations not only from the perspective of national law but also from the perspective of international public law. Although for the foreigner a legal bond between him or her and a residing State is not of the same significance as for a citizen, under the principle of *non-refoulement*, protecting foreigners from being returned to countries where they could

¹ (Charles University, Czech Republic): PhD student, Department of Public International Law, Faculty of Law, Charles University in Prague. Manager of the Legal Department, Counselling Centre for Integration (PPI) in Prague. Author is interested in international law, especially refugee law.

² D. Cole, ‘Their Liberties, Our Security: Democracy and Double Standards’ [2003] 31 Int’l J. Legal Info. 290-311

³ C. Schmitt, ‘Pojem politična’ (Praha: 2013) 46

face a risk of being mistreated, this bond may be of a crucial importance.⁴ Traditionally, the prohibition of refoulement usually involves protection against ill-treatment, but it has been extended into other areas as well, for example in cases of unfair trials. However, some foreigners are considered more dangerous than others and some States more determined to create special arrangements for such foreigners. For the purposes of this article the concept of national security will be limited to the foreigners considered as a security threat and measures adopted against this threat.

Where do we stand on the national security clause?

The bond between foreigner and sojourning State has attracted a great deal of legal attention. At the beginning of the colonial period some scholars simply prescribed that foreigners may travel and sojourn provided that they do no harm to the natives.⁵ In these days, the acceptance of a foreign national in the territory of a State largely remains at State discretion but involuntary departures, such as for instance expulsion, are subject to some limitations.⁶ Although a national security clause has a long-standing tradition in national laws and counts as a serious reason for terminating residence of the foreigner and his / her expulsion, it is not the omnipotent.

The demand for a national security clause regulating the status of incoming foreigners emerged at the international level in connection with the refugee crisis during the inter-war period. It influenced several international instruments related to refugees even before the Second World War.⁷ After the Second World War, during the preparation of the Convention relating to the Status of Refugees, an importance of the national security was highlighted by some representatives arguing that *national security was a consideration which should take precedence over all others*.⁸ Thus the final version of the Convention contains national security clause in relation to the prohibition of refoulement. But the personal scope of the Convention is limited only to refugees. In this regard, human rights law provides broader protection for foreigners against refoulement. At the same time, it imposes a burden on States once they decide to use a national security clause.

Unlike the Convention relating to the Status of Refugees the International Covenant on Civil and Political Rights or the Convention for the Protection of Human Rights and Fundamental Freedoms do not explicitly include the prohibition of refoulement.⁹ However, both instruments are in these days interpreted in a way that they include this prohibition, for example in relation to the risk of ill-treatment. This judicial interference could be well illustrated in case of the European Court of Human Rights (hereinafter "*The European Court*" or "*the Court*") and the Court's jurisprudence. In 1989 the Court stated that the responsibility of a State under Article 3 would be engaged in case of returning an individual no matter how heinous crime that individual committed before his return.¹⁰ Consequently, the Court repeatedly confirmed this approach even in national security cases.

For States one the most frustrating moments became once it was clear that this prohibition of refoulement applies even to dangerous foreigners – for example terror suspects considered as a threat for national security. In the European context, the Court repeatedly rejected balancing safety of an individual

⁴ The prohibition of refoulement forms a cornerstone of refugee law but it has expanded into other areas as well, especially human rights law. Basically, it is based on the State's obligation to protect foreigners from being returned into countries with record of human rights violations. For further details see for example G. S. Goodwin-Gill, J. McAdam, 'The Refugee in International Law' (Oxford: 2011) 232-244

⁵ Francisco de Vitoria in L. C. Green, O. P. Dickason, 'The law of nations and the New World' (Edmonton: 1989) 43

⁶ I. Brownlie, 'Princípy medzinárodného verejného práva' (Bratislava: 2013) 569

⁷ See for example Article 3 *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, or Article 5 *Convention concerning the Status of Refugees Coming From Germany*, 10 February 1938, *League of Nations Treaty Series*, Vol. CXCII, No. 4461, page 59

⁸ UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, *First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, at 2.30 p.m., 10 February 1950, E/AC.32/SR.20*

⁹ But for example Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does. However, its scope is very limited. UN GA resolution 39/46, 10 December 1984

¹⁰ *Soering v UK*, application no. 14038/88, § 88, Series A no. 161

against national security due to alleged terrorist activities.¹¹ By doing this, the Court practically deprived States of one of the basic security tools against dangerous foreigners. Eventually, States stroke back using more complex practices to put security interests back in play while observing their human rights obligations.

Diplomatic assurances and double standards

One of these practices involves the use of diplomatic assurances reducing the risk of ill-treatment.¹² Although the practice of using assurances is not innovative, States have recently invested a lot of effort and means into it. According to their supporters, assurances offer bilateral improvement to multilateral obligations. On the other hand, their opponents claim that they are unreliable intergovernmental promises circumventing obligations of States under the human rights law. In most cases the debate focused on the prohibition of refoulement. In this regard, security of an individual-returnee based on the prohibition of refoulement has been extensively reviewed by human rights bodies. For example before the European Court this conflict over diplomatic assurance has been long but in the end, the Court accepted this practice under certain circumstances.¹³ The Court is mainly interested in human rights record. At the same time, it may take into a consideration a good-faith where a human rights protection has a long history. Where this tradition is missing, further assurances are necessary and their reliance depends on the Court's judgment. In other words, the quality of assurances is based on a case by case analysis considering existing criteria prescribed by the Court.¹⁴ These assurances should, apart from other things, also involve monitoring mechanism.

However, the system of assurances with returnee's rights respected would represent another dilemma. According to the UN High Commissioner for Human Rights, the use of diplomatic assurances creates two-class system of detainees with privileged individuals who are granted bilateral protection and special monitoring regime.¹⁵ On the other hand, systematic abuse of rights of others is ignored, even though all are entitled to the equal protection in accordance with UN instruments. Thus, according to this scenario, alleged terrorists – returnees would be protected more than others. In other words, by using diplomatic assurances do we accept suffering of others while asking not to interfere with the rights of a specific individual-returnee?

Suffering has a longstanding tradition in international law. It is for example firmly connected with refugee law. In this sense, protection granted to refugees has been criticized for *institutionalizing exile at the expense of human rights*.¹⁶ Refugees are saved, those left behind usually not. Suffering of others is distant and the need for immediate help is somehow relieved by granting the protection to the refugees. Once the refugee protection is granted it may be unlimited by time since the conditions in the country of origin remain unchanged. Hence the existence of refugee law could be contested for reluctance or inability of the international community to prevent or to stop human rights violations.¹⁷ However, refugee law could be also defended with regard to the development of international law respecting sovereignty of States.

To conclude, if we accept the existence of parallel protection with double standards then the only difference between refugee protection and the practice of diplomatic assurances is where is this protection situated; whether in the residing country or in the country accepting returnee. In the first case, we provide mercy to refugees, in the latter; we provide protection for the public from the dangerous individuals. Once we create a refugee, we also make an exception while admitting human rights violations.

To abstain but protect?

¹¹ *Saadi v Italy* [GC], application no. 37201/06, §§ 125, 138-139, ECHR 2008. For a different approach see *Suresh v Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1 § 78

¹² The term diplomatic assurances refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law. See UNHCR Note on Diplomatic Assurances and International Refugee Protection [2006] 2.

¹³ *Othman (Abu Qatada) v UK*, application no. 8139/09, ECHR 2012

¹⁴ See A. Izumo, 'Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' [2010] HRLR 42:1 Fall 233-277. For individual criteria see *Othman (Abu Qatada) v UK*. op. cit., § 189

¹⁵ See UN High Commissioner for Human Rights. *On Terrorists and Torturers*. Statement for Human Rights Day [2005].

¹⁶ G. S. Goodwin-Gill, J. McAdam, op. cit. 489

¹⁷ However, one should also consider the existence of so-called humanitarian intervention or responsibility to protect that emerged into international law.

In the name of the national security States produced several practices in the last two decades that were criticized by many as a violation of human rights. This includes the practice of diplomatic assurances described above. On the other hand, others replied that human rights development, sometimes caused by judicial activism, deprived States of effective tools how to respond to security threats related to foreigners. Considering latest activity related to terrorism, the demand for security seems to have the upper hand. The question is whether this demand is still valid from the legal perspective?

To begin with, pushing national security argument could be understood as a part of the social contract between a State and individuals in order to form a community preserving rights and security against outsiders.¹⁸ But due to atrocities committed during the last century, human rights, derived from the dignity and worth inherent in the human person, have been universally declared and consequently affirmed.¹⁹ Hence the existence of the social contract is more likely a philosophical issue in these days. The development of human rights jurisprudence has serious consequences for States.

Human rights impose negative and positive duties on States. As described above, they grant foreigners protection from the refoulement for example. At the same time, human rights require from States to adopt appropriate measures to protect rights of the individuals within national society.²⁰ The European Court has already stated that States have to take preventive measures and are responsible *where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.*²¹ Not surprisingly, this approach has also been accepted by the Inter-American Commission on Human Rights considering the level of violence in the Americas.²²

In addition to this, the European Court also considered obligation to afford general protection to society against the potential acts of one or of several persons.²³ Thus provide security not only to a specific individual but to the general public against dangerous individuals. Although the case before the Court focused on alternative measures to imprisonment, it may be presumed that the Court would apply the same approach in terror related cases.

This development could lead into a clash of obligations. Both national and international law sometimes might require use of a balancing approach in case of conflicting rights or interests. However, the European Court has already denied this balancing test in case of refoulement and protection of national security as it was mentioned above. Thus acceptance of the diplomatic assurances by the Court offers a way out. This way out is allegedly required by the need for national security as claimed by States.

In terror related cases, the lack of permissible evidence sometimes makes impossible to start criminal proceedings. The human rights development limits other options. For a long-time expulsion has been a traditional tool for States to transfer dangerous foreigners. It is now strictly limited by the prohibition of refoulement. Diplomatic assurances respecting required standard could provide a viable tool for solving the dilemma of developing human rights obligations. At the same time, they respond to the call of national security in cases of dangerous foreigners.

But if we accept the use of diplomatic assurances, we basically ask for a special regime - different standard based on the conditions stipulated among States. Here the assurances offer additional improvement that does not always exist at the multilateral level, for example the existence of monitoring mechanism. Unfortunately, the European Court has not yet expressed his opinion about the existence of double standards. However, the Court supports firm stand and deportation of non-nationals considered to be threat to national security.²⁴

¹⁸ J. Lock, 'Second Treatise of Government' (1689), Chapter 8, p. 32, available at Early Modern Texts.

¹⁹ See Wold Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action, [1993]

²⁰ P. H. van Kempen, 'Four Concepts of Security – A Human Rights Perspective' [2013] 13:1 Human Rights Law Review 1-23

²¹ *Osman v UK*, application no. 87/1997/871/1083, § 116, Reports of Judgments and Decisions 1998-VIII

²² Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights, [2009] OEA/Ser.L/V/II. Doc. 57 31 § 42

²³ *Mastromatteo v Italy* [GC], application no. 37703/97, § 69, ECHR 2002-VIII

²⁴ *Othman (Abu Qatada) v UK*. op. cit., §§ 183-184

Conclusion

This article discussed how the development of human rights affects the status of foreigners and the use of national security clause by States. In this sense, the prohibition of refoulement and its expansion through judicial or quasi-judicial activism limits the transfers of dangerous individuals even in cases of invoking national security clause. As a result of it, States tend to development practices that are criticised by their opponents for circumventing human rights. On the other hand, lack of effective measures leaves protection of national security from dangerous foreigners useless.

The practice of diplomatic assurances aims at reducing risk for potential returnees so that States may proceed with transferring dangerous foreigners. The European Court has addressed the use of assurances in many cases before reaching the threshold for accepting this practice. However, the practice of returning individuals against diplomatic assurances also raises the question of double standards. Considering the evolution of positive obligations of States to protect general public against dangerous individuals, it is not clear whether the acceptance of double standards would pose a drawback. However, it would not be for the first time that we accept the existence of double standards, at least not from the perspective of international law. Thus the idea of ultimate human rights protection sometimes faces the conflict of interests. But without balancing approach, the acceptance of diplomatic assurances even with their double standards could be a respond to the complex world of human rights development and protection of security. To answer the principal question, at this moment, the continuing practice of States and evolving jurisprudence imply that parallel regimes and double standards for dangerous individuals could be justified in the name of the national security.

Bibliography

Books:

1. BROWNLIE, Ian. *Princípy medzinárodného verejného práva* (Principles of Public International Law). 1. Vyd. Bratislava: EUROKÓDEX, 2013 868 s. ISBN: 978-80-89447-64-0.
2. GOODWIN-GILL, Guy S a Jane MCADAM. *The refugee in international law*. 3rd ed. New York: Oxford University Press, 2007, lix, 786 p. ISBN 978-019-9207-633
3. GREEN, L a Olive Patricia DICKASON. *The law of nations and the New World*. Edmonton, Alta., Canada: University of Alberta Press, c1989, xiii, 303 p. ISBN 0-88864-257-1.
4. LOCK, J. *Second Treatise of Government* (1689), at Early Modern Texts. © Jonathan Bennett 2008 available at: <http://www.earlymoderntexts.com/pdfs/locke1689a.pdf> [accessed 19 February 2015]
5. SCHMITT, Carl. *Pojem politična*. (Begriff des Politischen). Vyd. 2 Praha: Oikoymenh, 2013. 124 s. Translation: Otakar Vochoč. ISBN: 978-80-7298-491-6.

Articles:

1. COLE, David, *"Their Liberties, Our Security: Democracy and Double Standards"* (2003). Georgetown Law Faculty Publications and Other Works. Paper 924, 31 Int'l J. Legal Info. (2003), p. 290-311
2. IZUMO, Alice. *Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence*. Columbia Human Rights Review Volume 42.1 (Fall 2010), p. 233 – 277
3. KEMPEN van, P.H. *Four Concepts of Security – A Human Rights Perspective*. Human Rights Law Review Volume 13:1 (March 2013), p. 1-23

Case-law:

1. *Mastromatteo v. Italy*, Application No. 37703/97, Council of Europe: European Court of Human Rights, 24 October 2002
2. *Osman v. The United Kingdom*, Application No. 87/1997/871/1083, Council of Europe: European Court of Human Rights, 28 October 1998
3. *Othman (Abu Qatada) v. The United Kingdom*, Application No. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012
4. *Saadi v. Italy*, Application No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008
5. *Soering v. The United Kingdom*, Application No. 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, Series A no. 161
6. *Suresh v Canada* (Minister of Citizenship and Immigration), Case No. 27790 Supreme Court of Canada, 11 January 2002

Treaties and other publications:

1. *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, available at: <http://www.refworld.org/docid/3dd8cf374.html> [accessed 19 February 2015], or Art. 5
2. *Convention concerning the Status of Refugees Coming From Germany*, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461, page 59, available at: <http://www.refworld.org/docid/3dd8d12a4.html> [accessed 19 February 2015]
3. Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights, 2009 OEA/Ser.LV/II. Doc. 57 31
4. UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, at 2.30. p.m., 10 February 1950, E/AC.32/SR.20, available at: <http://www.refworld.org/docid/3ae68c1c0.html> [accessed 19 February 2015]
5. UN High Commissioner for Human Rights. On Terrorists and Torturers. Statement for Human Rights Day. 7 December 2005, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E> [accessed 7 March 2015]
6. UN High Commissioner for Refugees (UNHCR), UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, available at: <http://www.refworld.org/docid/44dc81164.html> [accessed 7 March 2015]
7. Vienna Declaration and Programme of Action. World Conference on Human Rights in Vienna. 1993. available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> [accessed 7 March 2015]

MAINTENANCE OF SECURITY OF EMPLOYERS AND EMPLOYEES WITHIN SOCIAL PARTNERSHIP IN LABOUR: KAZAKHSTAN'S EXPERIENCE AND PERSPECTIVES FOR DEVELOPMENT

Muslim Khassenov¹

Abstract

The primary mission of social partnership under, in particular, labour legislation consists in maintaining the balance of interests of labour relations' parties, economic growth, increasing production efficiency and welfare.

In this regard, it can be assumed that Kazakhstan legislation adheres to modern trends of labour law science in order to combine economic and social functions of law.

This approach is reflected in the Labour Code regulating social partnership relations, health protection and security.

However, we propose to consider the possibility of improving the legal framework of social partnership in respect of the security of employees' and employers' (this applies equally to their representatives). Security in this case involves not only working conditions but also the conditions for implementation of labor relations of the parties and their representatives in the framework of social partnership.

Each citizen of the state has the right to working conditions that correspond to security and hygiene requirements. The employer is obliged to provide his employee with working conditions in accordance with legislation, collective or employment agreement.

Ideas of full support to entrepreneurship and building society of universal labour are declared in strategic legal documents of Kazakhstan, without diminishing the value of social guarantees and standards.

However, in essence, this approach is not always consistently reflected in the Labour code regulating the relations of social partnership, health and security.

In many countries, an employer has been traditionally seen as a "stronger" party of the employment contract. Therefore, for example, in Kazakhstan, the employer is largely devoid of a number of tools, methods and conditions for implementation of the rights granted to him in the area of social and labour relations.

One of the most effective tools of maintenance of the balance of interests is signing of memorandums of cooperation between local authorities and enterprises in order to keep workplaces during the crisis process in economy.

These anti-crisis management measures are aimed at the needs of a specific team and create additional opportunities to ensure the security of both employers and employees as well as increase their activity and productivity.

Keywords: security of employers and employees, social partnership, economic crisis, entrepreneurship.

Introduction

Labour Law is indeed an area of knowledge where security issues hold a special place in legal regulation. Primarily it is connected with social partnership instruments and socio-labour disputes settlement.

The main purpose of this paper is to consider and evaluate some tools and measures providing security of employers and employees within social partnership as indicators of security in general.

This paper has three objectives. First, it outlines some theoretical and practical positions regarding balance of interests of social partnership parties. Second, it reveals current situation in the labour market on

¹ *Doctoral Candidate in Law, L.N. Gumilyov Eurasian National University (Astana, Kazakhstan). Official of National Chamber of entrepreneurs of Kazakhstan. Doctorate dissertation devoted to legal mechanism of social partnership in labour.*

global and local levels that influences security of employers and employees. Third, it proposes some policy-making options.

The central idea underlying the issue under consideration is the concept of decent work presented by the International Labour Organization (hereinafter – ILO) in 1999. Decent Work Program is a unifying framework and a central priority for legal regulation of labour².

Although there are critical processes in global economy, social partnership instruments could soften and prevent their possible negative consequences.

Undoubtedly, social dialogue can make a valuable contribution in countries across a wide spectrum of institutional diversity and income division, although its content and form must vary in different contexts³.

1. Security of employers and employees: searching balance of interests.

Results of the Strategy of Kazakhstan until 2030 indicate that the rates of development of Kazakhstan's economy and global integration processes require development of innovative, entirely new standards of legislative regulation of various areas of economic and social life of the country⁴.

It seems that these circumstances naturally required declaration in the political and legal documents provisions for comprehensive business support and building society of universal labour, without diminishing the value of social guarantees and standards. Thus, in our view, by the above priorities an objective to combine economic and social functions of law in Kazakhstan is confirmed at the highest political level.

As E.Nurgaliyeva noted, the balance of interests of labour relations' parties is achieved through social partnership⁵.

In many countries, an employer has traditionally been seen as a “strong party” of the employment contract. As a consequence, for example in Kazakhstan, an employer is mostly deprived of a number of tools, methods and conditions which help him implement the rights granted to him in the area of social and labour relations.

In sub-item 54) of item 1 of Article 1 of the Labour Code of Kazakhstan it should be indicated that the guarantees are the means, methods and conditions which help implement not only the employees' rights but also the employers' rights in the area of social and labour relations. Such a formulation would be more correct than the current one.

One of the missions of social partnership in Article 258 of the Customs Code consists in providing assistance in ensuring the rights of employees and employers in the workplace.

Thus, we propose to carry out the improvement of the Kazakh legal mechanism of social partnership by ensuring the security of employees and employers (this applies equally to their representatives). Security in this case involves not only working conditions, but also the conditions for implementation of labour relations of parties and their representatives within social partnership.

2. Labour market under crisis conditions

Nowadays we observe crisis process in world economy, particularly in the post-Soviet region which is crucially caused by sanction regime against the Russian Federation. And this crisis process is going to be more considerable than global financial and economic crisis of 2008-2009.

However, previous financial crisis is named the first in the fully globalized economy, and there were no precedents of similar scope to be studied concerning their industrial relations effects⁶.

² According to the Report of the ILO Director-General to the International Labour Conference, “The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”. ILO: Decent work, Report of the Director-General, International Labour Conference, 87th Session, Geneva, 1999.

³ Dharam, Ghai. Decent work: Concepts, models and indicators / Discussion paper, DP/139/2002. - P.27

⁴ Kussainova L.A., Zhakupov R.E. Problems of labour legislation and regulation of trade-union activity // Zanger. – 2013. - № 1. – p. 81.

⁵ Nurgaliyeva, E.N. The role of Labour Law in market mechanism of economy. – Karaganda: «Bolashak-Baspa», 2011. – pp. 94-95.

⁶ Rychly, L. Social dialogue in times of crisis: Finding better solutions / Geneva, International Labour Office, 2009. Working Paper No. 1. – P.1.

The International Labour Organization (ILO) says a slowdown in economic growth means more jobs will be lost this year with young people again bearing the brunt of the financial crisis and its aftermath. ILO the Director General Guy Ryder said: "More than 61 million jobs have been lost since the start of the global crisis in 2008 and our projections show that unemployment will continue to rise until the end of the decade. This means the jobs crisis is far from over so there is no place for complacency."⁷

According to the ILO's report, *World Employment and Social Outlook – Trends 2015*, over 201 million people were unemployed in 2014 around the world, over 31 million before the start of the global crisis. And global unemployment is expected to increase by 3 million in 2015 and by further 8 million in the following four years.

The global employment gap which measures the number of jobs lost since the start of the crisis currently makes 61 million. If new labour market participants over the next five years are taken into account, additional 280 million jobs need to be created by 2019 to close the global employment gap caused by the crisis⁸.

Unemployment will continue to rise in the coming years, as the global economy has entered a new period combining slower growth, widening inequalities and turbulence, a new ILO report warns.

As international experts supposed, in such critical circumstances, various forms of dialogue, from simple exchange of information or consultations to full-fledged negotiations, are badly needed, as these can contribute to better, more transparent and more efficient governance. More than ever, mutual trust and cooperation are prerequisites for achieving effective, balanced and viable policies⁹.

Nevertheless, there is no critical statistics of unemployment in Kazakhstan, For instance, unemployment rate in 2014 was 5% that is lower indicators of 2013 (5.2%) and 2010 (5.8-6.3%)¹⁰. Moreover during the last 2-3 months considered dynamics has not been altered.

In some cases, anti-crisis measures were embodied in tripartite or bipartite documents. Most of them (pacts, agreements, declarations, joint guidelines, opinions, etc.) are not enforceable by law but have undeniable political importance. Not only do they contain concrete recommendations for governments and social partners, but they also send important political messages in such sensitive areas as wages and redundancies, sometimes containing guidelines for socially responsible restructuring¹¹.

In this regard we illustrate Kazakhstan's experience of anti-crisis management actions which are not enforced by law but were implemented during the last 2 years.

3. Kazakhstan's experience: some key tools for anti-crisis management in labour and entrepreneurship

No doubt the management of the crisis and its impact will require extraordinary efforts from public authorities in general and from labour administrations in particular¹².

One of the key instruments of the current period in Kazakhstan for the implementation of anti-crisis measures are implemented within the state program "Nurly Jol" memorandums of cooperation between local authorities and employers (national companies, backbone enterprises) on social development to create new jobs. This is an example where unconventional bipartism instruments become a motor element of social partnership in labour.

Today, there are more than 19,000 memorandums signed between employers and local authorities that will save 1.2 million jobs and 431 memorandums concluded for procurement of goods, works and services worth about 1.4 trillion tenge (US\$ 7.5 billion).

⁷ <http://www.theguardian.com/business/2015/jan/19/global-unemployment-rising-ilo-social-unrest>

⁸ *World employment and social outlook: Trends 2015/ International Labour Office.* – Geneva: ILO, 2015.

⁹ Rychly, L. *Social dialogue in times of crisis: Finding better solutions / Geneva, International Labour Office, 2009. Working Paper No. 1.* – P.iii.

¹⁰ Official site of the National Committee of statistics of Kazakhstan: <https://www.stat.kz>.

¹¹ Rychly, L. *Social dialogue in times of crisis: Finding better solutions / Geneva, International Labour Office, 2009. Working Paper No. 1.* – P.17.

¹² Rychly, L. *Social dialogue in times of crisis: Finding better solutions / Geneva, International Labour Office, 2009. Working Paper No. 1.* – P.20.

The main content of supra mentioned memorandums are the following: 1) supporting and strengthening relations in the field of social development; 2) elimination of job cuts and salary reduction of employees; 3) intensifying efforts aimed at employers' observation of labour legislation, including in respect of arrears of wages.

There are identified specific obligations of the parties in memorandum. In particular, local authorities intend to:

- determine the needs of the region in goods, works and services in order to create new industries and the expansion and modernization of existing enterprises;
- develop a regional plan for social development;
- determine the list of products in demand by large enterprises in the region (raw materials, components, consumables, packaging, etc.) in order to develop proposals for the creation of related industries for employment in the region.

In their turn the employers intend to:

- inform about meetings, dialogue platforms, roundtables, forums and other activities for the development of local content;
- assist in the conclusion of long-term contracts between domestic producers and large backbone enterprises;
- provide information, analytical and advisory services in the sphere of social development.

In this regard, considering the importance of local content, development for economic development and preserve jobs, all these measures found as effective and far-sighted to the social and economic stability and growth.

Another anti-crisis-management measures are connected with development of entrepreneurship as the most influenced power of employment.

Development of entrepreneurship in Kazakhstan is carried out in two important ways – support to domestic business and creation of favorable investment climate.

In the first area there undertaken unprecedented measures in the country. In early 2014 in order to support the economy 1 trillion tenge (US\$ 5.5 billion) were allocated from the National Fund, of which 100 billion tenge (10%) were paid out to support the manufacturing sector with a focus on the food industry with establishing of new industries.

A number of government programs were implemented to support domestic business: Business Roadmap-2020, Agribusiness-2020, Roadmap for employment, etc.

As part of the program "Business Roadmap - 2020" in 2014 4,464 projects worth \$430 million were subsidize; 572 projects worth \$215 million were guaranteed; 230 start-ups worth \$3 million were provided with grants¹³.

During the second year of the program Agribusiness-2020 under the direction of "financial improvement of subjects of agriculture" reduced rate and lengthen the loan for 291 borrowers worth US\$ 1.7 billion.

National Chamber of Entrepreneurs of Kazakhstan issued an effective mechanism of guidance to new businessmen. The manual "100 projects for small businesses," became very popular among new entrepreneurs and became available in all parts of the country.

Each region of the country is establishing permanent service and support centers for entrepreneurs under the principle of "single window" in regional centers.

Indeed, small enterprises constitute a large and growing share of employment in the developing world, and are generally more labour intensive than larger firms¹⁴.

There is developed and implemented the Road map for the dual system education, which includes training on the needs of enterprises.

The results of this public policy are obvious and confirmed by official statistics.

For 2 years (2013-2014) the number of active small and medium-sized enterprises increased by 50 thousand and reached more than 850 million active SMEs. Growth of SME products in the past year amounted

¹³ Official site of Public Foundation for entrepreneurship of Kazakhstan "Damu": <http://www.damu.kz/2371>.

¹⁴ ILO: Working out of poverty, Report of the Director-General, International Labour Conference, 91th Session, Geneva, 2003. - P.44; UNDP/ILO: In-depth evaluation report: Kalerwe community-based drainage upgrading project, Uganda, UGA/92/006 (ILO, 1994), cited in GB.286/TC/1, op. cit

to more than half a 1 trillion tenge. Employment in SMEs increased by 150,000 people amounting to about 2 million 800 thousand people¹⁵.

According to the second direction "Creation of favorable investment climate" also undertaken unprecedented measures.

Key tool for these actions become a radical reform of the licensing system and the reduction of administrative barriers to business. After the double-declining (30% by 30%) the number of permits there has been prepared and adopted in 2014, single law "On permissions and notifications", which is essentially a prevention mechanism for appearance of new permits and administrative barriers.

An important component of a favorable investment climate was the reform of control and supervision of public authorities. There was established a moratorium on inspections of small and medium-sized businesses in 2014, there has been canceled scheduled inspections since 2015, totally revised requirements for inspections introduced on the basis of international standards system of risk assessment, legally provided the insurance of entrepreneurs' liability.

These and more other anti-crisis-management measures foster not only entrepreneurship activity and growth but become an effective condition for saving workplaces and social obligations of employers before wide-spread community of employees.

We agree with authors who argue that industrial relations at the enterprise and national levels are not merely a passive object of development related to the crisis; quite the contrary: it can be a useful policy tool which can help mitigate social hardship and facilitate recovery measures, and most of all help rebuild confidence which is the crucial condition for returning to normal economic conditions¹⁶.

Conclusion

Social partnership in labour and collective labour law play important role under crisis conditions and supposed to be used as instruments both for preventing socio-labour disputes as a direct consequence of the crisis as well as for revitalizing – through new management tools – it leads to economic progress, growth of productivity and entrepreneurship.

Security of employers and employees includes both the maintenance of working conditions and the conditions for the implementation of labour relations parties and their representatives in the framework of social partnership. The second one is the most effective tool of achievement of balance of interests between the parties of labour relations.

The illustrative and sufficient measures in practice are memorandums of co-operation between local authorities and enterprises in order to save workplace during the crisis process in economy as Kazakhstan's experience proposed.

As regards system measures the most relevant example of preventive mechanism is entrepreneurship supporting policy.

These anti-crisis management actions are aimed at the needs of a specific team and create additional opportunities of employers and employees' security in order to increase their activity and productivity.

Bibliography

1. ILO: Decent Work, Report of the Director-General, International Labour Conference, 87th Session, Geneva, [1999]
2. Dharam, Ghai, Decent Work: Concepts, models and indicators / Discussion paper, DP/139/2002 27
3. Kussainova, L.A., Zhakupov, R.E. Problems of labour legislation and regulation of trade-union activity // Zanger. [2013] №1 81

¹⁵ Official site of the National Committee of statistics of Kazakhstan: <https://www.stat.kz>.

¹⁶ Rychly, L. Social dialogue in times of crisis: Finding better solutions / Geneva, International Labour Office, 2009. Working Paper No. 1. – P.26.

4. Nurgaliyeva, E.N. The role of Labour Law in market mechanism of economy. – Karaganda: «Bolashak-Baspa» [2011] 94-95
5. Rychly, L. Social dialogue in times of crisis: Finding better solutions / Geneva, International Labour Office [2009] Working Paper №1 1
6. Official site of the Guardian: <http://www.theguardian.com/business/2015/jan/19/global-unemployment-rising-ilo-social-unrest>
7. World employment and social outlook: Trends 2015. International Labour Office. Geneva: ILO [2015]
8. Official site of the National Committee of statistics of Kazakhstan: <https://www.stat.kz>
9. Official site of Public Foundation for entrepreneurship of Kazakhstan “Damu”: <http://www.damu.kz/2371>
10. ILO: Working out of Poverty, Report of the Director-General, International Labour Conference, 91th Session, Geneva [2003] 44

EU ELECTION OBSERVATION A TOOL FOR BUILDING STABLE SECURE DEMOCRACIES

Gergő Kocsis¹

Abstract

Election observation is a tool for democracy development and thus an important instrument in advancing stability and security. Election monitoring activities rose to prominence in the early 1990s as states of Eastern Europe after the fall of communism were holding their first free elections. Election monitoring has become a complex activity with many defining actors in the international arena. Genuine democratic elections are an important and integral part of democracies and as such are also essential to provide for more stable and secure countries, regions and in fact a safer world. Although development cooperation and democracy building were the prime aim of election monitoring activities it must also be noted that such activities may positively influence the post-election behaviour of all relevant actors, as these tendencies have been observed in political science researches.

The aim of the paper is however to examine the matter from a legal perspective presenting the European Union's regulatory structure regarding election observation. The European Union is one of the most prominent organisers of such activities with detailed legal regulation on the matter. EU regulations in this field are also of great importance due to the fact that they serve as a basis and inspiration of further international legislation of election observation missions. The detailed legal instruments of the EU were created at the end of the 1990s, early 2000s thus before the work began on the Declaration of Principles for International Election Observation, which is a document elaborated in 2005. The European Union is one of the most important actors in development cooperation and has been aiming at increasing its importance in international politics, thus the legal regulation of EU election observation as a tool of democracy building is directly linked to security in the instable regions of our world.

Keywords: election observation, election assistance, development cooperation, democracy, rule of law

Introduction

The European dream after World War II was securing countries and whole regions, perhaps even a whole continent, creating peace for decades. After the devastating shock of the war the leaders of Europe had the aim to create new united Europe where there are no wars, where there is stability prosperity and peace. These idealistic thoughts lead to the creation of an economic community that was at the same time one of the greatest peace projects in the world. The European Coal and Steel Community established by the Treaty of Paris in 1951 brought together French and German interests stabilizing the relations between two important Western European nations.

Despite its success the European project had to face the fact that the continent was torn into two by the iron curtain. However at the end of the 1980's and the beginning of the 1990's the iron curtain fell, Germany reunited and the Soviet Union was dissolved, which led to new prospects and new challenges in Europe. The newly independent states of Central and Eastern Europe began their transition into democracies and almost immediately expressed their wish to become a part of the European Communities². The transition of these

¹ PhD candidate at the Faculty of Law of the University of Pécs. He also works as the Council of Europe desk officer at the Ministry of Foreign Affairs and Trade of Hungary. His main research area is the cooperation of the European Union with international organizations with a special emphasis on the EU – United Nations relations. Recently he began researching the legal regulation of election observation activities in international organizations.

² e.g. Hungary's prime minister József Antall handed over a memorandum stating Hungary's wish to accede to the European Communities to Jacques Delors president of the European Commission on 18 July 1990

states into democracies with free market and the rule of law became a priority and the main project of several European international organizations such as the OSCE and the Council of Europe.

One of the cornerstones of a genuine democracy is free and fair elections. Realizing this one of the most important tools in helping societies in building strong democracies is the tool of international election monitoring. Though the phenomenon of monitoring an election and the transition within a state already appeared in the second half of the 19th century regarding the unification of Moldavia and Wallachia³, the real increase in such activities came only at the end of the 20th century.

Election assistance and election observation have become major democracy support activities of the European Union after the changes in the political systems of Eastern Europe in the early 1990s. First EU election observation mission was to the Russian Federation in 1993⁴. Since then the European Union has monitored more than 150 elections on all continents⁵. The programme of election assistance has become one of the biggest development cooperation programmes.

The aim of the following article is to give an overview of the European Union's regulation of election assistance starting from the treaties and then introducing the secondary legislation.

1. EU legal regulation concerning election observation

The European Union has also passed through a long path of transition since 1993, the year of its first election observation mission. The Treaty of Maastricht entered into force creating the European Union with the pillar system, the Treaty of Nice, Amsterdam and most importantly the Treaty of Lisbon entered into force. The EU of 1993 has also grown from a Western European community of 12 member states to the supranational organization of 28 member states with an impressive population of more than half a billion people and the world's largest GDP. However one of the aims in 1993 was to help states in transition to build genuine democracies with election assistance and election observation missions. This was both an aim of necessity to build a secure and stable neighbourhood of Europe and a value based mission.

Today after so many reforms, both the Treaty on the European Union and the Treaty on the Functioning of the European Union contain provisions relevant to the field of election assistance.

Treaty on the European Union

Article 2 of the Treaty on the European Union (hereinafter TEU)⁶ is the basis for all value based action of the Union. It holds a symbolic message that such article, which enlists democracy, the rule of law and human rights as the bases of the community of the member states is at the very beginning of the TEU. Though Article 2 is a reference to the internal regulation of member states and the values that they are committed to within their own societies, these are also the values that they shall represent in the international community.

The mother of all legal instruments of the EU concerning its external activities is Article 21 of the TEU. This is the first article within the chapter on the general provisions on external action and security policy. Here within Article 21 we see the foundation of the common external policies of the EU. The first paragraph of article 21 is almost a repetition of Article 2 stating that the foundations of the external actions are democracy, the rule of law and human rights.

Article 21 first defines the core values and then the goals that are served by the foreign policy of the EU. This very essential paragraph (1) of the article basically forms a group of provisions with Article 2 and 3 of the treaty, which lay the ground for value based policies both internally within the Union and the principles that guide its foreign relations.

Paragraph (2) sets out the goals of the foreign policy, where we can easily recognize several ones laying the groundwork for democracy support and election assistance. Paragraph (2) enlists 8 main objectives

³ Article 23 of the 1856 Treaty of Paris established a commission to monitor elections and the future of the principalities of Moldavia and Wallachia

⁴ At the invitation of the Government of the Russian Federation, the European Union established a mission to observe the general elections in Russia in December 1993.

⁵ http://eeas.europa.eu/eueom/missions/index_en.htm

⁶ Article 2 of TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

for the foreign policy of the Union out of which half of those can be linked to election assistance activities. Points a)-d) all form the basis of such activities on very broad terms.

More precisely point b) and d) could be cited as goals that are served by international election assistance. Point b) declares as an objective the consolidation and support of democracy, the rule of law and human rights, which are considered as values of the Union and which once again, reinforce the importance of article 2 and 3 of the treaty in terms of foreign policy.

Point d) lays down the basis of international development cooperation activities of the EU, determining the fostering of sustainable economic, social and environmental development of developing countries as a goal. Although point d) very cautiously defines its goals with the primary aim of eradicating poverty, thus creating a stricter interpretation leaving out the direct aims of defence and security policy, however the scale is still very broad.⁷

As it can be noted the above provisions of the Treaty on the European Union are all of a general nature with the intention of setting broad goals in foreign policy, that reflect the value system of the Union itself.

1.1. Treaty on the Functioning of the European Union

The Treaty on the Functioning of the European Union (hereinafter: TFEU) details the provisions on the Union's external action in Part V in seven titles. Out of these seven titles two are in relation with election assistance and election observation activities: Title I the general provisions on the Union's external action and Title III the cooperation with third countries and humanitarian aid.

Title I of Part V of the TFEU consist of one article, Article 205.⁸ This article revokes Part V of the TEU, stating that the Union's external action shall pursue the objectives of the relevant TEU provisions and shall be guided by the principles and conducted in accordance with these provisions.

Title III of Part V details the Union's cooperation with third countries and humanitarian aid and it is divided into three chapters: development cooperation; economic, financial and technical cooperation with third countries; humanitarian aid. Out of the three chapter's of the Title election observation and election assistance are activities that are related to Chapter I, that is development cooperation. In principle the development cooperation activities can concern any country that is not a member state of the Union, however its main target are the state parties to the Cotonou Agreement⁹. The Cotonou Agreement is an international treaty with the aim of creating a widespread partnership of development cooperation in a large geographical area; therefore it has been signed and ratified by 77 states form the African, Caribbean and Pacific group as well as the European Union and its member states.

Although Article 208 of the TFEU refers back to the TEU when it sets eradicating poverty as the main goal of development cooperation in its first paragraph it also states that development cooperation should be conducted within the framework of the principles and objectives of the Union's external action. As it has been noted above these principles and objectives clearly contain provisions regarding democracy and the rule of law. Thus these above provisions create the legal basis on the level of the primary legal sources of the EU for the European Instrument for Democracy and Human Rights (EIDHR), which is the funding mechanism to support the democracy and human rights related development cooperation activities of the European Union.

1.2. European Instrument for Democracy and Human Rights

⁷ KAJTÁR Gábor: „A kettős pillérszerkezet megerősített kontúrjai a Lisszaboni Szerződés hatálybalépése után” Európai jog 2010/4, p. 3-14.

⁸ TFEU Part V Article 205: “The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.”

⁹ Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

The European Instrument for Democracy and Human Rights (EIDHR) entered into force on 1 January of 2007¹⁰ and was a fund created for the first time for the 2007-2013 budget cycle of the EU. The EIDHR was renewed for the 2014-2020 budgeting period of the EU by a joint regulation of the European Parliament and the Council¹¹. The primary aim of the EIDHR is to finance different democracy building and human rights protections projects and programmes for example giving small grants to human rights defenders, helping finance the UN High Commissioner for Human Rights and providing for the human and material resources for EU election observation missions.

The objective of the regulation on EIDHR is to create a framework for the development cooperation programmes concerning the fields of democracy and human rights. Paragraph (16) of its preamble is the first to mention election observation missions declaring that the regulation should provide for policy coherence, a unified management system and common operating standards in this field.

The regulation is a framework structured in a way that it first presents the subject matter and objectives of EIDHR, then the scope of the instrument and after that the implementation mechanisms such as the rules of coordination, the delegation of power and tools such as strategy papers and a general framework for programming and implementation. Most importantly the regulation's Article 10 contains the provision on the financial envelope of EIDHR, which is EUR 1 332 752 000 for the period of 2014-2020.

Election observation as a tool for the support of electoral processes is mentioned as one of the objectives of the instrument in Article 1 of the regulation. Article 2 of the regulation regarding the scope of EIDHR is the first legal instrument in the EU acquis, which goes into details about election observation missions. In point d) of Article 2 the support to electoral processes is described in four sub-points, which create four objectives of the election assistance programs of the EU.

The most visible and the most important of all the activities listed in point d) is the deployment of EU election observation missions for monitoring of electoral processes. This activity is the prerequisite of all the other three groups of action and most importantly this activity is given a special focus by a joint declaration of the European Parliament, the Council and the Commission¹², in which the parties declare that EU EOMs contribute to increase transparency and confidence in electoral processes, also declaring that EU EOMs provide informed assessment of elections, which are of high value in the political dialogue with the partner countries. The parties therefore agreed in the declaration that up to 25 % of EIDHR funds should be devoted to EU election observation missions, depending on annual election priorities. It is worth noting that such declaration was elaborated for the first time, since in the previous budget period it did not exist, thus it can be taken as a sign of the rising significance of EU EOMs.

The support mechanisms enlisted in point d) also include the aid of domestic civil society actors in their observation activities not only at national, but also regional and local levels as well. Another objective based on EU EOM recommendations is to disseminate information helping the improvement of electoral processes to civil society actors and relevant domestic authorities.

The final objective listed in point d) is the promotion of peaceful outcome of electoral processes to reduce electoral violence and to promote "the acceptance of credible results by all segments of society". This is an activity that can directly serve the security of societies and even regions. Unrests after elections are great threats to national security and the stability of whole geographical areas.

Conclusion

If we look at the big picture EU EOMs can be viewed as a very small part of the European Union's external action, however it is an integral part of international development cooperation. EOMs can be considered a success story, an effective and operational tool for democracy support and can serve the security and stability of nations and wider geographical regions, which is also one of the reasons why its

¹⁰ Regulation of the European Parliament and of the Council (EC) 1889/2006 establishing a financing instrument for the promotion of democracy and human rights worldwide [2006] OJ L 386

¹¹ Regulation of the European Parliament and the Council (EU) 235/2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L77

¹² Joint Declaration of the European Parliament, the Council of the European Union and the European Commission on Election Observation Missions; Annex III of EU Regulation (EU) 235/2014

significance is rising. Naturally new questions may arise about its regulation both within the development cooperation programmes and also in the EU's relations with partner states. Within the EU acquis, if the importance of election observation missions as tools of the external action of the Union continues to grow, it might be worth considering a specialised EU regulation for it with more detailed provisions. Regarding also the relations with developing partner states EU EOMs could become standard clauses and preconditions in further bilateral agreements.

Bibliography

1. KELLEY, Judith G.: "Monitoring democracy: when international election observation works and why it often fails" (Princeton: 2012) Princeton University Press
2. OSZTOVITS András (editor): "Az Európai Unióról és az Európai Unió Működéséről szóló szerződések magyarázata" (Budapest: 2011) CompLex Kiadó
3. KAJTÁR Gábor: „A kettős pillérszerkezet megerősített kontúrjai a Lisszaboni Szerződés hatálybalépése után” in Európai jog 2010/4, p. 3-14.
4. Peace Treaty of Paris, 30 March 1856
5. Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.
6. Regulation of the European Parliament and of the Council (EC) 1889/2006 establishing a financing instrument for the promotion of democracy and human rights worldwide [2006] OJ L 386
7. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C 326/01)
8. Regulation of the European Parliament and the Council (EU) 235/2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L77

PROTECTION OF THE RIGHT TO THE COMPANY'S NAME IN THE POLISH CIVIL LAW

Justyna Kopałka – Siwińska¹

Abstract

As far as the security purpose of law is concerned the interests of individual participants of the market cannot be overlooked. Certainty and security of the business transactions are the basis of the economy of each country that is why every participant of the market should have right and legal means to protect himself, not only against dishonest contractors who want to break or violate the contract, but also against any kind of violation of the company's name. Undoubtedly the right to the company's name, or the name of the individual entrepreneur, is the most important good which helps them to provide advertising, reputation and status in the market, so called goodwill. However there are situation in which this right is threatened or violated by other participants of the market. In order to oppose and neutralize that, possibility of the company's name protection as well as the legal means provided for this purpose are established in the Polish Civil Code. Due to this regulation the entrepreneur whose right to the company's name has been violated by actions or other means may request such action to be desisted or require removal the violation effects by making a statement in the appropriate form and content, compensation for material damage or returning the benefit received by the person who committed the violation. The Polish legislator established those rules as an independent basis for the protection of the company's name which is based on the principle of presumption of illegality. That means that the violator is obliged to prove legality of his action. Considering the Polish regulation it may seem that the right to the company's name is protected in many fields. However the question is whether the protection is complete and the security purpose of law, from the entrepreneurs' point of view, has been achieved.

Keywords: the right to the company's name, violation, protection, legal means.

Certainty of business transactions are the basis of the economy of each country, that is why every participant of the market should have right and means to protect himself, not only against dishonest contractors who want to break or violate the contract, but also against any kind of violation of the company itself (the company's name). The following paper concerns definition of the right to the company's name as well as legal means (remedies) provided for protection in Polish Civil Code. It presents Polish legal regulations and tries to answer the question whether it is suitable and complete or not. Due to limited volume of the paper, only the most important issues are mentioned, however that there are many problems which could also be discussed considering the subject considering for example protection of the company's name according to Law on Industrial Property or Law on Unfair Competition in which the protection is regulated even wider than in Polish Civil Code.

Considering protection of the right to the company's name according to Polish civil law, it is necessary to define a concept of an entrepreneur in the Polish Civil Code². According to the article 43, an entrepreneur is a natural person, legal person or an organizational unit, referred to article 33¹ § 1, carrying on their own business or professional activity. It is important to notice that the concept of the entrepreneur in Polish law is not uniform. The difference between those conceptions is noticeable especially in private and public law. For example, according to the article 4 paragraph 1 Law on Freedom of Economic Activity³, an entrepreneur is a natural person, legal person and an organizational unit without legal personality, to which the law admits a

¹ Master of Law, PhD student on University of Lodz, Poland, trainee lawyer at the District Council of Lawyers in Lodz. She is interested in studies relating to a joint stock company in Polish law, especially with the institution called "squeezing out". That is why she prepared a dissertation applying to this subject.

² Polish Civil Code (23.04.1964, Dz.U.2014.121).

³ Law on Freedom of Economic Activity (2.07.2004, Dz.U.2013.672).

separate legal capacity – carrying on an economic activity on their own behalf. In turn, the article 2 of the aforementioned law defines the economic activity as gainful, generating, construction, trade, service and prospecting activity, exploration and extraction of minerals from deposits, as well as the professional activity carried out in an organized and continuous way. This kind of inconsistency may be a result of the fact that, as W.J. Katner suggests, the Civil Code was neither the first nor the only one in the definition of an entrepreneur⁴. According to this author, the term 'entrepreneur' is the successor of the concept of a 'merchant', defined in Commercial Code of 1934⁵, later defined as 'trader' in the Law on Economic Activity⁶ and finally specified in the amended provisions of aforementioned act as the entrepreneur. Before the art. 43¹ had been established, the Polish Civil Code defined all entities running an economic activity in a descriptive way, using expressions such as 'a person who runs a business on his own account'⁷.

As A. Janiak⁸ rightly points, the definition of the entrepreneur established in the Polish Civil Code was constructed on the basis of three criteria: subjective, functional and both subjective-functional. The first apply to the range of persons who may be entrepreneurs. The second indicates the type of an activity that characterizes the entrepreneurs. According to the third one, the entity should undertake activity on its own behalf⁹. The subjective criterion, which is accepted in the article 43¹, indicates that entrepreneurs may become only entities equipped with the legal capacity (persons).

According to the article 43² § 1 of Polish Civil Code, an entrepreneur operates under the company's name. As A. Janiak indicates, a word 'company' (Polish: 'firma') is derived from the Latin word 'firmare' which means 'ascertain', 'consolidate'. In the everyday Polish language the word 'company' has got many meanings. For example it is often using as a synonym of an enterprise or an entrepreneur (you can say: He built a huge company). As the aforementioned author points, sometimes it can be used as the definition of the workplace not necessarily conducting an economic activity (it can be said: Fire brigade is a company that works even on Sundays). However, the author rightly indicates that on the ground of the Polish Civil Code the company can be understood only as the designation (name) of the entrepreneur. What's more, U. Promińska highlights that the definition of the company consists of two elements: subjective on the basis of which it can be stated that the company individualizes the entrepreneur, and the other one which is connected to its reading and let to express that the company is a sound designation containing only surname, only name or both name and surname of the entrepreneur¹⁰.

In the legal literature it is indicated that the company has got many roles in the trade. The most important role is to individualize the entrepreneur. As it is pointed by U. Promińska, individualization of the entrepreneur is the legal role of the company which helps him to differentiate himself on the market¹¹. Moreover, A. Janiak points that individualizing role of the company can be compared to role which is fulfilled by name and surname of a person¹². However the individualizing role of the company is crucial, the company's name may fulfill other roles such as advertising and guarantee. The first one helps the entrepreneur to promote his own business and provide high status on the market. There is no doubt that violation of this role of the company may bring severe consequences for the entrepreneur such as loss of goodwill and even bankruptcy. The guarantee role, on the other hand, is important for the consumers. Thanks to it they are confident that goods produced by particular entrepreneur have got high quality and good standards. A. Janiak emphasizes that entrepreneurs strive for a good perception of their company on the market and exert themselves to fix certain information about the company. That is why exclusiveness of using the company's name is so important for entrepreneurs¹³.

The company's name, considered as the designation of the entrepreneur, is above all his intangible assets. As A. Janiak notes, regarding its economic role it can be also considered as the tangible assets as it

⁴ Edited by: M. Pyziak-Szafnicka, P. Księżak, 'Civil Code. The general part' (Warsaw: 2014) 449-450.

⁵ Ordinance Of the President of Republic of Poland Commercial Code (27.06.1934, Dz.U.1934.57.502).

⁶ Law on Economic Activity (23.12.1988, Dz.U. 1988.41.324).

⁷ Edited by: A. Kidyba, 'Civil Code. Comment. Volume I. The general part' (Warsaw: 2012) 191 and next.

⁸ Ibidem, 194.

⁹ Similar: edited by: K. Pietrkowski, 'Civil Code. The commentary. Volume I' (Warsaw: 2004) 130 and next.

¹⁰ Edited by: M. Pyziak-Szafnicka, P. Księżak, 'Civil Code. The general part' (Warsaw: 2014) 465.

¹¹ Ibidem, 67.

¹² Edited by: A. Kidyba, 'Civil Code. Comment. Volume I. The general part' (Warsaw: 2012) 205.

¹³ Ibidem, 205.

often has got high economic value¹⁴. The right to the company's name is a inalienable right which is effective *erga omnes* (enforceable against all). It is the right of each and every entrepreneur, including persons who run a business in the form of a civil partnership (which in Polish legal system does not have legal capacity). Because of the fact that the right to the company's name is inalienable tangible asset and has got financial, material character, it cannot be a part of the company's assets, but it is included in the entrepreneur's assets¹⁵.

According to the article 43³ of the Polish Civil Code, the company's name should be sufficiently distinguished from other companies operating on the same market. What is more, according to § 2 of the same article, the company's name cannot be misleading, particularly as regard to the individual entrepreneur, the subject of the entrepreneur's acting, place of business, sources of supply. It can be said that art. 43¹ of Polish Civil Code constitutes the principle of exclusivity. As A. Janiak indicates, only company which name meets aforementioned conditions can provide adequate individualization of the entrepreneurs acting on the market¹⁶. What is more, P. Nazaruk points that rules resulting from the art. 43³ aim first and foremost to protect broadly defined public interest and safety trade¹⁷. This author notices that considering distinguishability of several companies, all participants of the market's point of view should be taken into consideration which means that verification of the individualization should be made not only from the entrepreneur's perspective but also from the point of view of the contractors and consumers¹⁸. The lack of distinguishability was the subject of a case heard by the Appeal Court in Lodz in which the court indicates that sound convergence of the company called 'Interagra' and 'Interabra' may lead to confusion among the consumers as to which company they make a business relations, especially when the graphic signs of both companies are similar¹⁹. As a consequence, the company's name cannot be misleading as to the subject of the activity.

Summing up all reflections about the company's name it must be added that according to the article 43⁵ and 43⁶ of the Polish Civil Code, the company's name of the entrepreneur is his name and surname, whereas the company's name of a legal entity is its name considered as the designation.

Considering each and every role of the company's name, its significance and functionality for the entrepreneur it is obvious that every violation of the company's name may be devastating for the participant of the market, not only for entrepreneurs themselves but also for contractors and customers who may not know that they are dealing with 'wrong' entrepreneur. To prevent such situations Polish legislator constitutes remedies for entrepreneurs whose right to the company's name has been violated. According to the article 43¹⁰ of the Polish Civil Code, the entrepreneur, whose right to the company's name was threatened by actions of others, may request such action to be removed, unless it is not unlawful. He can also require the violator to remove the violation effects by making a statement in the appropriate form and content, to compensate the material damage or to return the benefit received by the person who committed the violation. It is crucial to notice that the article mentioned above contains independent principle of protection which is based on the principle of presumption of illegality. Illegality is recognized objectively and in Polish legal system it is understood as someone's behavior incompatible with legal system *sensu largo*²⁰. It is important to mention that illegality of using the company's name is not applicable to a situation in which user is someone who exercise his own right. According to U. Promińska²¹, it concerns two situations: the first one, when someone is acting on the basis of power of attorney, the second regards to acting as exercising somebody's own right coming from priority of using the company's name on the same market.

The protection of the company's name is widely recognized. It is not only protection against risk of misleading but also against unauthorized use, especially in advertisements or mass media if its aim is to discredit authorized entrepreneur or simply eliminate him from the market²². As it was indicated by the Appeal Court in Katowice, violating the right to the company's name has its place whenever even only one of the

¹⁴ There, 205.

¹⁵ R. Skubisz, 'The rules of the company's law' (Warsaw: 1993) 9.

¹⁶ Edited by: A. Kidyba, 'Civil Code. Comment. Volume I. The general part' (Warsaw: 2012) 211.

¹⁷ Edited by: J. Ciszewski, 'Civil Code. Commentary' (Warsaw: 2013) 96.

¹⁸ Edited by: J. Ciszewski, 'Civil Code. Commentary' (Warsaw: 2013) 96.

¹⁹ Appeal Court in Lodz, No. I ACr 23/91.

²⁰ Edited by: M. Pyziak-Szafnicka, P. Książak, 'Civil Code. The general part' (Warsaw: 2014) 409

²¹ Ibidem, 409.

²² There, s. 409-410.

company's name role is violated. Therefore violating may concern the individualizing role, the guarantee role or advertising one²³. Foregoing statement leads to the conclusion that violating of the company's name may take a variety of forms, even by using similar or identical trade mark. This problem has become groundwork for the judgment of the Supreme Administrative Court in Poland. In this case a joint stock company called 'PEBEX' registered a trade mark containing of the name of the company which made another company (limited liability company), also called 'PEBEX', impossible to use their own company's name²⁴.

It is also crucial to underline that art. 43¹⁰ of the Polish Civil Code provides protection against both threats and violation of the company's name.

As to the means of protection, first of all it should be claimed that the entrepreneur whose right to the company's name has been violated by actions or other means may request such action to be desisted. He can also require removal the violation effects by making a statement in the appropriate form and content, compensation material damages or returning benefits received by the person who committed the violation. Those indicated claims have both financial (material) and non-pecuniary character. In the opinion of U. Promińska the most important claim is a claim of forbearance (in which an authorized user may require cessation of the violation)²⁵. According to this author, aforementioned claim let to stop threatening or violating actions. Similar consequence has the claim of removing effects of the violation, because it let to restore the previous state. As a material claims should be considered claim of compensating material damage or returning benefits received by the person who committed the violation. According to Polish civil law, it is obvious that damage should be a normal consequence of the violator's action and should be entirely repaired. As to the claim of returning the benefit, according to U. Promińska, it should be understood like a claim of unjust enrichment²⁶. That is why a relationship between impoverishment of the authorized entrepreneur and enrichment of the violator should be reveal. However this relation is not causation. In opinion of the aforementioned author it is because between those parties exists relation in which they both are parties of the same transfer of property²⁷. The benefit achieved by the violator is especially the one which does not enlarge the assets of the authorized user. However U. Promińska rightly points that it is not impossible that authorized user has suffered damage e.g. by weakening his status on the market or loosing goodwill. By using connector 'or' in the article 43¹⁰ considering material claims, in the opinion of the author, it means that authorized user may use one of the claims or both of them²⁸. Taking into consideration literal interpretation of the law, this point of view should be considered as the right one.

The catalogue of possible claims is closed so authorized user cannot demand redressing in connection with the violation. This opinion dominates in the legal literature and jurisdiction. According to many authors²⁹ because of the fact that the company's name received an individual, independent and autonomous protection, regulations concerns protection of personal goods cannot be applied. Despite the fact that this opinion is actually predominating, there are still authors in opinion of which applying regulation concerning protection of personal goods is possible³⁰. Those opinions should be recognized as unfounded. However, according to A. Janiak, claim of declaratory relief is not excluded in cases of violation of the right to the company's name³¹.

The right to protect the company's name arises and last from the moment of notification the company in proper register. However, it is not apply to the situation when the entrepreneur does not have to reveal his company in any register or when the violator is acting in bad faith. I such a situation the beginning of the protection of the company's name should be combined with start of using the company's name by the authorized entrepreneur³².

²³ Appeal Court in Katowice, No. V ACa 126/12.

²⁴ Supreme Administrative Court in Poland, No. II SA 3390/01.

²⁵ Edited by: M. Pyziak-Szafnicka, P. Księżak, 'Civil Code. The general part' (Warsaw: 2014) 409.

²⁶ Ibidem, s. 502.

²⁷ There, 502.

²⁸ Ibidem, 502.

²⁹ e.g. edited by: M. Pyziak-Szafnicka, P. Księżak, 'Civil Code. The general part' (Warsaw: 2014) 502 but also Edited by: A. Kidyba, 'Civil Code. The Commentary. Volume I. The general part' (Warsaw: 2012) 236.

³⁰ M. Kłapczyńska, 'The company and its protection' (Warsaw: 2004) 202, but also edited by: J. Ciszewski, 'Civil Code. The commentary' (Warsaw: 2013) 106.

³¹ A. Kidyba, 'Civil Code. Comment. Volume I. The general part' (Warsaw: 2012) 237.

³² Ibidem, s 236.

Because of the fact that the right to the company's name is effective *erga omnes*, the remedies can be used against everybody who tries to violate this right. The scope of protection is not limited neither by the territory nor the fields of acting of the authorized user³³.

Last but not least it should be underlined that there are essential differences between the name of the subject of the market (the company's name) and the name of the business running by the entrepreneur as separate subjects of protection. As claims A. Janiak, the right to the company's name and the right to designate an enterprise are two completely different rights which consider different intangible assets³⁴. As a consequence, protection of the right to the company is regulated in the article 43¹⁰ of the Polish Civil Code whereas protection of the designation of an enterprise results from the Law on Unfair Competition³⁵, which is not the subject of this paper.

Conclusion

Summing up it should be pointed that the right to protect company's name is one of the most important right of each and every entrepreneur, thank to which he can carry on his enterprise without feeling of threatening or violating the company's name and gain the company's goodwill. Considering that fact, Polish Civil Code provides complete catalogue of legal means of protection (remedies) which can be used in every case of threatening or violating this right. Those means can be used against anyone who tries to threaten or violate the right and the protection itself arises right after notification the company in the proper register or even earlier, in case the entrepreneur is not obliged to be revealed in proper register. Moreover thanks to presumption of illegality of the violator, a burden of proving acting in accordance with the law lies with the violator, which can be very difficult to rebut. Furthermore, protection of the company's name, considered as a trade mark, is also regulated in other Polish laws, that is why, in the opinion of the author, the regulation considering the protection of the company's name in Polish civil law is complete and sufficient.

Bibliography

1. Edited by: A. Kidyba, 'Civil Code. Comment. Volume I. The general part' (Warsaw: 2012).
2. Edited by: J. Ciszewski, 'Civil Code. Commentary' (Warsaw: 2013).
3. Edited by: K. Pietrkowski, 'Civil Code. The commentary. Volume I' (Warsaw: 2004).
4. Edited by: M. Pyziak-Szafnicka, P. Księżak, 'Civil Code. The general part' (Warsaw: 2014).
5. J. Szwaja, 'Commercial Companies Code. The commentary' (Warsaw: 2004).
6. K. Wojtczak, 'Profession and its legal regulation. Study in the field of substantive administrative law' (Poznan: 1999).
7. M. Klapczyńska, 'The company and its protection' (Warsaw: 2004).
8. R. Skubisz, 'The rules of the company's law' (Warsaw: 1993).
9. S. Dmowski, 'Civil Code. Commentary' (Warsaw: 2007).

Legislations:

10. Polish Civil Code (23.04.1964, Dz.U.2014.121).
11. Law on Freedom of Economic Activity (2.07.2004, Dz.U.2013.672).
12. Law on Economic Activity (23.12.1988, Dz.U. 1988.41.324).
13. Ordinance of the President of Republic of Poland Commercial Code (27.06.1934, Dz.U.1934.57.502).
14. Law on Unfair Competition (16.04.1993, Dz.U.2003.153.1503).

³³ J. Szwaja, 'Commercial Companies Code. The commentary' (Warsaw: 2004) 224.

³⁴ Edited by: A. Kidyba, 'Civil Code. Comment. Volume I. The general part' (Warsaw: 2012) 237.

³⁵ Law on Unfair Competition (16.04.1993, Dz.U.2003.153.1503).

Cases:

15. Appeal Court in Lodz, No. I ACr 23/91.
16. Appeal Court in Katowice, No. V ACa 126/12.
17. Supreme Administrative Court in Poland, No. II SA 3390/01.

DEFENSE OF CRIME VICTIMS: SOME ASPECTS

Anton Liutynskii¹

Abstract

The existing methods of legal regulation in different countries allow us to determine the difference in the approaches to the legal regulation of mediation. The development of mediation procedures requires analysis of the fundamental principles of criminal justice, criminal law and the state criminal policy.

The most important idea underlying the concept of alternative procedures in criminal process is the idea of reconciliation. The use of criminal responsibility and punishment as a result of criminal proceedings is not always an effective way of solving specific criminal legal conflicts and the crime treatment in general. It is important that the Criminal Procedure Code of Russia has refused from "fighting against crime" as the goal of criminal procedure and declares other more important priorities in order to ensure the effective protection of rights and legitimate interests of individuals, organizations and crime victims.

Along with the moral issues of penalty we discuss the economic aspects of criminal justice and execution of punishment. There are studies on the costs of criminal justice and custodial restraint, according to which these legal institutions demand great monetary expenses from society.

Mediation in criminal proceedings solves several problems at once: improving the efficiency of proceedings in the context of protection and restoration of rights; humanization of criminal policy; cheapening of the prosecution and execution systems.

One can specify the following important criminal procedural issues of mediation that require studying: strengthening of dispositive norms.

Keywords: the purpose of criminal procedure; humanization of criminal policy; victims' protection; alternative procedures in criminal process

Introduction

Criminal procedure as a procedural form must ensure the protection of rights of victims and the enforcement of the substantive law, especially the criminal law. The idea of state protection of crime victims is enshrined in the most important international and national legal acts. However, the very concept of the victims' protection needs to be clarified in the context of mediation in criminal proceedings. In this publication we consider some important aspects of the issue on the example of the norms of the Russian criminal procedure law:

The concept of "protection of a crime victim"

Punishment and the purpose of the crime investigation procedure.

1. Main Body

The most important idea underlying the concept of alternative procedures in criminal process is the idea of reconciliation. As it is noted in literature, the use of criminal responsibility and punishment as a result of criminal proceedings is not always an effective way of solving specific criminal legal conflicts and the crime treatment in general (Arutyunyan). It is important that the Criminal Procedure Code of Russia has refused from "fighting against crime" as the goal of criminal procedure and declares other more important priorities in order to ensure the effective protection of rights and legitimate interests of individuals, organizations and crime

¹ PhD in law, associate professor assistant professor of the chair of criminal procedural law the North-West institute (branch) of University n.a. O.E.Kutafin (Vologda, Russia).

victims. The idea of restoring the right, violated with socially dangerous acts, is broader than the idea of mandatory punishment for a crime and it follows the main regulations of The Criminal Procedure Code as well as its goal-setting.

The ideology of the current Criminal Procedure Code of the Russian Federation does not accept fighting against crime as the purpose of criminal procedure and declares another more important priority that is ensuring of the effective protection of rights and legitimate interests of individuals and organizations, criminal offence victims².

The practice of achieving the penalty goals declared in the criminal law - restoration of social justice, correction of convicts and crime prevention - causes reasonable doubts about its effectiveness. There is a problem of moral and logical justification of penalty. Does a victim of crime always need a criminal penalty (for an offender)? Is criminal penalty a way to protect and restore a violated right? Answering these questions we should note their complexity for legal science, as well as for social practice. The fact is that moral considerations are not a solid and consistent set of rules which could correlate with the rules of law. Conceptions of punishment for offenders vary greatly even within the same social group. This conclusion can be drawn from parliamentary debates and publications in the media on the topics related to criminal liability. One can state that the ideas of humanization of punishment and the state-regulated restrictions for inhumane traditional forms of criminal responsibilities, which are being promoted by many scientists, are not always understood by the public. And these people are the force that influence the formation of parliaments in many countries and are the "customers" of criminal policy. In these circumstances, it is not always easy to implement the legislative restrictions for some common public perceptions of punishment and justice.

Along with the moral issues of penalty we discuss the economic aspects of criminal justice and execution of punishment. There are studies on the costs of criminal justice and custodial restraint, according to which these legal institutions demand great monetary expenses from society.

Thus, according to one study, one day of criminal proceedings in Russia 10 years ago cost the state budget almost 30 thousand rubles³. Stay of a convict in prison in Russia costs budget more than 200 thousand rubles⁴.

The economic aspect includes compensation of the property damage combined with punishment. Victim of a property crime, as a rule, is interested in quick compensation of damage by the perpetrator. But staying in a correctional facility (or jail) often implies difficulties, because the official income of working convicts is rather low⁵. The practice of the penal system institutions shows that a convict cannot always effectively indemnify while in prison, and it's much easier to do this at large.

The subject of mediation issue can be qualified as one of the criminal procedure aspects of reconciliation. Who should be vested with the authority to organize the reconciliation process? International experience allows us to say that the subjects of mediation can be presented as follows: a specialized social organization (as in Germany) or an authorized individual (as in France); family conferences – meetings of the parties in interest (relatives of the persons in dispute, teachers and others), practiced in New Zealand; a government agency, separated from the judicial authorities and the law-enforcement agencies, like the probation service in Great Britain⁶.

The logic of mediation procedures allows us to speak about the necessity to introduce some special procedure party, not connected with the judicial and investigation authorities, who would be authorized to:

- 1) take actions in reconciliation of the parties;
- 2) formulate a legally valid decision in a form of written opinion (a mediation agreement), justifying actionability and the fact of reconciliation of the parties.

² Apostolova N.N., 'Expediency (discretionary) in the Russian criminal trial'. Author's abstract of Doctor of law (Moscow, 2011) 3

³ More information: Bazhanov S.V., 'The cost of criminal procedure'. Author's abstract of PhD in law (Nizhny Novgorod, 2002)

⁴ Data for 2010 of the Accounts Chamber of the Russian Federation. See: http://www.budgetrf.ru/Publications/Schpalata/2012/ACH201206231336/ACH201206231336_005.htm

⁵ 'The salary of convicts will be raised and the worktime standarts will be revised' [2013 Oct.8.] IZvestia.

According to official data, in some regions the average salary of convicts is 140 rubles per day. See: <http://www.interfax-russia.ru/Ural/report.asp?id=487845>. Link dated 02.15.2015.

⁶ Popadenko E.V., 'The use of reconciliation procedures (mediation) in criminal proceedings' (Moscow, 2010) 22-29

This question is closely connected with another interesting problem that can be defined as the obligation of government entities to carry out activities of criminal proceedings to reconcile the parties of the criminal conflict. To develop the mediation mechanisms in criminal proceedings it is necessary to expand the reconciliation duties for the officials in charge of the criminal case - the investigator, the interrogating officer, and the judge of the Federal Court. In our opinion, these persons should take measures to ensure the possibility of alternative dispute resolution.

We would also like to touch on another interesting issue. In most legal systems the termination of criminal case due to reconciliation of the parties is not applicable to all crime categories but mainly to the crimes of low and medium social danger. Termination of criminal case due to reconciliation of the parties demands the declaration of a victim's will and the consent of an accused, recorded in case papers.

In this regard one can put another question: is it possible to apply mediation in criminal cases with no victims, when the harm is caused to society?

Some authors believe that if a victim is a natural person, the mediation must be applied mandatory in such case⁷.

In our opinion, this issue is very important and requires further examination. The current Russian legislation allows termination of criminal cases on the crimes where the damage was caused to the state budget, in case the undone damage. In addition to such crimes there are others, including those with very strong sanctions, where the harm is caused to social relations, rather than to a particular person. In our opinion, it is necessary to introduce additional procedural opportunities of reconciliation for crimes with no victims. In our view, it also requires the introduction of an additional procedural figure, not connected with the state prosecuting authorities. Representative bodies, local authorities and members of public organizations could become the bearers of the procedural status of "public victim". They could be authorized to consent to reconciliation with the accused.

There is also a very interesting and contentious issue of expanding reconciliation to the criminal cases of serious and even extremely serious crimes. The concept of "the severity of crime" in the Russian criminal law is conditional. It is defined by the maximum penalty for this offense under the article. In our opinion, this is not always fair. As an idea for discussion one can suggest to expand the opportunities of using mediation procedures, limiting its application only to the most socially dangerous violent crimes against person that caused the most serious consequences (primarily, murder).

Conclusion

Certainly, many of the mentioned issues go far beyond the criminal procedure law and require a detailed discussion and study, first of all from the point of criminal and penal laws and criminology.

We can draw the following conclusions:

1. The State should legislatively set the restoration of rights of a crime victim as a mandatory goal for the application of criminal law. Punishment should be considered only as an additional result of application of criminal and criminal procedure law, possible only in special cases.
2. The penalty system and its practice should be based on reasonable humanistic principles. Legal proceedings and execution of penalties are rather expensive and should not be applied formally.
3. Mediation in criminal proceedings can help solve several problems at once: to improve the efficiency of judicial process in terms of protection and restoration of rights; to humanize the criminal policy; to cost-cut the expanses of prosecution and execution of criminal penalties.
4. Expansion of mediation in criminal proceedings requires the solution of a number of important issues, such as: the figure of the mediator, the role of court and preliminary investigators in reconciliation.
5. There is the necessity to develop the opportunities for applying mediation in criminal cases with no victim, where the harm is caused to society. It also requires the introduction of new procedural figures that can, in a sense, "replace" the victim.

⁷ Arutyunyan A.A., 'Mediation in criminal procedure'. Author's abstract of PhD in law (Moscow, 2012) 6

6. The applying of mediation should be expanded to many serious crimes. Mediation should not be applied only in cases of extremely serious crimes against life.

Bibliography

1. Apostolova N.N., 'Expediency (discretionary) in the Russian criminal trial'. [Tselesoobraznost (diskreسیونnost) v rossijskom ugovnom sudoproizvodstve]. Author's abstract of Doctor of law (Moscow, 2011)
2. Arutyunyan A.A., 'Mediation in criminal procedure'. [Mediatsija v ugovnom protsesse]. Author's abstract of PhD in law (Moscow, 2012)
3. Bazhanov S.V., 'The cost of criminal procedure' [Stoimost ugovnogo protsessa]. Author's abstract of PhD in law (Nizhny Novgorod, 2002)
4. 'The salary of convicts will be raised and the worktime standarts will be revised' [Zarplatu osuzhdyonnym podnimut, a normy truda peresmotryat] [2013 Oct.8.] Izvestia
5. Popadenko E.V., 'The use of reconciliation procedures (mediation) in criminal proceedings'. [Primenenie primiritelnykh protsedur (mediatsii) v ugovnom sudoproizvodstve] (Moscow, 2010).

STATE LIABILITY IN INTERNATIONAL COMMERCIAL ARBITRATION

Nērika Lizinska¹

Abstract

The purpose of this conference paper is to analyze the security of the merchants' contractual relationships during the implementation of international commercial agreement, concluded between a state and commercial party, and also in international commercial arbitration, where state is a party. In order to achieve this goal, first of all, concept and definition of the "state" (its entities, organs and instrumentalities) will be presented. Since the concept of "state" is a broad term, it is necessary to understand to which legal personality claim should be submitted and who should be held liable. Secondly, it will be demonstrated how to prove that actions of a state entity are attributable to a state. And thirdly, insights into the differences between international commercial arbitration and investment treaty arbitration in this context will be provided. This aspect is highly important since investment treaty arbitration is regulated by international public law, which contains different principles and where breach of a contract is regarded as the breach of an international obligation.

Based on methodological and practical aspects, in summary of this conference paper, insights, main tendencies and conclusions regarding secure international commercial transactions and arbitration process, where one of the parties is a state, will be provided.

Keywords: arbitration, state contracts, attribution

Introduction

When a state participates in international transactions and concludes commercial agreements, for example, purchase of goods, arbitration is usually chosen as a dispute resolution mechanism. Taking into account the specifics of this process and the fact that state is a sovereign with various legal instruments, which may be used to affect the process or enforcement of an arbitral award, the following question arises – whether commercial party can be secure that a state, its entities and instrumentalities will be held liable for concluded agreement, conducted actions and it will not discredit arbitration process or the result of it?

The main concern is related to the fact that state as a sovereign has various legal instruments (for example, state immunity), that can be used to disrupt the process. Accordingly, where the principle of equality of the parties should prevail, one of the parties is often seen as "the weakest" party of the contract.

"The application of the principle of *pacta sunt servanda* is found suitable to the contractual relationship between two equal partners. Thus, as a principle of international law, it applies to the treaty relationship between States. Also, in different municipal legal systems, the principle applies to the contractual relationship between unequal partners, i.e. between a State as a party on the one hand and a foreign private party on the other."² Despite the fact that the parties enter into commercial agreements with different objectives and that the parties have a different set of available legal instruments, the "inequality" of the parties is necessary and possible to balance, as will be described further.

¹ PhD student at the University of Latvia, Faculty of law, Department of International and European law sciences. Currently is preparing doctoral thesis "State as a party to international commercial arbitration". Research interest of the author includes international law, theory of law and philosophy of law. E-mail: nerika.lizinska@gmail.com.

² A.F.M.Maniruzzaman, 'State Contracts with Aliens. The Question of Unilateral Change by the State in Contemporary International Law', Journal of International Arbitration, Vol. 9, No. 4, (Kluwer Law International: 1992), p. 142.

1. Concept of a State

There are various national and international laws which contains the definition of state. First, countries sets their own administrative structure, as well as determines those legal entities, which have the right (or are forbidden) to enter into international commercial contracts and conclude arbitration agreements. At the international level, a document governing the capacity of states to conclude arbitration agreements is the European Convention on International Commercial Arbitration (hereinafter - European Convention), signed on April 21, 1961. Article 2 (1) of the European Convention states that “[..] legal persons considered by the law which is applicable to them as ‘legal persons of public law’ have the right to conclude valid arbitration agreements.”³ “The expression “legal persons of public law” should be interpreted in a broad way as to comprise not only public corporations but also States and any public agencies.”⁴ It should be noted that more than 30 countries are currently party to the European Convention, and nowadays only Belgium, according to Article 2 (2) of the European Convention has a declaration which states that “[..] in Belgium only the State has [..] the faculty to conclude arbitration agreements.”⁵

A similar approach with regard to the broad term “state” definition can be found in other international laws, for example, United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter – UN State Immunity Convention). According to the Article 2 of the UN State Immunity Convention “state” means: “(i) the State and its various organs of government; (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; (iv) representatives of the State acting in that capacity.”⁶ UN State Immunity Convention’s *travaux preparatoires* details that the concept of “state” “should understood as comprehending all types of categories of entities and individuals so identified which may benefit from the protection of State immunity”⁷, thus providing a very wide list of legal subjects. State immunity doctrine is an important aspect in this context due to the fact that states often claims immunity from jurisdiction or immunity against the enforcement of an award in order to avoid the arbitration or execution of an award against its property.

Based on above mentioned and taking into account substantial case law on this aspect it can be concluded that “state” concept in the international field should be interpreted broadly, including state agencies, instrumentalities, organs etc. However, prior to the conclusion that the legal subject is actually part of the state, and that actions taken are attributable to the state, it is necessary to determine the relevance of the activities carried out to the state.

2. Attribution of Conduct to A State

As it was mentioned in the introduction part of this conference paper, international commercial arbitration where one of the parties is a state partly can be seen as a challenge compared to commercial dealings between two commercial parties, where all of the conditions and risks are more or less known. “[..] this type of arbitration involves risks and loopholes associated with the distinct status that a state may seek to claim, be it prior to the actual arbitration proceedings, during the proceedings, or subsequent to the rendering of an award.”⁸

³ ‘1961 European Convention on International Commercial Arbitration’, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en, accessed: 20.02.2015.

⁴ D.Hascher, ‘Commentary on the European Convention on International Commercial Arbitration of 1961’, A. J. van den Berg (ed.), ‘Yearbook Commercial Arbitration’, Volume XX, (Kluwer Law International: 1995), p. 1016.

⁵ Declarations and reservations are available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en, accessed 02.03.2015.

⁶ ‘United Nations Convention on Jurisdictional Immunities of States and Their Property’, available at http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf, accessed 01.03.2015.

⁷ Report of the International Law Commission on the work of its thirty-eight session, p.14, available at http://legal.un.org/ilc/documentation/english/A_41_10.pdf, accessed 20.02.2015.

⁸ R. Boivin, ‘International Arbitration with States: An Overview of the Risks’, Journal of International Arbitration, 19 (4), (Kluwer Law International: 2002), p.285.

On the question of attribution of actions to a state, main aspect is to identify state liability for those actions which were taken (for example, breach of a contract) by its agencies, organs, instrumentalities. Generally, "attribution is a normative operation, the purpose of which is to identify the author of the act in question and to ascertain the association of the author of the act with a State in the performance of that act."⁹ Thereby, it is necessary to find a link between the state and its institutions (for example, in the case Svenska Petroleum Exploration AB v. Lithuania¹⁰, Svenska Petroleum Exploration AB (Swedish company) entered into an agreement with Lithuanian state owned entity. Arbitral tribunal, taking into account all the circumstances of the case, stated that government was bound by the arbitration agreement even if it was not a party to the agreement), and in addition, to avoid undue considerations.

In order to avoid legal arbitration agreement in practice, state may try to prove that 1) under its internal law, entity who signed an arbitration agreement has not been entitled to do so (as discussed in well know *ad hoc* case Benteler v. Belgium which nowadays "provides further authority for the proposition that a commercial arbitration between a [s]tate and a private party cannot be avoided simply by the [s]tate's invoking a prohibition in its own law against arbitration by the [s]tate."¹¹). Furthermore, 2) states argue that arbitration agreement has not been signed according to its internal procedures (for example, in the case Framatome SA v. Atomic Energy Organisation of Iran, arbitral tribunal "[...] dismissed the contention of Iran that the arbitration clause was null and void from the outset, pursuant to a provision of the Iranian constitution requiring the approval of Iran's Council of Ministers"¹²), or that 3) entity was not entitled to sign international commercial agreement with arbitration clause (the lack of internal authorisation (for example, in the case Fougierolle SA (France) v. Ministry of Defence (Syrian Arab Republic), this argument was applied by the Administrative Tribunal of Damascus. According to its decision "the Administrative Tribunal found that the ICC awards were "nonexistent" because the Syrian Council of State had not advised on the arbitration clause. It, therefore, refused enforcement."¹³), and also 4) other arguments.

"The principal argument for involving the state at the outset is that the state entity did not have a separate legal personality but was merely a subdivision of the state administration. Thus, under well established principles of state responsibility, the entity may have no power to bind the state in any way. By making the state, and not the state entity, a party to the arbitration agreement this possibility is eliminated. Frequently, however, the state entity has its own legal personality so that it and not the state becomes party to the arbitration agreement. In those cases a state which has not signed the arbitration agreement can only be made a party if it can be shown that the state nevertheless submitted to arbitration or cannot rely on the separate legal personality of its state owned entity."¹⁴ For example, in the International Chamber of Commerce case No.9762 arbitral tribunal stated that "[...] it is not unusual to use "government" to designate "state" as A had done [A is the main company, comprising two group companies – Ax and Ay, which concluded various project's with Ministry of Agriculture and Food of Republic Z – author's comment]. In the opinion of the arbitral tribunal, the Ministry represented the State and the State was bound by its acts."¹⁵ Regarding enforcement of an arbitral award, "the natural tendency of courts, when asked to rule on the seizure of an entity's assets to satisfy the debts of a State, is to find that such assets are out of reach of that State's creditors because they belong to an entity distinct from the debtor State."¹⁶ Thus the case law in this area is mainly focused on the

⁹ E. Gaillard, J. Younan eds., 'State entities in International Arbitration', IAI series on International Arbitration No.4, (Juris Publishing: 2008), p. 11, hereinafter - 'State entities in International Arbitration'.

¹⁰ UK No. 72, Svenska Petroleum Exploration AB (Sweden) v. Government of the Republic of Lithuania, High Court of Justice, Queen's Bench Division (Commercial Court), 4 November 2005 in A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XXXI (Kluwer Law International: 2006), pp. 906-942.

¹¹ J. Paulsson, 'May a State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration? Reflections On the Benteler v. Belgium Preliminary Award', Arbitration International, Vol. 2, No.2 [1986], p.96.

¹² I. Alvik, 'Contracting with Sovereignty: State Contracts and International Arbitration', (Bloomsbury Publishing: 2001), p.110, cit. Framatome SA v. Atomic Energy Organisation of Iran, (Award (ICC Case No 3986), 1982) [1983] 8 Yearbook Commercial Arbitration, 94.

¹³ Case Syria No. 1, Fougierolle SA v. Ministry of Defense, Syrian Arab Republic, Administrative Tribunal of Damascus, 31 March 1988 in A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XV, (Kluwer Law International: 1990), p.515.

¹⁴ J. D. M. Lew, L. A. Mistelis, S. Kröll, 'Comparative International Commercial Arbitration', (Kluwer Law International: 2003), p. 739.

¹⁵ Final Award in Case No.9762 of 2001 in A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XXIX, (Kluwer Law International: 2004), p.28.

¹⁶ 'State entities in International Arbitration', p.188.

issue – first of all, how to prove the relevance of such activities to the state and secondly, how to make sure that the arguments used in order to avoid an arbitration agreement is legally justified.

3. Investment v. commercial arbitration

First of all, it must be clearly stated that “[i]nvestment arbitration is not international commercial arbitration. It is essentially a form of international judicial review of governmental (regulatory, administrative and at times fiscal) action, though using the forms of commercial arbitration.”¹⁷ Even if the similar principles can be found, one should keep in mind that “investment treaties (or treaties for the promotion and protection of investments) are inter-State treaties and, as such, they are governed by the rules of public international law.”¹⁸ By contrast, international commercial arbitration is governed by the rules of private international law, and should be applied accordingly.

Thereby, to determine state liability under international public law, International Law Commission’s “Articles on the Responsibility of States for Internationally Wrongful Acts” (hereinafter – ILC Articles) must be taken into account. According to Article 2 of the ILC Articles, “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.”¹⁹ Thus, in order to apply it, attribution and breach of an international obligation must be established. “Customary public international law should not be applied to a dispute arising from the breach of a State contract since such a breach does not in principle constitute a “breach of an international obligation by the State” and could not be characterized as an internationally wrongful act of that State.”²⁰ In the context of state liability, breach of an international commercial contract, where one of the parties is the state, should be regarded as breach of private contract (*lex contractus*), similarly as in cases when such contract has been concluded between two companies under international private law, but bearing in mind the peculiarities that are inherent in commercial transactions with the state.

Conclusion

This brief analysis has shown that practice with regard to the state liability in cases where legal subject enters into an international commercial contract and which contains an arbitration clause, particularly in international transactions with the state, is not fully clear. Concept of a state contains a wide range of legal subjects, such as ministries, entities, instrumentalities and agencies through which the state exercises its functions and thus is related to the activities they carry out. Accordingly, it makes a state as the main respondent in international arbitration, which should be held liable for its actions. The state can be held liable under international public law or international private law depending on what kind of contract is concluded, what kind of contract breach is made and whether it is attributable to the state.

Bibliography

1. I. Alvik, ‘Contracting with Sovereignty: State Contracts and International Arbitration’, (Bloomsbury Publishing: 2001);
1. R. Boivin, ‘International Arbitration with States: An Overview of the Risks’, *Journal of International Arbitration*, 19 (4) (Kluwer Law International: 2002);
2. E.Gaillard, J.Younan eds., ‘State entities in International Arbitration’, IAI series on International Arbitration No.4, (Juris Publishing: 2008);

¹⁷ N.Horn (ed.), ‘Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects’, (Kluwer Law International:2004), p.211.

¹⁸ ‘State entities in International Arbitration’, p.7.

¹⁹ International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf, accessed:07.03.2015.

²⁰ ‘State entities in International Arbitration’, p. 45.

3. D.Hascher, 'Commentary on the European Convention on International Commercial Arbitration of 1961', A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XX, (Kluwer Law International:1995);
4. N.Horn (ed.), 'Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects', (Kluwer Law International: 2004);
5. J.D.M.Lew, L.A.Mistelis, S.Kröll, 'Comparative International Commercial Arbitration', (Kluwer Law International: 2003);
6. A.F.M.Maniruzzaman, 'State Contracts with Aliens. *The Question of Unilateral Change by the State in Contemporary International Law*', Journal of International Arbitration, Vol. 9, No. 4, (Kluwer Law International: 1992);
7. J. Paulsson, 'May a State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration? Reflections On the Benteler v. Belgium Preliminary Award', Arbitration International, Vol. 2, No. 2 [1986];
8. '1961 European Convention on International Commercial Arbitration', available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII2&chapter=22&lang=en;
9. Declarations and reservations are available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII2&chapter=22&lang=en;
10. 'United Nations Convention on Jurisdictional Immunities of States and Their Property', available at http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf;
11. International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf;
12. Report of the International Law Commission on the work of its thirty-eight session, available at http://legal.un.org/ilc/documentation/english/A_41_10.pdf;
13. UK No. 72, Svenska Petroleum Exploration AB (Sweden) v. Government of the Republic of Lithuania, High Court of Justice, Queen's Bench Division (Commercial Court), Not Indicated, 4 November 2005 in A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XXXI (Kluwer Law International: 2006);
14. Final Award in Case No.9762 of 2001 in A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XXIX, (Kluwer Law International: 2004);
15. Case Syria No. 1, Fougierolle SA v. Ministry of Defense, Syrian Arab Republic, Administrative Tribunal of Damascus, 31 March 1988, in A. J. van den Berg (ed.), 'Yearbook Commercial Arbitration', Volume XV, (Kluwer Law International: 1990).

CRIME OF ILLICIT ENRICHMENT AS A THREAT TO PUBLIC SECURITY

Skirmantė Makūnaitė¹

Abstract

Illicit enrichment is generally considered as a corruption-related crime of a public official or a crime of a person who has habitual contacts with known criminals. In Lithuania this crime is not directly linked neither with corruption nor with organised crime, therefore the question which legal goods are protected by the criminal law which forbids such act is still open.

This paper reviews two aspects of illicit enrichment as a threat to the security of society. Firstly, it analyses what legal goods are encroached by this crime, and secondly - what measures are necessary to ensure that the struggle against this harmful act would not infringe the freedoms and rights of separate individuals.

The conclusion is drawn that public security is assigned to the object of illicit enrichment. It should be understood not only as a security from committing new crimes, but also as financial and economic security. It is also stated that a not significant enrichment shall not be considered as a crime, as well as enrichment because of the illegal work, hiding income from small-scale commercial activities. The origin of assets should be based not only on financial calculations, but also on data about the owner's personality, his relations, activities, sources of income and way of life. It must be ensured that a criminal process takes place strictly in accordance with the presumption of innocence. Only in this case, criminalising illicit enrichment will contribute to public security and, in the meantime, individuals will be protected from disproportionate criminal prosecution.

Keywords: Illicit enrichment, presumption of innocence, criminal law, criminalisation

Introduction

The criminalisation process in a democratic state with the rule of law is inseparable from the principle of *ultima ratio*. The actions of an individual must be truly dangerous and pose a real threat, in order for the most drastic measures of criminal law to be applied in a struggle against them. Each criminal activity must generally pose a threat to the security of an individual, society, or the state. At the same time, the application of legal punitive measures for certain actions itself cannot pose a threat to the security of a separate individual or to society. Only when it is clearly indicated what legal goods would be encroached by the criminal act, it is possible to measure if the application of criminal liability would be proportional.

Illicit enrichment has been criminalised in Lithuania since the year 2010². Discussions about the object of the crime of illicit enrichment started before criminalisation. According to O. Fedosiuk, the object of the crime of illicit enrichment is provisions regarding the acquisition of ownership right³. However, exactly which legal goods would be encroached by this criminal activity still has not been analysed in detail; thus, the search for an answer to the question – is the threat and harm resulting from illicit enrichment substantial enough that criminal law should be introduced to battle this activity – is complicated.

The purpose of this paper is to review two aspects of illicit enrichment as a threat to public security, i.e. to analyse what legal goods are threatened by this criminal activity and what measures are necessary to ensure that the struggle against this harmful phenomenon would not infringe the freedoms and rights of separate individuals.

¹ PhD student of Vilnius University Faculty of Law, Department of Criminal Law. Fields of research: criminal law, illicit enrichment. E-mail: skirmante.makunaite@gmail.com.

² Lietuvos Respublikos baudžiamojo kodekso 3, 67, 72, 190 straipsnių pakeitimo ir papildymo ir Kodekso papildymo 72-3, 189-1 straipsniais įstatymas Nr. XI-1199 [2010] Žin. 145-7439

³ O. Fedosiuk, 'Lietuvos baudžiamoji teisė: specialioji dalis. Pirmoji knyga' (Vilnius: Justitia 2013) 413

1. Legal Goods as Encroached by Illicit Enrichment

The understanding of illicit enrichment in the world is usually related to the definition of this crime, which has been consolidated by the United Nations Convention on Corruption of 31 October 2003 (hereinafter – the Convention). Article 20 of the Convention indicates that illicit enrichment is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income⁴. Illicit enrichment is considered as a crime of corruption. It is presumed that all the assets possessed by the public official, and not covered by his legitimate income, are acquired by the unidentified crimes of corruption. This exactly reflects the dangerous component of this crime.

In Communication from the Commission to the European Parliament and the Council of 20 November 2008 – Proceeds of organised crime: ensuring that „crime does not pay“ it has been proposed that the similar criminal activity – criminal offence for owning "unjustified" assets should be criminalised. It is defined as the possession of assets which are disproportional to the declared income of the owner, when he/she has habitual contacts with known criminals⁵. Thus, it is presumed that such assets derive from organised crime. Therefore, such crime is related not to corruption, but to organized crime. It poses a threat to the security, financial interests and economic stability of the society.

In many countries where illicit enrichment has been criminalised (for example, Argentina, China and Mexico⁶), illicit enrichment is considered as a crime of corruption, and the persons of interest of this crime are public officials. Conversely, in France this crime is more related to organized crime⁷.

In Lithuania, the crime of illicit enrichment is indicated in Article 189¹ of the Criminal Code of the Republic of Lithuania (hereinafter – the CC). Criminal liability is applied to a person who owns property exceeding the value of approximately € 18828, while being aware or ought to have been aware and could have been aware that such property could not have been acquired through legitimate income⁸. In Lithuania this crime is not directly linked neither with corruption nor with organised crime. This crime is committed when any person is in possession of assets, which could not be acquired using legitimate income. When the persons of interest are not specifically described, the question – which legal goods are protected by the criminal law which forbids such actions – becomes much more complicated.

It should be indicated that in a democratic state with the rule of law, where the protection of the right to property is ensured by the Constitution, solely the possession of a certain amount of assets cannot be recognized as a crime. As the Supreme Court of Lithuania has indicated, the concept of “assets” is neutral in the aspect of its gravity⁹. Thus, the gravity of “assets”, as the subject matter of this crime, should be related to their origin.

In the CC, this crime is in the section of crimes and misdemeanours against property, property rights and property interests. In the case of illicit enrichment, it is presumed that assets have been received from unidentified or unproven crimes (which can be considered as an initial crime). However, there is no basis for the claim that the initial crime must be related to the encroachment to the property, property rights and property interests. The object of the initial crime can vary. For example, the person may have acquired the assets from the trafficking of drugs, weapons or other forbidden items, or may have received a bribe. The assets involved in such cases can be acquired even by infringements to the law that are not necessary criminal. Moreover, it is not necessary to determine a concrete initial crime; it is enough to prove that, by the right of ownership, the possessed assets could not have been acquired by legitimate income and the person had or should have had and could have had knowledge of this.

⁴ United Nations Convention against Corruption [2003] at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

⁵ European Commission, Communication from the Commission to the European Parliament and the Council of 20 November 2008 Proceeds of organised crime: ensuring that „crime does not pay“ COM(2008)766 [2008] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0766&from=EN>

⁶ L. Muzila, M. Morales, M. Mathias, T. Berger, 'On the Take: Criminalising Illicit Enrichment to Fight Corruption' (Washington, DC: World Bank 2012) 68, 71, 81

⁷ Criminal Code of the French Republic [2005] at <http://www.legislationline.org/documents/section/criminal-codes>

⁸ Lietuvos Respublikos baudžiamasis kodeksas VIII-1968 [2000] Žin. 89-2741

⁹ Lietuvos Aukščiausiasis Teismas baudžiamoji byla 2K-P-93/2014 [2014]

Even though in some cases the property, property rights and property interests could have been encroached by initial crime, when there is no information that the assets have been possessed from the other persons or received by avoiding duties, it is doubtful that property is the legal good that is always encroached due to this crime.

This shows that the threat posed by the illicit enrichment should be evaluated by distancing from the attempt to identify the initial offence. Instead of that, it should be indicated who is always encroached when a person becomes illicitly enriched, without taking into consideration the crime by which the assets were acquired.

The crime of illicit enrichment is conceptually close to money laundering, the object of which are the financial and credit protection. Illicit enrichment can be considered as a result of money laundering, which aim is to hide the origin of assets, because in a case of illicit enrichment, the origin of the assets possessed by the person cannot be legitimate, however, the initial crime and even the fact of committing it is not clear and does not have to be established.

When someone becomes illicitly enriched, it becomes difficult or sometimes even impossible for honest persons, who pay taxes and do not receive income from illegal sources, to compete with those who have profited from illegal sources. Moreover, taxes are not being collected, the real situation of the financial system in the state is distorted, as well as its market, also inflationary processes are encouraged. In addition to this, the income received from the illegal sources can be reused for the development of further criminal activities.

It should be considered that the object of illicit enrichment is wide and includes many goods; thus, constraining only one of these would not reflect the essence of the criminal activity.

Therefore next to the financial interests, public security should also be assigned to the object of illicit enrichment. However, it should be understood not only as a security against committing new crimes, but also as a financial and economic security.

2. Security of an Individual as a Part of Security of Society

It should be noted that the security of the state and of the society cannot be achieved if the security of each individual is not ensured. One of the aspects guaranteeing the security of an individual is protection from disproportional governmental coercion.

The Constitutional Court of the Republic of Lithuania (hereinafter – the Constitutional Court) has indicated that the protection of common interests in a democratic state cannot deny the essential concrete rights of an individual. It also stated that one of the principle elements of a constitutional state with the rule of law, is the constitutional principle of the proportionality, which indicates that the measures regulated by law must reflect the lawfulness and importance of the purposes of society; that these measures must be essential for the achievement of the aforementioned purposes, and that they should not restrict the rights and freedoms of an individual, more than it is deemed necessary¹⁰.

The composition of the crime of illicit enrichment is unique, because the subject of this crime is not the assets that are acquired by the known criminal activity, but the assets that are of an unknown origin, also it is known that it could not be acquired from legitimate sources. Therefore, if it has been proven that all the plausible legal measures to acquire these assets have not been applied, it is presumed that the origin of the assets is illegal.

Such composition of the crime causes constant balancing on the line of infringing the presumption of innocence. O. Fedosiuk¹¹ and S. Bikelis¹², who have analysed the problematic aspects of this crime, stated that criminalising illicit enrichment might cause infringement of principles of criminal justice.

Moreover, it should be noted, that out of 28 European Union member states, only Lithuania and France have criminalised illicit enrichment. A substantial part of the EU member states as well as United States of

¹⁰ Lietuvos Respublikos Konstitucinis Teismas nutarimas KT9-N5/2015 [2015]

¹¹ O. Fedosiuk, 'Baudžiamųjų įstatymų prieš neteisėtas pajamas ir korupciją leidyba: tarp gerų siekių ir legitimumo' [2012] Jurisprudencija 1220

¹² S. Bikelis, 'Kad nusikaltimai neapsimokėtų: tradiciniai ir modernūs turto konfiskavimo mechanizmai: monografija' (Vilnius: Justitia 2014) 319

America, Canada, Switzerland, Australia and Russia¹³ have indicated that they will not criminalise illicit enrichment because this would contradict their constitutions, and may cause infringement upon the principle of presumption of innocence or have indicated that they have enough measures to fight profiting from crimes.

During the first two years after the criminalisation of illicit enrichment, the courts have addressed the Constitutional Court two times with requests to analyse whether or not the Article 189¹ of the CC contradicts the Constitution of the Republic of Lithuania. However, both times the Constitutional Court has refused to fundamentally analyse it. The Constitutional Court has instead indicated that the legislator has the discretion to criminalise dangerous activities and the motives for the contradictions of the Article 189¹ of the CC regarding the Constitution are declared as insufficiently argued¹⁴.

As illicit enrichment in Lithuania remains criminalized, while respecting the discretion of the legislator, it should be noted that in order not to violate the *ultima ratio* principle, both the law and the judicial practice has to ensure that criminal responsibility would apply only when there is a significant threat to public security. Therefore, the composition of the illicit enrichment offence must be designed in such a way that it would in fact comply with the risk level necessary for the criminal law.

An overreaching attempt to control the whole economical practices of people while applying the measures of criminal law, especially when a country has a low employment rate, does not increase the security of the society; on the contrary, it decreases it. That is why enrichment because of illegal work, hiding income from small-scale commercial activities should not be considered as a crime of illicit enrichment. The origin of the assets should not be considered illegal when they are acquired due to the activities that are not forbidden by law, and it should not matter whether the income has been accounted for according to the legal regulations.

Illicit enrichment is always a result of the insufficient work of law enforcement institutions. A struggle against illicit enrichment is always a struggle against consequences, but not the sources, i.e. crimes itself. When taking into consideration the fact that while attempting to prove this crime, it is not necessary to determine the exact origins of the assets, and that there is always a possibility of infringing on the principles of the criminal justice while presuming that the assets are illegal, only substantial illegal enrichment that raises no doubts should be considered as a crime of illicit enrichment. Furthermore, the value of the assets, which when possessed are applicable for the criminal law, should not be static when economic conditions are changing. During times of inflation, or the rise of wages or the index of consumer prices, the minimal limit of the punitive actions should change accordingly.

In addition, basing the fact that a person could not have acquired the current assets out of legitimate sources, it should be based not only on financial calculations, but also on data about the property owner's personality, his relations, activities, sources of income and way of life. This has also been indicated by the Supreme Court of Lithuania¹⁵. For example, information that a person belongs to an organised group, has been judged for various crimes, has no legal subsistence income, but has a high expenditure rate, would constitute better support for the claim that the assets possessed by him are from an illegal sources, and would cause less problems resulting from a possible infringement of the presumption of innocence.

At the same time, it must be ensured that a criminal process takes place strictly in accordance with the presumption of innocence and other principles of criminal justice. Only in this case, criminalising this activity will contribute to public security and, in the meantime, individuals will be protected from disproportionate criminal prosecution.

Conclusion

¹³ UNCAC coalition 'UNCAC review official documents' at <http://www.uncaccoalition.org/en/uncac-review/official-country-reports>; Transparency International Russia 'Russian implementation of UNCAC' [2013] at <http://transparency.org.ru/en/news/ti-russia-recommends-improvements-to-the-implementation-of-the-un-convention-against-corruption>; United Nations Convention Against Corruption 'Declarations and reservations' at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en

¹⁴ Lietuvos Respublikos Konstitucinis Teismas sprendimas [2012] at <http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta121/content>; Lietuvos Respublikos Konstitucinis Teismas potvarkis 2B-13 [2012] at <https://www.e-tar.lt/portal/lt/legalAct/TAR.8EAE5580B05D>

¹⁵ Lietuvos Aukščiausiasis Teismas baudžiamoji byla 2K-P-93/2014 [2014]

1. Illicit enrichment threatens the financial and economical safety of the society, as well as its protection from repetitive crime. Thus, a threat to public security should be assigned to the object of illicit enrichment, as well as the financial interests of the state.

2. A not significant enrichment should not be considered as a crime, as well as enrichment because of the illegal work, hiding income from small-scale commercial activities. The origin of assets should be based not only on financial calculations, but also on data about the owner's personality, his relations, activities, sources of income and way of life.

3. Only with the addition of a sufficient threat composition of the crime of illicit enrichment in the CC and by ensuring that criminal proceedings will be carried out by applying the presumption of innocence and other judicial principles, the criminalisation of this activity will comply with the aims of ensuring the safety of society, and in the meantime it will not be a threat for certain individuals as well as to the whole society as a result of the disproportionably applied measures of the criminal law.

Bibliography

Legal acts:

1. United Nations Convention against Corruption [2003] at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
2. Criminal Code of the French Republic [2005] at <http://www.legislationline.org/documents/section/criminal-codes>
3. Lietuvos Respublikos baudžiamasis kodeksas VIII-1968 [2000] Žin. 89-2741
4. Lietuvos Respublikos baudžiamojo kodekso 3, 67, 72, 190 straipsnių pakeitimo ir papildymo ir Kodekso papildymo 72-3, 189-1 straipsniais įstatymas Nr. XI-1199 [2010] Žin. 145-7439.

Books and articles:

5. L. Muzila, M. Morales, M. Mathias, T. Berger, 'On the Take: Criminalising Illicit Enrichment to Fight Corruption' [Washington, DC: World Bank 2012] 68, 71, 81
6. S. Bikelis, 'Kad nusikaltimai neapsimokėtų: tradiciniai ir modernūs turto konfiskavimo mechanizmai: monografija' (Vilnius: Justitia 2014) 319
7. O. Fedosiuk, 'Baudžiamųjų įstatymų prieš neteisėtas pajamas ir korupciją leidyba: tarp gerų siekių ir legitimumo' [2012] Jurisprudencija 1220
8. O. Fedosiuk, 'Lietuvos baudžiamoji teisė: specialioji dalis. Pirmoji knyga' (Vilnius: Justitia 2013) 413

Cases:

9. Lietuvos Respublikos Konstitucinis Teismas nutarimas KT9-N4/2015 [2015] at <https://www.e-tar.lt/portal/lt/legalAct/983fb970bdb911e4bde5b7a24f3fe3f3>
10. Lietuvos Respublikos Konstitucinis Teismas sprendimas [2012] at <http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta121/content>;
11. Lietuvos Respublikos Konstitucinis Teismas potvarkis 2B-13 [2012] at <https://www.e-tar.lt/portal/lt/legalAct/TAR.8EAE5580B05D>
12. Lietuvos Aukščiausiasis Teismas baudžiamoji byla 2K-P-93/2014 [2014]

Other:

13. UNCAC coalition 'UNCAC review official documents' at <http://www.uncaccoalition.org/en/uncac-review/official-country-reports>;

14. Transparency International Russia '*Russian implementation of UNCAC*' [2013] at <http://transparency.org.ru/en/news/ti-russia-recommends-improvements-to-the-implementation-of-the-un-convention-against-corruption>
15. United Nations Convention Against Corruption 'Declarations and reservations' at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en
16. European Commission, Communication from the Commission to the European Parliament and the Council of 20 November 2008 – Proceeds of organised crime: ensuring that „crime does not pay“ COM(2008)766 [2008] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0766&from=EN>.

PRINCIPLE OF DISTINCTION IN REMOTE WARFARE: “LONG LIVE THE KING!”

Neringa Mickevičiūtė¹

Abstract

Defense-related challenges have for centuries been a major driver of science and technology research. Throughout the human history wars have changed dramatically mainly because of innovations in weaponry. Technological developments in the last few centuries enabled positioning combatants further from their targets. It was expected that such progress would increase their security, as well as reduce collateral damage. However, use of new technologies in warfare challenges the international humanitarian law (IHL), the law that regulates the conduct of armed conflicts, restricts and guides the choice and application of means of warfare.

One of the main principles of IHL, reflecting the very spirit of this branch of law, is that of distinction between civilians or civilian objects and combatants or military objectives. It prohibits indiscriminate or deliberate attacks against civilians and civilian infrastructure.

This paper will analyze application of this principle to the new type of weaponry that can be categorized based on one particular criterion: (extreme) remoteness from the target, consequences of the attack or both. This category will include computer network attacks, unmanned aerial vehicles, automated or fully autonomous weapon systems, and other. Some of the above mentioned innovations have already made their way into military usage, while others are yet to be developed. Nevertheless, rise of the technology that retracts combatants from the actual battlefield might create difficulties in duly applying the principle of distinction.

Although ‘remote warfare’ enters the battlefield with a promise of greater security for states and individuals, the goal of this paper is to stress the importance of ensuring respect for fundamental principle of distinction in new age wars.

Keywords: remote warfare, principle of distinction

Introduction

Security is a basic human need, but ensuring national, regional or global security seems more like a Sisyphean task than a natural state of affairs. Paradoxically, it appears that greater security is often sought through military means that cause loss of human life, damage infrastructure and, inevitably, feed into the increased level of global insecurity.² In this light, it is important to analyze how wars are fought so that security of those directly and indirectly involved is not compromised beyond what is permissible.

The last few centuries bear witness to tremendous changes in warfare due to technological developments. The examination of technological interconnections between security and threat perceptions clearly brings out the important role that technology has played in the past and the inevitability of its increasing impact in the future.³ Mankind advanced from mainly close combat to using weaponry that enables rather precise and/or effective long-distance attacks, like (long range) guided missiles, weapons of mass destruction, directed-energy weapons, unmanned (combat) aerial vehicles (UAVs), semi–or fully–autonomous weapons systems, computer network attacks, and others. Even though some of the above-mentioned technologies

¹ PhD student at Mykolas Romeris University, Institute of International and European Union Law. Field of research: new technologies in armed conflicts, remote warfare, and probable evolution of IHL in the face of technological developments.

² “The fall in global peace in the last year has primarily been driven by the deterioration in four indicators: terrorist activity, number of internal and external conflicts fought, deaths from internal conflicts and number of displaced persons as a percentage of population.” The Institute for Economics and Peace, ‘Global Peace Index 2014’ [2014] 1. Available at: < <http://economicsandpeace.org/> > [accessed 22 February 2015].

³ A. Mallik, ‘Technology and Security in the 21st Century: a Demand-Side Perspective. SIPRI Research Report No. 20’ (New York: Oxford University Press 2004) 113.

resemble science fiction books more than reality, one should take heed of world-famous physicist Michio Kaku's warning that sci-fi technology becomes reality sooner than we expect.⁴ Cyber-attacks in Estonia (2007), Georgia (2008) or Iran (2010), hundreds of drone strikes in Afghanistan, Pakistan, Yemen, Somalia, or Iraq (on-going from 2002), are just a few examples of the new technologies already being employed for military purposes.

It is important to stress that the above-mentioned technologies share (at least) one common feature: they enable remote warfare. Attacking from a distance is nothing new, but with the advent of certain new technologies, attacks can be undertaken in which the attacker remains very remote from the scene where force will be employed.⁵

To fully understand challenges of regulating remote warfare, one needs to remember that rules governing wars were created with a kinetic force and human fighters in mind, thus responding to the realities of the time. Modern legal framework that applies to and limits the effects of armed conflicts began developing in the last decades of the 19th century. Throughout the 20th century it grew into what is now known as international humanitarian law (IHL).⁶ It 'can be defined as the branch of international law limiting the use of violence in armed conflicts by: sparing those who do not or no longer directly participate in hostilities; restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy.'⁷

This definition not only sums up the philosophy of IHL, but also leads to its basic principles, one of which is the principle of distinction (or discrimination) between civilians and combatants. While this principle undoubtedly reflects the essence of IHL, it recently drew critique for lacking moral ground in the face of contemporary conflicts,⁸ resting on an "outdated view of the world", being "bad law"⁹ or altogether meaningless¹⁰.

Thus, the question that this article intends to answer is the following: "is the principle of distinction dead in the age of remote warfare, or does it still reign?". This issue is addressed in three steps, which define three sections of the article: first, an examination of remote warfare and its characteristics; second, a brief analysis of principle of distinction, its elements and their meaning; and third, a practical challenge to illustrate difficulties created by remote warfare to the applicability of the principle, followed by conclusions.

1. Remote Warfare and Its Characteristics

Remote warfare as a term is quite new to legal academic writing. On the one hand, it is so because remote warfare refers to new means and methods used in armed conflicts mainly starting from the 21st century.¹¹ On the other hand, while each new technology – be it UAVs, cyber network attacks, or killer robots – drew scholarly attention, they were analysed separately, and not identified as part of a larger phenomenon that shares similarities and is exemplary of particular tendencies in contemporary conflicts.

Weapons law expert dr. William Boothby employs the term 'remote attack' to analyze certain 'military operations from a distance' that he limits to UAVs, computer network attacks, and autonomous weapons.¹² Global security consultant Chris Abbott uses a term of 'remote-control warfare', which illustrates the US led warfare at a distance that relies "on smart technologies and light-footprint deployments rather than more

⁴ For more, see: M. Kaku 'Neįmanomybių fizika' [Physics of the Impossible] (Vilnius: Metodika 2012) 7.

⁵ W. Boothby, 'Some legal challenges posed by remote attack' [2012] 94 (886) *International Review of the Red Cross* 579.

⁶ For more on history of IHL, main documents and developments, see 'Treaties and customary law: overview' [2010]. Available at: <<https://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm>> [accessed 22 February 2015].

⁷ M. Sassoli and A.A. Bouvier, 'How does law protect in war?' (Geneva: International Committee of the Red Cross 1999) 67.

⁸ For an in-depth discussion, see: J. Dill, 'Should International Law Ensure the Moral Acceptability of War?' [2013] 26 (02) *Leiden Journal of International Law* 253 – 270.

⁹ For further elaboration, see G. Swiney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' [2005] 39 *International Lawyer* 733 – 758.

¹⁰ For an excellent summary of critique of principle of distinction, see: J. T. Johnson, 'Maintaining the Protection of Non-Combatants' [2000] 37 (4) *Journal of Peace Research*, Special Issue on Ethics of War and Peace 421 – 448.

¹¹ Some would indicate the 2001 September 11th attacks as a turning point.

¹² W. Boothby, above note 5.

traditional military approaches”.¹³ According to his analysis, the five key aspects of remote-control warfare developed by the US are: special-operations forces; intelligence, surveillance and reconnaissance; unmanned vehicles and autonomous weapons systems; private military and security companies, and cyber warfare.¹⁴ The researchers at the Remote Control project take a similar approach.¹⁵ The term ‘remote warfare’ is applied to drones and autonomous weapons, private military and security companies, special forces (that conduct specialised operations such as reconnaissance, unconventional warfare, and counter-terrorism actions), and military cyber activities.

For the purposes of this article, no exhaustive list of elements (technologies) that make up ‘remote warfare’ is drawn. Rather, remote warfare is analyzed as a phenomenon that, based on its particular characteristics, has the potential to encompass new emerging elements. Remote warfare is, thus, perceived as a way to conduct hostilities by employing new technologies that remove combatants from actual battlefield where the force is used or effects of the attack occur¹⁶, or even from lethal decision-making processes.

It is no surprise that after the pro-longed engagements in Afghanistan and Iraq, Western countries were under pressure to change their stand on using military force to maintain global and regional security. In the short term, there is a common view in the United States, Britain and France that remote control warfare is a significant and welcome development after a decade of considerable difficulty associated with the ‘war on terror’.¹⁷ In addition to this, diffusion of technologies makes remote warfare attractive and affordable to many state and non-state actors.¹⁸ Not surprisingly, it is suggested that spending on new technologies and extent of their usage will increase tremendously in the next few years.¹⁹ Although the technology gap between wealthy and poor belligerents will remain,²⁰ reliance on remote warfare should not diminish in the face of asymmetrical security threats. On the contrary, remote warfare is likely to be seen as an ideal alternative that allows delivering results faster, reducing costs, saving lives (both military and civilian), and, at least for the time-being, operating under lax rules. There, however, lie intrinsic risks that cannot be ignored.

Researchers Scott Hickie, Chris Abbott and Raphaël Zaffran observe the following downsides: “Firstly, it allows actions to be approved that would never be considered using conventional military means, yet the consequences and risks of those actions are not being adequately considered. Secondly, it removes policymakers and military planners one step further from the realities of war fighting for both the military operators and civilian casualties.”²¹ To expand on the latter, the concerns are raised that due to the distant and covert nature of remote-warfare tactics, there is a loss of proper oversight, no universal casualty recording and no effective redress for victims.²²

¹³ C. Abbott, ‘Blowback: the failure of remote-control warfare’ [2015]. Available at: <<https://www.opendemocracy.net/opensecurity/chris-abbott/blowback-failure-of-remotecontrol-warfare>> [accessed 28 February 2015].

¹⁴ C. Abbott, above note 13.

¹⁵ For more information, see Remote Control Project. Available at: <<http://remotecontrolproject.org/>> [accessed 23 February 2015].

¹⁶ This is not to say that combatants are not directly participating in hostilities if their are located extremely far from their target. However, the format of such direct participation changes.

¹⁷ P. Rogers, ‘Remote control – A New Way of War’ [2012] International Relations and Security Network. Available at: <<http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=156055&tabid=1453431548&contextid774=156055&contextid775=156053>> [accessed 28 February 2015].

¹⁸ “Future military strategies will need to take into account some important technology trends. First, the role of dual-use technologies will be far more relevant, with many military capabilities based on civilian technologies. This means that more countries will have access to military capabilities that were available to only a few powers in the past. In a sense this means that the technology gap between the most advanced and the average-level countries will be reduced overall. Hence, strategies and tactics to ensure the best use of available technology will play a larger role in the future.” A. Mallik, above note, 115.

¹⁹ For more information, see ‘New Ways of War: Is Remote Control Warfare Effective? The Remote Control Digest. October 2014’ [2014] 6 – 7. Available at: <<http://remotecontrolproject.org/wp-content/uploads/2014/10/Remote-Control-Digest.pdf>> [accessed 1 March 2015].

²⁰ “Despite the increasing diffusion of technology, in many fields the technology gap will probably remain at the same level or even grow because of the sheer cost and complexity of sophisticated technologies.” A. Mallik, above note 2, 115.

²¹ S. Hickie, C. Abbott and R. Zaffran, ‘Trends in remote-control warfare: March – September 2014’ [2014] Preface. Available at: <<http://www.openbriefing.org/docs/Trends-in-remote-control-warfare-March-September-2014.pdf>> [accessed 28 February 2015].

²² For an in-depth analysis, see K. Hofstra and E. Minor, ‘Losing Sight of the Human Cost: Casualty Recording and Remote Control Warfare’ [2014]. Available at: <<http://remotecontrolproject.org/wp-content/uploads/2014/08/EC-RC-Losing-Sight.pdf>> [accessed 1 March 2015].

This practice is even more dangerous when it is coupled with a resistance to apply or somewhat selective application of IHL to remote warfare operations.²³ However, there are no sufficient legal arguments to support the view that remote warfare should fall out of the regulatory scope of IHL. To expand on dr. Boothby's observation,²⁴ remoteness of attack renders it neither unlawful, nor unregulatable. While acknowledging that certain IHL rules might not be sufficiently precise²⁵ to address all legal concerns raised by remote warfare (and might require review or adoption of new provisions), it certainly does not mean that remote warfare is fought in a legal vacuum, as discussed below in more detail.

2. Principle of Distinction and Remote Warfare

Principle of distinction, or principle of discrimination, is considered to be cardinal,²⁶ intransgressible,²⁷ permeating the entire fabric of IHL²⁸. It is reflected in numerous IHL documents²⁹ and, what is more important, it is considered to be a norm of customary IHL, applicable in both international and internal armed conflicts. As a customary rule, it is binding on all parties in armed conflicts, including non-state actors.

Principle of distinction obliges parties to the conflict to distinguish between civilians/civilian objects and combatants/military objectives at all times. The rule is simple: attacks may only be directed against the former and never against the latter. Customary IHL asserts that indiscriminate attacks are prohibited,³⁰ thus obliging belligerents to only choose weaponry that can comply with such requirements. Parties to armed conflicts have to do everything in their power to ensure that those who are not entitled to and do not directly participate in hostilities (civilians), or those who no longer fight (injured or sick soldiers), are safe from targeting.³¹

In order to better understand the principle, one must understand the meaning of its elements, mainly, how we define three key concepts: combatants, civilians, and direct participation in hostilities. Combatant is a term historically only used in international armed conflicts. No such official status exists in internal armed conflicts. However, in this article it will rather be used as a generic term to describe all those who are entitled to participate in hostilities, like members of armed forces, participants in a *levée en masse*³², and members of

²³ For example, a denial by the US authorities to apply IHL to US drone strikes. For a brief summary of a relevant critique, see: O. Bowcott, 'Drone strikes threaten 50 years of international law, says UN rapporteur' [2012]. Available at: <<http://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un>> [accessed 1 March 2015].

²⁴ "What emerges from the analysis, however, is that the distance in time and space does not of itself render the attack unlawful. At the root of the problem is the effect that this remoteness has on the ability of planners and decision-makers to undertake required precautions and to obtain information to support a sensible evaluation of the lawfulness of the planned attack." W. Boothby, above note 5, 588.

²⁵ 'Proceedings of the Bruges Colloquium: Technological Challenges for the Humanitarian Legal Framework' [2010] 11th Bruges Colloquium 101. Available at: <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_41_0.pdf> [accessed 2 March 2015].

²⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, International Court of Justice (ICJ), 8 July 1996, para. 78.

²⁷ ICJ Nuclear Weapons Advisory Opinion, above note 25, para. 79.

²⁸ ICJ Nuclear Weapons Advisory Opinion, above note 25, para. 78.

²⁹ From St. Petersburg Declaration to Additional Protocols I and II to Rome Statute of the International Criminal Court. For more information, see ICRC, Customary IHL Database: Rule 1. Available at: <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> [accessed 3 March 2015].

³⁰ "Indiscriminate attacks are those:

(a) which are not directed at a specific military objective;

(b) which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction." ICRC, Customary IHL Database: Rule 12. Available at: <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule12> [accessed 3 March 2015].

³¹ This does not mean they cannot come to harm. IHL does not prohibit civilian casualties as part of collateral damage, it only prohibits deliberately attacking non-military objects. In assessing if attacks are permissible, other principles – proportionality, military necessity, and humanity – also come into play.

³² "The *levée en masse* is defined as taking place against foreign troops either invading or occupying a country, restricting the definition to one involving national self-defense. It refers especially to situations in which the populace spontaneously takes up what weapons it has and, without having time to organize, resists the invasion." See more at Crimes of War Project: *Levée en masse*. Available at: <http://www.crimesofwar.org/a-z-guide/levee-en-masse/#sthash.M7WIMHwU.dpuf> [accessed 4 March 2015].

organized armed groups, consisting of individuals with “continuous combat function”.³³ Combatants are required to distinguish themselves from civilians.³⁴ Civilian is defined negatively as someone who is not a combatant, i.e. does not belong to any of the above listed groups. Also, it is important to note that a civilian might lose his/her protection from an attack for as long as he/she directly participates in hostilities. Finally, direct participation means specific hostile acts as part of the conduct of hostilities that are likely to benefit one and cause harm to the other party of a conflict.³⁵

As was mentioned above, principle of distinction has attracted critique for being inoperable in new wars. Apart from academic writings that support such view, jurisprudence of countries that are involved in remote warfare at least in some form is also an important source for analysis. For example, in the eyes of the United States D.C. Circuit Court of Appeals the international customary principles are “amorphous”.³⁶ Judge Brown further elaborates that “the old wineskins of international law [...] are ill-suited for the bitter wine of this new warfare.”³⁷ According to her, we are faced with a “new and frightening paradigm, one that demands new rules be written.”³⁸ The Israeli Supreme Court in the so-called Targeted Killings Case (covering drone strikes and other remote attacks) could not have held a more differing view on the relevance of international law and customary principles: “Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law”.³⁹

Indeed, the newness of the means of warfare must not render the fundamental principles of IHL invalid. The International Court of Justice noted nearly two decades ago: “Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”⁴⁰

Thus, the status and importance of the principle of distinction must be reaffirmed in any new type of armed conflict. While some new technologies or tactics used in combat might require specific restrictions or prohibitions, they do not question the principle as such, nor the necessity to apply it.⁴¹ Despite the critique, the principle of distinction still reigns.

This does not, however, mean that it is easy to uphold the principle in practice. The following section will give an example of how remote warfare tactics made it more difficult to ensure respect for the principle of distinction.

3. Ensuring Respect for the Principle of Distinction in Remote Warfare

As was discussed in the first section, asymmetrical security threats encouraged the wider usage of and support to remote warfare. Since some of the technologies have been used now for over a decade, there have been reported cases of violation of principle of distinction.⁴² This did not, however, led to believing that those technologies as such are not capable to be used in accordance with the requirements of IHL. Yet, few could argue that ensuring respect for the principle of distinction in the context of urban warfare, increasing reliance on dual-use technologies (like Internet), growing involvement of private military and security companies, and

³³ N. Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (Geneva: ICRC 2009) 27. Available at: <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> [accessed 28 February 2015].

³⁴ With uniforms, insignia, or even if only by openly carrying arms.

³⁵ N. Melzer, above note 27, 45 – 46.

³⁶ *Al – Bihani v. Obama*, No. 09 – 5051 [2010] United States Court of Appeals for the District of Columbia Circuit. Available at: <http://ccrjustice.org/files/2010-01-05Al%20Bihani.v.Obama_CourtOfAppealsOpinion.pdf> [accessed 5 March 2015].

³⁷ *Al – Bihani v. Obama*, above note 35.

³⁸ *Al – Bihani v. Obama*, above note 35.

³⁹ Public Committee Against Torture in Israel v. Government of Israel, 796/02 [2005] High Court of Justice. Available at: <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm> [accessed 5 March 2015].

⁴⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] I. C. J. Reports 226, para. 86.

⁴¹ ICJ Nuclear Weapons Opinion, above note 39, para. 76.

⁴² For example, drone strikes against civilians. For more, see ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson’ A/HRC/25/59 [2014]. Available at: <<http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>> [accessed 6 March 2015].

blurring geographical and temporal limitations of contemporary armed conflicts (like the US-led Global War on Terror), is not a difficult task.

This task is formulated as an obligation placed on belligerent parties. The purpose of this requirement is to ensure only legitimate targets are attacked. It also must be noted that civilians have a duty to not participate in hostilities: 'the immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts.'⁴³

If they do, however, take active part in hostilities, they become legitimate targets for as long as they do so.⁴⁴ Although a primary burden of ensuring respect for the principle of distinction is placed on belligerents, it is also expected of civilians to "avoid participating in the fight" and "simply avoid, if possible, being in the area where the fighting occurs."⁴⁵ Thus, it could be said that civilians themselves also share this burden.⁴⁶ While the law does not explicitly prescribe this, such an interpretation appears rather practical – until it becomes unrealistic.

Remote warfare tactics have already created situations where civilians simply have no possibility to affirm their civilian status. Cyber space is one of the examples where lines between those who do not take direct part in hostilities and those who do can be easily blurred. A civilian with no intent to cause harm to a belligerent party can be using the device or IP address that was previously used for engagements in hostilities. Another stark example is a drone strike. A civilian can have no knowledge of an upcoming drone strike or that he/she is being observed as a potential target. Therefore, an innocent civilian cannot take any actions to show his/her status is not compromised under IHL.⁴⁷ Moreover, under these circumstances, he/she could be deprived of an effective opportunity to surrender.⁴⁸ Thus, the burden of distinction indeed rests on belligerent parties, which unfortunately rely on not so accurate intelligence and, yet, not so precise technologies.

Conclusion

As we move ahead in this young century, there is a somewhat sombre realization that the challenges of technology management will become even more demanding, while technology continues to provide more choices for better or for worse.⁴⁹ Technology in warfare can bring welcome changes, as well as new legal challenges. Remote warfare as a phenomenon is sold to the public as less costly, more precise and, thus, providing better possibilities to safeguard human lives. On the other hand, it is often argued that such new way of waging wars cannot be subject to outdated requirements of IHL and its core principles. This article reaffirmed the applicability of IHL to any new means of warfare, as well as the relevance of principle of distinction to remote warfare. Even more so, it stressed the crucial burden for belligerents to distinguish between those who take part in hostilities and those who do not directly participate in armed conflicts. Remote or not, hostile acts in armed conflicts must bow down to the fundamental principle of distinction.

⁴³ Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [1987], art. 51, p. 618, paragraph 3. Available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookupCOMART&articleUNID=4BEBD9920AE0AEAC12563CD0051DC9E>> [accessed 6 March 2015].

⁴⁴ ICRC, Customary IHL Database: Rule 6. Available at: <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6> [accessed 6 March 2015].

⁴⁵ H. W. Elliott, 'Evacuation of Civilians from the Battlefield', Crimes of War Project. Available at: <http://www.crimesofwar.org/a-z-guide/evacuation-of-civilians-from-the-battlefield/#sthash.bdFxshNL.dpuf> [accessed 6 March 2015].

⁴⁶ H.W. Elliott, above note 44.

⁴⁷ A vivid example of situations where civilians are afraid to not cross a line of some unknown battlefield was brought during the testimony of a member of Pakistani family, victim of a drone strike, appearing before the US Congress: "Now I prefer cloudy days when the drones don't fly. When the sky brightens and becomes blue, the drones return and so does the fear. Children don't play so often now, and have stopped going to school. Education isn't possible as long as the drones circle overhead." See K. McVeigh, 'Drone strikes: tears in Congress as Pakistani family tells of mother's death' [2013] The Guardian. Available at: <<http://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress>> [accessed 5 March 2015].

⁴⁸ O. Mayorga, 'Double-Tap Drone Strikes and the Denial of Quarter in IHL' [2013] Program on Humanitarian Policy and Conflict Research Harvard University. Available at: <<http://www.hpcrresearch.org/blog/ofilio-mayorga/2013-05-08/double-tap-drone-strikes-and-denial-quarter-ihl>> [accessed 6 March 2015].

⁴⁹ A. Mallik, above note 2, 123.

Bibliography

Legal acts:

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
2. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
3. Rome Statute of the International Criminal Court, 17 July 1998.
4. St Petersburg Declaration relating to Explosive Projectiles, 1868.
5. Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [1987]. Available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=4BEBD9920AE0AEAEC12563CD0051DC9E>>.

Case law:

6. Al – Bihani v. Obama, No. 09 – 5051 [2010] United States Court of Appeals for the District of Columbia Circuit. Available at: <http://ccrjustice.org/files/2010-01-05Al%20Bihaniv.Obama_CourtOfAppealsOpinion.pdf>.
7. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, International Court of Justice (ICJ), 8 July 1996.
8. Public Committee Against Torture in Israel v. Government of Israel, 796/02 [2005] High Court of Justice. Available at: <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm>.

Books and articles:

9. W. Boothby, 'Some legal challenges posed by remote attack' [2012] 94 (886) International Review of the Red Cross.
10. J. Dill, 'Should International Law Ensure the Moral Acceptability of War?' [2013] 26 (02) Leiden Journal of International Law 253 – 270.
11. J. T. Johnson, 'Maintaining the Protection of Non-Combatants' [2000] 37 (4) Journal of Peace Research, Special Issue on Ethics of War and Peace 421 – 448.
12. M. Kaku 'Neįmanomybių fizika' [Physics of the Impossible] (Vilnius: Metodika 2012).
13. A. Mallik, 'Technology and Security in the 21st Century: a Demand-Side Perspective. SIPRI Research Report No. 20' (New York: Oxford University Press 2004).
14. N. Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (Geneva: ICRC 2009). Available at: <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>.
15. M. Sassoli and A.A. Bouvier, 'How does law protect in war?' (Geneva: International Committee of the Red Cross 1999).
16. G. Swiney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' [2005] 39 International Lawyer 733 – 758.

Other sources:

17. C. Abbott, 'Blowback: the failure of remote-control warfare' [2015]. Available at: <<https://www.opendemocracy.net/opensecurity/chris-abbott/blowback-failure-of-remotecontrol-warfare>>.
18. O. Bowcott, 'Drone strikes threaten 50 years of international law, says UN rapporteur' [2012]. Available at: <<http://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un>>.

19. Crimes of War Project: Levée en masse. Available at: <http://www.crimesofwar.org/a-z-guide/levee-en-masse/#sthash.M7WIMHwU.dpuf>.
20. Customary IHL Database, International Committee of the Red Cross. Available at: <https://www.icrc.org/customary-ihl/eng/docs/home>.
21. H. W. Elliott, 'Evacuation of Civilians from the Battlefield', Crimes of War Project. Available at: <http://www.crimesofwar.org/a-z-guide/evacuation-of-civilians-from-the-battlefield/#sthash.bDFxshNL.dpuf>.
22. 'Global Peace Index 2014' [2014] The Institute for Economics and Peace. Available at: <http://economicsandpeace.org/>.
23. S. Hickie, C. Abbott and R. Zaffran, 'Trends in remote-control warfare: March – September 2014' [2014]. Available at: <http://www.openbriefing.org/docs/Trends-in-remote-control-warfare-March-September-2014.pdf>.
24. K. Hofstra and E. Minor, 'Losing Sight of the Human Cost: Casualty Recording and Remote Control Warfare' [2014]. Available at: <http://remotecontrolproject.org/wp-content/uploads/2014/08/EC-RC-Losing-Sight.pdf>.
25. K. McVeigh, 'Drone strikes: tears in Congress as Pakistani family tells of mother's death' [2013] The Guardian. Available at: <http://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress>.
26. O. Mayorga, 'Double-Tap Drone Strikes and the Denial of Quarter in IHL' [2013] Program on Humanitarian Policy and Conflict Research Harvard University. Available at: <http://www.hpcrresearch.org/blog/ofilio-mayorga/2013-05-08/double-tap-drone-strikes-and-denial-quarter-ihl>.
27. 'New Ways of War: Is Remote Control Warfare Effective? The Remote Control Digest. October 2014' [2014]. Available at: <http://remotecontrolproject.org/wp-content/uploads/2014/10/Remote-Control-Digest.pdf>.
28. 'Proceedings of the Bruges Colloquium: Technological Challenges for the Humanitarian Legal Framework' [2010] 11th Bruges Colloquium. Available at: https://www.coleurope.eu/sites/default/files/uploads/page/collegium_41_0.pdf.
29. Remote Control Project. Available at: <http://remotecontrolproject.org/>.
30. 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson' A/HRC/25/59 [2014]. Available at: <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>.
31. P. Rogers, 'Remote control – A New Way of War' [2012] International Relations and Security Network. Available at: <http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=156055&tabid=1453431548&contextid774=156055&contextid775=156053>.
32. 'Treaties and customary law: overview' [2010]. Available at: <https://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm>.

LABOUR LAW AS A TOOL FOR RISK AND SECURITY DISTRIBUTION. THE CASE OF POST-CRISIS POLAND

Karol Muszyński¹

Abstract

Economic crisis 2008-2009 was identified by the Polish political system as an external event. Concurrently, several factors were identified as threatening the future economic growth, most importantly decrease in exports, risk of losing access to capital and foreign direct investment, rising unemployment, as well as risk of falling into middle income trap. Poland has reacted to the crisis with strong flexibilisation of labour law that reflected neoclassical approach to the economy and intended to restore economic equilibrium, economically mobilise the population, and boost investors confidence. That resulted in substantial shifting of the economic risk from the employers to the employees. The article argues that this form of transformation of economic risks pushes Poland to the labour-intensive mode of development and may aggravate the middle-income trap, posing threats to further economic development.

Keywords: economic crisis, Poland, labour law

Introduction

The financial crisis that struck the world in 2008-2009 has been identified as an external event by the Polish political system². The crisis coincided with the debate on the perspectives of growth of the Polish economy and reflections upon the limitations of the labour-intensive path of growth. Around the time the financial crisis started to impact the economy (2008-2009), the political system identified and expressed five intertwined factors/risks to the future economic growth:

- 1) side-effects of the Eurozone crisis which posed a threat to Polish export;
- 2) risk of losing foreign investors confidence if structural reforms are not enforced – threat to foreign direct investment deemed as necessary for growth;
- 3) lack of capital as a recurring feature of the Polish economy and risk of limiting of the accessibility of credit due to global distortions;
- 4) risk of stagnation due to the "middle income trap" – threat that the current mode of economic development based on labour intensity was a dead end and was too expensive to maintain from the social point of view, as well as ceased meeting citizens' expectations;

¹ Socio-legal researcher, PhD candidate at the Faculty of Law and Administration, University of Warsaw; MA in Law and an MA in History from the University of Warsaw, as well as an MA in Business Law from the University of Poitiers, visiting scholar at the International Institute for the Sociology of Law. He writes a doctoral thesis on the post-crisis developments in Polish labour law.

² There are numerous examples thereof, most importantly:

a) The government's 'Plan of Stability and Development' from autumn 2008, stressing the lack of 'internal' danger of default in payment of short-term credits and little level of bad debts; the identified risks are potential decrease in exports, decrease in FDI, limited access to credit due to decreased liquidity and higher credit criteria - 'Plan Stabilności i Rozwoju - wzmocnienie gospodarki Polski wobec światowego kryzysu finansowego' (2008).

b) Ministry of Economy's 'Information on anti-crisis actions undertaken in selected countries' that states explicitly that Poland is only slightly affected by the crisis because its sources are of external character - Ministry of Economy, 'Informacja dotycząca działań antykryzysowych podejmowanych w wybranych krajach świata' (Warsaw 2009).

c) Ministry of Economy's 'Actions undertaken by the Ministry of Economy for the stability and development' saying that the source of the crisis is external to Poland - Ministry of Economy 'Działania Ministerstwa Gospodarki na rzecz Stabilności i Rozwoju' (Warsaw 2009).

d) National Bank of Poland report saying that crisis is an external destabilizing factor to which Poland needs to take a position - National Bank of Poland 'Polska wobec światowego kryzysu gospodarczego' (Warsaw 2009).

5) risk of rising unemployment that has always been the single most important socio-economic issue for the government after the post-communist transition.

The paper intends to make use of the sociology of law/regulation framework in order to sketch the recent, post-crisis developments in law regulating employment relations in Poland (mainly labour law). I want to analyse how risk distribution within the area of employment was shaped both as a way and result of dealing with the economic crisis, itself being identified as a risk. The assumption of my paper is that economic challenges can also be tackled by the political system as "risks", and therefore an analysis applicable to other hazards may be of use.

1. Anti-crisis Policy

As a direct result of the crisis, the government announced the "Plan of Stability and Development". Within the pact certain counter-cyclical instruments were announced that aimed at facilitating the financing of the enterprises. The sole most important act introduced as a way of dealing with the crisis was the Act of July 1 2009 on alleviation of economic crisis effects on employees and employers (hereinafter: the "Anti-Crisis Act"). The Anti-Crisis Act was presented as result of the 13 point consensus that was agreed upon by the employers and employees in the Tripartite Commission for Social and Economic Affairs (the main institution for social dialogue on industrial relations in Poland), although in fact it realised only those provisions from the pact that were beneficial for the employers. The trade unions that participated in the Tripartite Commission proceedings withdrew support for the Anti-Crisis Act, claiming that none of their demands were realised in the draft proposal. The main declared idea behind the Act was to enable the subsidization of the remuneration or co-finance contribution for social welfare/skill formation if an enterprise would fall in temporary financial difficulties as a result of the economic crisis. It therefore aimed at socialising the costs of the crisis - the remuneration or co-financing were made from the public resources. However, due to rigidity of the provisions, the entrepreneurs found it nearly impossible to meet the requirement of the financial difficulties and those instruments turned out to be in fact useless - only around 1% of the assumed resources allocated for the subsidies and co-financing were spent.

The Anti-Crisis Act, supposedly on the sidelines of the aforementioned solutions, also included new provisions with regard to working time regulations, introducing a possibility to all enterprises to adopt reference periods for calculation of the working time of up to 12 months. The Act also provided for more flexible daily working time and for a reduction of working time with a proportional reduction of the remuneration if employees' representatives would agree thereto. Those instruments were extensively used, encompassing more than 100,000 employees. Noteworthy is that the provisions stipulating for longer reference periods for working time calculation were introduced permanently to the Labour Code in 2013.

Trade unions subjected their participation in any discussions on the anti-crisis legislation to the condition that fixed-term contracts, which are one of the key problems of Polish labour market, would be limited (constantly around 24-28% of all employees are employed on fixed-term contracts³). The adopted Act, however, suspended until the end of 2011 the existing provision of the Labour Code stipulating that only two consecutive fixed-term employment contracts are allowed, with the third contract automatically transformed into contract of unspecified duration. The Act provided that fixed-term contracts may be concluded only for 24 months but no sanction for breach was stipulated. In fact, the possibility of use of the fixed-term contracts had been therefore broadened.

Since 2008, except for the Anti-Crisis Act, Poland has undertaken the following steps in the area of employment:

- a) raising of the pension age from 60/65 to 67;
- b) reform of the temporary work agencies that gives more flexibility to the use of temporary work;
- c) reform of the employment agencies that supports creating unstable but any employment, in particular in SME sector;
- d) institutional and financial incentives for switching to self-employment.

³ Eurostat 2004-2013.

The outcome of the post-crisis legislation was the remodelling of the legal structure of risk distribution in order to:

1) exert a positive effect on the disturbed market equilibrium through transfer of the transaction costs of dealing with externalities in the form of⁴:

a. "vertical" reallocation of the risk from the employers/investors to employees, often put at the margin of labour market (fixed-term contracts), working outside the scope of the labour law (civil law contracts) or under the category of "self-employed" but in fact conducting dependent entrepreneurial activity;

b. "diagonal" reallocation of the risk from intermediary bodies as employment agencies/subcontractors to employees;

2) economically mobilise social groups:

a. employees ("entrepreneurship" agenda similar to the "new spirit of capitalism" as described by Boltanski/Chiapello⁵);

b. employers/investors (especially foreign; showing that the environment for investment is favourable).

2. Shifting the Economic Risks

The recent reforms reflect a neoclassical understanding of the role of labour law regulation. In short, neoclassical economics states that labour law distorts the market equilibrium and prevents the markets from achieving full efficiency. Labour law can impose certain obligations, most importantly for the employers, that would force them to incur certain costs that they would not be forced to bear on the "free market". To put it another way, labour law may force the contracting parties to "interiorise" certain risks. For instance, dismissal provisions can force the employers to maintain employment during a notice period, therefore preventing them from the most efficient use of productive resources, from their point of view; working hour limitations can push the employers to bear costs of overtime or hire new employees, while without those limitations they could introduce more flexible working patterns for the already hired employees and reduce the costs. As a result, regulations create market distortions and negative outcomes. In the neoclassical perspective, limiting the social security rights enables the creation of a more efficient structure of the labour market, on which labour (understood as a commodity) is more rationally invested. The flexibilisation agenda intends to rebuild the legal ramifications of the market so that it could be better integrated with the global market and react to changes in the demand-supply more quickly. It should be remembered, the crisis was understood as an external factor to which the Polish economy and legal system must have responded. The response was therefore to facilitate recovery of the economic equilibrium through liberalisation/deregulation so that the market could more freely "work things out".

The fact that more flexible solutions are allowed obviously does not mean that the risks of dealing with externalities cease to exist. Accordingly to the transaction cost analysis, the risks related to unpredictable market developments will be transferred to the employee. As a result of the reforms, the employee is now exposed to the risk of being quickly dismissed if demand falls, to the risk of working longer and more flexible hours without overtime pay if it increases etc. In other words, risk related to changes in supply-demand and unpredictable market outcomes that in standard model employment are borne by the entrepreneur had been partially transferred to the employee⁶. The amount of risk should be treated as generally stable - its distribution is a question of the legal system⁷. The idea behind the flexibilisation agenda pursued in Poland was that the risks incurred on employers would, for financial reasons, backfire to employees in form of unemployment. The

⁴ Vectors of shifts in risk taken from: N. Countouris, M. Freedland (eds) 'Resocialising Europe in a Time of Crisis' (Cambridge: Cambridge University Press 2013).

⁵ L. Boltanski, E. Chiapello 'The New Spirit of Capitalism' (Verso 2007).

⁶ Statement of Reasons to the Anti-Crisis Act explicitly expresses that it is not a desirable situation that the "employer bears costs of the hiring even no goods or services are being produced" - 'Statement of Reasons to the draft proposal of the Act on alleviation of economic crisis effects on employees and employers' (Sejm Paper 2044, 5 June 2009) p. 1. One should however see that the fact that the employee is not subjected to the changes in supply-demand is actually the core of the standard model employment in which it is entrepreneur who bears costs of the unpredictability of the developments on the market.

⁷ N. Luhmann 'Risk: A Sociological Theory' (Berlin-New York: Walter de Gruyter 1993).

financial costs of rigid (or, to put it another way, "standard") employment regulations were also seen as a potential threat to the economic growth itself.

The idea was to deal with the risk of recession and potential unemployment (brought by the projected redundancies caused by too high financial costs for employers) and "exchange" them for the risk of flexibility⁸.

3. Economic Mobilisation

Solutions aiming to distribute risk may also have social impact - both as a tool of social engineering and as a way of rebuilding the confidence of the investors, most importantly the foreign ones.

Poland has a long history of the promotion of entrepreneurship. Success of Polish economic transformation is conceptualised to be very much based upon strong incentives for developing enterprises that were created at the end of communist period. An epitome of that is the often-cited declaration of Lech Wałęsa at the presidential inauguration address to the Poles to "take matters into your own hands". In fact, "shock therapy" was intended to suddenly expose the population and economic institutions to high-intense economic risk. After the transition, Polish governments, both right- and left-wing, have been pursuing a strongly pro-business agenda, aimed at creation of strong financial and institutional incentives for the development of SME's and solo entrepreneurship in order to "release" the economic potential. This policy highly resembled the New Right approach adopted since the '80s that planned both to deconstruct the huge industrial enterprises in order to weaken the trade unions, as well as to economically mobilise the population through exposing it to market risks⁹. When Poland joined the EU, Polish "Thatcherite-Reaganian" approach to entrepreneurship was further strengthened by the EU's agenda of SME promotion in order to foster more flexibility and job creation. This was not distorted by the fact that Poland has always had one of the highest percentages (47% as of 2014¹⁰) of necessity-driven entrepreneurship in the world, i.e. involvement in entrepreneurial activity due to no other option for work or being forced thereto by the employer.

Actions undertaken as a way of dealing with the crisis resemble the general discourse of the development of the labour law in the EU, expressed most notably by the European Commission's Green Paper "Modernising labour law to meet the challenges of the 21st century"¹¹ that automatically links flexibility with more entrepreneurship and therefore - with innovation and growth. As we know from the empirical studies, this is not always the case¹². This agenda of risk exposure is compliant with the general tendency of blurring the boundaries between labour and entrepreneurship¹³.

The other factor that was crucial to labour law flexibilisation was the willingness to maintain the investors' confidence. Obviously, in a democratic country with free market economy, the legitimisation of the government depends largely on the economic results which are not entirely within the scope of influence of the government but which are dependent from the willingness of the investors to invest¹⁴. That in fact makes the governments partially dependent on the investors' confidence. Employers' organisations were traditionally supporting flexibilisation of labour law and warmly welcomed the adoption of the Anti-Crisis Act, claiming that it finally realised what was long-anticipated. Konfederacja Lewiatan, the most publicly visible of Polish employer's organisations, ordered a couple of expert opinions providing the reasons for the adoption and extension of the Anti-Crisis Act. Moreover, foreign investors are of importance. The general level of FDI dropped drastically in the world as a result of the crisis. Keeping a high level of foreign investment was

⁸ E. Giermanowska 'Ryzyko elastyczności czy elastyczność ryzyka. Instytucjonalna analiza kontraktów zatrudnienia' (Warsaw: WUW 2013).

⁹ R. Burrows (ed.) 'Deciphering the Enterprise Culture. Entrepreneurship, Petty Capitalism and Restructuring of Britain', (London-New York: Routledge 1991).

¹⁰ Global Entrepreneurship Monitor 2014.

¹¹ Commission of the European Communities 'Green Paper. Modernising labour law to meet the challenges of the 21st century' (Brussels 2006).

¹² e.g. A. Kleinknecht, F. N. van Schaik, H. Zhou 'Is flexible labour good for innovation? Evidence from firm-level data' [2014] Cambridge Journal of Economics 38 1207-1219; S. Deakin, F. Wilkinson 'Labour Law and Economic Theory: A Reappraisal' [1998] University of Cambridge Working Paper 92.

¹³ U. Beck 'The Brave New World of Work' (Polity Press 2000).

¹⁴ M. Kalecki 'Political Aspects of Full Employment' [1943] Political Quarterly 14/4 322-330; W. Streeck 'Markets and peoples' [2012] New Left Review 73 63-71.

deemed to be the key to further economic development. According to the annual research on foreign investors, labour law was one of the key factors where they indicated a need for change. This is understandable since Poland is mainly a target for labour-intensive investments. It is therefore obvious that for the investors that are mainly offshoring services and manufacturing, the most important issues are low labour costs and flexible solutions that enable cost reduction¹⁵. For instance, Poland is the third biggest BPO (Business Process Outsourcing) market in the world, only after China and India¹⁶. Unsurprisingly, foreign investors also strongly supported the Anti-Crisis Act¹⁷. Their voice with regard to undertaken solutions is important due to the huge and increasing dependence of Poland on foreign investment and capital¹⁸.

4. The Question of the Middle-income Trap

Concurrently, the way the crisis was tackled seems to push Poland into a labour-intensive dead end that will aggravate the middle-income trap¹⁹.

Since the transformation, Poland has pushed for labour cost reduction and the flexibilisation of labour law. As a result of the recent reforms, the risk for employers/investors is reduced, whereas employees are being increasingly subjected to risk. This reverses the traditional "capitalist" structure in which employers/investors are the ones who are taking the risk (Knight, Schumpeter). Beck's notion with regard to ecological dangers, that uneven or unreasonable risk distribution tends to be inflicted on specific groups but in fact affects everyone,²⁰ applies to the economic issues as well. Since employers/investors have little incentive for risk-taking (because risk has been unevenly distributed to employees), they tend to get stuck in low productivity, labour-intensive sectors. The result is that Poland has one of the lowest levels of R&D spending, extremely low investment in continuing education, and Polish employers are organising any training for employees almost 3 times less than EU counterparts (22% against EU's average of 66%²¹). This results in Poland being a laggard in terms of general level of innovation in EU, being ahead only of Romania and Greece²² (the latter dropping drastically and probably only temporary due to the prolonging crisis).

The structure of Polish labour law encourages the transfer of externalities aiming at labour cost reduction. It has subsequently launched a continuous spiral that makes the labour-intensive path of growth the only viable solution and that creates incentives for further transfer of externalities (e.g. in the form of labour law violations, unpaid overtime, mass use of fixed-term contracts, forcing the employees to switch to self-employment to further reduce labour costs etc.). Moreover, since employers/investors are also encouraged to follow labour-intensive paths as the most profitable, they therefore spend their resources on neither R&D nor skill development. What also cannot be ignored, labour-intensive paths of development create a huge class of entrepreneurs dependant upon further labour costs reduction what can heavily impact politics.

Low labour costs also attract foreign investors who seek new markets for outsourcing and offshoring and also contribute to fostering of the flexibilisation agenda.

¹⁵ OECD STAN

¹⁶ PAIIZ 2013

¹⁷ PAIIZ 'Bariery w napływie bezpośrednich inwestycji zagranicznych do Polski. Raport za 2012 r.' (Warsaw 2011) 19; PAIIZ 'Bariery w napływie bezpośrednich inwestycji zagranicznych do Polski. Raport za 2013 r.' (Warsaw 2013) 13.

¹⁸ National Bank of Poland 'Międzynarodowa pozycja inwestycyjna Polski w 2013 r.' (Warsaw 2014).

¹⁹ Voices claiming that Poland has avoided the "middle income trap" are highly arguable. "Middle income trap" is obviously a theorized situation of a situation in which country gets stuck in certain relative income per capita and cannot transcend to high-income status because of the lack of passage from labour-intensity to capital-intensity. The problem is therefore structurally related to labour/capital intensity, R&D spending, global value chain position and not necessarily to the dynamics of income itself that may be relative and dependent upon other factors. Claiming that Poland avoided middle-income trap because it exceeded the calculated level of certain per capita income annually is a misunderstanding. The other factor is that "middle income trap" is estimated to be from \$12,000 to as much as around \$17,000 nominal per capita income annually - P.-R. Agénor, O. Canuto, M. Jelenic 'Avoiding Middle-Income Growth Traps [2012] The World Bank-Poverty Reduction and Economic Management Network November 98 1. The higher calculation is still far from being achieved in the case of Poland (13,333 \$ nominal per capita in 2013; IMF 2014).

²⁰ U. Beck 'Risk Society: Towards a New Modernity' (New Delhi: Sage 1992).

²¹ Eurostat 2010.

²² Global Innovation Index 2014.

Interestingly, solutions stipulated in the Anti-Crisis Act were mainly used by the big enterprises²³. It is an essential fact since: 1) the Anti-Crisis Act was intended to help mainly SMEs; 2) SMEs are already overfilled with mostly illegal flexible working patterns²⁴. It shows that the spiral of externalities exteriorisation expands on the core sectors of the economy, which is against the basic idea of Post-Fordism that aimed at placing risk and flexibility at the margin of the economy (SME sector, subcontractors etc) in order to provide stability at its core (Piore, Sabel²⁵). The fact that the core has also been subjected to drastic market risk shows that economic policy has resorted in new measures in order to sustain economic growth and keep investor's confidence.

Outcomes

As a result of the agenda of flexibilisation, Poland is noting some increase in the rate of employment but almost solely on fixed-term, civil, temporary or self-employed low wage positions jobs. Government actions ultimately intend to transform the "public" risk of unemployment into "private" risks of flexibility/working poverty, which are both skyrocketing. "Entrepreneurship" agenda is used as a theoretical justification to the flexibilisation and as bait for foreign investors.

Issue	EU average - 2013	Poland 2007	Poland 2013	Poland - relative change 2007-2013
Unemployment rate	10.8%	9.6%	10.3%	+7.2%
Wage share in GDP	57.8%	48.3%	46.3%	-4.2%
Unpaid overtime	n/a	8.1%	22.9%	+186%
Share of working poor	8.9%	6.6%	11.1%	+68.1%
Share of working on civil law contracts	n/a	8.5%	13%	+52.9%
Share of temporary agency workers	1.6%	0.4%	1%	+150%
Workers on fixed-term contracts	14%	24.6%	28.4%	+15.4%

One of the interesting features of the recent development of the labour law is that even though it has been largely flexibilised (that is – certain actions that were illegal until 2008 have been legalised), the number of labour law violations has not dropped – it has partially stagnated and in certain domains (such as the illegal use of non-standard employment, working hours and overtime violations) even increased. This means that the level of protection afforded by labour law has decreased sharply.

Bibliography

1. P.-R. Agénor, O. Canuto, M. Jelenic 'Avoiding Middle-Income Growth Traps [2012] The World Bank-Poverty Reduction and Economic Management Network November 98.
2. U. Beck 'The Brave New World of Work' (Polity Press 2000).
3. U. Beck 'Risk Society: Towards a New Modernity' (New Delhi: Sage 1992)
4. L. Botanski, E. Chiapello 'The New Spirit of Capitalism' (Verso 2007).
5. R. Burrows (ed.) 'Deciphering the Enterprise Culture. Entrepreneurship, Petty Capitalism and Restructuring of Britain', (London-New York: Routledge 1991).

²³ Labour Inspectorate Data, 2010-2011.

²⁴ National Bank of Poland 'Raport 2014. Badanie ankietowe rynku pracy' (2014) 56.

²⁵ M. J. Piore, C. F. Sabel 'The Second Industrial Divide: Possibilities for Prosperity' (New York: Basic Books 1984).

6. Commission of the European Communities 'Green Paper. Modernising labour law to meet the challenges of the 21st century' (Brussels 2006).
7. N. Countouris, M. Freedland (eds) 'Resocialising Europe in a Time of Crisis' (Cambridge: Cambridge University Press 2013)
8. S. Deakin, F. Wilkinson 'Labour Law and Economic Theory: A Reappraisal' [1998] University of Cambridge Working Paper 92.
9. E. Giermanowska 'Ryzyko elastyczności czy elastyczność ryzyka. Instytucjonalna analiza kontraktów zatrudnienia' (Warsaw: WUW 2013).
10. M. Kalecki 'Political Aspects of Full Employment' [1943] Political Quarterly 14/4 322-330
11. A. Kleinknecht, F. N. van Schaik, H. Zhou 'Is flexible labour good for innovation? Evidence from firm-level data' [2014] Cambridge Journal of Economics 38 1207–1219
12. N. Luhmann 'Risk: A Sociological Theory' (Berlin-New York: Walter de Gruyter 1993).
13. Ministry of Economy 'Działania Ministerstwa Gospodarki na rzecz Stabilności i Rozwoju' (Warsaw 2009).
14. Ministry of Economy 'Informacja dotycząca działań anty kryzysowych podejmowanych w wybranych krajach świata' (Warsaw 2009).
15. National Bank of Poland 'Raport 2014. Badanie ankietowe rynku pracy' (2014)
16. National Bank of Poland 'Międzynarodowa pozycja inwestycyjna Polski w 2013 r.' (Warsaw 2014).
17. National Bank of Poland 'Polska wobec światowego kryzysu gospodarczego' (Warsaw 2009)
18. PAliIZ 'Bariery w napływie bezpośrednich inwestycji zagranicznych do Polski. Raport za 2012 r.' (Warsaw 2011)
19. PAliIZ 'Bariery w napływie bezpośrednich inwestycji zagranicznych do Polski. Raport za 2013 r.' (Warsaw 2013)
20. 'Plan Stabilności i Rozwoju - wzmocnienie gospodarki Polski wobec światowego kryzysu finansowego' (2008)
21. M. J. Piore, C. F. Sabel 'The Second Industrial Divide: Possibilities for Prosperity' (New York: Basic Books 1984).
22. W. Streeck 'Markets and peoples' [2012] New Left Review 73 63-71.

LEGAL SECURITY AS THE PURPOSE OF POST-ARBITRATION LITIGATION – PERSPECTIVE OF POLISH AND SWEDISH ARBITRATION LAWS

Aleksandra Orzeł¹

Abstract

One of the core principles of commercial arbitration is finality of awards rendered by arbitral tribunals. Nevertheless, state courts as a rule exercise some degree of control over arbitration proceedings with the seat in their country. This is a natural consequence of the fact that the state recognizes and enforces arbitration agreements on the basis of which parties waive their right to have a case tried before public courts. The incorporation of remedies against arbitration awards to the national arbitration laws strikes a balance between ensuring finality of such awards and safeguarding legal safety of the parties. Moreover, such a solution is often justified by the public interests.

The paper aims at presenting the procedural rules enabling the party to pursue annulment of the arbitral award that violates certain fundamental principles. It will cover Polish and Swedish arbitration laws which both follow the UNCITRAL Model Law on International Commercial Arbitration. Under Polish law, a party to the arbitral proceedings may by petition demand that an arbitral award be set aside if the circumstances listed in Article 1206 of the Polish Civil Procedure Code take place. On the other hand, the Swedish Arbitration Act distinguishes between invalid and challengeable awards. Awards under section 33 of the Act are invalid *ab initio* and the issue of invalidity should be examined by a court of its own motion, if the award is brought before it, while challengeable awards must be challenged in accordance with the conditions stated in section 34 of the Act.

The author will compare the solutions provided by Polish and Swedish legislation in order to prove that they seek to ensure legal security of the parties to arbitral proceedings and stability of the legal systems as a whole.

Keywords: commercial arbitration, challenge of an arbitral award, invalidity of an arbitral award, Polish arbitration law, Swedish arbitration law

Introduction

Commercial arbitration is generally defined as a specially established mechanism for final and binding determination of disputes concerning a contractual or any other relationship by independent arbitrators. As the parties' autonomy is the core principle here, arbitration is conducted in accordance with procedures and substantive legal or non-legal standards chosen directly or indirectly by the parties². Usually, arbitration is used in legal disputes with an international element, as it is a private, independent and neutral system offering a decision which under certain conditions may be subject to enforcement, similarly to a court judgment. Although the advantages of arbitration are clearly visible in the international context, this method is also chosen by parties to purely domestic disputes, who count on efficiency of the procedure and expertise of arbitrators in certain specific areas, such as construction or gas and oil sector.

¹ Master of Laws, Ph.d. candidate in the Department of Civil Procedure at the Faculty of Law and Administration of the University of Warsaw.

² D.M. Lew, L.A. Mistelis, 'Comparative International Commercial Arbitration' (The Hague, New York: Kluwer Law International 2003) 1.

It is clear, under all developed legal systems, that arbitral awards are final and binding legal instruments, which generally create legal rights and obligations for the parties³. Nevertheless, state courts as a rule enjoy some degree of control over a decision made by arbitrators which is exercised during the proceedings regarding recognition and enforcement as well as while considering the challenge of an arbitration award. The review of the award, which is to be recognized and enforced, can be conducted multiple times by national courts in different jurisdictions where the assets of the losing party are located. On the other hand, a decision on an action to challenge the award is reserved for the court of the seat of the arbitration which has an exclusive jurisdiction over such case⁴. It should be also emphasized that when a court accepts a challenge, an award is not enforceable in the country in which it was made and usually anywhere else⁵. Thus, the application for setting aside an award or declaring its nullity is the most powerful measure that a party dissatisfied with the award may use.

The control exercised by national courts of the seat of arbitration is a natural consequence of the fact that a state recognizes and enforces arbitration agreements on the basis of which parties waive their right to have a case tried before public courts. This way, the parties to the arbitration agreement resign from the whole palette of procedural safeguards offered by the system of national courts, including the right to appeal⁶. Therefore, national arbitration laws provide for procedural mechanisms enabling state courts to review arbitral awards in order to strike a balance between the expected finality of decisions rendered in arbitration and legal safety of the parties. This way, the state ensures that certain basic principles, such as equal treatment and the right to be heard, are respected in arbitration⁷.

Taking into consideration that an action to annul the arbitration award gives the national courts the most far-reaching opportunity to control the award, it will be the main focus of this paper⁸. Specifically, it seeks to analyze and compare regulations that are present in Polish⁹ and Swedish¹⁰ arbitration laws, which both generally follow the UNCITRAL Model Law on International Commercial Arbitration from 1985. Neither in Poland nor in Sweden, there is an appeal to a national court on merits against a final award¹¹. Nonetheless, each of these legal systems has created quite a different model of challenging an arbitral award.

1. Setting Aside an Arbitral Award in Poland

The Polish arbitration law is included in a separate chapter of the Polish Civil Procedure Code (Part V, Arbitration Court) which was reformed in 2005¹². It applies when the seat of arbitration is within the territory of Poland, and also in instances specifically stipulated in the law itself¹³. There is a single

³ G. Born, 'International Commercial Arbitration, Second Edition' (The Netherlands: Kluwer Law International 2014) 2897.

⁴ A. Redfern, J.M. Hunter, 'Redfern and Hunter on International Arbitration (Fifth Edition)' (Oxford, New York: Oxford University Press 2009) 590.

⁵ Article V(1)(e) of the New York Convention provides that an award may be denied recognition if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". There are very few countries such as France and the USA which recognize and enforce arbitral awards that were successfully challenged by the court of the seat of arbitration.

⁶ It is very rarely for the parties to arbitration agreement to agree on appellate review in arbitration.

⁷ G. Knuts, 'Recourse to the Courts against an Arbitral Award' in: U. Franke, A. Magnusson (eds), 'International Arbitration in Sweden: A Practitioner's Guide' (The Netherlands: Kluwer Law International 2013) 236.

⁸ Due to the limits regarding the size of this paper, it does not cover issues connected with challenging a decision by arbitrators on a plea of lack of jurisdiction.

⁹ T. Ereciński, K. Weitz, 'Sąd arbitrażowy' (Warsaw: LexisNexis 2008) 35.

¹⁰ G. Knuts, *op. cit.*, 237.

¹¹ J. Szpara, 'Setting Aside an Arbitration Award' in: 'Arbitration in Poland' (Warsaw: the Court of Arbitration at the Polish Chamber of Commerce 2011) 111.

¹² Pol. Kodeks postępowania cywilnego (Część V, Sąd polubowny (arbitrażowy), Dz. U. 2014 nr 0 poz. 101 (uniform text).

¹³ Article 1154 of the Polish Civil Procedure Code.

set of rules governing setting aside of final awards rendered in Poland¹⁴ in institutional arbitration or by *ad hoc* tribunals, and regardless of whether the arbitration is of a domestic or international character¹⁵.

It should be noted that parties can only apply for setting aside an award which decides on the merits of the relief demanded by them¹⁶. Consequently, there is no procedural mechanism enabling a party to challenge an order on procedural matter. However, once an award is rendered, it may be possible to raise procedural errors as grounds to set aside the award. It is in line with the rule allowing a party to the setting aside procedure to rely only on circumstances that it objected to during the arbitration¹⁷.

According to Article 1206 § 1 of the Polish Civil Procedure Code, an arbitral award may be set aside if: (1) there was no arbitration agreement, or the arbitration agreement is invalid, ineffective or no longer in force under the provisions of applicable law, (2) the party was not given proper notice of the appointment of an arbitrator or the proceedings before the arbitral tribunal or was otherwise deprived of the ability to defend its rights; (3) the arbitral award deals with a dispute not covered by the arbitration agreement or exceeds the scope of the arbitration agreement¹⁸, (4) the requirements with regard to the composition of the arbitral tribunal or fundamental rules of procedure before such tribunal, arising under statute or specified by the parties, were not observed, (5) the award was obtained by means of an offence or the award was issued on the basis of a forged or altered document, and (6) a legally final court judgment was issued in the same matter between the same parties. Additionally, Article 1206 § 2 stipulates the grounds for annulment which a court reviews on its own motion, namely: (1) lack of arbitrability of a dispute resolved by arbitrators and (2) contradiction between an award and fundamental principles of the Polish legal order (public policy clause).

The analyzed list includes exclusive grounds for challenging an award in Poland. However, it should be taken into consideration that a court assesses individually whether a particular award is contrary to the Polish public policy, thus, in fact, there is no exhaustive catalogue of circumstances that may cause annulment of the award¹⁹. In any case, a court reviewing an arbitral award is not allowed to retry the merits of the case²⁰. Its control resolves to evaluation whether an arbitrators' decision is contrary to the Polish public policy²¹ which covers fundamental principles of all fields of law²². Primarily, this kind review should be used to set aside collusive awards, which may be considered in terms of the parties' abusing arbitration to injure third parties or to conceal criminal activity²³.

An application to set aside an arbitral award must be filed within 3 months from service of the final award on the party. Nonetheless, the deadline for such application is calculated differently in case of allegation that the award was obtained through an offence or on the basis of a forged or altered document or in case of *res judicata* effect of an award rendered earlier by a national court²⁴. In order to ensure the stability of legal relationships, the final deadline for an action against an arbitral award is five

¹⁴ Article 1205 §1 of the Polish Civil Procedure Code.

¹⁵ J. Szpara, op. cit., 111.

¹⁶ Article 1205 §2 of the Polish Civil Procedure Code.

¹⁷ Article 1198 of the Polish Civil Procedure Code.

¹⁸ However, if the decision on matters covered by the arbitration agreement is separable from the decision on matters not covered by the arbitration agreement or exceeding the scope thereof, then the award may be set aside only with regard to the matters not covered by the arbitration agreement or exceeding the scope thereof. Moreover, exceeding the scope of the arbitration agreement cannot constitute grounds for vacating an award if a party who participated in the proceedings failed to object against hearing the claims exceeding the scope of the arbitration agreement.

¹⁹ M. Łaszczuk, J. Szpara, 'Postępowania postarbitrażowe' in: A. Szumański (ed.), 'System Prawa Handlowego. Arbitraż handlowy' (Warszawa: CH Beck 2009) 589.

²⁰ T. Erciński, K. Weitz, op.cit., 399.

²¹ Judgment of the Supreme Court of 9 March 2012, I CSK 312/11.

²² Judgment of the Supreme Court of 27 November 2007 r., IV CSK 239/07; Ł. Błaszczak, 'Kontrola orzeczeń arbitrażowych ze szczególnym uwzględnieniem klauzuli porządku publicznego' [2008] 'ADR. Arbitraż i Mediacja' No. 3, 8.

²³ J. Szpara, op. cit., 120.

²⁴ Article 1208 § 2 of the Polish Civil Procedure Code.

years after service of the award on the party²⁵. Though, the fact the award has already been recognized or declared enforceable does not undermine a right to seek its annulment²⁶.

In Poland, there are no specialized courts for actions to set aside arbitral awards. They are reviewed by a court that would have had subject matter and geographical jurisdiction to resolve the dispute if the parties had not concluded arbitration agreement²⁷. Therefore, it may be a district court or regional court depending on the amount in dispute that was submitted to arbitration. It is important to note that a court judgment in annulment case may be subject to appeal as provided in general rules of Polish civil procedure. In most cases, it is also possible to file a cassation appeal to the Supreme Court²⁸, which in many instances results in a long and costly post-arbitration litigation.

2. Annulment of an Arbitral Award in Sweden

The Swedish legislator decided to enact a separate statute in order to regulate arbitration law. The Swedish Arbitration Act²⁹ from 1999 applies, similarly to the Polish arbitration law, to international as well as to domestic arbitration³⁰. The Act recognizes the principle of finality of arbitral awards but it also provides for possibilities of judicial review of arbitral awards that is based on formal grounds³¹. Namely, the Swedish Arbitration Act distinguishes between invalid and challengeable awards. Awards under section 33 of the Act are invalid *ab initio* and the issue of invalidity should be examined by a court of its own motion, if the award is brought before it by the parties, while challengeable awards must be challenged in accordance with the conditions in section 34 of the Act. The effect of both rules are comparable – the award cannot be used by a prevailing party and – if an arbitration agreement is valid – it is possible to commence another arbitration to rule on the same claims.

Under the Swedish Arbitration Act³², an action against an allegedly invalid or challenged award is determined by the appellate court of a place where the proceedings were held. However, if the place of arbitration was not stated in an award, the action should be brought before the Svea Court of Appeal³³. Generally, a judgment of the appellate court is final but in cases of special importance the court may grant leave to appeal to the Supreme Court³⁴. This way, the Swedish model promotes quick termination of post-arbitration litigation and limits its costs.

Invalid awards do not exist in a legal sense and in theory, they have no legal consequences for the parties. However, in practice, it is necessary to have the award declared void by a national court as the prevailing party may in any case try to enforce it abroad under the New York Convention. According to section 33 of the Act, an award is invalid if: (1) it includes determination of an issue which, under Swedish law, may not be decided by arbitrators (lack of arbitrability); (2) the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system (public policy clause) and (3) the award does not fulfill the requirements with regard to the written form and signature stipulated in the Act.

The grounds for invalidity cover situations where the public interests are at stake and largely correspondent to the circumstances listed in Article 34(2)(b) of the UNCITRAL Model Law (as well as Article 1206 § 2 of the Polish Code of Civil Procedure) that are subject to *ex officio* scrutiny³⁵. The

²⁵ Ibidem.

²⁶ Decision of the Supreme Court of 31 May 2000, I CKN 182/00.

²⁷ Article 1158 of the Polish Civil Procedure Code.

²⁸ J. Szpara, *op. cit.*, 123.

²⁹ Sw: Lag (1999:116) om skiljeförfarande, <http://swedisharbitration.se/wp-content/uploads/2011/09/The-Swedish-Arbitration-Act.pdf> (6.03.2014).

³⁰ B.G.H. Nilsson, B. R. Andersson, 'Fundamental Principles of International Arbitration in Sweden' in: U. Franke, A. Magnusson (eds), *op. cit.*, 4.

³¹ G. Knuts, *op. cit.*, 237.

³² Section 43 of the Swedish Arbitration Act.

³³ The Appellate Court for Stockholm.

³⁴ The Supreme Court may in case reject the right to appeal.

³⁵ K. Hober, 'International commercial arbitration in Sweden' (Oxford; New York: Oxford University Press 2011) 294.

legislator intended them to be interpreted in a restrictive manner³⁶ which is fully understood by judges – according to G. Knuts³⁷, no arbitral award has ever been declared invalid under section 33, although there were cases where corrections made to an arbitral award were declared void since the amended award was not signed by all arbitrators³⁸. This reflects the arbitration-friendly climate of Sweden.

It should be also emphasized that section 33 of the Act contains a set of mandatory rules which cannot be waived. Moreover, if the court finds that one of the conditions for invalidity has been met, it cannot refuse to declare the award invalid³⁹. As an award is invalid *ipso facto* and *ab inito* thus, there is no time limit for a claim of invalidity. The absence of a time limit for an action for declaration of invalidity can mean that an award could be declared invalid years after it has been issued. However, this concern is balanced by the fact that the list of grounds for invalidity is exhaustive. Further, since the circumstances stipulated in section 33 are said to be beyond the control of the parties, a failure to object or reserve rights during the proceedings does not preclude them from initiating an action to declare the award invalid afterwards⁴⁰.

Amongst the grounds for invalidity, the public policy clause is the most common basis for an action against an award that is used by parties. Public policy is to cover arbitral awards in which fundamental principles as regards the merits or procedural matters have been set aside⁴¹. Examples mentioned in the legislative history are arbitral awards through which somebody is ordered to perform an illegal action or that the arbitrators have settled a dispute without considering a provision of law which is peremptory for the benefit of a third party or a general public interest and that expresses a particularly important legal principle⁴². What is more, in doctrine it has been discussed whether in exceptional cases an arbitral award could violate public policy if it includes the application of law leading to unreasonable results⁴³.

On the other hand, the grounds for setting aside an arbitral award can be found in section 34 of the Act. The purpose of this provision is to ensure the observance of procedural safeguards in the course of the arbitration⁴⁴. An arbitral award can be challenged if: (1) it is not covered by a valid arbitration agreement between the parties; (2) the arbitrators have made the award after the expiration of the period decided on by the parties, or where the arbitrators have otherwise exceeded their mandate; (3) if arbitral proceedings, according to the Act, should not have taken place in Sweden; (4) an arbitrator has been appointed contrary to the agreement between the parties or the Act; (5) an arbitrator was unauthorized due to lack of legal capacity or lack of impartiality; or (6) without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.

The above-listed grounds for a challenge are exclusive, therefore, an action to set an award aside can neither rely on any other procedural irregularities nor be combined with a request which seeks to have a dispute retried on merits⁴⁵. Section 34 of the Act includes a specific time limit – namely, an action can be brought before a court within 3 months from the date upon which a party received a final award. Following the expiration of this time limit, a party may not invoke a new ground to support its claim. Moreover, a party may base its application for challenge of an award only upon circumstance to which it objected during the proceedings. Otherwise, under section 34 of the Act a party is deemed to have waived its right to rely on these irregularities in post-arbitration litigation.

³⁶ Governmental Bill 1998/99:35, 141 et seq.

³⁷ G. Knuts, op. cit., 239.

³⁸ See *Wirgin Advokatbyrå Handelsbolag v. If Skadeförsäkringar AB*, judgment by the Svea Court of Appeal of 12 September 2005, T 4390-04.

³⁹ L. Heuman, 'Arbitration Law of Sweden: Practice and Procedure' (Huntington, New York: Juris Pub 2003), 575.

⁴⁰ L. Heuman, op. cit., 572.

⁴¹ *PAX-Design LLC v. Connyland AG*, judgment of the Svea Court of Appeal of 13 November 2013, T 1417-14.

⁴² Government Bill 1998/99:35, 140.

⁴³ S. Lindskog, 'Skiljeförfarande En kommentar (2nd edition)' (Stockholm: Norstedts juridik 2012) 847 and 884.

⁴⁴ G. Knuts, op. cit., 244.

⁴⁵ K. Hober, op. cit., 295.

In Sweden, the rules on challenge of an arbitral award are interpreted in a way to avoid limiting the possibilities of the arbitrator to handle the proceedings in a flexible manner. The Swedish courts generally accept that arbitrators have wider discretions in deciding on procedural matter than national courts, thus, they tend to uphold arbitral awards⁴⁶.

Conclusion

The conducted analysis of Polish and Swedish arbitration laws enables to conclude that judicial review of arbitral awards aims not only at protecting the parties to arbitration but also seeks to ensure legal safety of third parties and coherence of legal systems. It is the most visible when considering the public policy clause, that is a ground for an action to set aside in Poland, and the application for invalidity in Sweden. Despite the differences in character and procedural details, both mechanisms serve the very same purpose – to safeguard the public interests.

With the growth of arbitration business, challenging the award has become a typical procedural step which is undertaken in many cases. As the parties to arbitration agreement have made a free decision to submit their dispute to arbitration, the judicial control should, in my opinion, be limited to obvious and flagrant situations. Therefore, the grounds for annulment of an arbitral award should be interpreted in a restrictive manner, as it is done in Sweden.

Bibliography

1. G. Born, 'International Commercial Arbitration, Second Edition' (The Netherlands: Kluwer Law International 2014).
2. T. Ereciński, K. Weitz, 'Sąd arbitrażowy' (Warsaw: LexisNexis 2008).
3. L. Heuman, 'Arbitration Law of Sweden: Practice and Procedure' (Huntington, New York: Juris Pub 2003).
4. K. Hober, 'International commercial arbitration in Sweden' (Oxford; New York: Oxford University Press 2011).
5. G. Knuts, 'Recourse to the Courts against an Arbitral Award' in: U. Franke, A. Magnusson (eds), 'International Arbitration in Sweden: A Practitioner's Guide' (The Netherlands: Kluwer Law International 2013).
6. D.M. Lew, L.A. Mistelis, 'Comparative International Commercial Arbitration' (The Hague, New York: Kluwer Law International 2003).
7. S. Lindskog, 'Skiljeförfarande En kommentar (2nd edition)' (Stockholm: Norstedts juridik 2012).
8. B.G.H. Nilsson, B. R. Andersson, 'Fundamental Principles of International Arbitration in Sweden' in: U. Franke, A. Magnusson (eds) 'International Arbitration in Sweden: A Practitioner's Guide' (The Netherlands: Kluwer Law International 2013).
9. A. Redfern, J.M. Hunter, 'Redfern and Hunter on International Arbitration (Fifth Edition)' (Oxford, New York: Oxford University Press 2009).
10. J. Szpara, 'Setting Aside an Arbitration Award' in: 'Arbitration in Poland' (Warsaw: the Court of Arbitration at the Polish Chamber of Commerce 2011).
11. M. Łaszczuk, J. Szpara, 'Postępowania postarbitrażowe' in: A. Szumański (ed.), 'System Prawa Handlowego. Arbitraż handlowy' (Warszawa: CH Beck 2009).

⁴⁶ L. Heuman, op. cit., 574.

WILL MIFID II/MIFIR INCREASE SECURITY ON CAPITAL MARKETS?

Mateusz Pacak¹

Abstract

The final legislative texts of Markets in Financial Instruments Directive II (MiFID II) and Markets in Financial Instruments Regulation (MiFIR) were approved on 15 April 2014 by the European Parliament and on 13 May 2014 by the European Council. However “old” MiFID was agreed and entered into force just before the financial crisis that started in 2008, MiFIR and MiFID II can be regarded as a response to the crisis. Nevertheless both acts should be treated rather as a future protection of the markets, than a remedy for risks which the last financial crisis occurred.

MiFIR and MiFID II are the result of the dynamic changes of the financial markets, which are strictly associated with three factors: new technologies, globalization and regulation. These three factors are holistically interconnected since it may not be possible to differentiate them and define which of them is a cause and which of them a consequence of changes. To be more specific, examples like dark pools of liquidity (the globalization aspect), algorithmic trading (the new technology aspect) and European Market Infrastructure Regulation (the new regulation aspect) are jointly and to the same extent “responsible” for adopting a new capital market constitution.. Establishing of new regulations always raises the same question: about effectiveness. Is it possible to create at EU level a safer, sounder, more transparent and more responsible financial system and to strengthen integration, efficiency and competitiveness of EU financial markets with adopting one or two new acts?

The aim of this paper is to present briefly abovementioned three areas of capital market law, in which security may (or may not) increase gratefully to MiFIR and MiFID II. Furthermore, in the second part arguments and propositions from European doctrine which has not been adopted in MiFID II/MiFIR regulation will be presented. Especially in this part some views on possible softer regulations and increasing of civil liability on capital market will be argued. In the end the suggestion that MiFID II/MiFIR is only a halfway of protected investors will be advocated.

Keywords: MiFID II, MiFIR, security, capital markets

Introduction

The final legislative texts of Markets in Financial Instruments Directive II (MiFID II) and Markets in Financial Instruments Regulation (MiFIR) were approved on 15 April 2014 by the European Parliament and on 15 May 2014 by the European Council². However “old” MiFID³ was agreed and entered into

¹ *The author is the editor-in-chief of the Jagiellonian University Internet Law Review. He is interested in private law, especially in capital markets law and dogmatic aspects of civil law. His dissertation will dispute the necessity of drawing a distinction between property law and law of obligations. E-mail: mateusz.pacak@o2.pl.*

² Further MiFID II and MiFIR will be called collectively as MiFID II to make the text more clear and to show the contrast between MiFID I and MiFID II.

³ This abbreviation is referred to three different acts: Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments the Market in Financial Instruments Directive [2004] OJ L145/1 (MiFID), Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241 (hereinafter: implementing Directive) and Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, OJ L 241 (hereinafter: implementing Regulation).

force just before the financial crisis that started in 2008, MiFIR and MiFID II can be regarded as a response to the crisis. Nevertheless both acts should be treated rather as a future protection of the markets, than a remedy for risks which the last financial crisis occurred.

The term MiFID II will be used solely when referring to two acts: MiFIR – the Regulation No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation EMIR and the MiFID II – Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

Assessment of MiFID II in this paper will consider the nature of the system, taking into account a number of key assumptions derived from the revision of the MiFID Directive and the most important changes that the new act will introduce. This approach stems from the fact that the overall comparison of MiFID I and MiFID II is impossible in one short paper and what is more – tends to be pointless, because MiFID II will enter into force on January 1st, 2017.

In the first place, the author will discuss the roots of MiFID and MiFID II, in order to show the contrast of the regulatory context and the way in finding solutions. The next part will be made a brief presentation and assessment of the MiFID II. The third section will answer the question if a shift of a paradigm in investor protection in the proposed regulation was executed and if the answer is yes, whether the proposed changes are significant and what investors gain in direct customer – investment firm relationship. In summary entitled "Will MiFID II increase security?" the author will try to answer the question stated in the subject line.

1. The Relation between MiFID I and MiFID II

The entry into force of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments – was the final step in the implementation of the Financial Services Action Plan (FSAP) adopted by the European Commission in 1999⁴. The MiFID I regulatory approach was based on the assumptions developed by the so-called Committee of Wise Men (Committee of Wise Men), which has developed a four-level decision-making process in the field of financial market regulation, called Lamfalussy Process (named from Chairman of the Committee)⁵. Under this approach, the acts of the first level are general, framework nature and contain regulations that will eventually be included in the legal systems of the Member States. This group includes the provisions of Directive 2004/39/EC, in contrast to the provisions implementing Directive (MiFID level 2 Directive⁶) and the implementing Regulation, which are part of the second level of the Lamfalussy process. Therefore, the implementing Directive and the Regulation were strictly technical in nature. Based on the report of the Committee of Wise Men, in order to improve the creation of new regulations in the financial markets two new EU institutions were established – the European Securities Committee (ESC - European Securities Committee) and the Committee of European Capital Market Supervisors (CESR - Committee of European Securities Regulators)⁷. The latter organization in 2011 was replaced by the European Supervisory Authority and the Securities Markets Authority (ESMA - the European Securities and Markets Authority).

It should be noted that the MiFID, despite criticism that it was related to its introduction, is the essential foundation for the structure of the capital market in Europe. It is impossible to assess a scope consequences which could occur to the European economy in the face of the financial crisis started in

⁴ See i.e. L. Enriques, M. Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' [2008] 14 Stanford Journal of Law, Business, and Finance, no. 1, p. 45 et. seq.

⁵ See for example Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001 r.

⁶ See footnote 2.

⁷ M. Tison 'Financial Market Integration in the Post FSAP Era. In Search of Overall Conceptual Consistency in the Regulatory Framework' in: G. Ferrarini, E. Wymeersch (ed.), 'Investor Protection in Europe: Corporate Law Making, The MiFID and Beyond' (Oxford University Press 2006) passim.

2008 without implementation of MiFID⁸. On the other hand, in Poland the MiFID directive has been implemented de facto in 2009⁹, what – however – did not result in the Polish financial market participants felt the crisis more than market participants in other European countries.

Searching for the origins of MiFID II need to point out the recent financial crisis – a review of MiFID has been made in the context of a discussion about a new set of directives that would create (or have already formed) European strategy to prevent of market failures, restore confidence and promote the internal market. The overall aim of the regulation of financial markets has not changed – both in the making of MiFID I, as now, the goal of this is to provide a more coherent and safe single market in financial services. The introduction of MiFID II has led to the creation of legal and supervisory converging across Europe, which is to facilitate the integration of the market and bring benefits to both institutional investors and individual.

2. MiFID II – How Affects Security on the Market?

MiFID I is different from MiFID II in a number of respects. Primarily, the fundamental change is the structure of legislation – European Commission took into consideration the repeated accidents of inconsistent and delayed implementation of the directives and, as a result, a significant part of the requirements of the new package for the financial markets will be introduced by EU Regulation¹⁰. That means all of MiFIR provisions will have a direct effect in every national law system of EU countries. The new legislation will introduce new requirements for pre- and post-trade transparency. What is more, those requirements would have significantly greater scope, as they will now apply not only to the stock market instruments (securities or obligations etc.), but also to the OTC market (including derivative transactions). MiFIR will adopt also product intervention in articles 39-43, which entitle national financial authority or ESMA to ban the sale and distribution of certain financial instrument for a period of time.

In addition, allowances have been issued on the list of financial instruments, what means a significant change for the entire energy industry, as previously purchase or sale of these rights with physical settlement were excluded from the requirements of MiFID. This change should lead to improve the security of trading allowances, which is of particular importance in conjunction with the development of renewable energy in EU. On the contrary, despite the European Parliament's proposal, the protection requirements of investors in certain structured products (PRIIPS)¹¹ not become a subject of the MiFID II: structured deposits and investment policies are excluded from its scope.

In reference to the security, it must be stated that Member States are equipped with more defined measures with regard to powers, remedies and sanctions. As mentioned before, under MiFID II competent authorities will be given the power to suspend the marketing or sale of investment products in certain circumstances or even demand the removal of a person from the management board of an investment firm, which offer those products or otherwise infringes the law or the interest of customers.

To improve the consistency and uniformity of supervision, sanctions or measures imposed by national supervisory authorities must be published and reported to ESMA. Publication may be delayed or made anonymous if it would be disproportionate or would jeopardise the stability of the financial markets – that means MiFID II on the first place care about security of markets, not about punishing its

⁸ Cf. P. Francotte, D. Valiante, K. Lannoo, 'MiFID 2.0. Casting New Light on Europe's Capital Markets Report of the ECMI-CEPS Task Force on the MiFID Review' (Centre For European Policy Studies, Brussels 2011) p. 10.

⁹ From the date of the entry into force of the Regulation of the Minister of Finance of 20 November 2009 'On the procedure and conditions for investment firms and banks referred to in Art. 70 sec. 2 of the Act on Trading in Financial Instruments, and custodian banks' [2009], Journal of Laws 2009 no. 204 position 1577 (now amended).

¹⁰ Cf. M. Loos, 'Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive' [2010] 03, Centre for the Study of European Contract Law Working Paper Series, p. 3 and seq., SSRN: <http://ssrn.com/abstract=1639436>.

¹¹ Cf. G.S. Willemaers 'Client protection on European financial markets – from inform your client to know your product and beyond: an assessment of the PRIIPs Regulation, MiFID II/MiFIR and IMD 2', p. 3 et seq., SSRN: <http://ssrn.com/abstract=2494842>.

participants (market makers or investment firms). The sanctions which are provided in MiFID II are very common to present regulations in other directives and are based on financial punishments.

3. The Paradigm of Protecting an Investor

Although the protection of the investor is still – according to declarations of the MiFID II recitals – located in the heart of a new regulation, it may seem to be slowly pushed into the background. In way of response to the financial crisis, the European legislator decided to remodel the entire financial market in the EU, and the revision of MiFID will be one of the core points of the new model.

Article 19 of MiFID I, which is still the main point of investor protection under MiFID, will be divided into art. 24 and 25 in the MiFID II. Under these provisions, before investing in financial instrument, the customer will receive information, whether investment advice or suitability assessment done for him is based on a broad analysis of the market or not. Secondly, article 24 paragraph 5 of the new MiFID assumes that the investment firm providing independent investment advice will make possible the widest assessment of the market. This requirement is further reinforced by the prohibition of accepting benefits (incentives) from third parties, which shall also apply to portfolio management services (para. 6). The proposed article in paragraph 25.1 and 25.2 retains the appropriateness and suitability requirements (tests). In accordance with art. 25 paragraph 6 with provision of the investment advice investment firm is obliged to determine how the advice given take into consideration the individual characteristics of the client. Pursuant to article 27.2, investment firms will be forced to publish at least once a year on the quality of execution of transactions on their own system execution. These data shall be published in the form of periodic reports contain detailed information on price, speed and likelihood of completion of the transaction for the different types of financial instruments.

After a brief presentation of the MiFID II proposal it can be seen that the model of investor protection derived from MiFID has been extended. According to the author, however, is not a revolutionary change, or even very significant. Prohibition to accept benefits from third parties is the sanctioning of good practice that and so was recommended by the European Commission and ESMA. Moreover, the obligation to provide the broad market research before offering the investment service is not the duty of the category of "what to do", but the norm of a technical nature - "how to do". In other words, the European Union legislature decided that investment firms simply indicate how they provide investment advice in a situation in which the wrong advice is the responsibility of investment firms themselves. The duty to provide the client a document indicating "how given advice takes into account the individual characteristics of the client" may also be questionable. The most common form of testing knowledge and experience of clients regarding investments are surveys that the client fill up before the provision of investment services by the investment firm. If the individual characteristics of the client is incomplete or unreliable, eg. as a result of incorrect fulfillment of the questionnaire by the client itself, compliance with the characteristics of the advice will not have any meaning for the client – the error from the questionnaire is repeated. The question of how to measure the suitability and adequacy was not addressed during the review of the Directive. There are no references to the methods and criteria for testing the knowledge and experience of a client. Moreover in the literature there are some studies that show inconsistency and different results of surveys used by the different investment firms¹². Findings presented in this paragraph are not surprising in the light of what has been stated above – revision of the directive is going to influence more on the market in general than protect the individual investor.

At the end it is important to mention what MiFID II does not contain. First, it has not been clearly resolved the question of the conclusion of an implied investment advisory agreement. Paradoxically, in a situation of increasing responsibilities of investment firms in all agreements, the implied intention to

¹² N. Marinelli, C. Mazzoli, 'An insight into the suitability practice: the standard questionnaire dilemma', Research paper, 2011, SSRN: <http://ssrn.com/abstract=1853230>; N. Linciano, P. Soccorso, 'Assessing investors' risk tolerance through a questionnaire' (Consob Discuss Paper, Rome: July 2012), <http://www.consob.it/mainen/documenti/english/papers/dp4en.html?symbblink=/mainen/consob/publications/papers/index.html>

conclude a contract of investment advisory agreement can be harder to prove. This situation could potentially lead to the deterioration of position of investors who base their private law claims against an investment firms on the close relations with the representative of the investment firm's (eg. employee). Second, MiFID II do not contain any explicit legal basis for liability, nor regarding to the investment firms neither to managers. European legislator assumed that private law liability issue belong to the inner sphere of the law of the Member States – but at the same time European Commission do not create any even programmatic proposals in order to harmonise the issue! Number of lawsuits based on MiFID is still small, and that is because the burden of proof of negligence, improper or erroneous acts in providing investment advice or in investment service and causation rests entirely with the clients of investment firms. This is a consequence of the assumption that the MiFID, and thus its implementation, constitute rules of a public nature (the matter of administrative law). Only in Germany appeared the view that the provisions of the MiFID implementing the Act (WpHG) are the direct basis of private client claims (ie. the standards are to be double, private-public nature – *Doppelnatur*)¹³.

4. Summary – Improvement of the Security on the Market?

The European legislator seems not to notice that the law enforcement on capital market should not only be the subject of regulatory authorities. Every new regulation must be meet by the appropriate response of the market. Multiplication of administrative barriers and duties, the implementation of which is based on creating the large number of documents do not transfer in a simple way to increase the investor protection or the market transparency. Regulatory emphasis should be placed on soft law instruments, which should contribute to a better understanding of the need to ensure transparency and a better understanding of the needs of the investor. What is more, from the point of view of the investors themselves, the preferred solution would be a pan-European basis of private law liability investment firms and managers. If the client has suffered damages due to the action of any of these entities, administrative or penal sanctions not reward him any material loss. Furthermore, the increasing number of administrative and regulatory requirements leads to an increase in operating costs, which may in turn lead to the phenomenon of "race to the bottom" or even eliminate from the market smaller investment firms who cannot afford to implement a long term, costly compliance strategy. The phenomenon of race to the bottom was experienced by the markets in the pre-crisis era, when searching and encouraging clients was excessive and thus it is logical that regulatory action may lead to the next views of this race.

These findings suggest that in general the answer to the question in the topic must be divided into two parts: in the field of market structure improvement of the security should be significant and will be felt by all market participants, because of scope of MiFID II and implemented by MiFID II many control and supervision measures. In the field of investor protection, in the opinion of the author changes will be only cosmetic and they will not be of great importance in relation to the model adopted in MiFID I. The conclusion is that MiFID II is going to improve security on EU capital markets, but not in every aspect of the market security.

Bibliography

1. Busch D., 'Why MiFID matters to private law—the example of MiFID's impact on an asset manager's civil liability' [2012] 9 CMLJ 2
2. Enriques L., Gatti, M., 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' [2008] 14 Stanford Journal of Law, Business, and Finance, no. 1, SSRN: <http://ssrn.com/abstract=982282>.
3. Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001 r.

¹³ D. Busch, 'Why MiFID matters to private law—the example of MiFID's impact on an asset manager's civil liability' [2012] 9 CMLJ 2.

4. Francotte P., Valiante D., Lannoo K., 'MiFID 2.0. Casting New Light on Europe's Capital Markets Report of the ECMI-CEPS Task Force on the MiFID Review' (Centre For European Policy Studies, Brussels 2011).
5. Linciano N., Soccorso P., 'Assessing investors' risk tolerance through a questionnaire' (Consob Discuss Paper, Rome: July 2012), <http://www.consob.it/mainen/documenti/english/papers/dp4en.html?symbblink=/mainen/consob/publications/papers/index.html>.
6. Loos M., 'Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive' [2010] 03 Centre for the Study of European Contract Law Working Paper Series, SSRN: <http://ssrn.com/abstract=1639436>.
7. Marinelli N., Mazzoli C., An insight into the suitability practice: the standard questionnaire dilemma, Research paper, 2011, SSRN: <http://ssrn.com/abstract=1853230>.
8. Willemaers G.S. 'Client protection on European financial markets – from inform your client to know your product and beyond: an assessment of the PRIIPs Regulation, MiFID II/MiFIR and IMD 2', SSRN: <http://ssrn.com/abstract=2494842>.
9. Tison M., 'Financial Market Integration in the Post FSAP Era. In Search of Overall Conceptual Consistency in the Regulatory Framework' in: G. Ferrarini, E. Wymeersch, 'Investor Protection in Europe: Corporate Law Making, The MiFID and Beyond' (Oxford University Press 2006).

LEGAL JUSTIFICATION UNDER CONDITIONS OF UNCERTAINTY: EPISTEMOLOGY OVER-DEMANDED

André de Paula¹

Abstract

My contribution to this conference on the topic Security as the Purpose of Law is a theoretical one. For security in law involves not only security of individuals and groups in and through law and issues concerning the observance of the rule of law, but necessarily also legal certainty. In times of “loss of legitimacy”, certainty has been challenged socially and culturally in journalism, sciences, philosophy and – last but not least – in legal practice and theory. A representative sign of the decreasing certainty is the practical recourse to skeptical epistemology in legal argumentation. In this paper I will consider legal certainty in its argumentative aspects, specifically regarding skeptical legal epistemology and its consequences for a normative justificatory practice. The focus will be put on selected problems of argumentative recursivity and on the relation between skeptical epistemological views on legal decision-making and normative solutions on substantive legal questions based on them. It will be argued that some constructivist epistemological motives such as the “impossibility of rule-following” and the “concretization” of legal norms relate to substantive legal questions either in a self-refuting or in an indeterminate manner (indeterminate as they provide normative arguments neither for nor against a specific legal solution). Finally, I will argue that legal epistemology has been repeatedly over-demanded in the last decades in the search for solutions for substantive legal questions. Epistemological views on legal decision-making in skeptical form as presented within hermeneutics, rhetoric and postmodern legal theories are tendentially not able to provide justificatory elements for normative legal questions.

I. Introduction

Legal certainty must be achieved not only through socially adequate regulation and functioning legal systems, but also through reasonable argumentative practices. Besides traditional problems legal theory has treated on this subject such as the “open texture of Law” or the possibility of “one right decision in Law” – problems that are, indeed, still unsolved – there is something new that has not received attention of legal argumentation theory until the moment: new challenges for justification of normative claims emerging from a skeptical, usually constructivist epistemology.

In order to make an approximation to what is meant here by “skeptical epistemology”, it is worth to point out some epistemological motives that have become common in western culture in the last decades. Differences between human beings have been seen as construed – not as found – differences. The achieved knowledge in many fields of science has been often seen as a production of “narratives”, not of truths.² The identification of social constructs, biases, prejudices, pluralisms, paradigms, the negation of objective knowledge, of absolute truths and values as well as the discovery of a lot of irrational mechanisms in human thinking and behavior belong nowadays not only to the

¹ LL.M. (Frankfurt am Main), PhD student at Goethe University Frankfurt am Main, Germany. Scholarship holder of the National Council for Scientific and Technological Development (CNPq) – Brazil in partnership with the German Academic Exchange Service (DAAD).

² Sloterdijk, Peter: *Die Verachtung der Massen. Versuch über Kulturkämpfe in der modernen Gesellschaft*, Frankfurt am Main: Suhrkamp 2000, p. 76.

standard vocabulary of humanities; these skeptical topoi constitute also common senses in popular language, journalism, literature, architecture and many other fields.³

The list of constructivist epistemological motives which have become a common vocabulary among scholars could be far prolonged. In this paper I want to start from the observation of the so described widely accepted skeptical epistemology and draw attention to an – at least at first sight – astonishing phenomenon which is intrinsic related to it: *the direct argumentative mobilization of some skeptical motives as reasons in a justification of normative claims about substantive legal questions*. The reason for this astonishment is the unclear relation between skeptical epistemological assumptions and further normative⁴ claims based on them: if each argument is understood in a constructivist way as for example a “story” or a “narrative”, it seems not possible to decide between them, unless one creates a hierarchy between preferable and not preferable “stories” or “narratives” – a choice which would be itself just a further “story” or “narrative”... To this extent, it becomes interesting to analyze the relation between, on the one side, constructivist epistemological motives in the form as they are present in legal theory and, on the other side, justificatory normative claims hold on their basis.

II. Skeptical legal epistemology

The assimilation of skeptical, specially constructivist motives has been increasing among recent legal theories, in particular within postmodern inspired approaches. Several theoretical approaches since the second half of the 20th century have been emphasizing the creative role of legal decision-makers in dealing with legal rules. According to some of them, legal rules could not be *applied* at all, but only *created*. When legal decision-making is comprehended in this way and informed by hermeneutical analysis on prejudices and language, there seems to be no place for the existence of a *lex ante casum* which could guide its further “application”.⁵ Similar views from postmodern legal theory claim that there is no binding rule at all beyond concrete cases.⁶ “Rule-following” and “subsumption” have been seen, on the one hand, as necessary conditions of a good functioning legal system and as important parts of the self-description of law, but, on the other hand, as useful legal fictions.⁷ Additionally, legal rhetoric pretends to undermine the legal discourse as traditionally understood and comprehends it as a “temporary victorious meaning inside communication”⁸, excluding the possibility of truth about values, about interpretation and also of truths in general.⁹ The contingency of legal justification has been emphasized and resisting against elimination through the presentation of better arguments, because both an argument and its respective counter-argument could always be equally justified.¹⁰ Approaches

³ For some of these skeptical categories and their intrinsic relation with postmodernism, see Jencks, Charles (org.): *The Post-Modern Reader*, London: Academy Editions 1992, p. 34.

⁴ Normative is meant in this paper in opposition to descriptive. In law it means discussions about how substantive legal questions should be resolved, how legal statutes should be interpreted or, broader, how legal dogmatics should be developed, with subsequent suggestions about how legal decision-makers should decide cases.

⁵ Müller, Friedrich; Christensen, Ralph: *Juristische Methodik*, vol. 1, 9th edition, Berlin: Duncker & Humblot 2004, p. 9.

⁶ About problems of the postmodern reduction of decision-making into concrete case decisionism, see Christensen, Ralph: *Was heißt Gesetzesbindung? Eine rechtslinguistische Untersuchung*, Berlin: Duncker & Humblot 1989, p. 208.

⁷ See Schlieffen, K. Gräfin von: *Subsumtion als Darstellung der Herstellung juristischer Urteile*, in: Gabriel, Gottfried; Gröschner, Rolf (org.): *Subsumtion. Schlüsselbegriff der juristischen Methodenlehre*, Tübingen: Mohr Siebeck 2012, p. 385. Also Müller-Mall, Sabine: *Performative Rechtserzeugung. Eine theoretische Annäherung*, Weilerswist: Velbrück Wissenschaft 2012, p. 274.

⁸ Adeodato, J. M.: *Two philosophical problems for legal dogmatics to answer*, in: Adeodato, J. M. (org.): *Human rights and the problem of legal injustice. Annals of the preparatory meeting for the XXCVI World Congress of the International Association of Philosophy of Law and Social Philosophy*. São Paulo: Noeses Capes, 2013, pp. 5-24.

⁹ Adeodato, Adeodato, J. M.: *The Rhetorical Function of Law for the Boundaries of Tolerance*, *Inter-American Journal of Philosophy*, vol. 4, issue 1, June 2013, p. 67-82.

¹⁰ See Becker, Christian: *Was bleibt? Recht und Postmoderne. Ein rechtstheoretischer Essay*, Baden-Baden: Nomos 2014, p. 111.

inspired through phenomenology have been emphasizing the necessarily indescribable, unintelligible and inaccessible elements of law.¹¹

Obviously, the skeptical epistemological motives treated here are taken schematically and just exemplary. Nonetheless I think they are a representative selection of the tendency of contemporary legal theory, as they are examples of thesis with correspondents in almost every legal culture where reflections on legal epistemology have taken place. The relevant similarities between them enable us to – and even require – an unified account of their common results and consequences. The obvious risk of decontextualisation of the discussions hold on the respective levels of each theory seems worth to be taken – a risk which is common to every overall comparative theoretical study.

III. Some problems of skeptical epistemology for legal justification

Here I want to discuss some problems and challenges which the acceptance of some constructivist epistemological approach seems to imply. The method used here will be focused on the analysis of the *internal consistency* of constructivist epistemology and of the consequences of assuming it as a framework for normative justificatory purposes. For the specific purposes of this analysis I will not discuss the soundness of constructivist presuppositions in themselves – this would be a task to be performed under extensive consideration of each category and each theoretical approach on its own merits.

a. Recursivity

Constructivist epistemology poses an immediately identifiable problem for normative justification: how could any evaluative position on a substantive legal question or any theoretical normative program be defended in compatibility with radical constructivist understandings of legal justification? If one accepts for example that there are no binding rules beyond concrete cases that could be followed for the case solution, the conclusion that this impossibility also affects the own normative project of the respective constructivist theory itself seems to be unavoidable.

Recursivity problems are not only formal logical problems of self-refutation. They include, besides logical contradictions which can arise from the frontal collision of two concurrent thesis, also what could be called a “loose recursivity”: if every normative assumption (for instance “abortion violates the constitution”) is a “social construct” (cultural marxism), a “narrative” (postmodern approaches) or a “temporary victorious meaning inside communication” (rhetoric), it seems clear that the substantive question treated (e.g., if abortion violates the constitution) remains untouched and that this question is just shifted in another level. The same question could be – and under conditions of *non liquet*, must be – posed another way: *which* “social construct”, “narrative” or “meaning inside communication” is preferable and should be adopted. Epistemological skeptical motives of all-inclusiveness (i.e. claims determining the epistemological status of every normative claim) are, thus, not able to serve as *reasons for* or *objections against* normative claims about substantive legal questions, as they have been commonly used.¹² The new constructivist epistemology in the form of all-inclusive claims shifts the original normative question further to a similar question in other terms.

¹¹ For a phenomenological account see Vesting, Thomas: Nachbarschaft. Grundrechte und Grundrechtstheorie in der Kultur der Netzwerke, in: Augsberg, Ino; Koriath, Stefan; Vesting, Thomas (org.), Grundrechte als Phänomene kollektiver Ordnung. Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik, Tübingen: Mohr Siebeck 2014, p. 57-84.

¹² The recourse to constructivist epistemology toward justificatory purposes has become very common in morals, law and politics. For a convincing criticism about the ableness of postmodern skepticism on epistemology to support left-wing political projects, see Bouveresse, Jacques: Rationalité et cynisme, Paris: Les Éditions de Minuit 1984, p. 19-33. For a criticism on Rawls' constructivism in morals, see Kersting, Wolfgang: Kritik der Gleichheit. Über die Grenzen der Gerechtigkeit und der Moral, Weilerswist: Vellbrück Wissenschaft 2002, p. 63. For a criticism about the value of theoretical constructs as arguments for normative legal consequences (here specifically about the *actio libera in causa*), see Neumann, Ulfrid:

Similar problems of recursivity have been identified not only in Law, but also in politics and philosophy. The absolutely general contestation of all conventions, norms or political systems as “artificial” and “construed” – that was common in left-wing political movements in the seventies – is self-defeating and could be mobilized equally to support even right-wing conservatism – i.e., the contrary of what it is intended to support.¹³ The alternative to norms and conventions is the suggestion of *better* norms and conventions, not their abolition. Similar argumentative problems with this same pattern can be seen in the normative mobilization of several epistemological motives such as deconstructive methods, the incommensurability of paradigms¹⁴ and the under-determination of scientific theories¹⁵: they seem to be a “pot-pourri of ideas” which are “bad adapted” to the purposes of the respective normative project based on them.¹⁶ Indeed, if deconstructive methods (Derrida) are applicable to every difference, things have to be accepted this way in regard to every normative assumption, not only in regard to the political correct ones¹⁷ such as human rights or animal rights¹⁸ – otherwise deconstruction and similar all-relativisations run the risk to be transformed into rhetorical techniques which would consist in two steps: firstly, to refuse every normative claim ever done about a certain substantive topic of discussion for some relativistic reason, taking no account of beliefs already hold on the respective field of knowledge. This first step would presuppose, thus, the assumption that every claim on the substantive evaluative subject ever made is wrong – a procedure containing “heroic claims”:¹⁹ the assumption that there is no right interpretation of the constitution about a substantive legal issue contains a global refusal of each singular claim pretending to give it a plausible interpretation. Secondly, after the all-relativisation, it could be tried to restore normative certainty – at least partially – introducing values which rest mysteriously untouched (!) through the first relativistic argumentation step. This is the place where normally liberalism, equality, tolerance, promotion of diversity and humanistic values slip in as the “remaining” or “realistic” values after epistemological deconstructions of all kinds.²⁰ At the very latest at this point, it seems clear that political, legal and philosophical normative projects cannot be, in fact, skeptical about epistemological issues “all the way down”:²¹ if some evaluative assumption is taken to be reliable, some of the skeptical assumptions about the impossibility of values at all, of truths, of right interpretations, etc. (“first step”) must be at least in part wrong. Contradictions on this field seem to be unavoidable if they are not accompanied by compatibilistic efforts such as the reflective equilibrium,²² philosophical compatibilism²³ or other coherentistic²⁴ approaches.

Konstruktion und Argument in der neueren Diskussion zur *actio libera in causa*, in: Haft, F.; Hassemer, W.; Neumann, U.; Schild, W.; Schroth, U., *Strafgerichtsbarkeit. Festschrift für Arthur Kaufmann zum 70. Geburtstag*, Heidelberg, 1993, p. 581-593.

¹³ See Bouveresse, Jacques: *Rationalité et cynisme*, Paris: Les Éditions de Minuit 1984, p. 21.

¹⁴ Paradigms as stated by T. Kuhn in Kuhn, Thomas: *The Structure of Scientific Revolutions*, 2. edition, in: *International Encyclopedia of United Science*, Bd. 2, Nr. 2, Chicago 1970, p. 94.

¹⁵ According to the so called “Quine-Duhem thesis”. See Brincmont, Jean; Sokal, Alan: *Impostures intellectuelles*, Paris: Odile Jacob 1997, p. 69.

¹⁶ *Ibid.*, from p. 51.

¹⁷ For a similar criticism, see Teubner, Gunther: *Des Königs viele Leiber. Die Selbstdekonstruktion der Hierarchie des Rechts*, *Soziale Systeme* 2 (1996), 2.

¹⁸ In defending animal rights, Derrida seems not to be as rigorous as his deconstruction method would require. See Derrida, Jacques: *The animal that therefore I am*, *Critical Inquiry* 28, Winter 2002.

¹⁹ An expression used by Dworkin in a similar criticism about “indeterminacy by default”, i.e., about the assumption that there are no truths about interpretation as the groundless standard position in epistemology: Dworkin, Ronald: *Objectivity and truth: You’d Better Believe It*, in: *Philosophy and Public Affairs*, Spring 1996, 25, 2, p. 139.

²⁰ For examples of epistemological accounts from a skeptical perspective combined with the defense of humanistic values, see Adeodato, J. M.: *The Rhetorical Function of Law for the Boundaries of Tolerance*, *Inter-American Journal of Philosophy*, vol. 4, issue 1, June 2013, p. 67-82. ; and also Becker, C.: *Was bleibt? Recht und Postmoderne. Ein rechtstheoretischer Essay*, Baden-Baden: Nomos 2014, p. 139.

²¹ Dworkin, Ronald: *Objectivity and truth: You’d Better Believe It*, in: *Philosophy and Public Affairs*, Spring 1996, 25, 2, p. 91.

²² See Campbell, Richmond: *Reflective Equilibrium and Moral Consistency Reasoning*, in: *Australasian Journal of Philosophy*, 2014, vol. 92, no. 3, p. 433-451.

²³ For an example of compatibilistic approach between determinism and practical philosophy, see Strawson, Peter F.: *Freedom and Resentment and other Essays*, London and New York: Methuen 1973, p. 1-25.

These tensions can be exemplified in law with some appointments on legal hermeneutics. Much of the criticism on legal “subsumption-paradigm” of the 20th century is based on the assumption that there is an ontological difference between text and norm²⁵ and that the norm which decides the case is not contained in the text of the respective legal statute. According to this view, the norm is not *applied* in the concrete case, but *concretized*; the deciding rule has to be *produced*, not *discovered* by the legal decision maker in the moment of the decision.²⁶

Recursivity problems arise when one tries to reconcile these hermeneutical constructivist epistemology with normative goals. As soon as the respective theory pretends not to rest merely descriptive and, instead, when it pretends to raise also normative claims, legal theorists have felt the necessity of reverting occasionally and selectively some radical constructivist views in order to maintain coherence with their normative goals. In this sense, in the same radical skeptical theories one could find at the same time traditional, non-skeptical assumptions such as the leading function of legal texts²⁷, the necessary orientation of the legal decision maker to legislative goals,²⁸ the limits of possible concretization of legal norms²⁹ and the limits of sense attribution to norm texts.³⁰ These are, however, traditional motives whose refutation was already included in the previously accepted constructivist epistemology.³¹

b. Normative indeterminacy

In search for an adequate account of legal decision-making, there have been demands on Epistemology which cannot be responded adequately through it – for the simple reason that they are not epistemological questions, but rather substantive legal questions (e.g., again, if abortion is constitutional). In other words, the kind of knowledge that can be produced studying legal decision-making rhetorically, sociologically and hermeneutically can be mobilized only very difficultly in order to be transformed into *reasons* for deciding cases in one way or in other. This point can be clarified with one more example from legal hermeneutics: if every legal decision is understood as an event within an hermeneutical circle and is (not only, but necessarily) a product of the decision maker’s preconceptions, it does not seem possible to make differences between constitutional or unconstitutional, justified or unjustified decisions on this basis. Thesis such as the hermeneutical circle (in its many versions), the concretization of legal norms in legal decision-making and the topical description of legal thinking seem to be, indeed, enlightenments about legal decision-making, but nonetheless normatively undetermined in respect to the treatment of substantive legal questions (i.e., they provide *arguments neither for nor*

²⁴ For a coherentistic approach in law, see Aarnio, Aulis; Alexy, Robert; Peczenik, Aleksander; Rabinowicz, Wlodek; Wolenski, Jan: *On Coherence Theory of Law*, Lund: Jurisförlaget I Lund 1998.

²⁵ Streck, Lenio Luiz: A diferença ontológica (entre texto e norma) como blindagem contra o relativismo no processo interpretativo, in: *Revista Brasileira de Estudos Políticos*, n. 89 (separata), Belo Horizonte 2004, p. 121-160.

²⁶ As pointed out, for example, by F. Müller in Müller, Friedrich; Christensen, Ralph: *Juristische Methodik*, vol. 1, 9th edition, Berlin: Duncker & Humblot 2004, edge number 215.

²⁷ *ibid*, 626.

²⁸ *ibid*, 626.

²⁹ *ibid*, 516.

³⁰ Cf. Streck, Lenio Luiz: A diferença ontológica (entre texto e norma) como blindagem contra o relativismo no processo interpretativo, in: *Revista Brasileira de Estudos Políticos*, n. 89 (separata), Belo Horizonte 2004, pp. 129-134.

³¹ The problem between interpretative openness of legal norms and the limits of norm concretization within Müller’s methodic was also identified by Adeodato, J. M.: *Ética e Retórica. Para uma teoria da dogmática jurídica*, 3rd edition, São Paulo: Saraiva 2007, p. 251-252.

One of the so called “intellectual impostures” detected in postmodern literature and criticized satirically by Sokal and Brincmont was precisely the use of all-relativisations and ambiguous expressions of epistemological skepticism which are “either banal or clearly wrong”, in: Brincmont, Jean; Sokal, Alan: *Postmoderne in Wissenschaft und Politik*, in: *Mercur. Deutsche Zeitschrift für europäisches Denken*, n. 594/595, September/October 1998, p. 932 and Brincmont, Jean; Sokal, Alan: *Impostures intellectuelles*, Paris: Odile Jacob 1997, p. 52.

against a specific position in a normative legal issue).³² Problems such as the legality of abortion or the adequate interpretation of a specific legal statement are examples of questions whose existence, relevance and solution seem to be to a great extent independent from the adoption of a specific epistemological framework. In this respect there is “no privileged position for a skeptic”.³³ “Archimedean skepticism”³⁴ is not able to be directly translated into grounds for or against an interpretative option.

Here we face a similar problem as in the case of “loose recursivity” (as stated above): by adopting constructivist epistemological frameworks on legal decision-making such as the concretization of the legal norm and by accepting that there is no binding rule at all which could be *reproduced* (and not merely *produced*) in concrete cases, the original substantive question – e.g. whether abortion can be made in accordance with the law – is shifted to another level with other terms: how should legal norms be concretized, how should the hermeneutical circle take place, which decision maker’s preconceptions should be accepted in a legal justification, etc. In this way, constructivist epistemology does not provide normative directions to the treatment of the substantive legal questions.

The insufficiencies of contemporary skeptical epistemology for legal justification of normative claims can be also pointed out in the following enthymematical way: Premises: “there is no truth in matter of values or no right interpretation or no best argument etc”. Conclusions: “therefore we should decide according to the constitution, tolerate each other, promote diversity, promote liberalism, etc”. Put explicitly, the plausibility of the transition from a skeptical epistemological framework (premises) into substantive normative positions (conclusions) decreases considerably. For tolerance, diversity, liberalism etc. are clearly not supported by the premises – they are themselves values, interpretations, arguments, etc. which are, instead, contradict by the premises. This leads us again to self-defeating problems.

IV. Legal Epistemology is Over-Demanded

Summarizing some results of the previous analysis, it can be shown that the acceptance of constructivist epistemology as a basis for further normative justifications results tendentially in either one of two impasses:

1. The constructivist epistemology in its more radical form, which includes the negation of the possibility of truth, of values, of correctness about interpretation, of the possibility of sense-transfer through semantic determination, etc. (above a), is tendentially *self-defeating* in relation to its own normative project.

2. When the accepted epistemological basis assumes the form of less radical but still constructivist assumptions such as the necessity of concretization of the legal norm (above b), the description of legal decision-making as an event within an hermeneutical circle, etc., it rests *normatively undetermined* in relation to normative projects, i.e., it presents arguments tendentially neither for nor against eventually proposed normative solutions. Rather, it is compatible with a plenty of normative positions which can be even incompatible among themselves (in law: constitutional or unconstitutional decisions, in politics: left-wing and right-wing positions, etc.)

When used in order to support normative claims, legal epistemology has been over-demanded. Claims of constructivist epistemology are in neither of the patterns above able to be mobilized as reasons for specific solutions of substantive legal questions within the legal context of justification. The answer for normative legal questions can be very difficultly obtained from abstract epistemological investigations and imported into law as apparently the only “remaining alternatives” or as “the only

³² Betti seems to argue in a similar way in regard to some aspects of Gadamer’s Hermeneutics. See Betti, Emilio: Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften, Tübingen 1962, p. 43.

³³ Peczenik, Aleksander: A Coherence Theory of Juristic Knowledge, in: Aarnio, Aulis; Alexy, Robert; Peczenik, Aleksander; Rabinowicz, Wlodek; Wolenski, Jan: On Coherence Theory of Law, Lund: Jurisförlaget I Lund 1998, p. 12.

³⁴ I.e., “the purport to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it”, Dworkin, Ronald: Objectivity and truth: You’d Better Believe It, in: Philosophy and Public Affairs, Spring 1996, 25, 2, p. 88.

realistic views". The normative perspective of law has to be found and developed within law itself and cannot be substituted through (allegedly) more objective perspectives from sociology, hermeneutics, rhetoric, linguistic and related fields. This means also that a normative model for legal decision-making must not be confined within sociological, hermeneutical and rhetorical "objective" epistemological allowances. This acknowledgement invites us to a return to an explicit treatment of substantive legal questions within an explicitly normative framework. This research attitude is not new and has been increasingly recognized under very different rubrics. The comeback of rationality,³⁵ the primacy of substantial argumentation,³⁶ the overcoming of archimedean skepticism³⁷ and the primacy of legal argumentation standards in relation to (formal) logical standards³⁸ can be interpreted as some voices in this sense.

References

1. Adeodato, J. M.: *Ética e Retórica. Para uma teoria da dogmática jurídica*, 3rd edition, São Paulo: Saraiva 2007.
2. Adeodato, J. M.: *The Rhetorical Function of Law for the Boundaries of Tolerance*, *Inter-American Journal of Philosophy*, vol. 4, issue 1, June 2013, p. 67-82.
3. Becker, Christian: *Was bleibt? Recht und Postmoderne. Ein rechtstheoretischer Essay*, Baden-Baden: Nomos 2014
4. Betti, Emilio: *Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften*, Tübingen 1962.
5. Bouveresse, Jacques: *Rationalité et cynisme*, Paris: Les Éditions de Minuit 1984.
6. Brincmont, Jean; Sokal, Alan: *Impostures intellectuelles*, Paris: Odile Jacob 1997.
7. Brincmont, Jean; Sokal, Alan: *Postmoderne in Wissenschaft und Politik*, in: *Merkur. Deutsche Zeitschrift für europäisches Denken*, n. 594/595, september/october 1998.
8. Campbell, Richmond: *Reflexive Equilibrium and Moral Consistency Reasoning*, in: *Australasian Journal of Philosophy*, 2014, vol. 92, no. 3, p. 433-451.
9. Christensen, Ralph: *Was heißt Gesetzesbindung? Eine rechtslinguistische Untersuchung*, Berlin: Duncker & Humblot 1989.
10. Derrida, Jacques: *The animal that therefore I am*, *Critical Inquiry* 28, Winter 2002.
11. Dworkin, Ronald: *Objectivity and Truth: You'd Better Believe It*, in: *Philosophy and Public Affairs*, Spring 1996, 25, 2.
12. Jencks, Charles (org.): *The Post-Modern Reader*, London: Academy Editions 1992.
13. Kalinowski, Georges: *De la spécificité de la logique juridique*. In: *Archives de Philosophie du Droit*, vol. 11, 1966, p. 7-23.
14. Kaufmann, Arthur: *Rechtsphilosophie in der Nach-Neuzeit*, Heidelberg: Decker und Müller Verlag 1992.
15. Kersting, Wolfgang: *Kritik der Gleichheit. Über die Grenzen der Gerechtigkeit und der Moral*, Weilerswist: Vellbrück Wissenschaft 2002.
16. Kuhn, Thomas: *The Structure of Scientific Revolutions*, 2. edition, in: *International Encyclopedia of United Science*, Bd. 2, Nr. 2, Chicago 1970.
17. Müller, Friedrich; Christensen, Ralph: *Juristische Methodik*, vol. 1, 9th edition, Berlin: Duncker & Humblot 2004.

³⁵ Novak, Marko: *The Argument from Psychological Typology for a Mild Separation Between the Context of Discovery and the Context of Justification*, in: Dahlman, Christian; Feteris, Eveline: *Legal Argumentation Theory: Cross-Disciplinary Perspectives*, Dordrecht: Springer 2013, p. 153.

³⁶ Becker, Christian: *Was bleibt? Recht und Postmoderne. Ein rechtstheoretischer Essay*, Baden-Baden: Nomos 2014, p. 130.

³⁷ Dworkin, Ronald: *Objectivity and truth: You'd Better Believe It*, in: *Philosophy and Public Affairs*, Spring 1996, 25, 2, p. 88.

³⁸ Neumann, Ulfrid: *Juristische Argumentationslehre*, Darmstadt 1986, p. 33. Also Kalinowski, Georges: *De la spécificité de la logique juridique*. In: *Archives de Philosophie du Droit*, vol. 11, 1966, p. 7-23.

18. Müller-Mall, Sabine: Performative Rechtserzeugung. Eine theoretische Annäherung, Weilerswist: Velbrück Wissenschaft 2012.
19. Neumann, Ulfrid: Juristische Argumentationslehre, Darmstadt 1986.
20. Neumann, Ulfrid: Konstruktion und Argument in der neueren Diskussion zur *actio libera in causa*, in: Haft, F.; Hassemer, W.; Neumann, U.; Schild, W.; Schroth, U., Strafgerechtigkeit. Festschrift für Arthur Kaufmann zum 70. Geburtstag, Heidelberg, 1993, p. 581-593.
21. Novak, Marko: The Argument from Psychological Typology for a Mild Separation Between the Context of Discovery and the Context of Justification, in: Dahlman, Christian; Feteris, Eveline: Legal Argumentation Theory: Cross-Disciplinary Perspectives, Dordrecht: Springer 2013.
22. Peczenik, Aleksander: A Coherence Theory of Juristic Knowledge, in: Aarnio, Aulis; Alexy, Robert; Peczenik, Aleksander; Rabinowicz, Wlodek; Wolenski, Jan: On Coherence Theory of Law, Lund: Jurisförlaget I Lund 1998.
23. Schlieffen, K. Gräfin von: Subsumtion als Darstellung der Herstellung juristischer Urteile, in: Gabriel, Gottfried; Gröschner, Rolf (org.): Subsumtion. Schlüsselbegriff der juristischen Methodenlehre, Tübingen: Mohr Siebeck 2012.
24. Sloterdijk, Peter: Die Verachtung der Massen. Versuch über Kulturkämpfe in der modernen Gesellschaft, Frankfurt am Main: Suhrkamp 2000.
25. Strawson, Peter F.: Freedom and Resentment and other Essays, London and New York: Methuen 1973.
26. Streck, Lenio Luiz: A diferença ontológica (entre texto e norma) como blindagem contra o relativismo no processo interpretativo, in: Revista Brasileira de Estudos Políticos, n. 89 (separata), Belo Horizonte 2004, p. 121-160.
27. Teubner, Gunther: Des Königs viele Leiber. Die Selbstdekonstruktion der Hierarchie des Rechts, Soziale Systeme 2 (1996), 2.
28. Vesting, Thomas: Nachbarschaft. Grundrechte und Grundrechtstheorie in der Kultur der Netzwerke, in: Augsberg, Ino; Koriath, Stefan; Vesting, Thomas (org.), Grundrechte als Phänomene kollektiver Ordnung. Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik, Tübingen: Mohr Siebeck 2014, p. 57-84.

THE UN SECURITY COUNCIL'S TARGETED SANCTIONS REGIME AND THE ISSUES OF RESPONSIBILITY UNDER INTERNATIONAL LAW

Gintarė Pažereckaitė¹

Summary

The United Nations Security Council has primarily responsibility to protect international peace and security. Through its active decision-making in the recent decades the Security Council has reaffirmed its role through collective responses to breaches of fundamental norms of the international community in order to ensure collective security. At the same time, ironically, the activities of that same body have led to clashes between different public policy objectives – can the collective security be guaranteed while undermining individual human rights? This tension became evident in a number of judicial proceedings before various domestic and international judicial bodies regarding the binding non-forcible measures (“targeted sanctions”) imposed by the Security Council under Article 41 of the Charter.

The contribution (1) examines what rules bind the Security Council in its operation, i.e., what limits on its power are imposed by the Charter itself and human guarantees provided in general international law; (2) presents the Security Council's targeted sanctions framework; (3) analyses how courts approach the issues of responsibility with regard to the implementation of the United Nations sanctions by Member States and, subsequently, analyses what impact the jurisprudence has had on the United Nations sanctions regime. It is concluded that the limits on the actions of the Security Council related with the protection of individual human rights are imposed in a decentralized manner by regional and national courts which tend to establish responsibility of individual Member States of the United Nations.

Keywords: Targeted sanctions, UN Security Council, human rights, international responsibility

Introduction

The litigation provoked by the United Nations (hereinafter – UN) targeted sanctions responds to the tension between the maintenance of international peace and security as a fundamental purpose of the UN on the one hand and the need to ensure respect for individual human rights on the other hand. From the point of view of the rule of law, the effective fight against terrorism must be consistent with international human rights standards. But how to achieve this aim in the system of international law, which is decentralised, fragmented and lacks tools of enforcement?

This contribution demonstrates how courts indirectly enforce human rights obligations upon the Security Council by holding individual UN Member States responsible for the implementation of the UN sanctions. The analysis is structured in three parts. Part 1 discusses what human rights obligations bind the Security Council in its activities. Part 2 briefly presents the UN Security Council's targeted sanctions framework. Part 3 examines how courts approach the issues of international responsibility with regard to the implementation of the UN sanctions and, subsequently, analyses what impact the case law of national and regional courts have had on the UN sanctions regime. Finally, it is concluded that national and regional courts by establishing Member States' responsibility for the implementation of the UN targeted sanctions aim to remedy the lack of responsibility mechanisms at the UN level.

¹ *Ph.D. student at Vilnius University, Faculty of Law. Research interests: law of international organizations, international responsibility, European Union law.*

1. What Human Rights Obligations Bind the Security Council?

Traditionally, the system of international law, and particularly the system for the protection of human rights, has been designed with the State as the main subject of the legal relationship and as the only party responsible for the violations.² In 1949 in *Reparations* case the International Court of Justice has concluded that international organizations are distinct subjects of international law, who can hold their own legal obligations and make international claims.³ New players emerged in the international community. Consequently now there is a general agreement regarding the principle of international responsibility of international organizations.⁴ However, the enforcement of responsibility towards international organizations often faces obstacles due to the lack of judicial review and available legal remedies for individuals; moreover, international organizations normally are not parties to human rights treaties and therefore legally are not bound by human rights obligations.⁵ So are there any human rights related restrictions that must be followed by international organizations in their activities? This contribution focuses on the Security Council, which is one of the main organs of the UN.

When the Security Council acts under Chapter VII of the UN Charter⁶, it has a very wide discretion to determine situations that pose a threat to the international peace and security. And once it has determined such a threat, it has a wide selection of measures under Articles 41 and 42 in order to address this threat. However, the term “security” referred to in Article 1 paragraph 1 of the Charter should no longer be confined to the security of States, but must ultimately be destined to the protection of individuals. Therefore in the current system of international law, which is based on the rule of law, it is no longer acceptable to develop the system of collective security without guaranteeing human security therein.

Firstly, the Charter itself puts certain restraints on the Security Council. The measures under Article 41 must be chosen by the Security Council in a way as “to give effect to its decisions”. Therefore the means must correlate with the goals that are being pursued. It can be deduced that the Security Council must choose its measures in a proportionate way.⁷

Furthermore, the promotion of respect for human rights is one of the purposes of the UN.⁸ The Security Council has to act in accordance with the purposes and principles of the UN.⁹ As a result it can be concluded that the Security Council is principally bound to respect human rights in its activities. Its members have also committed to international law and to the Charter on numerous occasions.¹⁰

However, the scope of human rights mentioned as a purpose of the UN is very vague, and the purposes and principles of the Charter were designed to provide guidelines to the organs of the UN in a flexible manner. When the Charter was drafted, there existed no universal consensus about a certain catalogue of human rights. But in the following years, the UN and its Member States were highly active

² Uriarte, Joana Abrisketa. *The Responsibility of International Organizations and International and European Courts and Tribunals: Judicial Review of Security Council Resolutions*. In *Remedies and Responsibility for the Actions of International Organizations / Mesures de réparation et responsabilité à raison des actes des organisations internationales*. Edited by Dan Sarooshi. Brill, Nijhoff, 2014, p. 322.

³ International Court of Justice. *Advisory Opinion of 11 April 1949. Reparation for Injuries Suffered in the Service of the United Nations*, p. 178-179.

⁴ Draft articles on the responsibility of international organizations, with commentaries. *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, p. 2.

⁵ Reinisch, August. *Securing the Accountability of International Organizations*. *Global Governance* 7 (2001), p. 132-133.

⁶ The Charter of the United Nations signed on 26 June 1945, available online at <http://www.un.org/en/documents/charter/> [accessed on 9 March 2015] (hereinafter – Charter).

⁷ Birkhäuser, Noah. *Sanctions of the Security Council against Individuals – Some Human Rights Problems*. *European Society of International Law papers* (2005), available online at <http://www.esil-sedi.eu/sites/default/files/Birkhauser.PDF> [accessed on 9 March 2015], p. 10.

⁸ Article 1 para. 3 of the Charter.

⁹ Article 24 para. 2 of the Charter.

¹⁰ Meeting of the Security Council, 31 January 1992, *Provisional Verbatim Records S/PV.3046*, para. 143: “The members of the Council pledge their commitment to international law and to the United Nations Charter” as cited in Birkhäuser, p. 11.

in the drafting and implementing of human rights instruments, the most important of them being the Universal Declaration of Human Rights and the two Human Rights Covenants: Covenant of civil and political rights and Covenant of economic, social and cultural rights¹¹. Through this development and accompanying state practice, human rights standards have evolved and now embody the vision of human rights found in Articles 1 paragraph 3 and 55 of the UN Charter.¹² Most importantly, certain fundamental human rights may attain the status of peremptory norms of international law or *jus cogens* and are non-derogable.¹³

On the other hand, there is no judicial review with regard to the actions of the Security Council. And theoretically even if the Security Council violates certain human rights, Member States legally still have to comply with its decisions. It is necessary to recall Article 103 of the Charter, which states that “in the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. But how far this obligation goes? Are there any ways to influence the activities of the Security Council? These questions will be analysed in the context of the UN targeted sanctions system.

2. The Security Council's Targeted Sanctions System

As the organ primarily responsible for the maintenance of international peace and security, the Security Council can take the measures indicated in Chapter VI and Chapter VII of the UN Charter when international peace and security is under threat.¹⁴ Such action can take many forms including the use of non-military measures that comprise the imposition of economic or other sanctions under Article 41 of the UN Charter. Sanctions targeted at key individuals emerged as an important instrument in the Security Council's very limited toolbox. Sanctions imposed by the Security Council have served as an essential instrument to influence and alter the behaviour of national leaders in order to maintain international peace and security.

Since the first mandatory non military sanctions regime was established in December 1966 against the white minority government of Southern Rhodesia, the targets of these coercive means have traditionally been states or their representatives. Since the end of the 1990s, the idea of a war on terror and the failure of the general economic embargos have led to the use of a different sanctioning technique based on targeting specific individuals and private organizations suspected of being involved in terrorist activities. The blacklisting of individuals and private entities and the freezing of their financial assets have become the specific measures taken in these instances. The legal framework established pursuant to Resolution 1267 (1999)¹⁵ and subsequent decisions by the Security Council represents a move to pierce the veil of statehood¹⁶. Under this new regime, individuals not necessarily associated with states or state actors are subject to sanctions. This shift raised major legal issues, because the system lacked basic guarantees of fair trial and effective remedy.¹⁷ The 1267 sanctions regime, in its original form, imposed very far-reaching restrictions on individuals and legal entities, and allowed for no

¹¹ Shaw, Malcom. International Law. 6th edition. Cambridge University Press, 2008, p. 278.

¹² Birkhäuser, p. 11.

¹³ See European Commission for Democracy Through Law (Venice Commission). Report “Are there differentiations among human rights? Jus cogens, core human rights, obligations erga omnes and non-derogability”, CDL-UD (2005) 020.

¹⁴ Article 39 of the Charter.

¹⁵ The UN Security Council Resolution 1267 (1999), adopted by the Security Council at its 4051st meeting on 15 October 1999 available online at [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267\(1999\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267(1999)) [accessed on 9 March 2015].

¹⁶ By the Security Council Resolution 1267 (1999) the Security Council imposed targeted sanctions on individuals and legal entities associated with bin Laden, Al-Qaida, and the Taliban. After the fall of the Taliban in Afghanistan in 2001, the sanctions remained in place, evolving into a general anti-terrorist sanctions regime, complemented by the regime imposed under the Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001. Available online at

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> [accessed on 9 March 2015].

¹⁷ Reich, Johannes. Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999). 33 Yale Journal of International Law 505 (2008), p. 3.

humanitarian exemptions. Furthermore, listed persons had no way of challenging the restrictive measures imposed against them, except through requesting diplomatic protection and having representations made on their behalf by their State of nationality or residence before the Security Council. Generally Resolutions of the Security Council have been largely excluded from judicial review, as neither the International Court of Justice nor any other court, international or domestic, has any express power to review them. As professor Tomuschat noted: “in the long run, such a denial of legal remedies is unacceptable. To be sure, no one wishes to protect Al-Qaeda or the Taliban. But the freezing of assets is directed against persons alleged to have close ties to these two organisations. Everyone must be free to show that he or she has been unjustifiably placed under suspicion and that therefore the freezing of his or her assets has no valid foundation”¹⁸.

The lack of judicial review at the UN level led the targeted individuals to turn to national and regional courts. And these courts have reviewed the implementation of targeted sanctions by Member States with regard to their conformity with European and national constitutional human rights standards.

3. The Impact of The Indirect Judicial Review of the UN Sanctions Regime by Regional and National Courts

In the landmark decision in the first *Kadi* case¹⁹ the Court of Justice of the European Union (hereinafter – ECJ) annulled the EU Council Regulation, which implemented relevant Security Council’s resolutions, on the ground that “the Community courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to resolutions adopted by the Security Council.”²⁰ Firstly and most importantly, the ECJ affirmed the jurisdiction of the EU courts to examine the implementation of the Security Council resolutions and ensure their compliance with human rights law.

Moreover, the ECJ held that rights to due process had been violated: “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected”²¹. It also condemned the failure of the Regulation incorporating the Security Council’s sanctions regime to include any procedure for “communicating the evidence justifying the inclusion of the names of the persons concerned in the list”²². The violation of the right to defence also gave rise to a violation of the right to a legal remedy, since the appellants were prevented from defending their rights before the Community courts. The ECJ considered that the EU Council was competent to adopt the freezing measures, and noted that there could be grounds where the restriction of the right to property could be justified, but ruled that: “the regulation in question was adopted without furnishing any guarantee enabling Mr Kadi to put his case to the competent authorities. Such a guarantee was, however, necessary in order to ensure respect for his right to property”²³.

The *Kadi* case was but one of a series of human rights challenges before European and national courts which addressed the UN sanctions regime. Similar decisions followed in national courts.²⁴

In response, the Security Council adopted, at the end of 2009, Resolution 1904/25. This resolution aimed to address the “challenges, both legal and otherwise, to the measures implemented by Member

¹⁸ Tomuschat, Christian. *Human Rights: Between Idealism and Realism* (2003) (Oxford: OUP), p. 90.

¹⁹ Court of Justice of the European Union. Judgment of 3 September 2008. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I)*. Joined cases C-402/05 P and C-415/05 P.

²⁰ *Ibid.*, Kadi I, para. 287.

²¹ *Ibid.*, Kadi I, para. 334.

²² *Ibid.*, Kadi I, para. 345.

²³ *Ibid.*, Kadi I, para. 369.

²⁴ For example, *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* (Federal Court of Canada, 2009 FC 580, available online at <http://v1.theglobeandmail.com/v5/content/features/PDFs/sudan.pdf> [accessed on 9 March 2015]).

States” under the 1267 sanctions regime, as well as to make procedures for listing and delisting by the competent Sanctions Committee “fair and clear”²⁶. Resolution 1904 established the Office of the Ombudsperson, which was enabled to receive de-listing requests by individuals subject to the 1267 regime and to assist the 1267 Committee through information gathering, engaging in dialogue with the interested parties, and to present a comprehensive report to the Committee, which will be taking the decision on the de-listing request. The Security Council noted that “the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government”²⁷.

However, the establishment of the Office of the Ombudsperson did not satisfy domestic and regional courts, which kept pushing for judicial guarantees in the imposition of targeted sanctions on persons identified by the Security Council as being “associated with” the Taliban or Al-Qaida²⁸. In the second *Kadi* case²⁹ the ECJ affirmed that it would continue to review EU listings implementing Security Council resolutions in the face of lack of equivalent control at the UN level. The ECJ insisted on a rather strict standard of review of such listings and undertook a substantive review of the reasons for listing offered by the EU (which were in fact merely the narrative summary of reasons for listing that the Security Council released)³⁰.

It remains to be seen how much this model of decentralized enforcement by national and regional courts will be able to achieve. As pointed out by professor de Búrca, the legal, jurisprudential, and, of course, human dilemmas which these examples reveal are instances of a more general phenomenon, namely the increasing complexity and density of the international political and legal environment, and the growing multiplicity of governance regimes with the capacity to affect human welfare in significant ways.³¹ But it is a fact that the Security Council has already taken measures in the past to improve its sanctioning system in order to avoid challenges in domestic and other courts against the individual Member States.

Conclusion

Until stronger protections are provided at the UN level, it is likely that regional or (and) national procedural mechanisms will continue to operate, regardless of whether such procedures lead to results in tension with the Security Council’s mandate. In this way, regional and national courts indirectly address the discrepancies in the protection of human rights at the UN level and present an ultimatum to the Security Council: either the sanctioning procedures are amended in order to ensure their compliance with fundamental rights (by, for example, providing means of effective judicial protection and sufficient information to enable targeted individuals to exercise their rights of defence) or the implementation of the targeted sanctions by Member States will continue to be declared unlawful and the responsibility will be imposed on Member States.

²⁵ The UN Security Council Resolution 1904 (2009), adopted by the Security Council at its 6247th meeting, on 17 December 2009. Available online at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904%282009%29 [accessed on 9 March 2015].

²⁶ *Ibidem*, Resolution 1904 (2009), para. 34

²⁷ *Ibid.*, Resolution 1904 (2009), para. 20.

²⁸ *Her Majesty’s Treasury v Mohammed Jabar Ahmed and ors (FC); Her Majesty’s Treasury v Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v Her Majesty’s Treasury* [2010] UK Supreme Court, available online at <http://www.refworld.org/pdfid/4b62d9282.pdf> [accessed on 9 March 2015]; see also European Court of Human Rights’ judgement of 12 September 2013 in the case *Nada v. Switzerland* (application No. 10593/08).

²⁹ Court of Justice of the European Union. Judgement of 18 July 2013, *European Commission and Others v Yassin Abdullah Kadi (Kadi-II)*. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P. See also European Court of Human Rights’ judgement of 12 September 2013 in the case *Nada v. Switzerland* (application No. 10593/08).

³⁰ *Ibid.*, *Kadi II*, paras. 118, 159, 163.

³¹ de Búrca, Gráinne. *The European Court of Justice and the International Legal Order after Kadi*. Jean Monnet Working Paper 01/09, available online at <http://www.jeanmonnetprogram.org/papers/09/090101.pdf> [accessed on 9 March 2015], p. 4-5.

Bibliography

Legislation:

1. The Charter of the United Nations signed on 26 June 1945. Available online at <http://www.un.org/en/documents/charter/> [accessed on 9 March 2015].
2. Security Council Resolution 1267 (1999), adopted by the Security Council at its 4051st meeting on 15 October 1999. Available online at [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267\(1999\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267(1999)) [accessed on 9 March 2015].
3. Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001. Available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> [accessed on 9 March 2015].
4. Security Council Resolution 1904 (2009), adopted by the Security Council at its 6247th meeting, on 17 December 2009. Available online at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904%282009%29 [accessed on 9 March 2015].

Case law:

International Court of Justice

5. Advisory Opinion of 11 April 1949. *Reparation for Injuries Suffered in the Service of the United Nations*. I. C. J. Reports 1949, p. 174.

European Court of Human Rights

6. Judgement of 12 September 2013 in the case *Nada v. Switzerland* (application No. 10593/08).

Court of Justice of the European Union

7. Judgment of 3 September 2008. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I)*. Joined cases C-402/05 P and C-415/05 P.
8. Judgement of 18 July 2013. *European Commission and Others v Yassin Abdullah Kadi (Kadi II)*. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P.

National courts

9. *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* (Federal Court of Canada, 2009 FC 580, available online at <http://v1.theglobeandmail.com/v5/content/features/PDFs/sudan.pdf> [accessed on 9 March 2015].
10. *Her Majesty's Treasury v Mohammed Jabar Ahmed and ors (FC); Her Majesty's Treasury v Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v Her Majesty's Treasury* [2010] UK Supreme Court, available online at <http://www.refworld.org/pdfid/4b62d9282.pdf> [accessed on 9 March 2015].

Books and articles:

11. de Búrca, Gráinne. The European Court of Justice and the International Legal Order after *Kadi*. Jean Monnet Working Paper 01/09, available online at <http://www.jeanmonnetprogram.org/papers/09/090101.pdf> [accessed on 9 March 2015].

12. Reich, Johannes. Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999). 33 *Yale Journal of International Law* 505 (2008).
13. Reinisch, August. Securing the Accountability of International Organizations. *Global Governance* 7 (2001).
14. Shaw, Malcom. *International Law*. 6th edition. Cambridge University Press, 2008.
15. Tomuschat, Christian. *Human Rights: Between Idealism and Realism* (2003) (Oxford: OUP).
16. Uriarte, Joana Abrisketa. The Responsibility of International Organizations and International and European Courts and Tribunals: Judicial Review of Security Council Resolutions. In *Remedies and Responsibility for the Actions of International Organizations / Mesures de réparation et responsabilité à raison des actes des organisations internationales*. Edited by Dan Sarooshi. Brill, Nijhoff, 2014.

Other:

17. European Commission for Democracy Through Law (Venice Commission). Report “Are there differentiations among human rights? *Jus cogens*, core human rights, obligations *erga omnes* and non-derogability”, CDL-UD (2005) 020.
18. Draft articles on the responsibility of international organizations, with commentaries. *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, P. 2.

MANDATED DISCLOSURES IN THE INFORMATION AGE AND THE INFORMATION OVERLOAD PROBLEM

Ricardo Pazos¹

Abstract

In recent years the world has greatly progressed and the society we are living in is more developed than ever before, but it is also more complex, and both characteristics are influenced to a more or less high degree by the amount of information available. At the same time, in the second half of the XX century we started a trend that continues to this day in which the role of the State has grown both in public and private matters. It is considered governments have big roles to play in the lives of their citizens, and one of these roles is protecting us from other people and even from ourselves, guaranteeing a certain degree of safety and security. One way to ensure them is mandated disclosures of information. That is, even if we live in the information age, governments have implemented many rules concerning data individuals must be told in certain situations in order for them to be protected. Clear examples are the informed consent to be signed before surgery procedures, rules on food and drug labelling and mandated disclosures on financial services or banking products.

Human beings have limited capacity to get information, to process it, to retain it, to retrieve it, and to correctly apply it and put into practice the right actions. This paper will analyze some of the mandated information disclosures and the problems that arise when the information received by the individual is too much to be processed. When this is the case, rules on mandated information may result ineffective, if the information overload eliminates de potential benefits of information disclosure, inefficient, if the costs of regulation overpower the benefits, or even harmful, when mandated information makes useful information go unnoticed or misleads the person to be protected.

Keywords: information age, mandate disclosures, information overload problem, law and economics

Introduction

It is possible to discuss whether the increase of information available is the cause of the increasingly complex world we live in or the consequence of it, but in any case there is a relation between them both. More complexity brings new problems, new challenges, new experiences, new domains to act on, etc. What it is new is by definition unknown, and with the unknown comes uncertainty. People feel insecure, unsafe. In addition, one must take into account that the role of governments both in the public and the private spheres of individuals has grown in the XX century and that this trend continues to this day. If governments are playing a high role in the lives of their citizens and we are living in the information age, it is perfectly comprehensible governments will play an active role on matters related to information.

Even if we are surrounded by information, legislators are concerned about data they think people must be told in order to make informed decisions in some contexts. Part II presents some instances where legislators consider people are not safe enough, so they impose information duties which I will

¹ *Non-practicing lawyer of the Bar Association of Santiago de Compostela, Spain. Currently PhD candidate at the University of Santiago de Compostela. The topic of his dissertation is the control of the content of standard contract terms. His research interests lie in the fields of contract law, tort law, intellectual property, data protection and law and economics. He is a member of SECOLA (Society of European Contract Law) and GREERCA (Groupe de Recherche Européen sur la Responsabilité Civile et l'Assurance).*

refer to as 'mandated disclosures', to follow the term used by Ben-Shahar and Schneider in two publications which are the baseline for this article². Part III is devoted to the information overload problem, that is, when individuals cannot manage all the information they access to. Finally, part IV explores the negative effects of mandated disclosures. When there is a lot of data available and even more are added, the new information may backfire and be negative for the people it is thought to help.

1. A Few Mandated Disclosures of Information in European Union Law

Government action is highly influenced by the type of society we live in. Legislators are more and more concerned with communication, new technologies, social networks and data processing, and this insight could only lead to regulation dealing with information. To perform the task of protecting people, mandated disclosures are tempting tools because they are thought to be cheap, easy to implement, effective, they do not block choices, they do not create excessive distortions on markets, etc. While some mechanisms that aim to ensure protection of people may look too 'paternalistic', such as the obligation to assess the creditworthiness of the consumer imposed to creditors in article 8 of the Consumer Credit Directive³, mandated disclosures seem to be more subtle and not so intrusive⁴.

The Consumer Credit Directive, in which several references to 'consumer protection' can be found, contains mandated disclosure provisions. Article 5.1 ('Pre-contractual information') covers the information creditors must transmit to the consumer before the latter is bound by an agreement. The aim is to make it possible for the consumer to compare offers and make an informed decision. The information, to be provided by way of the Standard European Consumer Credit Information form, must specify the elements indicated in points a) to s). Mandatory pre-contractual information includes the total amount of credit and the conditions governing the drawdown, the annual percentage rate of charge and the total amount payable by the consumer, a warning regarding the consequences of missing payments, the right of early repayment, etc. Furthermore, article 6 sets out 'pre-contractual information requirements for certain credit agreements in the form of an overdraft facility and for certain specific credit agreements', the information being expressed in points a) to l)⁵. Information duties in the Consumer Credit Directive do not end here. For instance, article 10.2 lays down through points a) to v) information to be included in the credit contract. In points a) to i) of article 10.5 there are data to be supplied in credit agreements in the form of overdraft facilities. Article 11 deals with the information

² O. Ben-Shahar, C. E. Schneider, 'The Failure of Mandated Disclosure' [2011] 159 U. Pa. L. Rev. 647-749; O. Ben-Shahar, C. E. Schneider, 'More Than You Wanted to Know: The Failure of Mandated Disclosure' (Princeton: Princeton University Press 2014).

³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66). On the goals pursued with this obligation, see the European Court of Justice judgment of 18 December 2014 (CA Consumer Finance SA / Ingrid Bakkaus, Charline Bonato, née Savary, Florian Bonato, C-449/13), paragraphs 43 and 44, as well as point 56 of the opinion of the Advocate General in this case, delivered on 11 September 2014. Regarding the creditworthiness assessment, see Y. M. ATAMER, 'Investor Protection and Investment Firms' Duty of Care and Loyalty to Clients', in S. GRUNDMANN, Y. M. ATAMER (eds.), 'Financial Services, Financial Crisis and General European Contract Law' (Alphen Aan Den Rijn: Kluwer Law International 2011) 196-200; as well as, analysing also the Spanish provisions on the subject, M. ORDÁS ALONSO, 'Los contratos de crédito al consumo en la Ley 16/2011, de 24 de junio' (Cizur Menor, Navarra: Thomson Reuters Aranzadi 2013) 137-162.

⁴ Y. M. Atamer, 'Investor Protection and Investment Firms' Duty of Care and Loyalty to Clients', in S. Grundmann, Y. M. Atamer (eds.), 'Financial Services, Financial Crisis and General European Contract Law' (Alphen Aan Den Rijn: Kluwer Law International 2011) 188; O. Ben-Shahar, C. E. Schneider, 'The Failure of Mandated Disclosure' [2011] 159 U. Pa. L. Rev. 681-684; O. Ben-Shahar, C. E. Schneider, 'More Than You Wanted to Know: The Failure of Mandated Disclosure' (Princeton: Princeton University Press 2014) 5, 6, 139, 145, 146; F. Marotta-Wurgler, 'Even More Than You Wanted to Know About the Failures of Disclosure' [2014] (November 21, 2014). Jerusalem Review of Legal Studies first published online November 7, 2014; NYU Law and Economics Research Paper No. 14-38, at 1.

⁵ On the pre-contractual information to be supplied before the consumer is bound by the credit agreement, in accordance with Spanish law derived from the Consumer Credit Directive, see M. Ordás Alonso, 'Los contratos de crédito al consumo en la Ley 16/2011, de 24 de junio' (Cizur Menor, Navarra: Thomson Reuters Aranzadi 2013) 117-132.

concerning the borrowing rate, and article 12 addresses obligations in connection with credits in the form of an overdraft facility.

Going on with banking contracts and financial instruments, it is necessary to highlight Directives MiFID 1⁶ and MiFID 2⁷, whose relationship with safety concerns is out of question, as there are some references regarding the protection of investors and consumers, as well as to the safeguarding of client assets and funds. For example, article 19 of Directive MiFID 1 and article 24 of Directive MiFID 2 are included in sections headed 'Provisions to ensure investor protection'. These Directives also contain mandated disclosures. Article 19.3 of Directive MiFID 1 obliges Member States to ensure that investment firms provide appropriate information about the investment firm and its services, financial instruments and proposed investment strategies, execution venues, and costs and associated charges. Also regarding this subject, article 24.4 of Directive MiFID 2 is more detailed. First, article 24.4 presents the information to be provided when the service supplied by the investment firm is 'investment advice'. Second, the article deals with information on financial instruments and proposed investment strategies. And last, it expresses several elements to be included within the information about 'all costs and associated charges'⁸.

Another European Union legal text to be mentioned is Regulation (EU) No 1169/2011 on the provision of food information to consumers⁹. Guaranteeing safety is the main goal of this Regulation, as it can be verified by reading articles 1.1, 3.1 or 4. Within chapter IV of the Regulation ('Mandatory food information'), and just to cite a few provisions, article 9 contains a list of data to be expressed, list that goes from point (a) to point (l). Such data include, among others, the name of the food, the list of ingredients, the quantity of certain ingredients, the date of minimum durability or the 'use by' date, or any special storage conditions. In particular, point c) refers to Annex II, which is about substances or products causing allergies or intolerances, and where fourteen categories are found. Article 10 indicates additional mandatory information to be provided for specific categories of foods, referring to Annex III of the Regulation, where there are six categories, twelve subcategories, and up to twenty additional particulars. Article 21 is a specially important rule, as it addresses the labelling of certain substances or products causing allergies or intolerances. Other provisions to highlight are the one dealing with the list of ingredients that products have to display 'in descending order of weight, as recorded at the time of their use in the manufacture of the food' (article 18), the one mandating the replacement of the date of minimum durability by the 'use by' date (article 24), and the ones regarding the special storage conditions or conditions of use required (article 25), the instructions for use (article 27) and the content of the mandatory nutrition declaration (article 30).

2. The Information Overload Problem

⁶ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

⁷ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349). In accordance with its article 96, Directive MiFID 2 entered into force on 2 July 2014. Directive MiFID 1 is repealed by the new Directive with effect 3 January 2017, as stated in article 94 of Directive MiFID 2.

⁸ On the two MiFID Directives as a tool of consumer protection, through mandated disclosures and other more intrusive means, see O. O. Cherednychenko, 'Financial Consumer Protection in the EU: Towards a Self-Sufficient European Contract Law for Consumer Financial Services' [2014] 10 ERCL 480, 484-486. Comparing the obligations of information in Directives MiFID 1 and MiFID 2, see A. Agüero Ortiz, 'Tabla comparativa de obligaciones de información MIFID - MIFID II' [2014] Blog CESCO, October 27. Explaining the obligations of information in Spanish law derived from Directive MiFID 1, see Á. Carrasco Perera, K. Lyczkowska, 'Guía de obligaciones de información al inversor en el marco de la directiva MIFID' [2013] Blog CESCO, July 23.

⁹ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ L 304, 22.11.2011, p. 18).

The information overload problem is both a cause why mandated disclosures often fail, and a consequence of mandated disclosures themselves. The first thing to do is to emphasize that this part is not limited to the 'overload effect' as described by Ben-Shahar and Schneider, but encompasses also the so-called 'accumulation problem'. The 'overload effect', as the authors explained, is a matter of the volume and complexity of mandated disclosures, making the person who receives the information unable to manage it. The 'accumulation problem' is a matter of number, that is, of the many disclosures that exist and affect individuals¹⁰. If we are living in the information age, not only mandated disclosures are relevant. Any piece of information is. People listen to the radio, read newspapers, consult websites, watch TV, talk with others, and they are the target of advertisers and marketing experts.

The cognitive skills of human beings are limited and nowadays there is much more information that we can manage. If we have access to a lot of information, the first problem is to get it. We do not have an actual contact with all the information available. The second problem deals with processing. It is impossible to process every piece of information we have contact with, and if we do, it is impossible to do it perfectly well. If information is accessible, there is actual contact with it and it is correctly processed, the next problem is whether it will be retained or not. Memory is not infinite, so there is no guarantee the information is going to be kept by the individual. After all the previous steps, one has to make a decision, and it is anything but sure that all the elements of the situation will lead to retrieve the right piece of information. And, finally, if one has arrived to this point, the last problem to overcome is to properly apply the retrieved information. The more information surrounds us, the more probable there will be errors in any of the processes that have just been mentioned¹¹.

Information and choice are related, and this makes that most of the considerations expressed by Schwartz and Ward on the increasing number of choices available to people can be extended to information¹². To have access to more information allows the individual a higher degree of self-determination and autonomy, and the 'explosion' of choice the authors comment (food, consumer electronics, telephone services...) is perfectly applied to information as well. Every individual decides to get information through radio broadcasts, newspapers, TV channels, websites, magazines, etc. The person will also select the goals to achieve through information. All these choices depend on the personal preferences, concerns, beliefs, ideology, and the like. However, the authors observed that people often try to 'satisfy' and not to 'optimize'. That is, instead of reaching the highest degree of utility, people stop looking for more once they reach a threshold which is good enough. If this is the case, more choices are not necessarily better, and in fact decisions made can be worse and people may suffer because of the added choices, considering factors such as regret or second-guessing the choices made or to be made in the future, the opportunity costs of letting go alternatives, and so on and so forth¹³. All of this is valid for information, too.

¹⁰ O. Ben-Shahar, C. E. Schneider, 'The Failure of Mandated Disclosure' [2011] 159 U. Pa. L. Rev. 686-690; O. Ben-Shahar, C. E. Schneider, 'More Than You Wanted to Know: The Failure of Mandated Disclosure' (Princeton: Princeton University Press 2014) 8, 94, 95.

¹¹ Y. M. Atamer, 'Investor Protection and Investment Firms' Duty of Care and Loyalty to Clients', in S. GRUNDMANN, Y. M. ATAMER (eds.), 'Financial Services, Financial Crisis and General European Contract Law' (Alphen Aan Den Rijn: Kluwer Law International 2011) 188-189; O. Ben-Shahar, C. E. Schneider, 'The Failure of Mandated Disclosure' [2011] 159 U. Pa. L. Rev. 709-729; F. Heylighen, 'Complexity and Information Overload in Society: why increasing efficiency leads to decreasing control' [2002] Draft paper, version April 12, 2002, at 11-15; T. PAREDES, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation' [2003] 81 Wash. U. L. Q. 431-443.

¹² B. Schwartz, A. Ward, 'Doing Better but Feeling Worse: The Paradox of Choice', in P. A. Linley, S. Joseph (eds.) 'Positive Psychology in Practice' (Hoboken: John Wiley & Sons, Inc. 2004) 86-89.

¹³ B. Schwartz, A. Ward, 'Doing Better but Feeling Worse: The Paradox of Choice', in P. A. Linley, S. Joseph (eds.) 'Positive Psychology in Practice' (Hoboken: John Wiley & Sons, Inc. 2004) 91-99. See also T. Paredes, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation' [2003] 81 Wash. U. L. Q. 435-437; O. Perez, 'Complexity, Information Overload and Online Deliberation' [2009] 5 ISJLP 56-57. The information overload does not only cause stress or some kind of damage related to the well-being of individuals, but it also reduces economic productivity, as it

Marotta-Wurgler analyzed whether or not *voluntary* disclosures improved consumers welfare on clickwraps, browswraps and 'pay now, terms later' contracts. The first one is identified as more prone to let consumers be informed since just a click is demanded to accept contractual terms, while browswraps require a click on an hyperlink which can be more or less difficult to find, being the 'pay now, terms later' contracts the most obscure because the information on contract terms can be read only after the consumer has purchased the good in question. The author noted an increase in disclosure of information that did not translated into better contractual terms, concluding that firms feel safe because 'consumers [do not] read or [do not] understand what they read if they try'¹⁴.

Marketing and advertising must be considered, as well, even if they are not about informing, but rather about persuading. In fact, this is exactly why they must be taken into account. By way of marketing, firms may try to subtly hide elements they prefer consumers not to be aware of, and mandated disclosures may be oriented precisely to inform about those elements¹⁵. Furthermore, people actively seek information through mass media, databases or search engines, and they also receive it without realising, just by the mere fact of interacting with other individuals. No matter how information comes, it all gets accumulated and affects every decision individuals have to make¹⁶.

3. Negative Effects of Mandated Disclosures of Information

The information overload problem is just one of the many problems mandated disclosures entail, but it is a big one. The excessive number, length and complexity of disclosures are quite obvious. The European Union legal texts are concerned about clarity, comprehensibility, availability, accessibility, legibility or visibility of the information, but these positive concerns cannot be put into practice when there is simply too much to look at, too complex to fully understand it¹⁷. People must make choices but, logically, making efforts is avoided as much as possible. Hence, the more efforts required to make a decision, the less informed the decision will be. Mandated disclosures are added to voluntary disclosures, marketing, information actively sought and data unconsciously received, and all the 'noise' contribute to make it harder to deal correctly with information. So, while all the aforementioned concerns are good, the volume and complexity of mandated disclosures is of major importance. Too much, too complex information is simply unmanageable and erases the benefits derived from clarity, transparency, order and the others.

is explained in F. Heylighen, 'Complexity and Information Overload in Society: why increasing efficiency leads to decreasing control' [2002] Draft paper, version April 12, 2002, at 15-17.

¹⁴ F. Marotta-Wurgler, 'Even More Than You Wanted to Know About the Failures of Disclosure' [2014] (November 21, 2014). Jerusalem Review of Legal Studies first published online November 7, 2014; NYU Law and Economics Research Paper No. 14-38, at 3-7. On the failure of voluntary disclosure by private firms, see also M. J. Radin, 'Less Than I Wanted To Know: Why Do Ben-Shahar and Schneider Attack Only 'Mandated' Disclosure?' [2014] (May 31, 2014). Jerusalem Review of Legal Studies first published online November 7, 2014; U of Michigan Law & Econ Research Paper No. 14-012, at 11-14.

¹⁵ J. J. Rachlinski, 'Cognitive Errors, Individual Differences, and Paternalism' [2006] 73 U. Chi. L. Rev. 226-227: 'marketing represents an effort to dupe consumers into ignoring undesirable aspects of products'.

¹⁶ Excessive information may be negative even for democracy itself. See O. Perez, 'Complexity, Information Overload and Online Deliberation' [2009] 5 ISJLP 54-64.

¹⁷ For example, let us take a quick look at article 2 of the Regulation on food information to consumers, about applicable definitions for the purposes of the Regulation. In article 2.1 there are seven points with several concepts each, and to know their definitions seven other European Union legal texts must be consulted. In addition, article 2.2 provides more definitions in points a) to u), one needs to check another regulation to know how the 'country of origin of a food' is to be determined, and Annex I contains up to thirteen 'specific definitions' which are not always easy to understand. For instance, Annex I states that 'fibre' means 'carbohydrate polymers with three or more monomeric units, which are neither digested nor absorbed in the human small intestine and belong to the following categories: - edible carbohydrate polymers naturally occurring in the food as consumed, - edible carbohydrate polymers which have been obtained from food raw material by physical, enzymatic or chemical means and which have a beneficial physiological effect demonstrated by generally accepted scientific evidence, - edible synthetic carbohydrate polymers which have a beneficial physiological effect demonstrated by generally accepted scientific evidence'.

Let us recall the European Court of Justice judgment in *Air Berlin*¹⁸. This case was about the Regulation on the operation of air services¹⁹, in particular, its article 23 on information and non-discrimination. For air fares and air rates available to the general public, article 23 of the Regulation obliges to indicate at all times the final price to be paid. It will include 'the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication'. Conversely, it must be specified the air fare or air rate, taxes, and charges, surcharges or fees, such as airport charges and those related to security or fuel. The communication of optional price supplements must take place 'at the start of any booking process'. The European Court of Justice declared in *Air Berlin* that, in the context of a computerised booking system analogous to the one of the main proceedings, 'the final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time', and 'not only for the air service specifically selected by the customer, but also for each air service in respect of which the fare is shown'²⁰.

If customers try to book a flight online, want to check and compare schedules and connections, and have all prices, rates, services and extras indicated from the beginning at the same time, they may lose time identifying and discerning all elements, they may get confused with all the content displayed, and useful information might go unnoticed. The same happens in credit agreements, financial instruments, food labelling, and any other domain. Too much information makes it harder to locate the relevant one and easier to mix data and get them wrong²¹.

Radin notes how information disclosure is very useful to avoid allergies and sensitivities to ingredients, as well as how failing to read the information about calories does not cause a serious damage while in the long run fosters social welfare²². This is true, but several things are to be considered. For example, if one thinks about the number of people who are allergic to milk, lactose, peanuts, tree nuts, eggs, and others, a plausible conclusion is that *mandated* disclosures are not necessary at all. The number is high enough to be an incentive for firms to inform about allergies on their own and find the optimum way for that (for example, displaying information in the corporate website instead of overloading a label). In addition, if legislators are to impose a disclosure, it is their responsibility to assure people spend the shortest time finding the relevant data. And about calories and other data of this sort, the fact of facing too much information may discourage people to look for them, since the benefits they can provide in the long run are not easily perceived.

Conclusion

When Radin wonders why Ben-Shahar and Schneider attack only information disclosures that are 'mandated', she might have a point²³. Any piece of information, whether it is provided voluntarily or because of a mandate, contributes to the information overload problem. But indeed, the answer is not that difficult: because mandated disclosures are the only information we can control. We cannot stop the tide of mass media, new technologies, marketing, personal relations, the use of search engines or active information-seeking. We cannot make the world less complex. But we can modify, limit and

¹⁸ Judgment of 15 January 2015 (*Air Berlin plc & Co. Luftverkehrs KG / Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e. V.*, C-573/13).

¹⁹ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

²⁰ Judgment in *Air Berlin*, paragraphs 35 and 45.

²¹ However, see T. Paredes, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation' [2003] 81 Wash. U. L. Q. 442-443: 'information overload, notably, does not depend on irrelevant or less important information crowding out material information, although that sometimes happens. A decision maker may suffer from information overload even if all the information disclosed is material to the decision'.

²² M. J. Radin, 'Less Than I Wanted To Know: Why Do Ben-Shahar and Schneider Attack Only 'Mandated' Disclosure?' [2014] (May 31, 2014). *Jerusalem Review of Legal Studies* first published online November 7, 2014; U of Michigan Law & Econ Research Paper No. 14-012, at 4-7.

²³ *Ibid.* 13.

abandon mandated disclosures to reduce their volume. When talking about satisficers of utility, Schwartz and Ward proposed that knowing oneself may help to correct or reduce the problems derived from the overchoice effect. They gave some hints on how well-being might be improved, and these options are useful for legislators as well. For instance, the authors talked about letting opportunities pass by, trying to settle on a reasonable threshold, thinking less about opportunity costs, or regretting less²⁴. Maybe it is time for legislators to stop trying to control everything, be realistic, and select very carefully what are the truly relevant matters where mandated disclosure is really useful.

On reducing or erasing mandated disclosures and leaving more room to advice, opinion, consulting and the like, as BEN-SHAHAR and SCHNEIDER posed²⁵, it is true what MAROTTA-WURGLER noted: 'opinion data suffers from many of the problems identified (...) [opinions] are subject to biases and noise (...) Just like mandatory disclosure, opinion ratings are no panacea, and in some cases seem even less likely to be effective than disclosure'²⁶. But voluntary mechanisms have one big advantage. They make the individual in question responsible, so good information management is rewarded and thus fostered, and bad information management is costly and thus discouraged. In the same way, that will lead people to reward those who provide useful and clear information and exclude those who do not. Maybe the key lies in making every person assume a much higher degree of responsibility on information matters, just as every person enjoys a much higher degree of self-determination and choice thanks to the increase of the amount of information available. Of course, this is not the ultimate solution and has its own problems²⁷, but it seems to me that leaning towards this approach can correct some of the big mistakes mandated disclosures have not been able to avoid so far.

Bibliography

1. AGÜERO ORTIZ, 'Tabla comparativa de obligaciones de información MIFID - MIFID II' [2014] *Blog CESCO*, October 27. Available at <http://www.uclm.es/centro/cesco/pdf/trabajos/mifid.pdf>
2. Y. M. ATAMER, 'Investor Protection and Investment Firms' Duty of Care and Loyalty to Clients', in S. GRUNDMANN, Y. M. ATAMER (eds.), 'Financial Services, Financial Crisis and General European Contract Law' (Alphen Aan Den Rijn: Kluwer Law International 2011) 179-202
3. O. BEN-SHAHAR, C. E. SCHNEIDER, 'More Than You Wanted to Know: The Failure of Mandated Disclosure' (Princeton: Princeton University Press 2014)
4. O. BEN-SHAHAR, C. E. SCHNEIDER, 'The Failure of Mandated Disclosure' [2011] 159 U. Pa. L. Rev. 647-749
5. Á. CARRASCO PERERA, K. LYCZKOWSKA, 'Guía de obligaciones de información al inversor en el marco de la directiva MIFID' [2013] *Blog CESCO*, July 23. Available at <http://www.uclm.es/centro/cesco/pdf/trabajos/30/35.pdf>
6. O. O. CHEREDNYCHENKO, 'Financial Consumer Protection in the EU: Towards a Self-Sufficient European Contract Law for Consumer Financial Services' [2014] 10 ERCL 476-495

²⁴ B. Schwartz, A. Ward, 'Doing Better but Feeling Worse: The Paradox of Choice', in P. A. Linley, S. Joseph (eds.) 'Positive Psychology in Practice' (Hoboken: John Wiley & Sons, Inc. 2004) 99-102.

²⁵ O. Ben-Shahar, C. E. Schneider, 'The Failure of Mandated Disclosure' [2011] 159 U. Pa. L. Rev. 746-749; O. Ben-Shahar, C. E. Schneider, 'More Than You Wanted to Know: The Failure of Mandated Disclosure' (Princeton: Princeton University Press 2014) 185-188.

²⁶ F. Marotta-Wurgler, 'Even More Than You Wanted to Know About the Failures of Disclosure' [2014] (November 21, 2014). Jerusalem Review of Legal Studies first published online November 7, 2014; NYU Law and Economics Research Paper No. 14-38, at 8-12.

²⁷ O. Ben-Shahar, C. E. Schneider, 'More Than You Wanted to Know: The Failure of Mandated Disclosure' (Princeton: Princeton University Press 2014) 188-190.

7. F. HEYLIGHEN, 'Complexity and Information Overload in Society: why increasing efficiency leads to decreasing control' [2002] Draft paper, version April 12, 2002. Available at <http://pespmc1.vub.ac.be/papers/info-overload.pdf>
8. F. MAROTTA-WURGLER, 'Even *More Than You Wanted to Know* About the FAILURES of Disclosure' [2014] (November 21, 2014). Jerusalem Review of Legal Studies first published online November 7, 2014; NYU Law and Economics Research Paper No. 14-38. Available at SSRN: <http://ssrn.com/abstract=2529101>
9. M. ORDÁS ALONSO, 'Los contratos de crédito al consumo en la Ley 16/2011, de 24 de junio' (Cizur Menor, Navarra: Thomson Reuters Aranzadi 2013)
10. T. PAREDES, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation' [2003] 81 Wash. U. L. Q. 417-485. Available at: http://openscholarship.wustl.edu/law_lawreview/vol81/iss2/7
11. O. PEREZ, 'Complexity, Information Overload and Online Deliberation' [2009] 5 ISJLP 43-86. Available at http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Perez_Formatted_02_09.pdf
12. J. J. RACHLINSKI, 'Cognitive Errors, Individual Differences, and Paternalism' [2006] 73 U. Chi. L. Rev. 207-229
13. M. J. RADIN, 'Less Than I Wanted To Know: Why Do Ben-Shahar and Schneider Attack Only 'Mandated' Disclosure?' [2014] (May 31, 2014). Jerusalem Review of Legal Studies first published online November 7, 2014; U of Michigan Law & Econ Research Paper No. 14-012. Available at SSRN: <http://ssrn.com/abstract=2462818>
14. SCHWARTZ, A. WARD, 'Doing Better but Feeling Worse: The Paradox of Choice', in P. A. LINLEY, S. JOSEPH (eds.), 'Positive Psychology in Practice' (Hoboken: John Wiley & Sons, Inc. 2004) 86-104.

ACHIEVING BANKING STABILITY THROUGH LAW OF EUROPEAN UNION

Lenka Petrusková¹

Abstract

The purpose of this article is to introduce law regulation of European Union, which should protect and maintain banking stability and to assess this regulation.

At the beginning of the article it will be focused on the term “banking stability” and its importance for different groups of stakeholders (these four entities were chosen to demonstrate practical side of banking stability—a state, bank owners, banking clients and public).

Then article introduces European legislation, which should help to maintain banking stability.

At the end of the article is European legislation assessed from the point of above-mentioned stakeholders.

Keywords: banking law, European banking regulation, Banking Union, banking stability

Introduction

The financial crisis in 2007 showed the weakness of supervision, inadequate capital requirements, absence of the measures for crisis management of banks, risky business activities conducted by banks and other problems of banks. And the goal of policymakers was the only one - never again to admit such crisis. Without any doubt it could be said that financial crisis in 2007 was a huge impulse for legislative works. This legislative activity is very obvious in European Union. In 2009 was finished so called Larosière report made on the behalf of European Commission, in which the main causes of the financial crisis were mentioned and which made 31 recommendations how to solve these problems. Many of these recommendations are nowadays transformed into legislative acts. And these legislative acts and proposals of European Union which should help to maintain and foster banking stability are the subject of this article.

1. Main Body

Generally stability is defined in a way that a system can manage its key functions. The key functions of banks are: financial intermediation, emission of cashless money, carrying out payment services, and intermediation of financial investment on money and capital market.² Therefore banking system must fulfil these key functions in order to be assessed as stabile. Another definition says that banking stability is if the banking system ensures the optimal allocation of capital resources.

„Banking instability can be characterised either by a bank run or an insolvency and a credit crunch crisis.“³ But in the fact the opposite term banking instability isn't so much used, more the term bank crisis is used. Generally bank crisis arises when problems of an important bank or a few small banks,

¹ Master degree in Law at Faculty of law, Charles University, Prague, now student of a doctoral degree program “Financial sciences and financial law” at Faculty of Law, Charles University, Prague. Her research interests are in the field of banking law. She worked at the Ministry of Finance of the Czech Republic and now she is working in the office of Financial Arbitrator in the department of Payment Services and Foreign Exchange Activities.

² Z. Reverenda, M. Mandel, J. Kodera, P. Musílek, P. Dvořák, ‘Peněžní ekonomie a bankovníctví’ (Praha : MANAGMENT PRESS, 2012); p. 87

³ H. Ngalawa, F. Tchana Tchana and N., ‘Banking Instability and Deposit Insurance: The Role of Moral Hazard’ available at http://mpr.ub.uni-muenchen.de/31329/1/MPRA_paper_31329.pdf

grow into a crisis of a whole bank sector. Basically the primary problems are of two main categories: too risky business activities, or criminal activities of management. But because of a connection between banks the problems can very easily pour into another bank- it is so called domino effect.

Banking stability is a goal for a very different group of stakeholders. In this article these four entities were chosen to demonstrate practical side of banking stability- a state, bank owners, banking clients and public).

From the point of a state banking stability is important because a bank failure can be potentially very expensive. In some cases the state doesn't want a bank to fail (importance of the bank, absence of deposit guarantee scheme or other reasons), so in order to prevent this, the state interferes. There are different forms of state aid- two main forms are state guarantees for bank's liabilities and directly capital injection. The last bank crisis cost EU- member states about € 1481 bn⁴. Another important aspect is a connection between banks and a state, because banks lend to a state and are at the same time the greatest holders of state securities. So bank crisis can have direct fiscal effects on the state, because during the bank crisis banks aren't prepared to lend the state. Not mentioned the fact that good functioning banks can be one of the biggest taxpayers in the state (for example in 2013 the Czech Republic four of ten biggest taxpayers between companies were banks)⁵. At last it must be mentioned that states, in which bank crisis exists, loses its reputation by its citizen and even other states. Citizen can consider bank crisis as a failure of supervision, and as a failure of state itself.

Bank stability is also important for bank owners, who want to make profits and bank crisis could lead to the fact that they will lose their investments. But in fact we could find some examples in the history, when a state bailed out the bank and bank owners earned profit in spite of the fact that the bank nearly failed. The failure of one bank can be potentially dangerous for the other banks, because the banks are connected. But on the other hand the failure of another bank means the failure of a competitor for the other bank- in many cases the failure of one bank was solved by the take-over of the another bank. A failure of a small bank can also lead to the fact that big bank can use this as an advertisement.

Bank clients don't want to lose their money saved in a bank. Nowadays this is mostly solved by existence by deposit guarantee scheme. But normally not all deposits are covered, and in fact deposit guarantee schemes can absorb only the failure of a small bank. Not mentioned that in the case of bank' failure it can last some time until bank clients get their compensation from deposit guarantee funds.

Generally it is important that public should have the trust in functioning of the bank system. It is important that public use banks and give them their money.

European legislative which should maintain and foster banking stability is very complex set of different acts. It comes out from the recommendations in Larosière report.

It could be divided in two main groups- firstly preventive measures and secondly measures which intends to moderate effects of a failure of bank.

In category of preventive measures are following legislative acts: CRR (Capital Requirements Regulation)⁶, CRD IV (Capital Requirements Directive)⁷ and a proposed structural reform (Liikanem report).

CRR is about the minimum requirements quality and quantity of the bank capital.

⁴ D. J. Snower, 'The impact of the global financial crisis on Europe and Europe's Responses' available at http://www.bruegel.org/fileadmin/bruegel_files/Research_contributions/AEEF_contributions/Crisis_Developments_and_Long-Term_Global_Response/AEEF4PPDenisJ.Snower.pdf

⁵ D. Morávek 'Nejvíce na dani z příjmů zaplatila Česká spořitelna, Agrofert není ani v TOP 10'[2014] available at <http://www.podnikatel.cz/clanky/nejvice-na-dani-z-prijmu-zaplatila-ceska-sporitelna-agrofert-neni-ani-v-top-10/>

⁶ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

⁷ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

CRD IV regulates two main areas: firstly supervision and secondly banking licence. CRD IV specifies requirements which a company must accomplish to become a banking licence. There are requirements for initial capital, requirements for shareholders and another specifications regarding approving of the banking licence, refuse to give the licence, withdrawing of the banking licence.

Structural reform isn't approved yet, and it is in the stage of proposal of a regulation⁸. The aim of this reform is to separate certain potentially risky trading activities of banks from deposit taking business if the pursuit of such activities compromise financial stability.

The pillars to maintain banking stability in preventive measures are also nowadays- good capital requirements, strict requirements for banking licence and good supervision.

Secondly measures which intends to moderate effects of a failure of bank are DGS⁹ (Deposit guarantee schemes), BRRD (Bank Recovery and Resolution Directive)¹⁰ and Directive 2001/24/EC on the reorganisation and winding up of credit institutions¹¹.

DGS consists of two directives - Directive 2014/49/EU a Directive 94/19/EC, by Directive 2014/49/EU is still transposition period. According to DGS each member state should have deposit guarantee scheme, and a deposit guarantee fund into which banks pay contribution. In case of bank failure, bank's clients (clients whose deposits are covered) should be paid compensation up to the coverage limit by a deposit guarantee fund.

According to BRRD member states are obliged to establish resolution funds, into which banks give contributions and which will be used for financing of resolution (resolution is a process of solving bank's failure according to BRRD) . BRRD established so called resolution authorities (each member state has its own resolution authority), which are separated from supervisory authorities and which should intervene in case that a bank is failing or likely to fail. BRRD gives resolution authorities variety of powerful tools, which can be used to solve bank's failure.

Directive 2001/24/EC on the reorganisation and winding up of credit institutions is concerning with cross- border aspects as applicable law, information duties, withdrawal of a banking licence.

Because of complexity of banking matters and importance of banking, so called Banking Union has been established. Institutional framework of Banking Union is composed by Single Supervisory Mechanism (SSM)¹² and Single Resolution Mechanism (SRM)¹³. Actually Banking Union should firstly serve to improve supervision, in a way that the supervision under specific banks will be carried out by European Central Bank, not by member states authorities (SSM). So the supervision will be integrated. The second main task is to solve bank's problem on the European level (SRM). SRM is very similar to BRRD, but BRRD mechanisms are functioning on the member-state level and SRM should function on

⁸ Proposal of Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions

⁹ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes

¹⁰ 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 and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

¹¹ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions

¹² Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013

¹³ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010; Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund

European level. Members of the Banking Union are the states, whose currency is euro. The states whose currency isn't euro can choose if they join the Banking Union, or if they stand away.

Returning back to above mentioned groups of stakeholders, for a state itself- there are important legislative acts concerning supervision (CRD, SMM), because it is a state who is responsible for the good supervision of banks. Another very important act for a state is BRRD. BRRD is reacting on the fact, that state's intervention are expensive, BRRD tenses to transfer costs of solving bank's failure from a state to bank's shareholders and creditors (for example bail-in tool).

For the bank owners is important BRRD/SRM giving resolution authority power to bail- in their shares (basically bail-in shares means to cancel shares) and CRD IV which regulates banking licence. BRRD/SRM and DGS means also costs in a form of contributions into resolution funds and deposit guarantee funds. CRR regulates necessary capital requirements and therefore limits the high of exposures.

DGS aims to protect the clients of a failing bank, and to stop them to make a run on the bank. To stop clients to run on the bank is necessary, because in the history there were such cases, that quite sound banks were destroyed by the run only because of public panic. Negative side of DGS is potential moral hazard on the side of clients. Because if the deposits are under the guarantee, clients don't care in which bank they have their savings. Result of an above mentioned is that clients sometimes save their money in a bank with bad reputation but higher interest rate.

For public it is important the safety that someone supervises the banking sector in order that everything will be fine (CRD, SSM). For public is positive that not everyone can have a banking license and this is regulated (CRD IV). DGS is also very important for the public, because DGS is giving public a signal, that the banks are trustworthy.

Conclusion

Banking crisis exist as long as banking itself. First banking crisis were in the times, when there were only a few regulative laws. Nowadays it is a complex system of legislative acts which should help to maintain financial stability. But all these regulations have their limits, for example the resolution funds and deposit guarantee funds are in the high of only a small percentage of banking assets. Only the future can prove, if above mentioned regulation will be successful or if the law tries to regulate something, what is behind the borders, of what can be regulated by law. But still trying to regulate something as complex as banking stability is very ambitious.

Bibliography

Books and articles:

1. M. A. Segoviano, Ch. Goodhart, 'Banking Stability Measures' (International Monetary Fund, 2009), available at <https://www.imf.org/external/pubs/ft/wp/2009/wp0904.pdf>;
2. B. Gadanecz and K. Jayaram, 'Measures of financial stability – a review' (IFC Bulletin No 31) available at <http://www.bis.org/ifc/publ/ifcb31ab.pdf>;
3. N. Jahn, T.Kick, 'Determinants of Banking System Stability: A Macro-Prudential Analysis' available <http://www.bis.org/bcbs/events/bhbibe/jahn.pdf>;
4. 'Report on the stability of the German financial system' (Deutsche Bundesbank, 2003) available at https://www.bundesbank.de/Redaktion/EN/Downloads/Publications/Financial_Stability_Review/2003_financial_stability_review.pdf?__blob=publicationFile;
5. 'Shadow banking around the globe: how large, and how risky?' (International Monetary Fund 2014) available at <https://www.imf.org/external/pubs/ft/gfsr/2014/02/pdf/c2.pdf>;

6. 'Structural reform of the EU banking sector' (European Commission 2014) available at http://europa.eu/rapid/press-release_IP-14-85_en.htm?locale=en
7. http://ec.europa.eu/finance/bank/index_en.htm;
8. H. Ngalawa, F. Tchana Tchana and N., 'Banking Instability and Deposit Insurance: The Role of Moral Hazard' available at http://mpira.uni-muenchen.de/31329/1/MPRA_paper_31329.pdf;
9. G. Hoggarth, R. Reis, V.Saporta 'Costs of banking system instability: some empirical evidence'(Bank of England 2001) <http://www.bankofengland.co.uk/archive/Documents/historicpubs/workingpapers/2001/wp144.pdf>;
10. Z. Reverenda, M. Mandel, J. Kodera, P. Musílek, P. Dvořák, 'Peněžní ekonomie a bankovníctví' (Praha : MANAGMENT PRESS, 2012);
11. 'Structural reform of EU banks The European Commission's Liikanen proposals' (Freshfields Bruckhaus Deringer llp 2014) available at http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/00136_SE_FIG_FIG_Liikanen%20Briefing_FOR_SCREEN_AW.pdf;
12. D. J. Snower, 'The impact of the global financial crisis on Europe and Europe's Responses' available at http://www.bruegel.org/fileadmin/bruegel_files/Research_contributions/AEEF_contributions/Crisis_Developments_and_Long-Term_Global_Response/AEEF4PPDenisJ.Snower.pdf;
13. 'The high-level group of financial supervision in the EU Chaired by Jacyues de Larosièrè Report' [2009] available at http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf;
14. D. Morávek 'Nejvíce na dani z příjmů zaplatila Česká spořitelna, Agrofert není ani v TOP 10' [2014] available at <http://www.podnikatel.cz/clanky/nejvice-na-dani-z-prijmu-zaplatila-ceska-sporitelna-agrofert-neni-ani-v-top-10/>;
15. R. Cranston, 'Principles of banking law' (New York: Oxford University Press 2002);
16. S. Polouček 'Bankovníctví' (Praha: C.H.Beck 2013).

Legislation:

17. Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012;
18. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;
19. 'Proposal for a regulation of the European parliament and of the Council on structural measures improving the resilience of EU credit institutions' available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014PC0043&from=DE>;
20. Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes;
21. Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes;
22. 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 and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and

- 2013/36/EU, and Regulations (EU No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council;
23. Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions;
 24. Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions;
 25. Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013
 26. Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010;
 27. Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund.

SECURITY OF THE CIVILIAN POPULATION FROM THE CONSEQUENCES OF AERIAL WARFARE IN THE LIGHT OF THE HAGUE RULES OF AERIAL WARFARE OF 1923

Mateusz Piątkowski¹

Abstract

The WWI had introduced a variety of unknown means and method of warfare. Among them, one type of warfare played especially significant part during Great War hostilities – the rise of the air power. From the technical newbie, which was introduced by the Wright Brothers in 1909 the capabilities of aircraft rapidly increase during the first years of war and after the conflict. However, despite the obvious technical development, the new type of warfare is responsible for spreading the fear and terror among civilian population. The first aerial bombings of London and other towns in the United Kingdom had devastating impact on morale of the non-combatants and caused extensive damage to their properties and infrastructure. The applicable international humanitarian law was outrun by this situation. The Fourth Hague Convention from 1907 was accepted before aircraft's first combat deployment and lacked any specific provisions in this aspect. No other specific rules concerning the conduct of aerial warfare was adopted before the year 1914. When the gun finally silenced it was natural that international community was demanding an increase own security from the negative consequences of new developed types of warfare. Nevertheless, the main agenda concentrate over the problem of chemical weaponry and unrestricted submarine warfare, while the supreme powers of the mid- war world decide to regulate the conduct of modern combat during the Washington Disarmament Conference in 1922 – 1923. Quickly the conference became a playground for the state members, which focus on the post – war order rather than the solving the main issues of the international humanitarian law. However, the members of the conference had established an mixed commission of jurist and military officers who had been authorized to prepare a draft of aerial warfare code. The document was finally finished in 1923, and its know as Hague Rules of Aerial Warfare (HRAW), containing 60 articles concerning the use of the air power during the armed conflict. The proposed provisions outruns its times, introducing the 'prototypes' principles of military objective and proportionality, which later became an basic rules of contemporary law of armed conflict. As a way of protecting civilian population in urban areas, the draft proposed an restricted rules of engaging combatants in populated zones. Unfortunately, the HRAW has never been adopted as a treaty law. The futuristic approach to the issues of noncombatants security from the implications of unrestricted aerial bombings, as proposed by the mixed commission in 1923, have been ignored by the public opinion, which seemed to forget the fear and terror when the aerial actions against inhabited areas have been conducted by the fighting sides during the WWI. It is important to observe that the mid – war societies generally had been lulled into the false sense of security, considering that the eventual advantages of aircraft capabilities would overturn any possible threats of unregulated aerial warfare. Above explains why the states were unlike to accept any provisions which could constrain the future development of aviation. Nevertheless, the HRAW has significant role in shaping the future conventions and treaties, being considered a part of customary international law. The point of the paper is to examine the core of draft from 1923 and examine how the

¹ *Ph. D Candidate at the University of Lodz (Poland), at the Faculty of Law and Administration, International Public Law Branch from 2013 (Ph. D thesis: The Modern Aerial and Missile Warfare). Master degree holder in 2012, title: The Legal Regime of Aerial Warfare (Masters thesis received the 1st prize in the Faculty of Law and Administration master's thesis contest: – 1st Place in the Faculty of Law and Administration Masters Thesis Contest in 2012. From January 2013 legal trainee on apprenticeship in Lodz Bar Association.*

HRAW protected the civilian population from the consequences of the unlimited aerial warfare and how the 'security of noncombatants' principle and 'military way of thinking' have been balanced by this document.

Keywords: war – international law – aerial warfare – Hague Rules of Aerial Warfare

Introduction

I would like to begin my article with quoting professor Remigiusz Bierzanek, one of the most prominent Polish experts in the field of international humanitarian law (IHL) who described *that in the history of international law there are not many cases when ius in bello laws and customs had been disappointingly ignored by the contrary practice of the states and government, in the respect of the aerial warfare*². In fact, the issue of the aerial warfare had been a challenging and controversial concept of international humanitarian law since the beginning of the 20th century. In 1903 the Wright brothers innovation, called Flyer I, had begun a new era in a global transportation, achieving eventually the Dedal's dream of flying and Leonardo Da Vinci ambitions of creating an interdependent flying device which would be capable of traveling distances beyond the human imagination³. However almost simultaneously the military reasons prevailed over fantasy and it did not take long time for the constructors and developers were soon able to introduce an aircraft especially designed for the war – effort purposes. The first biplanes quickly replaced the role of the balloons as a observation spot and coordination centers for artillery fire. However, primitive in initially their first designs, the planes have soon become a lethal war machines. First bombers were able to transfer conflict far beyond the actual front line and effectively destroy the industry, infrastructure and, which seems the most important, civilian morale. Since the Great War no one could question the role of the aerial power in the future armed conflict.

To apprehend the phenomenon of the aerial warfare in the context of international humanitarian law it is imperative to analyze the relations between politics, history, technology and the of the first half of the 20th century. In 1868 in St. Petersburg the states decided to forbid the launching of explosive projectiles from the balloons, considering it as an *inhumane* means of warfare⁴. The St Petersburg declaration binding power was expanded during the Hague Peace Conference in 1899, when the state – signatories had decided to prolongate the temporal scope of the Declaration for the next five years. In 1907 the above mentioned declaration legal power was again extended until the new peace conference is adjourned⁵. Some authors claim that from a formal point of view, the declaration is still in force, pointing out that the next peace summit had never been called again⁶. Such a direction of idea from 1899 could suggest that the authors of the above mentioned provision aimed to established a total ban of aerial warfare⁷. In 1907, when the international community struggled to codify and revise the laws of armed conflict during the 1907 Hague Peace Conference, the status of aerial actions during the war remains unknown, due to the fact that first aircrafts were just still an idea and invention helpful for the

² R. Bierzanek, 'Wojna a Prawo Międzynarodowe/ War and International Law' (Warsaw, Ministry of Defence Publishing Office 1982) 305

³ See generally C. H Gibbs – Smith, 'The Wright Brothers: Aviation Pioneers and Their Work, 1899-1911' (Science Museum 2002)

⁴ Declaration to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899 full text available on <http://www.icrc.org/ihl.nsf/FULL/160?OpenDocument> (access 4. 03. 2015)

⁵ Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons. The Hague, 18 October 1907; full text available on <http://www.icrc.org/ihl.nsf/FULL/245?OpenDocument> (access 4. 03. 2015)

⁶ W. E Elis, 'Aerial – Land and Aerial- Maritime Warfare, The American Journal of International Law Vol. 8, No. 2 1914, pp 256 – 273 262 263

⁷ But see J. Borrie, M. Brehm, 'Enhancing Civilian Protection From Use of Explosive Weapons In Populated Areas: Building a Policy and Research Agenada' International Review of the Red Cross' [vol. 93, 883/2011] 9

transportation rather than military⁸. *Post factum*, it is hard to demand from the participants of the summit that they could be able to determine the future consequences of an unrestricted aerial warfare, while the plane capabilities were unknown to the public opinion. This fact rapidly changed with the First World War had indicated the role of the air power in the modern combat. From the legal perspective, the alarming question rises with the practice of the urban areas bombing, especially from the German airships Zeppelins which actions started a spread shocking terror campaign over the British Isles⁹. The destruction caused by those actions can be considered as quite limited, but the plane capabilities have risen significantly, and many experts predicted that the bombers could play a devastating role in future conflict¹⁰. Those fears were stimulated when the air forces military experts, especially G. Douhet from Italy and B. Mitchell from USA, introduce a new air power doctrine considering the bombers as a key factor in breaking of the morale of adversary civilian population, by creating an image of the waves of the bombers spreading a mass destruction of urban areas¹¹.

The First World War left the legal question of how the IHL rules and custom could regulate the conduct of hostilities in the aspect of aerial warfare. The article 25 of the Forth Hague Convention of 1907 stipulates that it is prohibited to bombard *undefended towns and villages by what ever means*. The construction of the provision suggests that its scope of the applicability was extended to govern all the means of warfare. In the 1920's the arbitrary tribunals, established by the Treaty of Versailles of 1919, executing jurisdiction over the unlawful acts of combat during the First World War, decided that the provisions of the Forth Hague Convention concerning the land warfare are applicable by analogy to judging actions of German airships over Greece and Romania¹². A closer examination of the article 25, especially the legal meaning of the word *undefended* poses to the experts the problem of the *impracticality and incompatibility* of the above mentioned provision in the matter of aerial warfare¹³. Scholarship of the IHL found it difficult to determine whether the defensibility of the location from the attack of the ground forces could adhere to aerial combat, especially taking into account the plane's combat operational range, which clearly extended the area of land forces fighting zones¹⁴. Such construction of the provision created an extremely dangerous legal loophole¹⁵.

As aftermath of the First World War, the IHL faced a series of challenging questions concerning the new methods and means of warfare which were deployed on the WWI battlefields e.g chemical warfare and unrestricted submarine attacks across the Atlantic. In such an ambient of the international community, the victorious Allied powers decided to adjourn the Washington Disarmament's Conference in 1921 - 1922. The agenda of summit included a point where the members of conference would

⁸ R. Bernhardt(ed.), *Encyclopedia of Public International Law, Use of Force War and Neutrality Peace Treaties (A – M)* (North – Holland Publishing Company, New York 1982) 7; F. Gomez,' *The Law of Air Warfare*' *International Review of the Red Cross* No. 232/1998

⁹ See generally J. Oates,'*Attack on London: Disaster, Riot and War*' (Pen and Sword, Barnsley 2008) 79-90 I. Castle, '*London 1914-17: The Zeppelin Menace*' (Osprey Publishing 2008.)

¹⁰ << The Zeppelins dropped 220 tons of bombs that left 557 dead, 1 538 wounded destroying \$30 milion of property>> J. D Murphy,'*Military Aircraft, Origins to 1918: An Illustrated History of Their Impact*' (ABC Clio, Santa Barbara 2005) 66

¹¹ See generally G. Douhet,' *The Command of the Air*' (The Univeristy of Alabama Press, Tuscaloosa 2008); A. F Hurley,' *Billy Mitchell, Crusader for Air Power* (Indiana University Press, Bloomington 1975)

¹² A. P. V Rogers,'*Law On The Battlefield*' (Manchester Iuris Publishing, Manchester 2006) 9; S. K Verma,' *An Introduction Public International Law*' 389

¹³ J. W Garner, '*Proposed Rules for the Regulation of Aerial Warfare*' *The American Journal of International Law*' Vol. 18, No. 1 (1924) 57

¹⁴ H. M Hanke,'*The 1923 Hague Rules of Air Warfare, A Contribution To The Development of International Law Protecting Civilians From Air Attack*', *International Red Cross Review* [1993] 13; H. M Hensel,'*The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Ashgate Publishing Limited, Hampshire 2008) 202; R. H Wyman,' *The First Rules of Air Warfare*', *Air University Review* [1984]; Y St-Fluer,' *Aerial Belligerency within a Humanitarian Rethoric: Exploring the Theorizing of the Law of War/Terrorizing of Civilians*' *Rights Nexus, Chinese Journal of International Law* (2009) 8(2): 347-373/ 357

¹⁵ See generally M. Piątkowski, '*Przepisy IV Konwencji haskiej z 1907 r. w świetle wojny powietrzne*' (Forth Hague Convention of 1907 In Light of The Aerial Warfare), *Polski Przegląd Stosunków Międzynarodowych* (Polish Review of International Affairs) [2013] 123-137

discuss the issue of aerial warfare¹⁶. However, soon the Washington Conference turned out to rather a political playground between the states, willing to restrain the increasing naval arsenal rather than resolving the threats arising from the war experiences¹⁷. The legal issues were excluded from the mainstream disputes, however it was decided to establish a commission of the IHL experts and military to examine a possibility of preparing the draft of the rules dedicated exclusively to the matter of the aerial warfare. The document was later become the Hague Rules of Aerial Warfare.

The Hague Rules of Aerial Warfare were designed to become a first code of laws and rules covering the the conduct of the military air operations during the armed conflicts¹⁸. The provision consists over 60 articles, however the most important and relevant were placed in the Chapter IV – Hostilities of the draft. Especially, the three of the stipulations (article 22 to 24) had a significant impact on the future development of the principles of the humanitarian international law. To summarize briefly, the article 22 forbids the aerial attack without distinction, underlying that it is unlawful to conduct such operation in order to terrorize the civilian population and to destroy civilian property without any military value. The provision would be considered as a response to the German air raids over the United Kingdom and indiscriminate bombardment of the civilian areas, without any combat reasons. To extend the scope of the notion of the noncombatants protection from the consequences of unrestricted aerial warfare, the art. 24 sec. 1 established the subject matter of legitimate aerial attack during the conduct of hostilities. According to the above mentioned rule, every bombing must be directed against a military objective, which is described as a target *whereof total or partial destruction would constitute an obvious military advantage*. Such an idea of defining the subject matter of legitimate military action is considered a breakthrough, which dismissed the inapplicability approach suggested in the article 25 of the Forth Hague Convention¹⁹. The concept of *military objective* as a subject matter was an outcome of close participation between the legal and aviation experts during the framework of the commission, acknowledging the deep understanding of the general concept of the IHL which aimed to balance the humanitarian purposes and realities of the battlefield²⁰. The proposed idea does not restrain the combatants perspective, respecting complementary the principle of the noncombatant immunity from the negative effects of aerial actions. Upon closer examination of the provision, the requirement of the *obvious military advantage* as a outcome of the partial or total destruction of the object is underlined, creating an obligation for the attacker to distinguish properly certain types of target. The section 2 of the article introduced an selective catalog of the types of infrastructure, that could be considered as a valuable element of war contribution. By adding the word *exclusively*, the authors of the draft proposed an enumerated list of targets²¹. From the *post factum* perspective, it was impossible, especially in the light of the future IHL conventions and the battlefield reality, to check, choose and create the list of potential targets of military value, however the idea of commission generally exemplifies the accepted approach concerning the types of infrastructure could be a valuable assets to war attribution with the respect of the mid – war times.

Art. 24 sec. 3 refereed to on issue of the indiscriminate aerial operations, dividing the urban accordingly to their proximity to the zone of actual ground forces operation²². In the scope of the above mentioned provision, the bombing of the civilian inhabited areas outside of the *immediate vicinity* of land

¹⁶ N. Ronzitti, G. Venturini (ed.), 'The Law of Air Warfare: Contemporary Issues (Eleven International Publishing, Utrecht 2006) 6-7

¹⁷ E. Goldstein, J. Maurer, 'The Washington Conference, 1921-22: Naval Rivalry, East Asian Stability and Road to Pearl Harbour (Routledge, New York 2014)

¹⁸ Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923. full text available on <https://www.icrc.org/ihl/INTRO/275?OpenDocument> (access on 8. 03. 2015)

¹⁹ H. DeSaussure, 'The Laws of Air Warfare: Are They Any?', International Law Studies 62 282

²⁰ D. Fleck, M. Bothe, 'The Handbook of Humanitarian Law in Armed Conflicts' (Oxford University Press 1999, 122

²¹ M. Roscini, 'Cyber Operations and the Use of Force in International Law, (Oxford University Press, Oxford 2014) 182; M. Roscini, 'Targeting and Contemporary Aerial Bombardment' International and Comparative Law Quarterly Vol. 54 411 – 444 (2005)420; I. G Delupis, 'The Law of War' (Cambridge University Press, Cambridge 2000) 283

²² K. V. R. T, 'Aerial Warfare and International Law' Virginia Law Review Vol. 28, No. 4 (Feb. 1942) 516 – 527 524

is forbidden with the only exception of the military objectives. The article obliged the attacker to suspend and abort all aerial action in case of a situation where the legitimate targets could be attacked only by hitting civilian areas. The fourth section laid down that it is allowed for the combatants to bombard urban zones located in the proximity of the front-line wherever there is a *reasonable presumption that the military concentration is important enough to justify the bombardment*. For many authors, the above mentioned disposition is an early version of the proportionality principle, conserved in a writing form of the first time. The section introduced an additional requirement of a pre-attack evaluation of the possible consequences for the civilian population.

As an additional regulation proposed by the draft, one could distinguish the provisions concerning the immunity of the hospitals, place of worship, historic and cultural heritage (art. 25 - 26), espionage (27 - 29), conduct with neutral aircrafts (30 - 39) and certain articles stipulating the rights and duties of the belligerent parties towards non - military aircrafts operating in the vicinity of the armed conflict (49 - 60).

Hague Rules of Aerial Warfare have never been adopted as a binding international treaty²³. According to R. Bierzanek, the reasons were rather political or technical²⁴. It is important to underline, that the Rules have never been rejected due to its legal inconsistency or incorrectness with the existing IHL framework. Nevertheless, multiple states have implemented the solutions proposed by the draft of 1923 into their military manuals²⁵. The Royal Air Forces senior officers claimed that *although not legally binding, the Hague Rules of Aerial Warfare will likely to represent the practice which will be regarded as lawful in any future war*²⁶. H. Lauterpacht believes that in his opinion the code of the aerial warfare could claim a mixed treaty - customary law status²⁷. H. M Hanke underlined that the draft finally dismisses the wrong criteria of locality *defensibility* described in Hague Convention of 1907. Before the Second World War, the international community generally strongly opposed to the practice of an indiscriminate bombing²⁸. From the viewpoint of the international public law, a practice (*usus*) of the interested states supported by the *opinio juris* - a notion that a practice having its ground in international law could constitute a customary rule. In contemporary international law it has been agreed, that the Hague Rules of Aerial Warfare are part of customary humanitarian law²⁹. It been discussed whether the

²³ S. Tiefenbrun, 'Decoding International Law: Semiotics and the Humanities' (Oxford University Press, Oxford 2010) 147

²⁴ M. Lippman, 'Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror From World War I To Afghanistan, California Western International Law Journal Vo. 33 N. [2002] 11; R. Bierzanek, '1923 Hague Rules for the Control of Radio in Time Of War. Commentary. [in:] N. Ronzitti (ed.), 'The Law of Naval Warfare: A Collection of Agreements and Documents With Commentaries', (Martinus Nijhoff Publishers Dordrecht 1988) 402

²⁵ << in 1937, Japan declared its intention to act in accordance with these draft rule during the course of hostilities in China>>N. Singh, E. MacWhinney, ' Nuclear Weapons and Contemporary International Law' (Martinus Nijhoff Publishers, Dordrecht 1989) 142

²⁶ P. J Goda, 'The Protection of Civilians From Bombardment by Aircraft: The Ineffectiveness of the International Law of War' 'Military Law Review' [93/1966], 99

²⁷ << Recognizes the following principles as a necessary basis for any subsequent regulations:1) The intentional bombing of civilian populations is illegal; 2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable; 3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence>> Protection of Civilian Populations Against Bombing From the Air in Case of War, League of Nations, September 30, 1938 text available on <http://www.dannen.com/decision/int-law.html#D> (access 8.03.2015) H. Lauterpacht, L. Oppenheim, 'International Law: A Treatise, vol. II, Disputes, War and Neutrality' (7th edition London 1952) 519 cited on <https://www.icrc.org/ihl/INTRO/275?OpenDocument> (access 09.03.2015)

²⁸ H. M Hanke, op. cit 20

²⁹ A. Clapham, P. Gaeta, 'The Oxford Handbook of International Law in Armed Conflict'(Oxford University Press, Oxford 2014) 122; W.H Boothby, ' Conflict Law: The Influence New Weapons Technology, Human Rights and Emerging Actors (TMC Asser, Hague 2008) 80; L. C Green, 'The Contemporary Law of Armed Conflict' (Manchester University Press, Manchester 1993) 17; I. Henderson, 'The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I (Martinus Nijhoff Publishers, Leiden 2009) 26; L. Doswald - Beck (ed) San Remo Manual on International Law Applicable to Armed Conflicts at Sea(Cambridge University Press, Cambridge 2005) footnote 23 at 91; H. Nasu. R. McLaughlin, ' New Technologies and the Law of Armed Conflict' (Springer, The Hague 2014) 195

draft was a source of international law during the Second World War³⁰. Each of fighting sides of the conflict conducted several aerial operations that caused serious controversies, especially the bombing of Warsaw, Rotterdam, London, Coventry, Dresden and multiple urban areas in Japan, including the atomic bombardment of Hiroshima and Nagasaki. Arthur 'Bomber' Harris, chief of the Royal Air Force Bomber Command, the mastermind of the strategic campaign over Germany, declared that in his opinion the rules concerning the use of the aircraft during the conduct of the hostilities do not exist³¹. In fact, the existing framework of the IHL, especially the article 25 of the Forth Hague Convention, proved to be completely ineffective method of protecting civilians from the negative consequences of the aerial warfare. On the other hand, the status of the Hague Rules of Aerial Warfare remained unknown, especially when the International Military Tribunal in Nuremberg decided to avoid judging the war criminals who command the aerial units during the most controversial air operations in urban areas. Nevertheless, in the District Court in Tokyo in *Shimoda v. State* held that the Hague Rules of Aerial Warfare had been recognized by the international experts and accepted as an appropriate legal practice so they might be considered as a part of the international customary law, and thus the bombing of Hirsoshima and Nagasaki violated the provisions of the draft of 1923³². This notion definitely sets a new direction of discussion concerning the legality of saturation bombing during the Second World War³³.

The experts had found few drawbacks in the Hague Rules of Aerial Warfare. The major issue concerns the question of how the zone of the immediate *vicinity of fighting* could be distinguished from other areas of the air space, also the exhaustive list of legitimate target could possibly put too strict restrains on combatants³⁴. W. H Parks claimed, that the draft of 1923 was ignored and rejected in the light of battlefield reality during the Second World War also P. Gray considered above rules as *political and legal failure*³⁵. However, the majority of experts underlined the importance of the Hague Rules as authoritative source of the laws covering the conduct of aerial warfare³⁶. The future IHL conventions and proposal like the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time

³⁰ W. H Parks, 'Asymestries and the Identification of Legitimate Military Objectives (in:) W. Heintschel von Heinegg, V. Epping (ed.), 'International Humanitarian Law Facing New Challenges, Symposium in Honour of Knut Ipsen' (Springer, Berlin 2007)73- 74; J. M Meyer,' Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine' The Air Force Law Review 2001/51 151- 152

³¹ Australian Defence Force Piblication 37 – Law of Armed Conflict (Defence Publishing Service, Canberra 2006)1 - 13

³² << Although the Draft Rules of Air Warfare cannot be described as part of positive law as they have not yet come into effect as a treaty, students of international law regard them as authoritative on the law of air warfare. Some States adopt the substance of the Rules as a code for the activities of their armed forces, and their essential provisions were formulated in line with the rules of international law and practice then in force>> Ryuichi Shimoda et al. v. The State (1963) District Court of Tokyo available on <https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/AA559087DBC1AF5C1256A1C0029F14D> (access 09.03.2015)

³³ A. Boivin,'The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare (Research Paper Collections, University Centre for International Humanitarian Law, Geneva 2006) 9 – 10 C. L Carntrell, 'Humanitarian Law in Armed Conflict: The Third Diplomatic Conference' Marquette Law Review 61/253 [1977] 256

³⁴ P. W Williams,' Legitimate Targets in Aerial Bombardment' The American Journal of International Law Vol. 23 No. 3 (1929) 578

³⁵ W. H Parks,'Air War and the Law of War' Air Forces Law Review 1990/32 33; P. Gray,'The Leadership, Direction and Legitimacy of the RAF Bomber Offensive from Inception to 1945 (Continuum International Publishing Group, New York 2012) 53

³⁶ F. Kalshoven, 'Reflection on the Law of War: Collected Essays,(Martinus Nijhoff Publishers, Leiden 2007) 437-438; << The Hague Rules, albeit not binding, have had considerable impact on the devolpoment of the customary law of armed conflict>> The Program on Humanitarian Policy and Conflict Research at Harvard University 'Manual on International Law Applicable to Air and Missle Warfare'(Oxford University Press 2014) ix; J. Doria, H. P Gasser, M. Cherif Bassiouni,'The Legal Regime of the International Criminal Court'(Martinys Nijhoff Publishers, Leiden 2009) 109; D. Schindler, J. Toman,' The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents (Martinus Nijhoff Publishers, Dorodrecht 1988) 24. The Federal Ministry of Defence of the Federal Republic of Germany, 'Humanitarian law in Armed Conflict – Manual' 1992rule 122

of War of 1956 from New Dehli are inspired by the yardsticks pointed out by the Hague Rules³⁷. The worldwide binding international law treaty, which is the I Additional Protocol to The Geneva Convention of 1949, has recognized the importance of the draft from 1923 by reimplementing its provision into art. 52 and 57 I of the Additional Protocol³⁸. The Commentary to the Protocol clearly underlined the influence of the Hague Rules considering it as a ground for emerging laws concerning the conduct of hostilities in the contemporary humanitarian law while Y. Dinstein concludes that conceptions proposed by the commission in 1923 were *endorsed and further elaborated – with a new definition – by Protocol I*³⁹.

Summary

To summarize, the unfortunate climate of midway times caused that the Hague Rules of Aerial Warfare were not adopted by the states only after the Second World War, despite the general acceptance of the international community. The significance of effort of the jurist commission effort was undeniable, however no government would like to restrain its air power and lower chances of victory in the future conflict. The consequences were dramatic and became visible with full scale during the Second World War, when the aerial operations caused an extensive damage to civilian life, health and property, with no strict rules were applicable to limit the effects of unrestricted aerial warfare. From the viewpoint of the scholarship and the experts the Hague Rules of Aerial Warfare are the first and one of the most crucial documents in the IHL history which laid ground to contemporary *ius in bello* principles like the distinction and proportionality.

Bibliography

1. N. Storey, 'Zeppelin Blitz: The German Air Raids on Great Britain during the First World War'
2. R. Bierzanek, 'Wojna a Prawo Międzynarodowe'/ War and International Law' Warsaw, Ministry of Defence Publishing Office 1982)
3. Y. Dinstein, 'The Conduct of Hostilities Under the Law of International Armed Conflict(Cambridge University Press, Cambridge 2004
4. P. V Rogers : Law on the battlefield, Manchester, Juris Publishing 2006
5. Shaw Malcolm: Prawo międzynarodowe/International Public Law) , Warsaw, Książka i Wiedza 2000
6. Y. Sandoz, C. Swiniarski, B. Zimmermann: Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC Geneva 1987
7. D. Schindler, J. Toman : The Laws of Armed Conflict, Dodrecht: Martinus Nijhoff Publishers 1988
8. F. Kalshoven, 'Reflection on the Law of War: Collected Essays,(Martinus Nijhoff Publishers, Leiden 2007)
9. J. Doria, H. P Gasser, M. Cherif Bassiouni,'The Legal Regime of the International Criminal

³⁷ Henry Dunant Institute Unesco,'International Dimensions of Humanitarian Law' (Martinus Nijhoff Publishers, Dordrecht 1998) 115; Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War. ICRC, 1956 available on <https://www.icrc.org/ihl/INTRO/420?OpenDocument> (access 09.03.2015)

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, UN Treaty Series 1979 - 17512 full text available on <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf> (access 09.03.2015) .W. H Boothby,'The Law of Targeting' (Oxford University Press, Oxford 2012) 22 – 25; Y. Sandoz, C. Swiniarski, B. Zimmermann, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (International Committee of the Red Cross, Geneva 1987)

³⁹ Y. Dinstein, 'The Conduct of Hostilities Under the Law of International Armed Conflict' (Cambridge University Press, Cambridge 2004) 111

- Court'(Martinys Nijhoff Publishers, Leiden 2009)
10. Heintschel von Heinegg, V. Epping (ed.), 'International Humanitarian Law Facing New Challenges, Symposium in Honour of Knut Ipsen' (Springer, Berlin 2007)
 11. M. Roscini,' Cyber Operations and the Use of Force in International Law, (Oxford University Press, Oxford 2014
 12. N. Ronzitti, G. Venturini (ed.), 'The Law of Air Warfare: Contemporary Issues (Eleven International Publishing, Utrecht 2006
 13. A. Clapham, P. Gaeta, 'The Oxford Handbook of International Law in Armed Conflict'(Oxford Univeristy Press, Oxford 2014)
 14. E.Goldstein, J. Maurer , 'The Washington Conference, 1921-22: Naval Rivalry, East Asian Stability and Road to Pearl Harbour Routledge, New York 2014
 15. J. S Corum, 'Inflated by Air Common Perceptions of Civilian Casualties From Bombing', Maxwell Air Force Base Alabama 1998,
 16. S. Tiefenbrun, 'Decoding International Law: Semiotics and the Humanities' Oxford University Press, Oxford 2010)
 17. D. Fleck, M. Bothe, ' The Handbook of Humanitarian Law in Armed Conflicts' Oxford University Press 1999
 18. Y. Dinstein, 'The Conduct of Hostilities Under the Law of International Armed Conflict' Cambridge University Press, Cambridge 2004
 19. A Jachec – Neahle, ' The Concept of Military Objectives in International Law and Targeting Practice, Routledge, New York 2015
 20. H. M Hensel' The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force' Ashgate. Burlington 2007
 21. G Delupis, 'The Law of War' Cambridge Univeristy Press, Cambridge 2000
 22. W.H Boothby, ' Conflict Law: The Influence New Weapons Technology, Human Rights and Emerging Actors TMC Asser, Hague 2008
 23. D. Saxon, 'International Humanitarian Law and the Changing Technology of War' Martinus Nijhoff Publishers, Leiden 2013
 24. I. Henderson, 'The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I Martinus Nijhoff Publishers, Leiden 2009
 25. H. Lauterpacht, L.Oppenheim, 'International Law: A Treatise, vol. II, Disputes, War and Neutrality' London 1952
 26. R. A Falk: The Vietnam War The Vietnam War and International Law, Volume 3: The Widening Context, Princeton University Press 1972.

SAFEGUARD OF CHILDREN RIGHTS IN THE INTERCOUNTRY CHILD ADOPTION

Ana Pliner¹

Abstract

Child adoption is regarded as intercountry when a child from one State (State of Origin) is adopted, and, as consequence of adoption, is moved to another State (Receiving State). Today, the majority of intercountry adoptions are made under 1993 Hague Convention on Protection of Children and Co-Operation In Respect Of Intercountry Adoption (Hague Convention), setting a complex of substantive and procedural rules for the purpose of assuring respect for children rights in intercountry adoptions. Despite figures demonstrating success of Hague Convention, there are still debates among scholars and practitioners on whether Hague Convention protects interests of children sufficiently and effectively, and whether it provides universal solution for all intercountry adoptions. Therefore, the paper discusses and analyses the concept of intercountry child adoption and its staples (such being priority of the best interest of the child, intercountry adoption subsidiarity, children protection from abduction, human sale and trafficking, co-operation principle and automatic recognition of adoption decisions) through perspective of possibility to safeguard and protect adoptive children rights effectively, being an indicator of success. With no doubt, Hague Convention has benefited to the legal environment of intercountry child adoptions by setting common standard of substantive requirements for intercountry adoptions and providing a clear scheme of interaction between cooperating States. However, such problems as excessive delays in intercountry adoption procedure, its complexity, different interpretation of Hague Convention contents and especially its standards remain and lead to different possibilities of harmonious and happy childhood for children from different States. Perhaps for better safeguard of children rights there is a need for even bigger convergence in the field of intercountry child adoptions.

Keywords: intercountry adoption, children rights, Hague Convention, best interest of the child

Introduction

Led by humanitarian ideas, demand for toddlers and babies to be adopted by childless families in the Western societies, or other reasons, such as growing openness of societies for inter-cultural and inter-racial family ties, intercountry adoptions have become quite a massive phenomenon, involving over a million children internationally adopted since World War II.² The numbers of intercountry adoptions, although slightly decreased during the last five years, still remain quite stable. From legal perspective, intercountry adoption has remained to be a complicated issue, at least due to the need of balancing the interests of parties involved and interaction between at least two legal systems, each having its own specificity in family law, whereas family law is known as one of the least unified areas of law. However, everyone agrees that intercountry adoptions must secure observance of children rights at the first place.

This article aims to overview international legal framework of intercountry adoption through the perspective of safeguard of children rights and to analyze how contents of main principles of intercountry adoptions, as provided for in the UN Convention of the Rights of the Child (CRC)³ and Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

¹ *PhD Candidate, Vilnius University, Faculty of Law, Private Law Department.*

² K.S. Rotabi, J.L. Gibbons 'Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?' [2011] *Journal of Child and Family Studies* 21 106

³ United Nations Convention on the Rights of the Child. General Assembly resolution 44/25 1989

(HCIA)⁴ could be further developed and enriched so that intercountry adoptions would not only observe children rights but be made for protection of children and their interests.

1. Legal Framework of Intercountry Adoption

Two main international legal instruments which provide ethical, legal and procedural background for intercountry child adoption are UN Convention on the Rights of the Child and Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.

Article 21 of the CRC is important in defining intercountry adoption as one of childcare options, where a child is deprived of biological family environment and cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. It also clearly states that the paramount interest of the child must be observed in intercountry adoptions, and that through removal from the native country the child must be guaranteed the same level of protection as in the case of national adoption, and does not get involved into trade of children.

HCIA, being based on the principles set in the CRC, is fully devoted to the issue of intercountry adoptions. HCIA has set minimum legal standards by recognizing that the best interest of the child in intercountry adoptions is paramount, and created a cooperation system ensuring children rights are safeguarded before, during and after the child is adopted internationally.

Despite great success of HCIA, boasting over 80 member States, there are still plenty of intercountry adoptions which occur outside of the scope of application of HCIA, because either the country of origin (mostly often) or the receiving country, or both, do not make part of the Hague system. According to different sources, the grey zone of adoptions may amount to over half of all intercountry adoptions in the world.⁵ This in no way should mean all of them violate children rights, at least because CRC still applies to such adoptions or perhaps they are covered by other States' bilateral agreements. However without clear States cooperation system and surety that both States have the same concept of intercountry adoption, the risks that children rights, being extremely vulnerable, be overwhelmed by other interests remain extremely high. Therefore still in 2000, the Parliamentary Assembly of the Council of Europe has encouraged its member states not only to ratify HCIA but "also to observe its principles and rules even when dealing with countries that have not themselves ratified it"⁶. This is an approach, which may indirectly contribute to creation of the intercountry adoption system complying with minimal international standards in developing countries, from where children are usually adopted and where the adoption process takes place, and where therefore children rights may be mostly violated throughout the adoption process. Unfortunately, receiving countries do not always follow this recommendation and, possibly in response to demand for their demographical needs, willingness of their nationals or other reasons still apply different standards in respect of intercountry adoptions from Hague and non-Hague countries, and miss an opportunity to contribute to safeguard of children rights in the process of intercountry adoption, taking place in the countries of origin.

Another downside in regulation of intercountry adoptions, not providing any safeguard for children rights, is that HCIA does not affect adoption policies of the states and is powerless in the cases where for political reasons children are not adopted nationally and are cared for in institutions, instead of being cleared for intercountry adoption.

2. Best Interest of the Child as a Safeguard of Children Rights in Intercountry Adoptions

⁴ Hague Convention on on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Conference on Private International Law 1993

⁵ H. Boechat, F. Fuentes 'The Grey Zones of Intercountry Adoption' [2011]
http://www.hcch.net/upload/wop/adop2010_info6e.pdf 4-6

⁶ Recommendation No. 1443 of the Parliamentary Assembly of the Council of Europe. International adoption: respecting children's rights [2000]
<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1443.htm>

The Preamble of the HCIA states that intercountry adoptions must be made “in the best interest of the child and with respect for his or her fundamental rights”. The best interest of the child is differentiated from the child’s fundamental rights in the text of HCIA. Interaction of both terms is quite unclear in the Good Practice Guide of HCIA, where the primary consideration of the best interest of the child is regarded as a fundamental right along with non-discrimination and the right of the child to express its view which to be taken into consideration at deciding on the issues related to the child⁷. Where both concepts are used side by side, the question may rise whether it is possible that intercountry adoption is made with respect to fundamental rights of the particular child however against his or her best interest. Barely, because having fundamental rights may not contradict to the best interest of the child, and vice versa, waiving child’s fundamental rights could not be in the best interest of the child.

Article 21 of the CRC requires that best interest of the child be a paramount consideration in intercountry adoptions. Given the inseparability and interdependence of both concepts of the best interest of the child and respect for fundamental children rights, the latter should also be regarded as paramount consideration in the intercountry adoptions, and as a consequence be guaranteed by the measures introduced in the HCIA.

Paramount or primary consideration of the best interest of the child definitely means its priority over potential interests of other parties in intercountry adoption.⁸ Moreover, paramount consideration shall also mean that legitimate reason for any adoption is a response to the need of the child, and not anyone’s other, for instance, adoptive parents’ wish to have a child in their family. This was expressly confirmed by ECHR in the case *Pini and others v. Romania* by stating that there is no right to adopt in the context of the Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹, and such conclusion was made in the light of HCIA.¹⁰ However such approach is not intended to totally neglect other parties’ of intercountry adoptions – family of origin and adoptive parents – rights. The best interest of the child itself requires observation of the rights and interests of all involved parties. Being interconnected, the rights have to be balanced, because abuse of the right of one party shall absolutely affect the child. For instance, where the mother is induced materially for relinquishment of the child, this violates mother’s rights. Neither does it serve for the absolute welfare of the child, because the child is then deprived of its right to access the extended birth family and to be raised in the ethnic and cultural environment if his or her origin.¹¹

Children rights may be at risk, where the concept of the best interest of the child lacks a definite content and becomes a speculative notion for covering other objectives.¹² Therefore HCIA sets safeguards which must guarantee observance of the fundamental children rights.

3. Subsidiarity of Intercountry Adoptions

Intercountry adoption shall always be subsidiary childcare option where the child is able enjoy his or her family of origin, as HCIA, in the Preamble, recognizes that enabling the child to remain in the care of his or her family is a priority. Moreover, Article 4(b) of HCIA requires, at considering intercountry adoption as a childcare option in a particular case, the competent authority first to determine that there are not likely to be possibilities of placing the child in a family in the state of origin (not necessarily in the

⁷ Hague Conference on International Private Law ‘The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Good Practice Guide No. 1’ (Bristol: Jordan Publishing Limited 2008) 28

⁸ G. Parra-Aranguren ‘Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption’ (HCCH 1993)

http://www.hcch.net/index_en.php?act=publications.details&pid=2279&dtid=311

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe 1950

¹⁰ *Pini and others v Romania*, applications No. 78028/01 and 78030/01 [2004] ECHR

¹¹ D. Smolin ‘Intercountry Adoption as Child Trafficking’ [2004] 39 *Valparaiso University Law Review* 285

¹² N. Cantwell ‘The Best Interests of the Child in Intercountry Adoption. Innocenti Insight’ (Florence: UNICEF Office of Research 2014) 17

form of adoption, however in the form of the permanent childcare), and that it is in the best interest of the particular child, besides other adoptability requirements, to be internationally adopted. As an example, it may be contrary to the child's interest to be adopted internationally where the child has family relations with the extended birth family, as in such case intercountry adoption would cease child's legal relations with the family of origin.

In this light, strongly supported by UNICEF, intercountry adoption often shall be regarded as a last resort option for placing a child in the family, prevailing only against institutional childcare, the latter being recognized as experience, having a negative impact on institutionalized children, hence regarded only as a temporary solution for children, lasting for the shortest possible gap of time. This point of view is strongly criticized by advocates of intercountry adoptions, stating that in today world intercountry adoptions allow to ensure the basic children rights, such as inherent child's right to life (Article 6 (1) of CRC), survival and development of the child (Article 6 (2) of CRC), a standard of living adequate for appropriate development, and education. Thus intercountry adoptions should be regarded as an option prevailing foster in most cases.¹³

Both approaches allow resuming that due to application of subsidiarity principle, amount of intercountry adoptions serves as an indicator that the state is not capable of ensuring children rights on a national level.

4. Child Protection from Abduction, Human Sale and Trafficking

One of the objects of HCIA, as stated in the Article 1(b), is creation of the system of co-operation between the states for ensuring abduction, human sale and trafficking of children are effectively prevented. Although exploiting of children, as a result of intercountry adoptions, usually does not occur, this principle remains actual in the light of ethic legitimacy of intercountry adoptions. Where parents from receiving countries view intercountry adoption as a source for filling their families with children, it is essential that intercountry adoption does not start to operate as children market and prevent the child from becoming a commodity, and that in general intercountry adoption does not turn into the form of social engineering.¹⁴ For this purpose, HCIA does not recognize private or direct adoptions, instead providing for substantive and procedural rules, applying to intercountry adoption and securing observation of children rights in it by checks and control system of Central Authorities. HCIA does not directly ban private adoptions but in its system they are qualified as illegal and void.¹⁵

However, many scholars criticize HCIA for not providing enough instruments for prevention of child abduction, human sale and trafficking or by vague and ambiguous definitions allowing such market to exist, and even compare it to the slave trade.¹⁶ Numerous debates in the media and testimonies of adopted children and birth families confirm existence of such problems.

In fact, HCIA provides for certain safeguards, however the question remains in effectivity of implementation of such measures. Article 4(c) of HCIA requires that consents, which must be given by persons, competent institutions or, where necessary, by the mother, are given after qualified counselling, freely and without material inducement. Obligation to ensure fulfilment of all of these criteria lies with the authorities of the states of origin, and is subject of capability of each state to put at place proper procedures and mechanisms of control, and what is more important, to implement them. True that in many cases such consents are given by mothers or other members of the birth families, driven by extremely difficult psychological, economic and social situation, or perhaps willing to ensure their children economic well-being which may not be guaranteed by remaining with the birth family. These situations spectacularly demonstrate that inter-country adoptions being a last resort solution actually

¹³ E. Bartholet 'InternationalAdoption: The Human Rights Position' Harvard University DASH repository. Available at: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:3228398> [viewed on 28/02/2015]

¹⁴ Cit.Op. 11 49

¹⁵ Cit. Op. 6 115-116

¹⁶ Cit.Op. 10

may not guarantee an absolute balance of all child's rights, and often one rights are sacrificed in the name of other rights.

Another safeguard is the standards, provided for in the Articles 10-12, and 32 imposing certain requirements on accredited bodies (these mainly being adoption agencies) and restrictions in objectives of their activities. Despite that HCIA sets ethical and qualitative framework for accredited agencies, this is one of most sensible chain in intercountry adoption, criticized for lack of transparency and control. Guide to Good Practice No. 2, now complemented by Note on the Financial Aspects of Intercountry Adoption, resulting from the work of expert group in the frame of Hague Convention, recognized the problem by concluding that HCIA standards are too general and the domestic laws do not adequately raise the standards. Therefore currently one of the main focuses is concentrated on the financial aspects of intercountry adoption and their impact on children rights. As a consequence, the most work is to be done within the national laws of the Hague states which are now provided with guidelines and uniform understanding with the HCIA standards, applying to *inter alia* activities of accredited bodies.

5. Co-Operation of States in Intercountry Adoptions and Recognition of Adoption Decisions

Creation of States co-operation model through Central Authorities and introducing procedural rules of intercountry adoption are a counter-answer to private and direct adoptions, which often lack transparency and control of safeguard of children rights. The co-operation model is aimed at introducing tools for coordinated intercountry adoption procedure and easing coordination of the process taking place in two states.

HCIA distributes the responsibilities for ensuring compliance with substantive requirements for intercountry adoptions between the States (Articles 4 and 5). By setting the procedural rules, it attempts to provide a compromise solution for both state of origin and receiving state to ensure safeguard of children rights and observation of the best interest of the child not less than in domestic adoptions. Indeed, Central Authorities have the broadest powers and take the most important decisions in intercountry adoptions under HCIA, therefore it is vital that Central Authorities understand HCIA and its objectives, and properly apply its principles. It is also important that in the course of co-operation, Central Authorities without crossing autonomy of another State, proactively interact for ensuring that all substantive conditions of intercountry adoptions are fully met.

HCIA is counting already a third decade of application, therefore certain experience has been accumulated for resolving coordinating and other aspects of states' cooperation. However often co-operation model under HCIA is seen as a load of institutional paperwork not in fact preventing protection for any party involved in intercountry adoption on the ground. Scholars propose that for better safeguard of children rights amongst rights and interests of other participants, co-operation framework should be strengthened by establishing a supervising supra-Governmental body at the level of Hague Convention, enabling it to apply responsibility measures for the states which Central Authorities are in breach of the principles, set by HCIA.¹⁷

Articles 23 and 24 of HCIA state that Hague adoptions shall be recognized in the remaining Hague states, unless recognition is refused on the ground of manifest contradiction to public policy, the best interest of the child taken into account. Where public policy does not have a unique face, in complex with consideration of the best interest of the child also lacking clear content, a child may easily be found unprotected once in the country of origin already adopted, however such adoption not being recognized in the receiving state or any other Hague state of residence.

Finally, due attention is not paid to co-operation of the states and their Central Authorities in post-adoptive period, though numerous failed adoptions resulting in "re-homing" of adoptive children or their placement into institutions, demonstrate that post-adoptive co-operation and extensive assistance is

¹⁷ L.K. Carlberg 'The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A 'More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?' [2007] Indiana International and Comparative Law Review 134-135

needed for safeguard of intercountry adoption as practice serving for the child's interest and fundamental rights.¹⁸

Conclusion

Intercountry adoption being a subsidiary childcare option aims to provide children with homes and families, where they are deprived of such possibility in their birth countries. Where intercountry adoption is made between Hague states, the principles of the paramount best interest of the child, subsidiarity, child protection from abduction, human sale and trafficking, co-operation between states, automatic recognition of adoption decision and other safeguards shall apply. However vagueness of the contents of these contents, lack of co-operation between the states, declarative character of these concepts without real underlying sufficient implementation in the states demonstrate that HCIA is not enough. Ethically questionable adoptions due to malpractices or difference in legal concepts in the states of origin and failed intercountry adoptions will always negatively affect possibility to ensure children rights. Therefore for further promotion of children rights, bigger level of uniformity in laws or at least legal concepts is needed.

Bibliography

Books and articles:

1. E. Bartholet 'International Adoption: The Human Rights Position' Harvard University DASH repository. Available at: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:3228398> [viewed on 28/02/2015]
2. H. Boechat, F. Fuentes 'The Grey Zones of Intercountry Adoption' [2011] http://www.hcch.net/upload/wop/adop2010_info6e.pdf
3. N. Cantwell 'The Best Interests of the Child in Intercountry Adoption. *Innocenti Insight*' (Florence: UNICEF Office of Research 2014)
4. L.K. Carlberg 'The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A 'More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?' [2007] *Indiana International and Comparative Law Review*
5. G. Parra-Aranguren 'Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption' (HCCH 1993) http://www.hcch.net/index_en.php?act=publications.details&pid=2279&dtid=3
6. Hague Conference on International Private Law 'The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Good Practice Guide No. 1' (Bristol: Jordan Publishing Limited 2008)
7. K.S. Rotabi, J.L. Gibbons 'Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?' [2011] *Journal of Child and Family Studies* 21;
8. D. Smolin 'Intercountry Adoption as Child Trafficking' [2004] *Valparaiso University Law Review* 39
9. J. Wilkening 'Intercountry Adoption Act Ten Years Later: The Need for Post Adoption Requirements' [2011] *Ohio State Law Journal* 72

¹⁸ J. Wilkening 'Intercountry Adoption Act Ten Years Later: The Need for Post Adoption Requirements' [2011] *Ohio State Law Journal* 72 1063-1066

Official documents:

10. *Pini and others v Romania*, applications No. 78028/01 and 78030/01 [2004] ECHR
11. Recommendation No. 1443 of the Parliamentary Assembly of the Council of Europe. International adoption: respecting children's rights [2000]
<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1443.htm>
12. Hague Convention on on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Conference on Private International Law 1993
13. United Nations Convention on the Rights of the Child. General Assembly resolution 44/25 1989
14. Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe 1950

ENERGY SECURITY: THE CONCEPT AND THE MAJOR PROBLEMS ENCOUNTERED IN RELATION TO ITS IMPLEMENTATION

Justinas Poderis¹

Abstract

The legal concept of energy security according to the doctrine, national and European Union legislation is analysed in this thesis. The concept of the energy security of the Republic of Lithuania is discussed through the assessment of the key threats to the energy system defined in the national legislation and of the measures, by which the goal of ensuring energy security is declared. Considering the measures applied under the national legislation in order to ensure energy security, the compliance of the applicable measures with the national concept of energy security established in the European Union and international legal acts is analysed, the key problems related with the application of the latter measures are identified.

Introduction

Energy security is defined as one of the strategic goals of the European Union policy. Based on Article 194 of the Treaty on the Functioning of the European Union, the EU policy on energy aim to ensure security of energy supply, to promote energy efficiency, to ensure the functioning of the energy market and diversification of the energy sources. According to the strategic legislation defining the policy of the European Union, energy security in the Union is interpreted not only as a separate goal of the policy, but at the same time as one of the fundamental measures in securing economic growth, environmental protection of the European Union. Accordingly, the consistent practice of the European Court of Justice and related doctrine admit the energy security being one of the crucial prerequisites for public security and existence, therefore the task of securing it is to be considered as public interest.

According to Point 1, Paragraph 2, Article 4 of the Treaty on the Functioning of the European Union, energy is attributed to the competence to be shared between the European Union and the Member States. Paragraph 2, Article 194 of the above-mentioned Treaty stipulates a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. Thus, the energy sector of the EU Member States is directly dependent, first of all, on the national energy policy of the member states themselves and the national legal regulatory measures used to ensure the latter security.

The National security strategy of the Republic of Lithuania *expresis verbis* stipulates that energy security is one of the primary interests of the national security, if not defended, it will eventually result in the breach of the vital interests of the Republic of Lithuania. Energy security, being one of the major long-term goals of the Lithuanian energy policy, is established also in the national energy independence strategy defining the Lithuanian energy policy, according to which energy security is interrelated with the functioning of the energy sector, economic growth and competitiveness of the country.

Despite the energy security, as the precondition for the existence of the state, society and for the economic wealth, is stipulated in the legislation defining both the European Union policy and the national state policy, the lack of uniform concept of energy security is admitted in the doctrine, where different elements of the energy security are distinguished. In order to ensure their energy security,

¹ *Postgraduate student of Public Law Department, Faculty of Law, Vilnius University. Associate lawyer at Law Firm GLIMSTEDT Bernotas & partners, Chair of the Lithuanian Wind Power Association. Main fields of scientific research: energy law, environmental law, partnership between public and private sectors.*

countries make different decisions on its implementing measures, taking into consideration the national concept of energy security defined by the state.

Considering the importance of energy security and the diversity of the elements defining the latter, lack of unified concept of energy security, the concept of energy security should be discussed according to the European Union and national legislation, and the degree of the compliance of the legal regulatory measures established by the country for ensuring energy security with the national concept of energy security and the major problems regarding their application should be assessed.

1. The Legal Concept of Energy Security

As it was already noted the doctrine does not contain a unified concept of energy security. The key concepts of energy security referred to in the doctrine and legislation defining the energy policy are given below:

(i) energy security means uninterrupted actual availability of energy resources on the market for the price affordable to all consumers.² According to the concept above, the energy security consists of two crucial elements: sufficiently of the quantity and affordability of the price of energy resources. In every specific case, when determining if sufficient quantity of energy resources is available on the market and if their price is affordable, the relation of the dependence on the price of energy resources on the quantity is important.³

(ii) energy security means uninterrupted actual availability of energy resources on the market.⁴ It means that affordability of the price of energy resources is not directly considered to be one of the crucial elements of energy security.

(iii) energy security means ensuring availability of energy services needed by consumers for the established price.⁵ According to the latter concept, energy security is associated with uninterrupted provision of energy services based on energy resources.

The aim of energy security to eliminate technical, human and natural risks representing threats to energy system is distinguished in the doctrine.⁶ Technical risks concern proper functioning of technological facilities, infrastructure of energy resources and energy generation. While natural risks concern natural calamities, shortage of fossil fuels and interrupted generation of energy from renewable sources. Human risks are related with political, geopolitical threats, terrorism.⁷ The above-mentioned risks are further divided into the following types: (i) the risk of using up the reserves of energy resources. To control the above-mentioned risk at the EU scale, the Council adopted Directive No. 2006/67/EC on 24 July 2006 on imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products; (ii) the risk of the contents of contracts on energy resources acquisition. The risk of the contents of energy resources acquisition contracts is associated with the state's right to make changes to the clauses of energy resources acquisition contracts signed with the other states according to the changes in the structure of energy resources used, implemented projects on resources diversification. For example, as it is noted in the doctrine, in practice the Russian Federation sells its natural gas to the European countries under long-term (from 10 to 35 years) contracts, the latter contracts contain the "take-or-pay" clause widely used in the gas sector, under which if the buyer fails to buy the minimum yearly quantity of natural gas established in the contract, he still must pay for the

² Commission Green Paper, 'Towards a European strategy for the security of energy supply' [2000] COM/2000/0769 final; S. S. Haghighi, 'Energy Security – The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries' [2007] (Hart Publishing).

³ OECD/IEA, 'Energy Security and Climate Policy. Assessing Interactions' [2007].

⁴ Cit. op. 7. It must be noted that the concept of energy security, as the uninterrupted actual availability of energy resources on the market without associating it directly with the price of energy resources is established also in the US Code.

⁵ Department of Energy & Climate Change, United Kingdom, 'Energy Security Strategy' [2012] Cm8466.

⁶ A. Cherp, 'Global Energy Assessment: Toward a Sustainable Future' [2012], Cambridge University Press, p. 330.

⁷ Cit. op. 7.

agreed quantity of gas to the seller.⁸ Therefore, the long term of contracts and gas purchase conditions (restricting the possibility to buy less gas) essentially limit the state's possibilities to change the structure of energy resources or to choose alternative energy suppliers. The latter risk is relevant for Lithuania in its negotiations on the new term contract on natural gas supply from Russian Federation, with the present contract expiring in 2015; (iii) investment-related risks; (iv) risks associated with the types of energy resources; (v) risks associated with energy generation and its capacities.⁹ The risk of the contents of energy resources purchase contracts, risks associated with the types of energy resources and with the energy generation and its capacities are among the most relevant for the Republic of Lithuania. Respectively, the risk of availability of energy resources.

Since the state ensures energy security to protect public interests from the above-mentioned risks, therefore when defining the concept of energy security, it is recommended to consider the availability of the final energy services (products) and affordability of their prices to final consumers. In particular, when assessing actual availability and price of final energy products, availability and sufficiently of not only energy resources but also of energy generation, as well as related economic costs, are taken into consideration. The Energy Independence Strategy of the Republic of Lithuania *expressis verbis* describes satisfaction of the interests of Lithuanian consumers, i.e. possibility to buy energy resources at the best prices, as the vital principle of the strategy until 2050. While, if associating energy security exclusively with availability and price of energy resources, the final goal of energy resources use, i.e. energy services, possibility to buy which must be provided to energy consumers, is disregarded. Considering the latter and the circumstance that the legislation of the Republic of Lithuania does not define the concept of energy security, it is suggested to define the national energy security as the whole of the state-imposed measures aimed at securing energy consumers' right to receive energy services according to their demand for the established, affordable price.

2. National Measures to Ensure Energy Security and Main Problems Encountered During Their Implementation

In order to eliminate the risks jeopardizing energy security, countries establish certain energy security ensuring measures depending on the specific country's geopolitical, geographical situation, energy consumption, available infrastructure of energy generation, supply, transmission, storage, economic indicators. Based on the legislation defining the energy policy of the Republic of Lithuania, a conclusion should be made that the national measures ensuring energy security consist of the following: (i) diversification of electricity and gas resources supply (including implementation of related strategic projects on infrastructure); (ii) renewable energy development; (iii) local energy generation development through fuel conversion; (iv) increasing energy efficiency. However, despite the legal acts defining the Lithuanian energy policy quite clearly naming the main measures aimed at ensuring energy security, but the solutions implementing the latter measures in practice are not interrelated, thus causing disintegration of the common energy policy. For example, the national energy independence strategy stipulates that one of the strategy energy projects is the project of liquefied natural gas terminal, which will allow ensuring gas diversification. However, the above-mentioned strategy does not contain any clauses regarding potential use of diversified gas in heat production, despite the largest gas consumption being in heat production sector at present. On the contrary, reorganisation is planned for the heat energy sector by converting fuel from gas into biofuel, which would further limit the potential applications of diversified gas.

By associating energy security with the final price of energy services (products) for energy consumers, the economic-financial benefits of the solutions implementing the energy security enhancing

⁸ Oxford Institute for Energy Studies, 'Reducing European Dependence on Russian Gas: distinguishing natural gas security from geopolitics' [2014] OIES PAPER NG 92.

⁹ S. S. Haghghi, 'Energy Security – The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries' [2007] Hart Publishing.

measures must be assessed. It must be noted that some of the solutions implementing the energy security enhancing measures are financed as public service obligations, expenses of which are included into the electricity price for final consumers. According to Paragraph 7.5 of the Resolution No. 916 of 18 July 2012 of the Government of the Republic of Lithuania On the approval of the description of the procedure of providing public service obligations in the energy sector, one of the public service obligations is development of electricity generation capacities to ensure security and reliability of the operation of strategically important electricity system or energy independence of the country. According to Paragraphs 7.3 and 7.4 of the above-mentioned description, respectively, public service obligations also include electricity generation and its system reserve in the established power plants, in which electricity generation is necessary in order to ensure security of electricity supply. However, neither the above-mentioned description nor other legal acts stipulate clear, competitive procedure, following which persons willing to provide the services concerned could compete among each other on the provision of the above-mentioned public service obligations. Therefore, it is recommended to consider the possibility to elaborate the clauses of legislation regulating public service obligations by developing competitive clearly-defined procedure for selection of persons providing public service obligations.

Conclusion

1. National energy security of the Republic of Lithuania should be defined as the whole complex of the state-imposed measures aimed at securing the energy consumers' right to receive energy services satisfying their needs for the established, affordable price.
2. Solutions implementing the measures aimed at ensuring energy security must be integrated by securing intersectoral integration (energy resources/energy production ratio).
3. By associating the degree of energy security with the final price of energy services (products) for energy consumers, the measures aimed at ensuring energy security and their implementing solutions must be assessed according to the principle of economic benefits in order to choose the most economically-efficient option.

Bibliography

1. Communication from the Commission to the European Parliament and the Council, 'European Energy Security Strategy' COM(2014)330 final, [2014], SWD/2014/330/Final;
2. Treaty on the Functioning of the European Union [2012] C/326;
3. European Union economic growth strategy 'Europe 2020: A European Strategy for Smart, Sustainable, and Inclusive Growth', Commission Communication [2010] COM (2010) 2020 final;
4. Environmental action programme 2020 established in the General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' by the Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013;
5. An opinion of Advocate General Mazák in case C-439/06 [2007];
6. An opinion of Advocate General Juliane Kokott in the case C-404/09;
7. The National Security Strategy approved by Resolution of the Seimas of the Republic of Lithuania on 25 May 2002;
8. The National Energy Independence Strategy approved by Resolution No. XI-2133 of the Seimas of 26 June 2012;
9. C. Winzer, 'Conceptualizing Energy Security' [2011] (University of Cambridge, EPRG Working Paper 1123, Cambridge Working Paper in Economics 1151);
10. Commission Green Paper, 'Towards a European strategy for the security of energy supply' [2000] COM/2000/0769 final;
11. S. S. Haghghi, 'Energy Security – The External Legal Relations of the European Union

- with Major Oil and Gas Supplying Countries' [2007] (Hart Publishing);
12. OECD/IEA, 'Energy Security and Climate Policy. Assessing Interactions' [2007];
 13. Department of Energy & Climate Change, United Kingdom, 'Energy Security Strategy' [2012] Cm8466;
 14. A. Cherp, 'Global Energy Assessment: Toward a Sustainable Future' [2012], Cambridge University Press;
 15. Oxford Institute for Energy Studies, 'Reducing European Dependence on Russian Gas: distinguishing natural gas security from geopolitics' [2014] OIES PAPER NG 92;
 16. Resolution No. 916 of 18 July 2012 of the Government of the Republic of Lithuania On the approval of the description of the procedure of providing public service obligations in the energy sector;
 17. *Campus Oil and Others*, Case 72/83 [1983];
 18. *Staat der Nederlanden v Essent NV and others*, Case C-105/12-C107/12 [2013];
 19. *Commission v Kingdom of Belgium*, C-503/99 [2002].

HUMAN SECURITY AND THE DEVELOPMENT OF BIOMEDICAL SCIENCE

Jurgita Randakevičiūtė¹

Abstract

The main objective of this conference paper is to analyse how the legal system, which has the aim to guarantee human security, should react to the development and novelties of biomedical science, even when the latter presents scientific knowledge, which is difficult for the law to comprehend.

Introduction

Scientific advancement, if properly performed, leads to benefits, both, to the economic systems and individuals. This includes biomedical science² that aim at developing advanced diagnostic and therapeutic strategies, in order to tackle many diseases and, this way, to enhance the welfare of human beings. However, despite the possible positive outcomes, this development, due to the fact, that biomedical science is closely related to highly sensitive categories, such as, physical or mental condition of human being, raises complex legal questions for governments and private entities. These subjects do not always share the same opinion on how the biomedical science should develop, in order to guarantee the well-being of the members of society.

The afore-described situation presupposes that it is necessary for the law to find guidelines while dealing with the divergent values and competing views of the actors of the biomedical science. This may be a difficult task for those legal systems that are strongly committed to human rights' standards, and, as the recent experience with regard to the response to terrorism threat shows, the human rights-related ideals may be compromised in extraordinary circumstances even in countries that have strong democratic traditions. Today countries routinely resolve questions that literally are beyond anything that could have been imagined when the foundations of many legal systems were set in place³. This is especially true, when law deals with such an innovative field as biomedical science. Therefore, a serious reconsideration of the legal framework in this sphere, in order to guarantee the protection of human security⁴ and to encourage the development of biomedical science, is needed.

The fact that the relation of biomedical science and law requires a serious analysis can be demonstrated by recent events, when the UK Parliament⁵ voted in favour of a procedure that would lead

¹ PhD candidate of Vilnius University Faculty of Law working under supervision of the prof. dr. (HP) Jevgenij Machovenko. Her work focuses on the relation between development of legal regulation and biomedical science. She holds two LL.M. degrees from Vilnius University Faculty of Law and Munich Intellectual Property Law Center. Jurgita's main fields of interest are the following: legal theory; legal philosophy; intellectual property law; law, science and technology; standard-essential patents and competition law; data protection and privacy law.

² Biomedical science is understood as a term describing the investigations carried out by specialist on samples of tissue and body fluids to diagnose disease and monitor the treatment of patients (Information of the Institute for Biomedical Science <<https://www.ibms.org/go/biomedical-science>> [last viewed: 8 March 2015])

³ S. Jasanoff, 'Science at the Bar. Law, Science, and Technology in America' (Harvard University Publishing 1997) ix

⁴ In this conference paper, human security is be regarded as a part of international security in the holistic sense, which foresees not only the state as the referent of the concept of security but also encompasses societal and environmental spheres (following the ideas of Barry Buzan (B. Buzan, 'People, states and fear: an agenda for international security studies in the post-cold war era' (ECPR Press 2008) 38)), and is understood as a situation when highly sensitive aspects of human, i.e. human life and human dignity, are protected (following the ideas of the United Nations Development Program, Human Development Report, <<http://hdr.undp.org/en/reports/global/hdr1993/chapters/>> [last accessed: 8 March 2015]). In the context of this conference paper such aspects, as physical and mental integrity of a human being, will be the most relevant parts of human security.

⁵ Parliament of the United Kingdom and Northern Ireland

to the creation of babies who would have the DNA of three different people, i.e. two parents and a donor woman.⁶ This procedure will be used to cure mitochondrial disease and result in babies with 0.1% of their DNA from the second woman. Although the percentage of the DNA of the donor is relatively small, 'the implications of this [technique] simply cannot be predicted'⁷. Thus, currently the legal system must decide on issues, that might have unknown and clearly irreparable consequences on human beings in the future: 'once the gene is out of the bottle, once these procedures that we're asked to authorise today go ahead, there will be no going back for society.'⁸

This example questions to what extent the existing institutions of governance are capable of meeting novel technical and moral uncertainties presented by the biomedical science. It seems reasonable, that it is necessary to understand the objects that are being created in the process of scientific advancement, in order to shape the legal system in an appropriate way. However, the scientific issues presented before us today are well beyond the comprehension of most of us.⁹ Lawyers, who are in charge of regulating such processes, are usually not among the latter group of people who properly understand biomedical science. Thus, the main objective of this conference paper is to analyse how a legal system, which has the aim to guarantee human security, should react to the development of biomedical science, even when the latter tackles issues that are difficult for the law to comprehend.

1. The Changing Tradition

Traditionally, science had been understood as a system of knowledge that is concerned with the physical world and its phenomena, and that entails unbiased observations and systematic experimentation.¹⁰ However, over time the notion of science changes. Nowadays, we are experiencing the paradigm shift in science, i.e. the paradigm of the 'old' science yields its position to the paradigm of the 'new' science.¹¹ The latter concept does not regard the possibilities of cognition as unlimited and accepts that it depends not only on the limitations of the subject, but also on the complexity and dynamics of the research object itself.¹² It is claimed, that nowadays science has reached such a stage when less is clear than unclear.¹³ Nevertheless, despite the afore-described uncertainties, our daily life strongly relies on science, which 'underwrites our most fervent hopes for the future, whether they centre on education or health, on sustainable environments or relief from hunger, on better jobs or more efficient production, on winning wars or keeping peace'¹⁴. Such developments with regard to the notion and importance of science encourage the analysis of its influence on various spheres of reality, including law.

A similar shift¹⁵ has been experienced in law after the WWII, when it became clear, that it is not possible to achieve peace and justice until law recognizes human being as the most important value that needs to be protected. The Universal Declaration of Human Rights (Declaration), which was signed

⁶ J. Gallagher, 'MPs say yes to three-person babies' (3 February 2015, BBC News website, <<http://www.bbc.com/news/health-31069173>> [last accessed: 6 March 2015])

⁷ J. Gallagher, 'MPs say yes to three-person babies' (3 February 2015, BBC News website, <<http://www.bbc.com/news/health-31069173>> [last accessed: 6 March 2015])

⁸ J. Gallagher, 'MPs say yes to three-person babies' (3 February 2015, BBC News website, <<http://www.bbc.com/news/health-31069173>> [last accessed: 6 March 2015])

⁹ S. Jasanoff, 'Science at the Bar. Law, Science, and Technology in America' (Harvard University Publishing 1997) ix

¹⁰ Encyclopaedia Britannica, <<http://www.britannica.com/EBchecked/topic/528756/science>> [last accessed: 6 March 2015]

¹¹ D. Valančienė, 'Teisės mokslas senoji ir naujoji mokslo paradigmos akivaizdoje' [2015] Doctoral Thesis 73

¹² D. Valančienė, 'Naujoji – sudėtingųjų dinamiųjų sistemų – mokslo įtaka teisės mokslui' [2012] 78 Teisė 197

¹³ D. Valančienė, 'Teisės mokslas senoji ir naujoji mokslo paradigmos akivaizdoje' [2015] Doctoral Thesis 73

¹⁴ S. Jasanoff, 'The sound conduct of science and the sound conduct of democracy both depend on the same shared values' (17 February 2009, SEED Magazine, <http://seedmagazine.com/content/article/the_essential_parallel_between_science_and_democracy/P1/> [last accessed: 6 March 2015])

¹⁵ By making this statement author is following the ideas of A. MacIntyre about the stages of the development of the tradition (A. MacIntyre, 'Whose Justice, Which Rationality' (Notre Dame: Notre Dame University Press 1988) 355).

in 1948, proclaimed that every human being is valuable and his/her dignity must be respected. In almost 70 years since the adoption of the Declaration, the comprehensive parameters of the obligations and the values have been established in a large number of agreements, pacts and conventions. Among those values, the protection of human dignity and life has an exceptional position: '<...> [the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.¹⁶ This way it has been recognized, that in every democratic society a human being must be regarded as an exceptional value and, thus, the legal system should preserve his/her security. This task nowadays is especially important in the context of the biomedical science.

Since the industrial revolution, the relationship between the afore-discussed categories largely had been economically driven.¹⁷ Such an approach have been suitable when the main scientific development was related to such fields as mechanical engineering. However, today's scientific development affects the most sensitive aspects of a human being. Therefore, simply throwing more money at science, or even listening to the best-qualified scientists for advice, may not ensure that research would be aligned with the human security.

With regard to the fact, that inventions inevitably become more and more sophisticated, science can be distinguished into several categories: (i) 'normal science' for ordinary scientific research; (ii) 'consultancy science', which is used for the application of available knowledge to well-characterized problems; and (iii) 'post-normal' science, for the highly uncertain and contested knowledge needed for many health, safety and environmental decisions.¹⁸ The latter type could be described as the 'intellectual creations which are disturbing to the very depths of our human society, as well as to our human existence'.¹⁹ It is claimed, that the third type of science should be subject to 'extended peer review', which means that it should be analysed not only by the scientists but also the stakeholders affected by the use of the that science.²⁰ Legal system, in order to guarantee human security, should provide similar 'extended' attention to the biomedical science. In the light of the afore-specified views, it will be further discussed, whether there exists any feasible approach to the issues raised by the advancement of biomedical science, which would guarantee human security.

2. Towards a New Approach

Usually, while discussing the influence of biomedical science to law, only specific situations are being discussed, e.g. a litigation over embryos²¹ or over the rights and status of a surrogate mother²², whereas the question, whether there is an overall impact on the legal system is being raised less often. Nevertheless, the question what kind of legal system can science oriented society expect to have²³, would encourage moving from individual legal issues and considering whether the development of science²⁴, is producing structural changes within the legal system²⁵, that might essentially reshape it.

While distinguishing rules from principles, Ronald Dworkin states that rules play in an 'all or nothing fashion'²⁶, whereas, principles have the 'dimension of weight or importance'²⁷. It may be possible to claim, that these ideas illustrate the issues that the interaction of law and science faces.

¹⁶ The Universal Declaration of Human Rights 1948, <<http://www.un.org/en/documents/udhr/>> [last accessed: 6 March 2015]

¹⁷ S. Jasanoff, 'The Life Sciences and the Rule of Law' [2002] *J. Mol. Biol.* 897-898

¹⁸ J. R. Ravetz, S. O. Funtowicz, 'Three types of risk assessment and the emergence of post-normal science', In S. Krimsky, D. Golding (eds.), 'Social theories of risk' (Westport: Praeger 1992) 251-273

¹⁹ O. Schroeder, Jr., 'Introduction' [1967] 19 *Case W. Res. L. Rev.* 6

²⁰ S. Jasanoff, 'Technologies of Humility: Citizen participation in governing Science' [2003] *Minerva* Vol. 41, Issue 3 232

²¹ E.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)

²² E.g., *Johnson v. Calvert*, 286 Cal. Rptr. 361 (Cal. App. 4th Dist. 1991)

²³ P. Drahos, 'Law, Science and Reproductive Technology' [1985] 9 *Bull. Austl. Soc. Leg. Phil.* 272-273.

²⁴ Including biomedical science.

²⁵ P. Drahos, 'Law, Science and Reproductive Technology' [1985] 9 *Bull. Austl. Soc. Leg. Phil.* 272

²⁶ R. Dworkin, 'Taking Rights Seriously' (Bloomsbury Academic 2013) 41

²⁷ R. Dworkin, 'Taking Rights Seriously' (Bloomsbury Academic 2013) 42

When speaking about law on the more abstract level, i.e. on the level of principles, it is clear, that the existing law is perfectly applicable to the developments that science brings. Even in the light of the most complicated technology, from the perspective of principles, highly sensitive issues related to human security most likely will be solved. However, that is not the case when law faces a concrete situation, which requires the application of legal rules. In such a case, the mode 'all-or-nothing' comes into play and the conflict between science and law becomes inevitable. While speaking about the development of science and technology and their relation to contemporary legal systems, we witness the confrontation between the utilitarian²⁸ and the deontological arguments²⁹. Such collision seems quite easy to solve on the abstract level, however, it becomes more complicated when it concerns specific situations. In such concrete situations a clear clash between the values that are enshrined in law and the practical benefits of the ground-breaking knowledge is visible.

However, the fact, that specific rules do not seem to be applicable to certain scientifically created situations, does not mean, that the whole legal system should be reviewed fundamentally. In this context, the methodological differences between science and law are highly important. Although, the relation between law and science is regarded as the relation between the prime movers of the social change, i.e. values and understanding³⁰, the interaction between these categories in the court proceedings reveals that they represent two very different traditions³¹. It is claimed, that there is an inherent conflict between science and law, because the nature of law is to be in a 'final form', whereas science and technology are instigators of change.³²

Due to the afore-discussed methodological differences between science and law, science becomes much useful when it comes to solving concrete situations, i.e. applying the rules. When a legal matter that is being discussed relates to biomedical science, the scientifically based arguments may seem more reliable. Nowadays, even in the legal systems, where such values, as human life and dignity should be of higher importance than the necessity to foster economic growth³³, it is becoming more and more difficult for the law to overcome the neutral and value-free arguments of science. This may lead to the situation when law is left to scientific determinism, i.e. the belief that everything 'is foreordained and the deliberate change as such is impossible'³⁴. Following this logic, certain scientific advancements seem inevitable and 'the societal responses must follow the paths carved out by technology's forward march'³⁵.

However, scientific determinism is not what contemporary democratic society, which cares about human security, should aim for. A situation when science will not pay attention to such values as human life and dignity may lead to terrible state-supported scientific projects, such as race science in Nazi Germany. Therefore, despite the difficulties that law is facing in concrete situations, the solutions should not be left only to the scientifically based arguments. Even in difficult situations, law must not easily give up upon its nature and inner values even in the light of scientific arguments. In this context, it is important to point out that human knowledge has advanced and 'we already know great many things

²⁸ E.g., the ability to cure severe diseases; possibility to gain high profits after being the first one to patent some kind of invention

²⁹ E.g., how certain scientific actions affect human health, integrity or even human dignity

³⁰ H. Gibbons, 'Relationship between Law and Science. Part IV' [1982] 22 IDEA 283

³¹ S. Jasanoff, 'Science at the Bar. Law, Science, and Technology in America' (Harvard University Publishing 1997) x

³² P. Drahos, 'Law, Science and Reproductive Technology' [1985] 9 Bull. Austl. Soc. Leg. Phil. 274, citing M. D. Kirby, 'Science, Technology and Law Reform', paper given at the Seminar on Science, Technology and the Law, Monash University/Law Council of Australia, 27 January 1977

³³ The Universal Declaration of Human Rights 1948, <<http://www.un.org/en/documents/udhr/>> [last accessed: 6 March 2015]

³⁴ M. D. Forkosch, 'Determinism and the Law'[1971] 60 Ky. L.J. 352

³⁵ S. Jasanoff, 'The sound conduct of science and the sound conduct of democracy both depend on the same shared values' (17 February 2009, SEED Magazine, <http://seedmagazine.com/content/article/the_essential_parallel_between_science_and_democracy/P1/> [last accessed: 6 March 2015])

about how to examine life, harness energy, measure society <...> to support rational public decisions'³⁶. Thus, in the scientifically well-explored spheres ('normal science' and the 'consultancy science'³⁷) law should take into consideration research data. The area where law should be more cautious and committed to its values is the 'post-normal' science, which tackles sensitive aspects of human nature that may affect human security.

Taking into consideration the arguments above, it is possible to claim, that in the 21st century we need a deep understanding of the history and nature of our legal system. It should be analysed what it means to align the advancement in biomedical science with the legal system that promotes human life and dignity as intrinsic values. This is especially important in the light of a largely unregulated relationship between science and private interests that drives discovery without attention to human security. There is a risk that encouraged by economic greed, science which is problematic to human security will appear without a proper attention to these intrinsic values. For this reason, even though preserving human security in the light of the development of biomedical science may not need a 'Second Enlightenment'³⁸, pointing out the intrinsic values of law each time when dealing with this scientific field is essential.

Conclusion

Nowadays, law by not being capable to provide the society with such a significant and foreseeable utilitarian uses as the science is, finds it more and more difficult to justify its values, which for a long time had been considered as fundamental. The afore-specified trend is especially significant when it comes to the 'post-normal' science, including biomedical science, which deals with highly sensitive aspects that are essential for the human security. However, the lack of the utilitarian arguments should not result in compromising the aim of law to protect human security. When dealing with unclear aspects of 'post-normal' science the 'must do' nature of law should prevail over the 'can do' orientation of the biomedical science.

Bibliography

1. The Universal Declaration of Human Rights 1948, <<http://www.un.org/en/documents/udhr/>> [last accessed: 6 March 2015]
2. B. Buzan, 'People, states and fear: an agenda for international security studies in the post-cold war era' (ECPR Press 2008)
3. P. Drahos, 'Law, Science and Reproductive Technology' [1985] 9 Bull. Austl. Soc. Leg. Phil.
4. R. Dworkin, 'Taking Rights Seriously' (Bloomsbury Academic 2013)
5. M. D. Forkosch, 'Determinism and the Law'[1971] 60 Ky. L.J.
6. J. Gallagher, 'MPs say yes to three-person babies' (3 February 2015, BBC News website, <<http://www.bbc.com/news/health-31069173>> [last accessed: 6 March 2015])
7. H. Gibbons, 'Relationship between Law and Science. Part IV' [1982] 22 IDEA 283

³⁶ S. Jasanoff, 'The sound conduct of science and the sound conduct of democracy both depend on the same shared values' (17 February 2009, SEED Magazine, <http://seedmagazine.com/content/article/the_essential_parallel_between_science_and_democracy/P1/> [last accessed: 6 March 2015])

³⁷ J. R. Ravetz, S. O. Funtowicz, 'Three types of risk assessment and the emergence of post-normal science', In S. Krimsky, D. Golding (eds.) 'Social theories of risk' (Westport: Praeger 1992) 251-273

³⁸ S. Jasanoff, 'The sound conduct of science and the sound conduct of democracy both depend on the same shared values' (17 February 2009, SEED Magazine, <http://seedmagazine.com/content/article/the_essential_parallel_between_science_and_democracy/P1/> [last accessed: 6 March 2015])

8. S. Jasanoff, 'Science at the Bar. Law, Science, and Technology in America' (Harvard University Publishing 1997)
9. S. Jasanoff, 'Technologies of Humility: Citizen participation in governing Science'[2003] *Minerva* Vol. 41 Issue 3
10. S. Jasanoff, 'The Life Sciences and the Rule of Law' [2002] *J. Mol. Biol.*
11. S. Jasanoff, 'The sound conduct of science and the sound conduct of democracy both depend on the same shared values' (17 February 2009, SEED Magazine, <http://seedmagazine.com/content/article/the_essential_parallel_between_science_and_democracy/P1/> [last accessed: 6 March 2015])
12. A. MacIntyre, 'Whose Justice, Which Rationality' (Notre Dame: Notre Dame University Press 1988)
13. J. R. Ravetz, S. O. Funtowicz, 'Three types of risk assessment and the emergence of post-normal science', *In* S. Krimsky, D. Golding (eds.) 'Social theories of risk' (Westport: Praeger 1992)
14. O. Schroeder, Jr. 'Introduction' [1967] 19 *Case W. Res. L. Rev.*
15. D. Valančienė, 'Naujojo – sudėtingųjų dinaminių sistemų – mokslo įtaka teisės mokslui' [2012] 78 *Teisė*
16. D. Valančienė, 'Teisės mokslas senojo ir naujojo mokslo paradigmos akivaizdoje' [2015] Doctoral Thesis
17. United Nations Development Program, Human Development Report, <<http://hdr.undp.org/en/reports/global/hdr1993/chapters/>> [last accessed: 8 March 2015]
18. Encyclopaedia Britannica, <<http://www.britannica.com/>> [last accessed: 6 March 2015]
19. Information of the Institute for Biomedical Science <<https://www.ibms.org/go/biomedical-science>> [last viewed: 8 March 2015]
20. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)
21. *Johnson v. Calvert*, 286 Cal. Rptr. 361 (Cal. App. 4th Dist. 1991)

THREE CRITIQUES OF SECURITY NATURALISATION, SECURITISATION & LIBERAL POLITICAL RATIONALITY

Cara Röhner¹

Maximilian Pichl²

Abstract

Since Thomas Hobbes' Leviathan security has been the key purpose of law and order. Today, security has even become a "catch all"-concept that embraces all the good things we want to have. Thus, security is often understood to be a positive value that needs to be maximised. In contrast to such a narrative, we want to argue that the language of security in legal discourses is inherently ideological and undemocratic. We demonstrate that argument by delineating three critiques of security. First, we criticise security as the foundation of modern order. We draw upon the contractual theory by Thomas Hobbes and show that it naturalises a negative idea of human nature and suggests that the state has necessarily to evolve out of the state of nature. This naturalisation has advanced security as a self-evident purpose or truth of law and forecloses debates about its merits. Whereas the first part is about the founding principles of state order, in our second critique we focus on how the notion of security works as the justification of modern state politics. With the securitisation theory we argue that the opposition of security is not insecurity, but a-security, or better democratic politics. According to this view security is not an objective fact or a state of an individual but a speech act, thus intersubjectively shared knowledge. In alignment with Foucault we can show in a third critique that liberalism and security politics are intertwined. The law has to address this precarious relationship. It has to acknowledge that security is the other side of liberalism and thus an inherent feature of modern political rationality within the liberal democratic state. Despite the ambivalences of democracy, we think that democracy could be an imminent benchmark for criticising domination rather than security.

1. All We Want is Security! Or Not?

Since Edward Snowden leaked classified information of the National Security Agency (NSA) to the English newspaper *The Guardian* in 2013, the enormity of global surveillance programs has become visible. The danger to privacy and fundamental rights was intensely debated in public. The first reaction of the German government, however, was irritating. Instead of criticising the surveillance made possible by programs such as PRISM and TEMPORA, the German Federal Minister of the Interior Hans-Peter Friedrich (conservatives) declared – after a meeting with the parliamentary control committee for secret services – that "Security is a super-fundamental right." His neologism suggests "security trumps other civil rights."³

In his analysis of the French Declaration of the Rights of Man and of the Citizen of 1789 Karl Marx stated that security is the highest social value of civil society.⁴ Like the German Federal Minister of the Interior, he assumed that security stands out from other individual rights. In contrast to the Minister,

¹ Studied Law and Political Science in Frankfurt am Main and in Bordeaux and is now a research associate at the law school of Frankfurt University.

² Studied Law and Political Science in Frankfurt am Main and is now a PhD-Candidate in Law at Frankfurt University.

³ V. Medick, P. Wittrock, NSA Scandal: Merkel's Interior Minister Not Up to the Job, Spiegel Online International 17th of July 2013.

⁴ K. Marx, 'On the Jewish Question', in: The Marx-Engels Reader (New York: Norton & Company 1978) 42 ff.

however, Marx does not draw on security in an affirmative way but identifies security as the concept of the police, as the protection of private property. He uses the concept of security as a critique of liberal democracy and the rule of law: “The concept of security is not enough to raise civil society above its egoism. Security is, rather, the *assurance* of its egoism.”⁵

Since Thomas Hobbes’ Leviathan security has been the key purpose of law and order. State order is justified as a tool to establish and maintain security and peace. Law aims in that perspective at guaranteeing individual and collective security; it is necessarily intertwined with security and order. Although security and other public services have been privatised during the last years, even political representatives of neoliberal policies would argue that security should remain the core function of the state.

In contrast to such a narrative, we want to argue that the language of security in legal discourses is inherently ideological and undemocratic. We demonstrate that argument by delineating three critiques of security. First, we criticise security as the foundation of modern order. We draw upon the contractual theory of Thomas Hobbes and show that it naturalises a negative idea of human nature and suggests that the state has necessarily to evolve out of the state of nature. This naturalisation has advanced security as a self-evident purpose or truth of law and forecloses debates about its merits. Whereas the first part is about the founding principles of state order, in our second critique we focus on how the notion of security works as the justification of modern state politics. With the securitisation theory we argue that the opposition of security is not insecurity, but a-security, or better democratic politics. According to this view security is not an objective fact or a state of an individual but a speech act, thus intersubjectively shared knowledge. In alignment with Foucault we can show in a third critique that liberalism and security politics are intertwined. Security is the other side of liberalism, and thus an inherent feature of modern political rationality within the liberal democratic state. But how to break this vicious circle? Despite the ambivalences of democracy, we think that democracy could be an imminent benchmark for criticising domination rather than security. Law should follow a democratic rather than a security paradigm.

2. Naturalisation: the State of Nature as Ideology

The origin of modern state theory is not based on empirical social facts, but on the legend of the state of nature. It was Thomas Hobbes, who in the confusion of the English Civil War, tried to construct a system of social order which could hold society together – despite all religious controversies. Whereas Hobbes nowadays is referred to as the inaugurator of totalitarian regimes, his contribution to state theory was progressive at the time. He detached state power from the doctrine of divine rights. For the first time, power had to justify itself. However, the main problem of his modern state project is the linkage with security as its main purpose.

According to Hobbes “nature hath made men so equal”⁶, but at the same time as “men live without a common Power to keep them all in awe, they are in a condition which is called Warre; and such a warre, as is of every man, against every man.”⁷ Hobbes calls this the state of nature, a pre-social condition, in which all human beings have absolute freedoms, but resources are scarce. In their wish to survive and to accumulate more property, they interfere violently with each other. In Hobbes’ thought experiment, everybody lives in constant fear of being attacked by others. Therefore, all human beings – in their strive to survive – would conclude to give up their absolute freedom and “conferre all their power and strength upon one Man [...]; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man.”⁸ It is the idea of a “peace machine” “with the focus on the

⁵ Ibid 43.

⁶ T. Hobbes, ‘Leviathan’ (Cambridge: Cambridge University Press 2001 [1651]) 86.

⁷ Ibid 88.

⁸ Ibid 120.

prevention of threats from within and from the outside". But as Günter Frankenberg puts it "the techniques employed by the state turn out to be security technology."⁹

Hobbes conception of the state is based on several assumptions: first, all free living persons tend to destroy each other in their egoistic manner to survive and to gain more power; second, private property is a natural right; and third, state security would prevent all dangers which result from the egoism of men.

This negative conception of human nature has survived the totalitarian concept of Hobbes' Leviathan. Even in liberal democracies the egoism of men is the main reference point to legitimise police actions and security measures. In fact, the whole idea of Hobbes' state of nature is an ideological operation to justify the modern state project.

Ideological strategies function in different modes. First, ideology constructs the outcome of concrete social struggles not as a historic moment but as a given or anthropologically necessary evolution. Ideology works first as *normalisation*.¹⁰ Despite the fact that Hobbes constructed the Leviathan as a thought experiment, his narrative for the legitimation of the state has become an unquestioned 'truth'. According to this narrative the state has not emerged from the British Civil War. Hobbes narrates the evolution of the state as a natural process without alternative, disguising that the Civil War could also have led to an empowerment of the church or even another mode of collective human organisation apart from the modern state.

Normalisation is also equipped with *naturalisation*: "In this way we may be encouraged to take the world for granted, rather than to approach it in terms of choices. We may come to see it as an objective domain to which we must adapt, rather than a political one defined through struggle and negotiation."¹¹ If Hobbes states that human nature is predetermined, then there is no alternative for mankind than to enable a power like the Leviathan. Then, a strong state power becomes necessary to control human beings and treat them as potential dangers for social order. In her postcolonial critique of contractual theories, Patricia Purtschert shows that Hobbes did not describe men in the state of nature, but men in civil society. The behaviour of men in civil society is presented as a pre-social condition. Therefore Hobbes wraps men of civil society just in a natural costume.¹²

From Hobbes point of view, as there is no alternative to a strong state with security as its main purpose, free deliberation to find new forms of collective organisation is dismissed: "From this false doctrine, men are disposed to debate with themselves, and dispute the commands of the Commonwealth; and afterwards to obey or disobey them, as in their private judgements they shall think fit. Whereby the Commonwealth is distracted and Weakened."¹³

The naturalised liberal idea of private property, as it is present in Hobbes' Leviathan, has not lost its self-evident truth until today. Nowadays attempts to think of societies without the imperative to accumulate capital or without the assumed natural right to private property are heavily confronted by state repression. Debates about social progress and social transformation are perceived to be threatening and are – in the name of security – marginalised, or even under close observation by security state apparatuses. In this perspective, it is consequential that the Leviathan is "not Subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new."¹⁴

Hobbes knew that his concept of sovereignty was not part of common human thinking. So the Leviathan was not only a peace project but also an educational one. "To rouse fear in the countryside, these preachers would have to be trained in the philosophical foundations of fearful obedience. This

⁹ G. Frankenberg, 'Political Technology and the Erosion of the Rule of Law' (Cheltenham: Edward Elgar 2014) 13f.

¹⁰ S. Marks, 'The Riddle of all Constitutions. International Law, Democracy and the Critique of Ideology' (Oxford: Oxford University Press 2000) 19.

¹¹ Ibid 22.

¹² P. Purtschert, 'Jenseits des Naturzustands. Eine Postkoloniale Lektüre von Hobbes und Rousseau' [2012] DZPhil 6, 866.

¹³ T. Hobbes, 'Leviathan' (Cambridge: Cambridge University Press 2001 [1651]) 223.

¹⁴ Ibid 184.

required education, which required teachers, which required universities.¹⁵ The negative human nature, one could argue, has to become man's second nature in a process of teaching and conviction.

Hobbes introduced fear and security as the purpose of law and order. His legitimization of the modern state is continued by conservative political philosophers with their interest in "how political rule can be protected from dangerous individuals, harmful elements and exuberant, untamed initiatives of the citizenry."¹⁶ But the recent images of police brutality in Ferguson, the repressive European border regime against migrants in the Mediterranean sea and the unlimited surveillance of people by the NSA and other secret intelligence services, should remind us, that the state might not be the protector of but the greatest danger to human security.

3. Securitisation: Security as a Speech Act

If we leave the contractual theory of Hobbes and look into modern security studies, we can find new conceptions of security as a positive reference point for state actions. Within the security studies a wide notion of security has been pushed in recent years in order to overcome the narrow cold war definition of security as the absence of (military) threat.¹⁷ New concepts have been formulated: *inter alia*, human security¹⁸ and environmental security¹⁹. The concept of human security has become popular to advance the basic needs of (disadvantaged) individuals. Security has become a "catch all"–concept that embraces all the good things we want to have. Therefore, in this view security has to be maximised. In contrast to such a positive account of security, we want to advance an alternative perspective called securitisation theory.²⁰ Ole Wæver and Barry Buzan, the so-called Copenhagen School, have developed the securitisation theory as a response to the progressive inclusion of non-traditional issues into the security agenda. To prevent a depletion of the security notion, they shift the focus from the question what security "really" means to how the notion is used in security discourses. Drawing upon John L. Austin's linguistic theory and his book "How to do things with words"²¹ they conceptualise security as a speech act. Language, in that perspective, does not represent a true reality but constitutes reality itself. Language has a productive or performative character that produces the things that are said – speaking is doing. The idea of security as a speech act focuses on the social construction of threats and argues that that, which is framed as in/security is produced through a process of social (and legal) discourses – through securitisation.²² According to this view, security is no objective fact or a state of an individual but an intersubjectively shared understanding about what a threat is: "Security" is thus a self-referential practice, because it is in this practice that the issue

¹⁵ C. Robin, 'Fear. The History of a Political Idea' (Oxford: Oxford University Press 2004) 39.

¹⁶ G. Frankenberg, 'Political Technology and the Erosion of the Rule of Law' (Cheltenham: Edward Elgar 2014) 17.

¹⁷ For a traditional, narrow understanding of security studies see S. Walt, 'The Renaissance of Security Studies' [1991] *International Studies Quarterly* 35:2, 211; D. Deudney, 'The Case Against Linking Environmental Degradation and National Security' [1990] *Millennium* 19: 3, 461.

¹⁸ See for example, United Nations Development Program, *Human Development Report 1994*.

¹⁹ See for example, R. A. Matthew, 'Environmental Security: Demystifying the Concept, Clarifying the Stakes', in: P.J. Simmons (ed.), *Environmental Change and Security Project Report No. 1*, (Princeton: Woodrow Wilson Center 1995) 14.

²⁰ O. Wæver, 'Securitization and Desecuritization', in: R. D. Lipschutz (ed.), 'On Security' (New York: Columbia University Press 1995) 46; B. Buzan, O. Wæver, J. de Wilde, *Security: A New Framework for Analysis* (Boulder/London: Lynne Rienner Publishers 1997); L. Hansen, *Security as Practice* (London/New York: Routledge 2006). For critiques of the Copenhagen School see J. Eriksson, 'Observers or Advocates? On the Political Role of Security Analysts' [1999] *Cooperation and Conflict* 34, 311; B. McSweeney, Bill, 'Identity and security: Buzan and the Copenhagen school' [1996] *Review of International Studies* 22, 81; M.C. Williams, 'Words, Images, Enemies: Securitization and International Politics' [2003] *International Studies Quarterly* 47, 511. For replies by the Copenhagen School see O. Wæver, 'Securitizing Sectors? Reply to Eriksson' [1999] *Cooperation and Conflict* 34:3, 334; B. Buzan, O. Wæver, 'Slippery? Contradictory? Sociologically Untenable? The Copenhagen School Replies' [1997] *Review of International Studies* 23:2, 241.

²¹ J. L. Austin, 'How To Do Things With Words' (Cambridge: Harvard University Press 1975).

²² O. Wæver, 'Securitization and Desecuritization', in: R. D. Lipschutz (ed.), 'On Security' (New York: Columbia University Press 1995) 46; B. Buzan, O. Wæver, J. de Wilde, 'Security: A New Framework for Analysis' (Boulder/London: Lynne Rienner Publishers 1997).

becomes a security issue – not necessarily because a real existential threat exists but because the issue is presented as such a threat.”²³

What is understood as a security issue or a threat is not a natural thing but contingent. „We are not dealing here with a universal standard based in some sense on what threatens individual human life.“²⁴ The perceived threat and the endangered referent object differ across sectors. In the military sector the security of “the state” is negotiated, in the economic sector the survival of firms or national economies are endangered by bankruptcy, in the societal sector threats to collective identities – inter alia societies, nations, religious communities – are formulated and in the environmental sector the endurance of species or the entire planet are securitised. The Copenhagen School uses this idea of sectors to include non-traditional security issues in its framework. The different sectors are taken from what the Copenhagen School found empirically in security discourses.

Since security is traditionally about survival the Copenhagen School argues that it triggers a logic of emergency, necessity and priority. The rhetoric implies: If we do not act now, it will be too late and the referent object will be dead. With the rhetoric of security therefore, the use of extraordinary measures can be justified in order to save the endangered object. By uttering security, the political elites can claim a right to act and can even legitimise the breaking free of normally binding rules. The grammar of security language asks for the suspension of normal politics, says that something is above politics, and therefore opens the door for fast, unbound executive actions. “We do not push the demand so high as to say an emergency measure has to be adopted, only that the existential threat has to be argued and just gain enough resonance for a platform to be made from which it is possible to legitimize emergency measures or other steps that would not have been possible had the discourse not taken the form of existential threats, point of no return, and necessity.”²⁵

For the unfolding of the legitimising effect of security, the relevant audience needs to accept the securitising move. If the audience does not accept the threat then it is only a securitising move; if the audience accepts the breaking free of rules an issue has been successfully securitised. In order to speak security successfully, one needs to have an authoritative speaker position within the security discourse, a position that usually political elites and experts have. The securitisation perspective demonstrates the importance of elites and experts in the field of security and stresses with its intersubjective approach the political nature of security: „It is always a political choice to securitize or to accept a securitization.“²⁶

The notion of security works as a justification tool in modern state politics. But it also attributes responsibility to elites, gives them a mandate to take action. That might explain why actors from civil society like to reframe political issues as security problems – e.g. the discourse about human security can be understood as such an attempt. But with the Copenhagen School we can argue that the opposition of security is not insecurity, but a-security, or better democratic politics. The framing of an issue as a security issue is, in the logic of Copenhagen, a failure to deal with it in everyday politics. “Security” is the move that takes politics beyond established rules of the game and frames the issue either as a special kind of politics or as above politics.”²⁷ Therefore, desecuritisation and the return to democratic politics are the normative ideals of such an approach. If we reframe a security issue as a political one, we can lose the logic of necessity, priority and existentiality that comes with security and we can re-open the democratic discourse. We agree with the Copenhagen School that security is, because of its undemocratic rhetoric, not a positive value that needs to be maximised. Contrarily, we argue to reframe issues as political issues in order to present them as a matter of politics and choice.

²³ B. Buzan, O. Wæver, J. de Wilde, ‘Security: A New Framework for Analysis’ (Boulder/London: Lynne Rienner Publishers 1997) 24.

²⁴ Ibid 21.

²⁵ Ibid 25.

²⁶ Ibid 29.

²⁷ Ibid 23.

4. Liberal Political Rationality: There is no Liberalism Without the Culture of Danger²⁸

With Michel Foucault we can critique security as part of liberal political rationality.²⁹ This line of critique can advance a further denaturalisation of security – and thus a step away from the Hobbesian tradition of security. We can show how security politics are an inherent feature of liberalism or as Foucault calls it governmentality – governmentality as “a specific art of governing human beings”.³⁰

As governmentality Foucault describes the modern logic of political rationality which emerged in the 18th century: “(...) by “governmentality” I understand the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument.”³¹ In Foucault’s narrative the population as a collectively and biologically perceived entity has become the main target of political regulation. Political economy as the dominant form of knowledge – the market and its economic principles have become a truth-defining regime.³² And finally, technologies of security are the primary instruments of the modern art of government.

Within the liberal mode of political rationality, there is for Foucault a constitutive connection between individual freedom, security and fear. Liberalism advances ideas about individual freedom; the freedom to act freely and to promote one’s self-interest. The free play of forces is propagated. But if every individual can act freely, the freedom of others is permanently endangered. Individual behaviour must not constitute a threat for the individual or the collective body. To stabilize freedom interventions become necessary. That is why Foucault defines freedom as “an actual relationship between governors and governed.”³³ Freedom produced through liberalism is permanently endangered and requires mechanisms of security. For Foucault, it is therefore the paradox of liberalism that it produces individual freedom and endangers it at the same time.³⁴

Danger and insecurity are not only negative side effects of liberal freedom but have productive consequences as they are part of economic calculations. In liberalism, individuals have to calculate their risks, weigh the benefits and costs, and be responsible for their decisions and actions. Thus, for Foucault there is no conflict between the principle of freedom and security – security politics are, in this perspective, just the other side of liberalism: „the setting in place of mechanisms of security... mechanisms or modes of state intervention whose function is to assure the security of those natural phenomena, economic processes and the intrinsic process of population: this is what becomes the basic objective of governmental rationality. Hence liberty is registered not only as the right of individuals legitimately to oppose the power, the abuses and usurpations of the sovereign, but also now as an indispensable element of governmental rationality itself.”³⁵ Foucault states therefore that „(t)here is no liberalism without the culture of danger“.³⁶

Thomas Lemke, in his interpretation of Foucault, stresses the moral function of insecurity in governing human beings and in producing a specific subjectivity. Individuals are addressed as entrepreneurial and cautious subjects at the same time. „Fear fulfils an important moral function in neo-

²⁸ M. Foucault, ‘The Birth of Biopolitics’ (New York: Palgrave Macmillan 2008) 67.

²⁹ M. Foucault, ‘Security, Territory, Population’ (New York: Palgrave Macmillan 2007); M. Foucault, ‘The Birth of Biopolitics’ (New York: Palgrave Macmillan 2008).

³⁰ T. Lemke, ‘Foucault, Governmentality, and Critique’ (Boulder/London: Paradigm Publishers 2012) 42.

³¹ M. Foucault, ‘Security, Territory, Population’ (New York: Palgrave Macmillan 2007) 108.

³² Ibid 103 ff.

³³ M. Foucault, ‘The Birth of Biopolitics’ (New York: Palgrave Macmillan 2008) 63.

³⁴ Ibid 64, 51 ff. See also T. Lemke, ‘Foucault, Governmentality, and Critique’ (Boulder/London: Paradigm Publishers 2012) Chapter 3.

³⁵ M. Foucault’s lecture, Collège de France, 5 April 1978, quoted in C. Gordon, Government rationality, in: G. Burchell, C. Gordon, P. Miller, The Foucault Effect. Studies in Governmentality (London: Harvester Wheatsheaf 1991) 19 f.

³⁶ M. Foucault, ‘The Birth of Biopolitics’ (New York: Palgrave Macmillan 2008) 67.

liberal government. The constant threat of unemployment and poverty, and anxiety about the future, induce foresight and prudence.³⁷

The law has to address these precarious relationships. It has to acknowledge that security is the other side of liberalism, and thus an inherent feature of modern political rationality within the liberal democratic state. Securitisation theory and the historical analysis of Foucault can show how the notion of security has legitimised new forms of state interventions and are part of political power relations. Instead of accepting Hobbes' assumption that security is the basis for the modern secular state – as it is done in law discourses over and over again – we should acknowledge the power effects that come with security. For the context of law, Günter Frankenberg has offered a recent interpretation of German security law as a normalisation of the state of emergency or as the formation of the security-state. He diagnoses a hyper-preventive security logic and an erosion of the rule of law. He can show how in the name of security against terrorism and organised crime new technologies of security have been introduced: the security apparatuses have received advanced competencies for interferences, traditional state power limiting mechanisms in police law have been softened etc.³⁸

5. Democracy as the Purpose of Law? A Resumé

Our three critiques have shown that security is not a good purpose of law. It has affirmative and stabilising effects. We want to propose democracy as an alternative purpose of law.

The constitutionalisation of the modern state was praised in the words of natural law as human progress, as the unfolding of human reason. But in reality it was the result of concrete social struggles. The French Revolution was realised by the uprising bourgeois elite to achieve political representation and economic independence. The revolution showed, however, that history is open to alternatives, that domination is not God-given or unquestionable. This is in our view the core function of democracy: basically to cast doubt on every form of domination and inequality. Democratic critique is capable of confronting modern society with its own benchmarks. Equality and the self-government of people are written in the constitutions. The purpose of law is to maintain these achievements as counterfactual norms. Political struggles can use them to orientate their strategies and reclaim them against forms of domination.

This perspective is a contrary approach to security as the purpose of law. Whereas democracy describes history as an on-going process, the notion of security is a tool to defend the present social status quo. Also, a democratic paradigm stresses broad and political contestation instead of a technocratic, depoliticised discourse that is usually associated with the security language. Security is defined, constructed and implemented primarily by state institutions, elites and experts. In contrast, democracy cannot be reduced to institutions and elite discourse. It can also take up ideas from civil society, it can re-open and re-democratise discourses and can allow for the development of new ideas about social relations and socialisation.

In her work on international law, the legal scholar Susan Marks analysed the “democratic norm thesis.”³⁹ This concept is used as a framework in international relations to universalise a standard of democratic governance. Marks' critique shows that democracy itself has become an ideological strategy to depoliticise social conflicts and mask inequality. But instead of just rejecting the idea of democracy, she tries to advance the progressive implications of democracy with a form of immanent critique: “Democracy's failures and omissions appear not as broken promises to be written off, but as promises that remain permanently executory, never to be fully performed.”⁴⁰ We do not want to push for a pluralistic approach but want to stress, as Susan Marks does, the modus of immanent critique.

³⁷ T. Lemke, 'Foucault, Governmentality, and Critique' (Boulder/London: Paradigm Publishers 2012) 49.

³⁸ G. Frankenberg, 'Political Technology And The Erosion Of The Rule Of Law' (Cheltenham: Edward Elgar 2014).

³⁹ S. Marks, 'The Riddle of all Constitutions. International Law, Democracy and the Critique of Ideology' (Oxford: Oxford University Press 2000).

⁴⁰ Ibid 150.

Immanent critique identifies rights and possibilities for autonomous subjects that have been established by social struggles. Law has not only the purpose to maintain political progress, but also to enable it. Legal struggles are often not the ending, but the beginning of political emancipation. Law has to offer social procedures to renegotiate social relations.

Bibliography

1. J. L. Austin, 'How To Do Things With Words' (Cambridge: Harvard University Press 1975).
2. B. Buzan, O. Wæver, J. de Wilde, *Security: A New Framework for Analysis* (Boulder/London: Lynne Rienner Publishers 1997).
3. B. Buzan, O. Wæver, 'Slippery? Contradictory? Sociologically Untenable? The Copenhagen School Replies' [1997] *Review of International Studies* 23:2, 241.
4. D. Deudney, 'The Case Against Linking Environmental Degradation and National Security' [1990] *Millenium* 19: 3, 461.
5. J. Eriksson, 'Observers or Advocates? On the Political Role of Security Analysts' [1999] *Cooperation and Conflict* 34, 311.
6. M. Foucault, 'Security, Territory, Population' (New York: Palgrave Macmillan 2007).
7. M. Foucault, 'The Birth of Biopolitics' (New York: Palgrave Macmillan 2008).
8. G. Frankenberg, 'Political Technology And The Erosion Of The Rule Of Law' (Cheltenham: Edward Elgar 2014).
9. C. Gordon, Government rationality, in: G. Burchell, C. Gordon, P. Miller, *The Foucault Effect. Studies in Governmentality* (London: Harvester Wheatsheaf 1991) 1 ff.
10. L. Hansen, 'Security as Practice' (London/New York: Routledge 2006).
11. T. Hobbes, 'Leviathan' (Cambridge: Cambridge University Press 2001 [1651]).
12. T. Lemke, 'Foucault, Governmentality, and Critique' (Boulder/London: Paradigm Publishers 2012).
13. S. Marks, 'The Riddle of all Constitutions. International Law, Democracy, and the Critique of Ideology' (Oxford: Oxford University Press 2000).
14. K. Marx, 'On the Jewish Question', in: *The Marx-Engels Reader*. (New York: Norton & Company 1978).
15. R. A. Matthew, 'Environmental Security: Demystifying the Concept, Clarifying the Stakes', in: P.J. Simmons (ed.), *Environmental Change and Security Project Report No. 1*, (Princeton: Windrow Wilson Center 1995) 14.
16. V. Medick, P. Wittrock, NSA Scandal: Merkel's Interior Minister Not Up to the Job, *Spiegel Online International* 17th of July 2013, available at <http://www.spiegel.de/international/germany/merkel-government-under-criticism-for-handling-of-nsa-affair-a-911568.html> (8.3.15).
17. B. McSweeney, Bill, 'Identity and security: Buzan and the Copenhagen school' [1996] *Review of International Studies* 22, 81.
18. P. Purtschert, 'Jenseits des Naturzustands. Eine Postkoloniale Lektüre von Hobbes und Rousseau' [2012] *DZphil* No. 6 (2012), 861.
19. C. Robin, 'Fear. The History of a Political Idea', (Oxford: Oxford University Press 2004).
20. United Nations Development Program, *Human Development Report 1994*.
21. S. Walt, 'The Renaissance of Security Studies' [1991] *International Studies Quarterly* 35:2, 211.
22. O. Wæver, 'Securitization and Desecuritization', in: R. D. Lipschutz (ed.), 'On Security' (New York: Columbia University Press 1995) 46.
23. O. Wæver, 'Securitizing Sectors? Reply to Eriksson' [1999] *Cooperation and Conflict* 34:3, 334.
24. M.C. Williams, 'Words, Images, Enemies: Securitization and International Politics' [2003] *International Studies Quarterly* 47, 511.

CURRENT ISSUES OF LEGAL REGULATION OF OCCUPATIONAL SAFETY IN UKRAINE

Olena Rym¹

Abstract

A large amount of normative and legal acts concerning occupational safety has been adopted in Ukraine. At the same time they are unstable, systemless and contradictory. Moreover sometimes legal acts of different legal force wholly or partially overlap the legal norms which regulate labour relations.

According to these circumstances the urgent need to reform the legal regulation of these social relations exists. It is important to research and analyze the foreign experience of legal regulation to improve the national labour legislation, its application and the needs of the modern science of labour law in Ukraine.

In the context of the European integration process in Ukraine it would be very useful to study the long-term experience of legal regulation of occupational safety and health in the EU.

Realizing the necessity of a global approach to the resolving of the occupational safety problems, in the Treaty on the Functioning of the European Union the issue of occupational safety and health was highlighted among the main spheres of social policy.

The specific measures for the realization of the state policy in this area are determined by the programs on occupational safety and health.

A large number of directives that define common minimum requirements for the protection of employed persons were adopted according to these programs.

The analysis of EU acts on occupational safety and health of employees allows us to declare the existence of sufficiently developed legal foundation in this area. Undoubtedly, this contributes to the effective realization and protection of labour rights. Therefore, the study and the usage of the related positive experience of the EU are the measures for further development of the legal regulation of relations of occupational safety and health of employees in Ukraine.

Keywords: occupational safety, workplace, adaptation.

Introduction

Ukraine and the EU have signed an Association Agreement in June 27, 2014². This is a momentous event for Ukraine's state and law, because it is expected that cooperation between Ukraine and the EU should significantly speed up and improve the process of our long lasting reforms.

In particular, labour law most of all needs to be reformed since the main act (Labour Code³), which has been adopted in 1971, is imbued thoroughly with socialist ideas of total protection of workers

¹ *Candidate of Legal Sciences, associate professor of the department of labour, agrarian and ecological law of the Law Faculty of Lviv National University Named After Ivan Franko. Fields of research: labour and employment law; labour rights in the system of human rights; prohibition of competition in labour legal relations; adaptation of Ukraine's legislation to European standards in the sphere of employment, social policy and equal opportunities (including employment of judges, prosecutors and other public officials); email: olenamakar@yahoo.com.*

² Association agreement between the European Union and the European atomic energy community and the their member states, of the one part, and Ukraine, of the other part [June 27, 2014] at http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013_en.htm

³ Кодекс законів про працю України [1971] at <http://zakon2.rada.gov.ua/laws/show/322-08>

and does not meet current needs. Numerous additions and changes to the Labour Code and other legal acts associated with it, did not achieve the desired positive results.

Association Agreement between Ukraine and the EU gives us the hope that the ineffectiveness of legal regulation in the sphere of labour will be overcome as soon as possible. We believe that Ukraine's international obligations under the Association Agreement should have positive results in the case of performance.

According to article 424 of the Agreement Ukraine shall ensure gradual approximation to EU law, standards and practices in the area of employment, social policy and equal opportunities, as set out in Annex XL to the Agreement.

In this Annex it is proposed to implement in Ukraine the provisions of various Directives in established time (from 2 till 10 years). In general, these are 42 acts, 27 of which concern to issues of occupational safety and health, 7 - discrimination and gender equality, 8 - labour laws in general⁴.

The big amount of the EU's acts on the occupational safety and health which should be adopted urgently, could be explained through the inefficient legal regulation of the occupational safety and health in Ukraine. Unfortunately, I have to notice that Ukraine is one of the countries where the state of occupational injuries is several times higher than in developed countries. The factors that cause high level of occupational injuries primarily are the aging of production equipment, inadequate funding of the occupational safety and health by the employers, the weakening of state regulation in the field of labour and so on. Therefore, the legal regulation of the occupational safety and health needs to be reformed first of all and should be harmonized with the international standards of safety immediately.

1. Occupational Safety in Ukraine: a New Content According to New Conditions

Today in Ukraine an extensive legal framework in the area of occupational safety has been created. The Labour Code of Ukraine⁵, the Law of Ukraine "On Labour Protection"⁶ and the Code of Civil Protection of Ukraine⁷ are the main sources of legal regulation in this sphere. As well, the National Social Program for Improvement of Safety, Workplace Hygiene and Production Environment in 2014 - 2018 has been approved by the Parliament in 2013⁸. This act is a comprehensive programme document on occupational safety issues.

The Law of Ukraine "On Ensuring Sanitary and Epidemic Safety of the Population"⁹, the Law of Ukraine "On Fight against Tuberculosis"¹⁰, the Law of Ukraine "On Protection of Population against Infectious Diseases"¹¹, the Law of Ukraine "On Use of Nuclear Power and Radiation Safety"¹², the Law of Ukraine "On Protection of People against Ionizing Radiation"¹³ also play an important role in legal

⁴ Annex XL to Chapter 21 Cooperation on employment, social policy and equal opportunities of the Association agreement between the European Union and the European atomic energy community and the their member states, of the one part, and Ukraine, of the other part [June 27, 2014] at http://eeas.europa.eu/ukraine/pdf/10_ua_annexes_to_title_v_economic_and_sector_cooperation_en.pdf

⁵ Кодекс законів про працю України [1971] at <http://zakon2.rada.gov.ua/laws/show/322-08>

⁶ Закон України "Про охорону праці" [1992] at <http://zakon3.rada.gov.ua/laws/show/2694-12>

⁷ Кодекс цивільного захисту України [2012] at Кодекс законів про працю України [1971] at <http://zakon2.rada.gov.ua/laws/show/322-08>

⁸ Закон України "Про затвердження Загальнодержавної соціальної програми поліпшення стану безпеки, гігієни праці та виробничого середовища на 2014-2018 роки" [2013] at <http://zakon4.rada.gov.ua/laws/show/178-18>

⁹ Закон України "Про забезпечення санітарного та епідемічного благополуччя населення" [1994] at <http://zakon4.rada.gov.ua/laws/show/4004-12>

¹⁰ Закон України "Про боротьбу із захворюванням на туберкульоз" [2012] at <http://zakon1.rada.gov.ua/laws/show/4565-17/paran227#n227>

¹¹ Закон України "Про захист населення від інфекційних хвороб" [2000] at <http://zakon4.rada.gov.ua/laws/show/1645-14>

¹² Закон України "Про використання ядерної енергії та радіаційну безпеку" [1995] at <http://zakon2.rada.gov.ua/laws/show/39/95-%D0%B2%D1%80>

¹³ Закон України "Про захист людини від впливу іонізуючого випромінювання" [1998] at <http://zakon4.rada.gov.ua/laws/show/15/98-%D0%B2%D1%80>

regulation of the occupational safety. The rules which are gathered in these acts on sanitary, fire, nuclear, radiation and environmental safety are integral elements of the "Safety" concept in general.

Moreover in 1999 in Ukraine a law concerning the system, principles and types of social insurance against accidents at work and occupational diseases had been adopted. It was the Law of Ukraine "On Mandatory State Social Insurance against Industrial Accident and Occupational Disease that Caused Disability"¹⁴.

This list is incomplete. It shows only a part of the laws on this issue.

The provisions of these laws are specified by the numerous legal acts that formed a completely independent system within the labour legislation of Ukraine. And there are hundreds of these acts, or even thousands in Ukraine.

The information about all valid normative and legal acts on occupational safety in Ukraine is gathered in the "State Register of legal acts on occupational safety". This Register is being hold from 1995. The normative and legal acts on occupational safety are grouped according to the type of economic activity in this Register. Thus, we can single out the legal acts on livestock, forestry, fishery, coal and peat, food and textile industry etc.

Despite the big amount of the legal acts on occupational safety, their quality characteristics are low. Moreover, the legislation on occupational safety is severely outdated. There are even acts which were adopted under the Soviet Union. For example, the valid rules on work outdoors in the cold season were adopted in far 1929¹⁵, and the rules on working conditions of loader with loading and unloading – in 1931¹⁶.

It is clear that these legislative provisions cannot longer meet the modern development of science and technology and require revision as soon as possible. In accordance, the improvement of legislation in this sphere is a necessary, natural and inevitable process.

We need to change the understanding of the concept "occupational safety" first.

Nowadays occupational safety is interpreted as the totality of legal norms which regulate the relations concerning the protection of life, health and ability to work by establishing safe and healthy working conditions. This legal institute unites the general rules on occupational safety; preventive rules from occupational injuries and illnesses; obligatory norms that establish the responsibilities of employers and employees in the sphere of occupational safety; additional rules which include measures for the protection of separate categories of workers.

Mainly the requirements for various factors of production environment and labour processes under which employment is carried out, are prescribed by the rules on occupational safety. For example, the standards of the temperature conditions, humidity, air movement and its pressure, light, fumes, dust, noise value, the level of vibration and other characteristics of the environment at the workplace are established by these rules. The rules on occupational safety also determine the requirements to the condition of the equipment, the quality of materials and tools. These rules oblige the employer to provide the employee with the necessary technical documentation, personal and collective equipment for protection.

However, the legal rules concerning the psychological factors that characterize the labour process are not provided till now. It should be noticed that in many European countries the legal rules on occupational safety establish the prohibition of uncivilized attitude of the employer to the employee, and intentional or unintentional actions of the administration, which may humiliate employee or offend

¹⁴ Закон України "Про загальнообов'язкове державне соціальне страхування від нещасного випадку на виробництві та професійного захворювання, які спричинили втрату працездатності" [1999] at http://ufpp.gov.ua/content/PDF/zakonodavstvo/15_zakon_1105.pdf

¹⁵ Правила о работе на открытом воздухе в холодное время года [1929] at <http://zakon2.rada.gov.ua/laws/show/n0001400-29>

¹⁶ Правила об условиях труда грузчиков при погрузочно-разгрузочных работах [1931] at <http://zakon3.rada.gov.ua/laws/show/v0254400-31>

his sense of human dignity. In return these legal rules stimulate to the implementation of special measures for the humanization of the production environment¹⁷.

Unfortunately, in Ukraine there are no mechanisms to ensure the psychological aspect of working conditions up to the present. Therefore, we often face the problem of moral harassment at the workplace. The lack of legal instruments to prevent and combat this negative phenomenon contributes to this. All this leads to deterioration of mental and physical health of employee, his/her lower productivity, enterprise damages and other negative consequences for both employees and employers.

Many scientists have been proving the necessity to include the creation of a favorable psychological climate at work in the production environment concept¹⁸.

The need to comprehend the psychological factors as a part of the concept of "working conditions" is proposed by other scholars¹⁹.

Thus the term "occupational safety" cannot be connected any more only with technical and sanitary regulations. The creation and support of comfortable and favorable psychological conditions for workers, who perform their job duties, is an integral part of this legal notion.

Submission to the Parliament a draft law "On Ensuring the protection from moral harassment at the workplace" is an important step which could help to resolve this problem. However, it should be noted that moral harassment at the workplace is a type of discrimination which is prohibited in Ukraine.

In particular, in 2012 the Law of Ukraine "On the Principles of Prevention and Counteracting Discrimination in Ukraine"²⁰ was adopted by the Parliament of Ukraine. This Law could be applied to labour relations. However, there is no progress in the resolving the problem of moral harassment at work after this Law adoption.

The above mentioned demonstrates the necessity to expand the doctrinal understanding of occupational safety. This could be done via the adoption of new legal rules aimed at creating supportive and comfortable psychological working conditions.

It is considered that legal protection of labour should ensure not only the labour productivity, but also must contribute a long active life of a person after the termination of employment because of a retirement age. Thus the working environment should be safe and healthy, and at the same time must be adapted to the physical and mental needs of the individual, his/her age and skills; the work should be organized in such a way that allows employee to affect his/her working conditions; it is worth considering the problems of individuals working in isolation; it is necessary for employer to take into account the personal inclinations of each person and to develop employee's initiative; the amount and types of work and operations, that are repetitive, should be gradually reduced; the work should be of meaningful character and should create conditions for the expression of every person etc.

The improvement of legislation and the transformation of general people's attitude towards safety at work should be conducted simultaneously, since the irresponsible attitude of employers and employees to the state of working conditions, poor discipline at the enterprise and constant postponing of the issues of safety "for later" do not help to provide favorable working conditions.

2. Adaptation of the EU Standards on Occupational Safety and Health: What it Could Give Us?

Association Agreement between Ukraine and the EU in 2014 has strengthened the problem of the compatibility of national legislation with international legal acts. For example, in the field of labour protection, the provisions of 27 EU Directives should be implemented.

¹⁷ И.Я. Киселев Сравнительное и международное трудовое право. Учебник для вузов. (Москва: Дело 1999) 173.

¹⁸ К.Х. Рекош Моббинг и проблема его преодоления во Франции [2002] # 2 Труд за рубежом 97-105.

¹⁹ У.П. Бек Правове регулювання охорони праці в Україні: теоретичний аспект. Дисертація на здобуття наукового ступеня кандидата юридичних наук (Львів: На правах рукопису 2013) 85.

²⁰ Закон України "Про засади запобігання та протидії дискримінації в Україні" [2012] at <http://zakon3.rada.gov.ua/laws/show/5207-17>

Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work is the first act in the list.

This Directive²¹ defines the legal principles which should be kept during the adoption of other EU directives and legislation of member states on occupational safety and health. Among them are the following:

- employer shall have a duty to ensure the safety and health of workers in every aspect related to the work;
- each worker is responsible for taking care as far as possible of his/her own safety and health and that of other persons affected by his/her acts or Commissions at work in accordance with his/her training and the instructions given by his/her employer;
- the legislative determination of the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care, could be provided.

Directive 89/391/EEC concerns not only the question of physical safety of workers, but also deals with the organization of work, social relationships at work, creation of mentally healthy working conditions. The general duties of employers and the rights and obligations of workers are fixed at this act. If the national legislation will be adapted to the provisions of Directive 89/391/EEC, it would be enriched with the following new provisions:

1. The employers will be obliged to inform employees of their contractors (employees of outside companies) about the safety and health risks concerning the work at their company.
2. The employees will be able to undergo regular medical examination due to risks to their safety and health at work if desired.

Despite the wide range of matters which are regulated by Directive 89/391/EEC, its framework character requires adoption of relevant acts on occupational safety and health. According to article 16 of the Directive the list of areas, where the adoption of specific directives is necessary, is proposed at the Amendments. Up to now nineteen directives were adopted due to execution of this provision.

Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace was the first individual Directive within the meaning of Article 16 of Directive 89/391/EEC.

The definition of the term "workplace" is proposed by Directive 89/654/EEC²². It is emphasized that workplaces shall satisfy the minimum safety and health requirements. In case of this Directive implementation, the Ukraine's labour law will get a reasonable definition of "workplace". Valid Ukrainian legislation offers about 30 different interpretations of this notion, which differ from each other. Therefore the necessity to unify all these definitions has appeared long ago.

The employer's obligations in the field of technical maintenance of the workplace, the equipment and devices are prescribed by this Act. It recommended to organize rest rooms for employees and in case of hiring disabled workers to provide them with appropriate arrangement of workplaces.

Ukrainian employees also will have the opportunity to use the rest rooms. For example, according to EU standards, such rooms should be organized in the case if the safety and health of workers so require. In particular, because of the type of activity carried out or the presence of more than a certain number of employees. Herewith the rest rooms should be large enough and equipped with an adequate number of tables and seats with backs for the number of workers.

²¹ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1999] at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31989L0391>

²² Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1999] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31989L0654>

Under Ukrainian legislation only employees who work in hazardous and difficult working conditions are allowed to use rest rooms now.

A number of directives deal with certain types of work. For example, Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers. This Directive defines the characteristics of loads which can be dangerous for workers, especially cause back injury; describes the physical effort when dealing with loads that could be dangerous, especially cause back injury; gives the characteristics of the working environment, which may increase the risk of back injury in particular; outlines activities that contributes to risk causing injury to the back²³.

In this context Ukrainian legislation just determines only the maximum weight of loads that can be moved by different categories of employees. Therefore, after the adaptation of Ukrainian legislation to EU standards, in this area, it would be complemented with new provisions that will help to protect the employee.

The demands to the occupational safety and health are established fully and comprehensively in Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment. According to Directive 90/270/EEC, the employer must carry out an analysis of working places equipped with computers; evaluate the safety of these workplaces and estimate their harmlessness; provide the workers with the personal protective equipment to prevent the risk of blurred vision; prevent the appearance of painful physical symptoms or mental stress²⁴.

The Rules on labour protection during operation of the computers²⁵ and the State sanitary rules and norms on work with visual display terminals computers²⁶ are the main sources of Ukraine's regulation in this area.

It should be mentioned that the State sanitary rules and norms could be applied to the working conditions and organization of work with visual display terminals of all types based on cathode ray tubes which are used in computers. Now almost all users of the screen devices work with visual display terminals for liquid crystals. Therefore, the relevant provisions of the State Sanitary rules and norms cannot be applied in the arrangement of their workplace. Thus Ukrainian version of the regulation of the work with computers needs substantial revision because of inconsistencies and contradictions of the legal provision.

It should be pointed out that the EU standards on occupational safety and health are strongly differentiated. Thus, in 1992 Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding was adopted²⁷. The specific requirements for Member States of EU to protect young people in the workplace are determined by the Directive 94/33/EC of 22 June 1994²⁸.

²³ Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0269>

²⁴ Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0270>

²⁵ Наказ Державного комітету України з промислової безпеки, охорони праці та гірничого нагляду № 65 від 26 березня 2010 р про затвердження Правил охорони праці під час експлуатації електронно-обчислювальних машин [2010] Офіційний вісник України від 05.05.2010 р., № 30, стор. 12, стаття 1119, код акту 50743/2010

²⁶ Постанова Головного державного санітарного лікаря України від 10 грудня 1998 р. № 7 про затвердження Державних санітарних правил і норм роботи з візуальними дисплейними терміналами електронно-обчислювальних машин [1998] at <http://zakon.nau.ua/doc/?code=v0007282-98>

²⁷ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0085>

²⁸ Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work [1994] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31994L0033>

Many directives deal with the issues of occupational safety and health of employees at work with certain substances. For example, Directive 90/394/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work²⁹, Directive 90/679/EEC of 26 November 1990 on the protection of workers from risks related to exposure to biological agents at work³⁰, Directive 2006/25/EC of 5 April 2006 on the minimum health and safety requirements regarding the exposure of the workers to risks arising from physical agents³¹.

We believe that the provisions of the above mentioned EU acts will promote the differentiation of legal regulation in Ukraine in order to achieve the balance between the guarantees of employee's rights according to their working conditions.

Conclusion

The adaptation of Ukraine's legislation to the EU legislation in the sphere of occupational safety and health needs considerable work and requires a high level of organizational measures. We should study and analyze the norms of European labour law, and at the same time we have to pursue an active legislative work in this direction and implement the appropriate legal provisions in legal practice right now.

I believe that in cooperation with our European partners we can realize all ambitious plans of the adaptation of national labour legislation to the European standards in the nearest future.

Bibliography

1. Association agreement between the European Union and the European atomic energy community and the their member states, of the one part, and Ukraine, of the other part [June 27, 2014] at http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013_en.htm
2. Кодекс законів про працю України [1971] at <http://zakon2.rada.gov.ua/laws/show/322-08>
3. Annex XL to Chapter 21 Cooperation on employment, social policy and equal opportunities of the Association agreement between the European Union and the European atomic energy community and the their member states, of the one part, and Ukraine, of the other part [June 27, 2014] at http://eeas.europa.eu/ukraine/pdf/10_ua_annexes_to_title_v_economic_and_sector_cooperation_en.pdf
4. Кодекс законів про працю України [1971] at <http://zakon2.rada.gov.ua/laws/show/322-08>
5. Закон України "Про охорону праці" [1992] at <http://zakon3.rada.gov.ua/laws/show/2694-12>
6. Кодекс цивільного захисту України [2012] at Кодекс законів про працю України [1971] at <http://zakon2.rada.gov.ua/laws/show/322-08>
7. Закон України "Про затвердження Загальнодержавної соціальної програми поліпшення стану безпеки, гігієни праці та виробничого середовища на 2014-2018 роки" [2013] at <http://zakon4.rada.gov.ua/laws/show/178-18>

²⁹ Council Directive 90/394/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work (Sixth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0394>

³⁰ Council Directive 90/679/EEC of 26 November 1990 on the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0679>

³¹ Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [2006] at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:114:0038:0059:EN:PDF>

8. Закон України "Про забезпечення санітарного та епідемічного благополуччя населення" [1994] at <http://zakon4.rada.gov.ua/laws/show/4004-12>
9. Закон України "Про боротьбу із захворюванням на туберкульоз" [2012] at <http://zakon1.rada.gov.ua/laws/show/4565-17/para227#n227>
10. Закон України "Про захист населення від інфекційних хвороб" [2000] at <http://zakon4.rada.gov.ua/laws/show/1645-14>
11. Закон України "Про використання ядерної енергії та радіаційну безпеку" [1995] at <http://zakon2.rada.gov.ua/laws/show/39/95-%D0%B2%D1%80>
12. Закон України "Про захист людини від впливу іонізуючого випромінювання" [1998] at <http://zakon4.rada.gov.ua/laws/show/15/98-%D0%B2%D1%80>
13. Закон України "Про загальнообов'язкове державне соціальне страхування від нещасного випадку на виробництві та професійного захворювання, які спричинили втрату працездатності" [1999] at http://ufpp.gov.ua/content/PDF/zakonodavstvo/15_zakon_1105.pdf
14. Правила о работе на открытом воздухе в холодное время года [1929] at <http://zakon2.rada.gov.ua/laws/show/n0001400-29>
15. Правила об условиях труда грузчиков при погрузочно-разгрузочных работах [1931] at <http://zakon3.rada.gov.ua/laws/show/v0254400-31>
16. И.Я. Киселев Сравнительное и международное трудовое право. Учебник для вузов. (Москва: Дело 1999) 173.
17. К.Х. Рекош Моббинг и проблема его преодоления во Франции [2002] # 2 Труд за рубежом 97-105.
18. У.П. Бек Правове регулювання охорони праці в Україні: теоретичний аспект. Дисертація на здобуття наукового ступеня кандидата юридичних наук (Львів: На правах рукопису 2013) 85.
19. Закон України "Про засади запобігання та протидії дискримінації в Україні" [2012] at <http://zakon3.rada.gov.ua/laws/show/5207-17>
20. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1999] at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31989L0391>
21. Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1999] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31989L0654>
22. Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0269>
23. Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0270>
24. Наказ Державного комітету України з промислової безпеки, охорони праці та гірничого нагляду № 65 від 26 березня 2010 р про затвердження Правил охорони праці під час експлуатації електронно-обчислювальних машин [2010] Офіційний вісник України від 05.05.2010 р., № 30, стор. 12, стаття 1119, код акту 50743/2010
25. Постанова Головного державного санітарного лікаря України від 10 грудня 1998 р. № 7 про затвердження Державних санітарних правил і норм роботи з візуальними

- дисплейними терміналами електронно-обчислювальних машин [1998] at <http://zakon.nau.ua/doc/?code=v0007282-98>
26. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0085>
 27. Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work [1994] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31994L0033>
 28. Council Directive 90/394/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work (Sixth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0394>
 29. Council Directive 90/679/EEC of 26 November 1990 on the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1990] at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31990L0679>
 30. Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [2006] at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:114:0038:0059:EN:PDF>

LEGAL MEASURES OF JOB SECURITY UNDER THE EUROPEAN AND POLISH LABOUR LAW – HOW EFFECTIVE IS THE LAW INTERFERENCE INTO THE RELATION BETWEEN THE EMPLOYER AND EMPLOYEE?

Anna Stokłosa¹

Abstract

It is traditionally understood that in the relation employee - employer, the former is the weaker party and therefore employment protection provided by the law provisions is a tool for aligning employee's position in the relation to the employer.

The starting point of the discussion in the paper is to discuss protective function in for determining labour market conditions. The main purpose of the paper is to present the concept of the protective function of the labour law from the point of view of the employee. It analysis the role of the measures provided for in the European and Polish law in building job security.

Analyzing legal provisions, at the beginning the paper provides European law perspective, presenting Articles 153 and 151 of the Treaty on the Functioning of the European Union (TFUE), the latter referring to the European Social Charter. Further it provides examples of protective provisions from the Charter of Fundamental Rights of the European Union. Finishing the subject of the EU law, the paper mentions specific legislation relating to the protection of specific values such as anti-discrimination or the acquisition of the employment establishment or its part, giving as examples the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Further the paper moves to Polish labour market beginning with the analysis of the Polish Constitution provisions. The paper puts the main emphasis on employment security guarantees provided for in the Polish Labour Code. Chosen Polish labour law provisions are discussed in terms of the protective function of law.

Finally, the author asks whether the regulation of labour law is one of the causes of unemployment, or the opposite - the role of regulation of labour law is a solution to this problem. The paper finishes with analyzing the effectiveness of the protective function of law in the area of the labour law.

Keywords: labour law, protective function, job security

Introduction

Traditionally, labour law is attributed to three main functions, i.e. organizational, educational and protective. The organizational function of labour law means that it contributes towards ensuring the proper, uninterrupted work process and high efficiency of employees. The educational function is to ensure positive attitude of employees in connection with the performance of work, proper attitude of

¹ *Master of Laws, a graduate of the Faculty of Law and Administration of the Jagiellonian University, Cracow, Poland. Currently a PhD candidate at the Jagiellonian University at the Chair of Labour Law and Social Policy. Completed Comperative and International Law LL.M. studies at the Columbus School of Law of the Catholic University of America (Washington D.C.). Experienced teacher of labour law, particularly issues of overtime, discrimination and protection of personal data. As an attorney-at law joins scientific research with a practice in her own legal firm.*

employers towards employees and to influence the attitude of those not involved in the labour relations towards work and working people. Protective function is the most important and most characteristic for labour law. It consists in legal favoring employees as economically and socially weaker partners in the employment relationship. The subject of this paper is analysing the last of the above mentioned functions of labor law, i.e. the protective function in the perspective of security as the purpose of law.

1. Protective Function of Labour Law

Nowadays, law is first of all to serve the best interests of people and to fulfill their needs, and only exceptionally to serve other values. In the typology of values for which legislation is intended, law as a means to realize individual interests or interests of the specific social groups and as a means of achieving goods valuable to the general public, represent distinct ranges.²

Labour law began to shape up as a regulation aimed at improving living and working conditions of factory workers, hence the primary function associated with it, which for long was the main basis for assessing the content of labour standards, was a protective function, associated with the desire to better shape the conditions of employment. The doctrine of laissez-faire and the situation on the labour market associated with the mismatch of supply and demand of labour, preferred employers. Consequently labour law was considered as the regulation related to the implementation of the fundamental interests of workers and on this basis was evaluated. Later, other directions of labour law were isolated and related to the needs of the employer (organizational or educational function), but the impact of labour law in this respect was not to ensure employers independent goods, as in the case of employees, but the values instrumental for the fulfillment of their needs in the field of business activity (legal framework of exercising supervision over the employees, as a means of achieving economic goals due to influencing the organization of the work).

The perspective of labour law evaluation as a means of improving the situation of workers, mainly associated with the guarantee of their interests, did not changed during the People's Republic of Poland. The base of the dominant position of the employer to the employees was different than in the open market conditions³, but the situation on the labour market and the relationship between the parties to the employment relationship justified dynamic recognition of protective function of labour law as consisting of "developing employee rights and strengthening guarantees of their compliance".⁴ The absence of unemployment, present in the modern scale and diversity, as well as the specific position of state employers tended to adopt the criterion of evaluation of labour law from the perspective of only one of the entities participating in the labor market - workers.

Current changes in axiological conditions of the labour standards in Poland result from the constitutional changes initiated in 1989, as well as the ongoing transformation in recent decades in the global economy. The globalization of economic activity means that entrepreneurs must take into account not only competition on the part of those operating in the same region or country, but also those operating on other continents, in very different social and legal conditions. This affects the demands on the content of legal regulation in various fields related to business, including labour law, in relation to the creation of such conditions of running the economic activity, which will allow entrepreneurs to remain competitive in relation to those of other countries. This implies a restriction of protection of values related to prosperity of work contractors (employees). It is true that employers seeking to weaken or slow down the development of the protective function of labour law are nothing new in the history of this branch of law, but in the current situation, it is further argued that the lack of opportunities to achieve competitive activity on the site, may result in a decision to change its location, which will result in adverse effects on the local labour market.

² Z. Ziemiński, *Wstęp do aksjologii dla prawników*, (Warszawa 1990) 97

³ T. Zieliński, *Antropologiczne i aksjologiczne podstawy prawa pracy* (in: B. Czech (red.), *Filozofia a tworzenie i stosowanie prawa*, Katowice 1992) 295-298

⁴ W. Szubert, *Funkcje prawa pracy* (PiP 1971, z.3-4) 578

2. European Law Perspective

Analyzing legal provisions, at the beginning it is worth to look at the protective function of labour law from the European law perspective. Article 153 of the Treaty on the Functioning of the European Union (ex Article 137 TEC)⁵ states that the Union supports and complements the activities of the Member States in the fields like improvement in particular of the working environment to protect workers' health and safety, working conditions, social security and social protection of workers, protection of workers where their employment contract is terminated, the information and consultation of workers, representation and collective defence of the interests of workers and employers, including co-determination, conditions of employment for third-country nationals legally residing in Union territory, the integration of persons excluded from the labour market, equality between men and women with regard to labour market opportunities and treatment at work, the combating of social exclusion and the modernisation of social protection systems. Further, Article 151 TFEU (ex Article 136 TEC) provides that the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, should have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. The Union and the Member States should implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action. On the basis of Art. 153 TFEU, the European Union supports the improvement of the working environment through the harmonization. For this purpose, at European Union level minimum requirements were defined, leaving the Member States the right to make decisions about introducing a higher level of protection at the national level. Article 151 TFEU refers the Charter of Fundamental Rights of the European Union⁶, which under its provisions protects employees in the event of unjustified dismissal (Article 30), provides basis for fair and just working conditions (Article 31) or family and professional life (Article 33) as well as social security and social assistance (Article 34), prohibits child labour and introduces protection of young people at work (Article 32).

The European Union law fulfills its protective function through other specific laws, just to mention, as a matter of examples, the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

3. Polish Law Perspective

General protective function of labour law is based on Article 24 and Article 65 section 1 of the Polish Constitution.⁷ Under Article 24 of the Constitution work should be protected by the Republic of Poland exercising supervision over the conditions of work. In these two sentences a fundamental standard of work protection has been saved. This standard requires the state to care (through their

⁵ Treaty on the Functioning of the European Union [Consolidated version 2012] OJ 2012/C 326/01

⁶ Charter of Fundamental Rights of the European Union OJ 2000/C 364/01

⁷ Constitution of the Republic of Poland [1997] J.L. No 78, item 483

bodies, such as government, labour inspection and by the statutory law), ensuring safe and healthy working conditions, fair wages and legal protection in the event of violation of labour laws.

The basis of the economy is work as a good to which the Constitution refers extensively. In this part of the Constitution, which is in Chapter I, it has a special meaning. A statement that work is protected by the State raises further and a numerous consequences. One of them Article 24 mentions explicitly, stating that the State has a duty to supervise the conditions of work. Stressing, however, the place and role of work in the Polish Republic, the Constitution requires the State to pursue an active policy to create jobs and realize the right to work. Labour protection from the State includes provision citizens with the right of choice of employment, non-permanent employment of children under the age of 16, the statutory warranty for determining the minimum amount of remuneration for work, a policy aiming at full productive employment, organization of public works, intervention works, monitoring the safety and hygienic working conditions, setting maximum working time. Moreover, in accordance with the Article 65 of the Polish Constitution everyone should have the freedom to choose and to pursue his occupation and to choose his place of work, only with exceptions specified by statute.

Development and specification of the constitutional provisions described in the above mentioned constitutional articles take place in the Act of 26 June 1974. – the Labour Code⁸ and its implementing rules, as well as other laws and regulations defining the rights and obligations of employees and employers. The Labour Code implements the protective function of labour law in many respects, in particular by:

- protection against termination of employment contract involving the prohibition binding the employer to terminate the contract of employment concluded with certain categories of employees or to make the effectiveness of the termination notice upon approval of the specific authority;
- protection of women's work, particularly pregnant women;
- protection of young workers;
- protection of employees health in particular through the provisions on daily and weekly rest, breaks and annual leave;
- protection of remuneration for work, in particular by the provisions on minimum wage.

As the example, when it comes to protection against termination of employment contract, a contract for indefinite period, may be terminated by the employer upon termination notice only when there is a real and specific cause to terminate and after consultation with the trade union (if trade union operates within the employment establishment). Additionally, an employer cannot terminate the contract of employment with pregnant employee, employee during maternity or parental leave, as well as certain categories of workers are protected from termination of the employment contract, e.g. the employee at pre-retirement age, a member of the management board of a trade union, social labor inspector. Regulation of working time is on one hand to protect employees from excessive periods of work (daily, weekly, annually), but another important function parallelly realized, is forcing employment growth in the enterprise. No possibility of extending the use of lawful employment of a person or group, forces employment of further employees. Thus, the impact of working time regulation can therefore be attributed to the nature of both the protection and promotion.

Conclusion

With the issue outlined in the paper, the problem of adverse effects on the labour market is involved, consisting of long-term persistence in many developed countries high level of unemployment. Tackling unemployment includes a variety of activities in the field of economic and social policy of the state and certainly is not limited to the introducing legal standards of specific content. However, these issues must be taken into account also in the field of labour law legislation. From the point of view considered here, it should be noted that there is a different context of evaluation of the labour law regulation represented by persons involuntarily inactive on the labour market. Basic values protection of

⁸ Labour Code, [1974] J.L. No. 24, item 141

which is expected by people from this group are associated with access to basic goods other than for workers.

Labour law provisions are not an instrument affecting the overall level of unemployment. The nature of the labour law is determined by safety standards leveling disparities in the actual balance of power between the employee and the employer. The basic value is the ability to use their professional skills and receive remuneration from their work, while employees access to work do not perceive as a value in itself, but, at most, as a good instrument for achieving prosperity. Of course it must be taken into account that the regulation of labour law is not the only, or may not even be the most important factor in creating the situation on the labour market. It is not the purpose of establishing labour standards creating such employment status, which admittedly provides excellent employment conditions, but on the labour market they will take the position of a scarce luxury, available for the few work performers and not accepted by the employers, as commonly used employment base. Therefore, the dynamic concept of the protective function of labour law, presented as an interaction in the direction of improving the status of employees, must now be supplemented by a number of conditions relating to the improvement of the instrumental value of employee entitlements for representatives of various groups involved in the labour market.

Bibliography

1. Treaty on the Functioning of the European Union [Consolidated version 2012] OJ 2012/C 326/01
2. Charter of Fundamental Rights of the European Union OJ 2000/C 364/01
3. Constitution of the Republic of Poland, [1997] J.L. No 78, item 483
4. Labour Code, [1974] J.L. No. 24, item 141
5. Szubert W., Funkcje prawa pracy, PiP 1971, z.3-4, p. 578
6. Zieliński T., Antropologiczne i aksjologiczne podstawy prawa pracy, in: B. Czech (red.), Filozofia a tworzenie i stosowanie prawa, Katowice 1992, p. 295-298
7. Ziemiński Z., Wstęp do aksjologii dla prawników, Warszawa 1990, p. 97.

EUROPEAN CIVIL PROCEDURE IN MAINTAINING SECURITY OF PRIVATE RELATIONS

Victor Terekhov¹

Abstract

The paper deals with a particular aspect of security in private law relations that exists when and where citizens and legal persons freely and unimpededly possess their property and make use of the products of their labor. In a complex and developed society such security is guaranteed only in the presence of an independent, efficient and competent judiciary.

While that is important for a national state, it is no less significant for supranational orders such as European Union as they create binding rights and obligations for individuals and thus need some form of their protection. In addition, private parties deserve a remedy against possible abuse of power on the EU side.

We can say that EU is not without mechanisms aimed at reaching the goal of protecting private interests by judicial means. In present paper we will try to see whether they function effectively and guarantee security.

Keywords: European civil procedure, cross-border litigation, judicial protection, remedies in supranational law, international judicial cooperation

Introduction

The word 'security' derives from Latin *se-* (apart, aside) and *cura* (concern, worry), literally denoting a condition of being deprived from any cares or troubles². A human being, feeling *secured* may freely pursue any activity, without a fear of outside invasion³.

Despite the term 'security' is frequently used in political, social and legal researches, it is polysemous and refers to different things and processes in human society⁴. There are multiple types of security including national, economic, food, health, environmental, political, etc⁵. It is almost impossible to speak about them all within one research. However the topicality of security studies is growing, as in the modern world there are numerous factors that undermine security or call it into question. Consequently people are interested in how to preserve or restore it in case of violation.

1. Security in Private Relations and the Role of Civil Procedure in its Maintaining

Our study centers on one specific side of security – that of private relations. They are quite widespread and each of us takes part in them every day: when we buy goods and use services, take a bus to work, visit a museum or order a cup of coffee. These relations are governed by Civil Law – the

¹ PhD student, Department of Private Law, Faculty of Law, Vilnius University; currently preparing doctoral thesis on *Regionalization and Globalization of civil procedure systems in EU and CIS states. Fields of interest: European Civil Procedure, Comparative Law, national procedural systems, recognition and enforcement of judgments, harmonization and unification in law, supranational law. E-mail: victor.terekhov@tf.stud.vu.lt.*

² J. Hamilton, 'Security: Politics, Humanity, and the Philology of Care' (Princeton: PUP 2013) 5.

³ O. Komelina, N. Fursova, 'Evaluation of Social Security: Systemic and Synergetic Approach' [2014] 21 Economic Annals 13.

⁴ Ibid. 7; C. Bailliet, 'Security: a Multidisciplinary Normative Approach' (Leiden: Martinus Nijhoff Publishers 2009) 1.

⁵ M. Rajaretnam, S. Singhdeo, A. Acharya, 'Human Security: From Concept to Practice: Case Studies From Northeast India and Orissa' (Singapore: World Scientific Publishing 2011) 1.

most magnificent branch of law. Being its subjects, we desire a strong protection: we want our property and money to rest with us, our immaterial status to be stable and we certainly wish to get the best from the transactions we enter into. In other words – we demand for the security in private relations.

We may say that it is the state and its presence that guarantees such security. According to Locke, Rousseau and Hobbes, before state there was a 'state of nature' where no man could be sure about the preservation of his property and life. By organizing ourselves into society we gave away our natural freedoms, but received in exchange a set of rights and safeguards⁶. As it was impossible to eliminate all conflicts from the society, the best the state could do was to establish a system of their peaceful settlement⁷ that could be an alternative to violence and vengeance. We speak here about the judiciary and the law that governs its operation. This is known as 'Civil Procedure' and in a civilized society it is one of the most important branches of law⁸.

The role of judiciary in our society is enormous: the court is a supporter of law and order; it enforces statutory provisions, restores violated rights and punishes the offenders. Due to the court's activity citizens may use their property and the results of their labor. We thus call the judiciary a guardian of security within a state-organized community. Despite some deficits, the system of civil justice functions more or less smoothly in modern states and lets people rely on it to protect their rights and freedoms.

2. Civil Procedure and Supranational Legal Orders

Nowadays we notice the rise of supra-state entities, the best example of which is European Union – a first international community that creates binding rules not only for states, but also for private parties⁹. It has its own government and legal system; nothing similar to that is known to previous human history¹⁰.

Although only the EU can be called a 'supranational order' in its full meaning, there are some other regional organizations that are coming close to obtaining similar features. Among them are NAFTA, the African Union, the Union of South American Nations and the Eurasian Economic Community. This means that the world is changing and where previously only the state had power over us, now it shares such power with a higher entity. It all makes us question whether such entity is prepared and willing to protect our rights and to give us a sense of safety. Or, is it going just to ruin everything that was achieved?

In the next sections we are going to look at the structure of EU Civil Procedure (as it is the best and the only true example of successfully lasting supranational order) to find out whether the existing system of civil justice there is consistent, free from gaps and equitable. We thus turn to the current EU legislation as well as its internal logics in order to find out how the mechanism of judicial protection works in practice.

3. The Status of EU Civil Procedures

The notion of Civil Procedure is not problematic *per se*: both scholars and practitioners agree that it is a system of rules dealing with judicial examination of disputes between private parties in the field of

⁶ J. Blackman, 'When Was the State of Nature? A Lockean Response to Rousseau's Critiques' [2009] at <http://ssrn.com/abstract=1403936>.

⁷ H. Genn, 'Judging Civil Justice' (Cambridge 2010) 1.

⁸ J. Walker, 'The Utility of the ALI/UNIDROIT Project on principles and Rules on Transnational Civil Procedure' [2001] 6(4) *UnilawRev* 804.

⁹ See: Van Gend & Loos, Case C-26/62 [1963] ECR 1963/00001; J. Polakiewicz, 'The Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Field of Private Law' [1994] 12 *Tel Aviv University Studies in Law* 183.

¹⁰ D. Chalmers, A. Tomkins, 'European Union Public Law' (Cambridge: CUP 2007) 3.

substantive civil law¹¹. There is a civil procedure in every state where there is court competent to hear a case on the right of possession over some property, breach of contract, interpretation of its terms, etc. These disputes are different from criminal and administrative law, as they do not feature state as one of the parties to substantive relation under consideration.

The question is whether there is Civil Procedure as a separate area of EU law, distinct from municipal laws of its Member States? At first sight it seems impossible due to the status of EU as an international organization¹². However we notice throughout the last years the development of such areas as EU Budgetary, Taxation, Customs and even Commercial law. Just like International Law, the law of EU is not a branch of law, but rather a *legal order* (due to the variety of questions it regulates) and consequently it is formed of autonomous branches of law itself.

Still the mere possibility of Civil Procedure's existence is not equal to its actual presence. In order to appear it needs an independent object of regulation and legislative homogeneity. Indeed, there are some acts of the EU in the given sphere and even a basis for their future elaboration in the Treaty¹³. For many scholars they present however something piecemeal and lacking uniformity¹⁴: despite there are acts on various topics (recognition of judgments¹⁵, taking of evidence¹⁶, service of documents¹⁷), it seems that the Union only legislates to solve particular problems at a concrete moment of time and not to establish a detailed system of law¹⁸. There is no general act, stipulating the principles of civil litigation, its aims and goals, as well as such questions as evidence gathering, case management, judicial decision and its features, appellation and enforcement of judgments¹⁹. Some also add that EU Civil Procedure is nothing more than a special agreement (*acquis*) within Private International Law (PIL)²⁰.

We may argue, however that the EU Civil Procedure still exists, though not in a codified form. A good example of its structure is provided by X. Kramer, presenting it as a 'house', in the basement of which we find general principles – fair trial, right to be heard, access to court and mutual trust. Regulations and Directives of different generations occupy the floors of this 'house'. Beside already mentioned there are acts establishing the order for payment procedure²¹, the small claims²² and recently – the account preservation order²³. While the acts of the 'first generation' indeed did not go further traditional questions of PIL²⁴ (an area dealing with cases involving a foreign element: property or party abroad, or some other significant connection to another jurisdiction), these latter ones showed a

¹¹ See e.g. R. Mehren, 'International Control of Civil Procedure: Who Benefits?' [1994] 57(3) Law and Contemporary Problems 13.

¹² L. Cadiet, 'Introduction' in L. Cadiet, E. Jeuland S. Amrani-Mekki (eds.), 'Droit processuel civil de l'Union Européenne' (Paris: Lexis Nexis 2011) XVII.

¹³ See: Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/01 (TFEU), art. 81.

¹⁴ This law presents a 'mosaic' of different pieces being put together rather than a single solid whole, see: Z. Vernadaki, 'EU Civil Procedure and Access to Justice after the Lisbon Treaty: Perspectives for a Coherent Approach' (Doctoral thesis: University College London 2013) 22-23.

¹⁵ Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.

¹⁶ Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1.

¹⁷ Regulation (EC) of the European Parliament and of the Council 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) [2007] OJ L324/79.

¹⁸ P. van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure' [2007] 3 CJR 68.

¹⁹ T. Möllers, 'The Role of Law in European Integration' [2000] 48(4) AmJCompL 683; G. Wagner, 'Harmonization of Civil Procedure: Policy Perspectives' in X.E. Kramer, C.H. van Rhee (eds.), 'Civil Litigation in a Globalizing World' (The Hague: Asser Press 2012) 118.

²⁰ V. Nekrošius, 'Europos Sąjungos civilinio proceso teisė (pirma dalis)' (Vilnius: Justitia 2009) 18.

²¹ Regulation (EC) of the European Parliament and of the Council 1896/2006 creating a European order for payment procedure [2006] OJ L399/1.

²² Regulation (EC) of the European Parliament and of the Council 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

²³ Regulation (EC) of the European Parliament and of the Council 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.

²⁴ X. Kramer, 'Procedure Matters: construction and deconstruction in European Civil Procedure' (Rotterdam 2013) 12-19.

significant departure from it due to their substantive content. It is uncommon for PIL to establish directly applicable procedures instead of conflict of law rules and in principle to deal with anything apart from jurisdiction, recognition and enforcement²⁵. These procedures, however, are directly applicable and may be used instead of national ones.

Even of greater interest is the status of procedural Directives, especially that on the IP Enforcement. It sets standards that equally apply in transnational cases and within national law²⁶, thus clearly going beyond PIL. This act clearly intervenes in the realm of national legislation.

We may thus make two conclusions: (1) the EU Civil Procedure is not a part of PIL, on the contrary it includes in itself a complex of PIL rules to use in transnational cases between Member States, but is not limited to them; (2) this branch has two aims: to create a system of transnational disputes resolution for the EU states and to bring together national laws on civil procedure (where it is appropriate). These tasks are solved by different means and it may be argued that not quite consistently.

4. Problems of EU Civil Procedure

To begin with, the EU Civil Procedure lacks a coherent structure: there is no single procedure for the EU, nor there is a hierarchical relation between the part that governs cross-border issues (let us call it 'federal') and that of the national states ('municipal'). Rather there are national laws on the subject in each of the Member States plus one legislation of the Union.

They do not generally overlap – EU rules are applied when we have a dispute involving two members of 'federation'; otherwise we need to address a particular domestic law. For the citizens of the EU this European superstructure is an additional guarantee of their protection and safety that allows them to make transactions in cross-border relations. Instead of leaving them to the discretion of a particular municipal system, the EU legislation proposes a simple and universally applicable system of procedural rules.

However this system in most cases is alternative²⁷, which means that it is possible to choose either it or the national one. It is good to have choices, but quite often it means sufficient uncertainty and lack of equality between Member States.

Another problem is the limitation of the system to the inter-usage of the EU states. Thus, existing jurisdictional rules are applicable for the disputes between Member States, but not third nations²⁸. This is not the only example of substantial deficits: the EU legislation likewise fails to address transnational contentious cases and cases in some specific fields of substantive law and even cross-border enforcement. Thus the EU Civil Procedure does not form a holistic system of dispute resolution even for transnational cases and even for the Member States. It rather covers some of the relevant issues and totally ignores others. It does not mean that everything will remain like this – there is a clear tendency of the branch's expansion both as to the questions it deals with and the depth of their elaboration.

We shall not forget such common problem as rights of the defendant. Various acts of EU Civil Procedure seek to facilitate cross-border recovery of debts, but such an aim only appeals the claimant. For the debtor it is nothing good in learning that his property may be subject to some compulsory procedures and even to deprivation by a court in another state. On the contrary it causes him fear and

²⁵ K. Boele-Woelki, 'Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws' (Leiden/Boston: Nijhoff 2010) 31; G. Bayraktaroğlu, 'Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization' [2003] 5 EJLR 131.

²⁶ Directive (EC) of the European Parliament and of the Council 2004/48 on the enforcement of intellectual property rights [2004] OJ L 195/16, 02.06.2004, Art. 2(1).

²⁷ This is true, *inter alia*, about the European Payment Order. See: V. Vėbraitė, 'Introduction to European Civil Procedure' (Vilnius: Vilniaus Universiteto leidykla 2014) 53.

²⁸ Ł. Dyrda, 'Jurisdiction in Civil and Commercial Matters under the Regulation no. 1215/2012: between Common Grounds on Jurisdiction and Divergent National Rules' in 'The Interaction of National Legal Systems: Convergence or Divergence?' (Vilnius 2013) 88-89.

disbelief and may even result in him limiting all foreign transactions in search of a safe life. It is obvious that we need to protect the claimant, but only in case he is a rightful possessor. The defendant must be given all due possibility to protect, the same he has according to the national law. Most EU procedures are uncontested, which means there is almost no trial in a classic sense. To give the defendant the most possible protection, it would be essential to introduce a full-width adversary trial into the EU Civil Procedure. Right now we may see, though, that EU legislator does not forget about the interests of the defendant: thereby in the text of new Regulation on jurisdiction and enforcement (1215/2012) the grounds for refusal of recognition and enforcement still remain available for the interested party²⁹. This fact shall not be forgotten further, and the EU legislator needs always to find a firm balance between the interests of plaintiff and defendant and protect equally their rights to give them the most they deserve.

Finally, domestic law is something that EU authorities should have in mind. They have already started intervention within it and it is unlikely that it is possible to stop them. We need thus to understand clearly what must and must not be harmonized in the procedural field. In the latter group are: the composition of courts, the institutions that are closely linked with national traditions and culture and/or have different purpose in various states³⁰.

5. Possibility of a Uniform Law of Civil Procedure

Will it be possible to have in future just one common law of Civil Procedure for the EU (*ius commune*), equally applicable in cross-border and national cases and settled by EU legislator? It will only become real when (or 'in case') EU turns into a state with its full capacity. Now it is still limited by the principles of 'subsidiarity' and 'proportionality' which means that it cannot trespass clearly established borders. Clearly the elaboration of a universal and comprehensive branch of law is beyond its limits.

Moreover, the replacement of national Civil Procedures with one system of rules that are applied in the same way universally seems an attractive promise, but only at the first glance. It must be pointed out that most Civil Procedures derive from the national traditions and culture and they seem a representation of state sovereignty and maturity. There are quite different procedures in adversarial and inquisitorial systems, in common law and civil law nations and even if they somehow agree to abandon them in order to seek for the best one – each of them would definitely has its own view on what shall be that new 'common' procedure. Again, it is quite unlikely that nowadays state would limit their sovereignty in this part and transfer such a delicate issue to the Union level.

6. The Procedural Law of EU

Before the final conclusion we need to say some words about the notion of 'EU procedural law' (without an attribute 'civil'). The authors regard it as describing the judicial organization of the Union, the competence of its courts and the procedures that exist before them³¹. The EU possesses its own judiciary in the face of Court of Justice (virtually there are three autonomous bodies under this common denomination)³². Its activity though is not regarded generally as a part of civil procedure as it does not involve private parties arguing about matters of civil law. Most cases in this Court concern questions on preliminary ruling – sent here by the national courts that need to clarify some matter of Union law that are not clear to them. Private parties appear here only in disputes concerning validity of EU legislation³³ and also in disputes of civil service nature (both matters of administrative rather than civil law). The

²⁹ X. Kramer, 'Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights' [2013] 60(3) NILR 347-348, 354.

³⁰ K. Kerameus, 'Procedural Harmonization in Europe' [1995] 43(3) AmJCompL 414.

³¹ See: P. Biavati, 'European Civil Procedure' (Alphen: Wolters Kluwer 2011); R. Bray (ed.), 'Procedural Law of the European Union' (London: Sweet & Maxwell 2006).

³² P. Craig, G. de Búrca, 'EU Law: text, cases and materials' (Oxford: OUP 2011) 58.

³³ D. Wyatt, A. Dashwood, 'European Community Law' (London: Sweet & Maxwell 1993) 123.

Court is thus may be considered a constitutional and administrative tribunal, but not a one of general jurisdiction. Its activity is nevertheless extremely important as it helps to build up the EU law and closes obvious gaps in it by providing its own constructive rulings. In the field of civil procedure it has done quite a lot as well by determining the scope of the public order clause in *Krombach*³⁴ or by ruling that anti-suit injunctions were contrary to the Union law in *West Tankers*³⁵. We need not to forget that its jurisdiction also gives private parties a chance to dispute vicious supranational legislation and thus to feel more secured dealing with this mighty entity.

Conclusion

It seems that the XXI century is going to be an age of regional unions that gradually acquire some traditional powers of the state. We cannot say that judicial protection of private rights in various procedures is something that these organizations would soon take away from states. In the end it all requires significant funding and it is better to leave the matter to the Member States. However there is nothing that forbids *per se* such organization to adopt unified legislation on the basis of a single code, containing one set of principles and similar procedures. As the states mutually cooperate it goes without saying that they adapt their legislations, harmonize them, transplant the best practices into their own law and consequently the law on civil procedure becomes more alike. The EU is now playing on both levels: transnational (at least two Member State) and national (only one Member State and its internal matters). It is only a question of time when it officially obtains a larger portion of competence in the given field. Our reaction to this process shall be not to hamper it, but to figure to ourselves how we may get the best of it for the protection of our rights and security and not to lose that level of guarantees that was already achieved. In other words we need the EU Civil Procedure as a democratic area, comprising the best possible norms that exist in democratic Member States and developing them even further in pursuing the ultimate defense of our private interests.

Bibliography

Books:

1. Bailliet C., 'Security: a Multidisciplinary Normative Approach' [Leiden: Martinus Nijhoff Publishers 2009]
2. Biavati P., 'European Civil Procedure' [Alphen: Wolters Kluwer 2011]
3. Blackman J., 'When Was the State of Nature? A Lockean Response to Rousseau's Critiques' [2009] at <http://ssrn.com/abstract=1403936>.
4. Boele-Woelki K., 'Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws' [Leiden/Boston: Nijhoff 2010]
5. Bray R. (ed.), 'Procedural Law of the European Union' [London: Sweet & Maxwell 2006]
6. Cadiet L., 'Introduction' in L. Cadiet, E. Jeuland S. Amrani-Mekki (eds.), 'Droit processuel civil de l'Union Européenne' [Paris: Lexis Nexis 2011]
7. Chalmers D., Tomkins A., 'European Union Public Law' [Cambridge: CUP 2007]
8. Craig P., de Búrca G., 'EU Law: text, cases and materials' [Oxford: OUP 2011]
9. Genn H., 'Judging Civil Justice' [Cambridge 2010]
10. Hamilton J., 'Security: Politics, Humanity, and the Philology of Care' [Princeton: PUP 2013]
11. Kramer X., 'Procedure Matters: construction and deconstruction in European Civil Procedure' [Rotterdam 2013]
12. Nekrošius V., 'Europos Sąjungos civilinio proceso teisė (pirma dalis)' [Vilnius: Justitia 2009]

³⁴ Dieter Krombach v. André Bamberski, Case C7/98 [2000] ECR I-01935.

³⁵ Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc., Case C-185/07 [2009] ECR I-00663.

13. Rajaretnam M., Singhdeo S., Acharya A., 'Human Security: From Concept to Practice: Case Studies From Northeast India and Orissa' [Singapore: World Scientific Publishing 2011]
14. Vėbraitė V. 'Introduction to European Civil Procedure' [Vilnius: Vilniaus Universiteto leidykla 2014]
15. Vernadaki Z., 'EU Civil Procedure and Access to Justice after the Lisbon Treaty: Perspectives for a Coherent Approach' [Doctoral thesis: University College London 2013]
16. Wagner G., 'Harmonization of Civil Procedure: Policy Perspectives' in X.E. Kramer, C.H. van Rhee (eds.), 'Civil Litigation in a Globalizing World' [The Hague: Asser Press 2012]
17. Wyatt D., Dashwood A., 'European Community Law' [London: Sweet & Maxwell 1993]

Articles:

18. Bayraktaroğlu G., 'Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization' [2003] 5 European Journal of Law Reform.
19. Dyrda Ł. 'Jurisdiction in Civil and Commercial Matters under the Regulation no. 1215/2012: between Common Grounds on Jurisdiction and Divergent National Rules' in 'The Interaction of National Legal Systems: Convergence or Divergence?' [Vilnius 2013].
20. Kerameus K., 'Procedural Harmonization in Europe' [1995] 43(3) American Journal of Comparative Law.
21. Komelina O., Fursova N., 'Evaluation of Social Security: Systemic and Synergetic Approach' [2014] 21 Economic Annals.
22. Kramer X. 'Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights' [2013] 60(3) Netherlands International Law Review.
23. Mehren R., 'International Control of Civil Procedure: Who Benefits?' [1994] 57(3) Law and Contemporary Problems.
24. Möllers T., 'The Role of Law in European Integration' [2000] 48(4) American Journal of Comparative Law.
25. Polakiewicz J., 'The Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Field of Private Law' [1994] 12 Tel Aviv University Studies in Law.
26. van der Grinten P., 'Challenges for the Creation of a European Law of Civil Procedure' [2007] 3 Civil Justice Review.
27. Walker J., 'The Utility of the ALI/UNIDROIT Project on principles and Rules on Transnational Civil Procedure' [2001] 6(4) Uniform Law Review.

Legal acts:

28. Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/01.
29. Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.
30. Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1.
31. Regulation (EC) of the European Parliament and of the Council 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) [2007] OJ L324/79.
32. Regulation (EC) of the European Parliament and of the Council 1896/2006 creating a

- European order for payment procedure [2006] OJ L399/1.
33. Regulation (EC) of the European Parliament and of the Council 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1.
 34. Regulation (EC) of the European Parliament and of the Council 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.
 35. Directive (EC) of the European Parliament and of the Council 2004/48 on the enforcement of intellectual property rights [2004] OJ L 195/16, 02.06.2004.

Case-law:

36. Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc., Case C-185/07 [2009] ECR I-00663.
37. Dieter Krombach v. André Bamberski, Case C7/98 [2000] ECR I-01935.
38. Van Gend & Loos, Case C-26/62 [1963] ECR 1963/00001.

ADOPTION AND REJECTION OF THE PRINCIPLE NULLA POENA SINE LEGE: HISTORICAL AND THEORETICAL ANALYSIS

Evgeny Tikhonravov¹

Abstract

Different opinions have been expressed as regards the principle *nulla poena sine lege*. Some critics argue that due to this maxim acts which are not criminal but at the same time detrimental to society and present the risk of disorder for the state cannot be punished and in this way prevented in a timely manner. Other researchers support the principle as a safeguard to secure civil freedom of the individual. The article aims to determine the correct approach to this issue.

Keywords: *nulla poena sine lege*; civil freedom; legal fiction

Introduction

This article proceeds as follows. Section 1 explores legislative acts and judicial practice of various countries concerning the punishment for acts which were not explicitly criminalised at the time of commission. Section 2 provides theoretical analysis of different approaches which are adopted in these acts and practice. Finally, the paper ends with a conclusion in which the correct approach is suggested.

1. Historical Analysis

In the early modern period, a number of European statutes authorised courts to punish acts which were not expressly criminalised by the sovereign. Among these laws were, for instance, *Halsgerichtsordnungen für Tirol* (1499)² and *Österreich unter der Enns Landgerichtsordnung* (1514).³

Often the judicial practice concerning the application of these laws was arbitrary.⁴ In order to restrain the abuse of powers by the judiciary, *Bambergensis* (1507), *Brandenburgensis* (1516), and the *Constitutio Criminalis Carolina* (1532) imposed a duty on judges to submit a case not specified by the criminal law to a legislative organ and to enquire how it should be solved.⁵ This procedure, however, was regularly ignored and achieved no considerable success.⁶

In the 18th century, one can still find enactments authorising courts to penalise acts which were not explicitly criminalised at the time of commission. These were, for example, the 1721 Prussian Code, the 1751 Bavarian Code, and the 1769 *Constitutio Criminalis Theresiana*.⁷

With the advent of the Age of Enlightenment, some prominent political scholars and philosophers took a firm stand against the wide discretion of the judiciary. With this regard, the names of

¹ *Candidate of Legal Science; Associate Professor of the History of State and Law Department, Siberian Federal University School of Law.*

² V. Ackermann, 'Das Analogieverbot im geltenden und zukünftigen Strafrecht' (Breslau-Neukirch 1934) 6

³ Ф. П. Дубровин, 'О размерах допустимости аналогии при применении уголовного закона' [1899] 5 Журнал министерства юстиции 130

⁴ *Ibid.* 129, 133; E. Rejewski, 'Die Stellung des Strafrichters zur 'Schuldfrage' unter dem Gesichtswinkel der Abgrenzung der ausdehnenden Auslegung zur Analogie' (Inaugural-Dissertation zur Erlangung der Doktorwürde. Breslau-Neukirch 1937) 19-20

⁵ Дубровин, *supra* note 3, at 130

⁶ *Ibid.* 132; Ackermann, *supra* note 2, at 7; Rejewski, *supra* note 4, at 20, 35

⁷ J. Hall, 'Nulla Poena Sine Lege' [1937] 47 *The Yale Law Journal* 168

C.-L. de Montesquieu and C. Beccaria are often cited.⁸ They proposed to dramatically limit the competence of courts and to reduce their powers to the mere application of the law.⁹

Soon these ideas found their way into legislative acts. In 1787, the Holy Roman Emperor, Joseph II, influenced by the enlightenment beliefs,¹⁰ enacted the Penal Code of Austria. Its part I § 1 provides as follows: “Only those illegal acts are to be considered and treated as crimes which have been declared to be as such by the present law.”¹¹

It is generally accepted¹² that this article was the first to adopt the principle which was later expressed by P. J. A. v. Feuerbach in a Latin formula ‘nulla poena sine lege’: no penalty without a law.¹³ Later similar provisions were incorporated in the 1789 Declaration of Human and Civil Rights (art. 7 and 8),¹⁴ the 1794 Prussian Law (title 20, part II, § 2),¹⁵ the 1810 French Criminal Code (art. 10),¹⁶ the 1813 Bavarian Penal Code (art. 1),¹⁷ the 1851 Prussian Penal Code¹⁸ and the 1871 German Penal Code (§ 2, par. 1).¹⁹

Although the punishment for non-criminal acts was forbidden, it did not, as E. Ehrlich concluded,²⁰ cease to exist in legal practice. To quote I. Anosov, “If we turn to practice, we will see, as one would expect, that this maxim [nulla poena sine lege], this axiom of the modern criminal law, was violated when it was (or appeared to be) favourable or necessary. The idea that not all crimes are listed in criminal codes governs the practice.”²¹

The words of E. Ehrlich and I. Anosov can be confirmed by a classic illustration: the unauthorised appropriation of electricity. At first, it was not prohibited by criminal codes as the legislators simply did not foresee the possibility of this act. Nevertheless, judges in the Netherlands²² and France²³ meted out punishment for it.

The same approach was adopted by courts in Bavaria: on 15 January 1895, the Oberlandsgericht (Higher Regional Court) Munich reached a guilty verdict on this matter.²⁴ By contrast, on 1 May 1899, the Supreme Court of the German Reich held that “the unauthorized tapping of an electric power line did not constitute theft.”²⁵ This way of dealing with the unauthorised appropriation of electricity was also employed in Switzerland.²⁶ However, in some other cases²⁷ German courts did not hold to the legally

⁸ Дубровин, *supra* note 3, at 135–136; S. Glaser, ‘Nullum Crimen Sine Lege’ [1942] 24 *Journal of Comparative Legislation and International Law* 30; A. Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’ [2005] 26 *Statute Law Review* 45–46

⁹ Дубровин, *supra* note 3, at 135–136; Glaser, *supra* note 8, at 30; Mokhtar, *supra* note 8, at 45–46

¹⁰ V. Krey, ‘Studien zum Gesetzesvorbehalt im Strafrecht: Eine Einführung in die Problematik des Analogieverbots’ (Berlin: Duncker & Humblot 1977) 209

¹¹ *Ibid.* 208

¹² Hall, *supra* note 7, at 168; Glaser, *supra* note 8, at 30

¹³ P. J. A. v. Feuerbach, ‘Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts’ (Giessen: Georg Friedrich Heyer’s Verlag 1847) 41

¹⁴ Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf

¹⁵ Krey, *supra* note 10, at 208

¹⁶ Hall, *supra* note 7, at 169

¹⁷ Ackermann, *supra* note 2, at 9

¹⁸ Hall, *supra* note 7, at 169

¹⁹ L. Preuss, ‘Punishment by Analogy in National Socialist Penal Law’ [1936] 26 *Journal of Criminal Law and Criminology* 847

²⁰ E. Ehrlich, ‘Die juristische Logik’ (Tübingen 1925) 226

²¹ И. И. Аносов, ‘Заметки к вопросу о применении аналогии в уголовном праве’ [1926] 5 *Бюллетень Средне-азиатского государственного университета* 4–5

²² C. W. Maris, ‘Milking the Meter – On analogy, Universalizability and World Views’ In ‘Legal knowledge and analogy: fragments of legal epistemology, hermeneutics, and linguistics’ (Dordrecht: Kluwer Academic Publishers, 1991) 71

²³ *Ibid.* 77

²⁴ И. В. Гессен, ‘Творческая роль суда (примеры из практики)’ [1897] 6 *Журнал Министерства Юстиции* 218

²⁵ Preuss, *supra* note 19, at 851

²⁶ Maris, *supra* note 22, at 77

²⁷ Rejewski, *supra* note 4, at 33–34

accepted *maxim nulla poena sine lege* which Germany, along with three other mentioned countries, incorporated in its criminal law.²⁸

The similar practice can be observed in the Russian Empire. Article 771 of the 1864 Statute of the Criminal Procedure declared that “the court shall acquit the accused if an act he was charged with is not prohibited by laws under the threat of punishment.”²⁹ Despite this provision, in 1868, the Governing Senate, the Supreme Court of the Russian Empire, ruled that “an act, though not prohibited by any article of the law, can be punished if acceptance of this act may lead to serious abuse.”³⁰ In other words, in some circumstances judges did not adhere to the legal principle *nulla poena sine lege*.

In the 20th century, it was, however, abolished in several countries.³¹ For instance, in the Russian Soviet Federative Socialist Republic and later in the USSR courts were authorised to penalise acts which were not specified by the law. In this regard, article 6 of the 1922 Criminal Code of the RSFSR defined crime as “any socially dangerous conduct or omission posing a threat to underlying principles of the soviet state and legal order established by the power of industrial workers and peasants for the transitional period to the communist order.”³² The definition corresponded with article 10 of the same code which declared that “when there are no direct references to particular crimes in the criminal code, penalties or means of social defence shall be applied according to the provisions of the criminal code which provide for crimes which are the most similar in their importance and their kind, in compliance with the rules of the general part of the code.”³³

This rule in a slightly different wording was transferred into article 16 of the 1926 Criminal Code of the RSFSR.³⁴ It is worth noting that its application was widespread. For example, in 1939, a group of scholars came to conclusion that in twenty months, the courts of Moscow region and the Moscow City Court have applied fifty-three provisions, which made up one third of the articles of the special part of the code, in accordance with its article 16.³⁵ This practice was condemned as “dangerous and politically harmful.”³⁶ Another team of researchers asserted that the application of article 16 was “occasionally coupled with the outrageous perversion of the socialist criminal law.”³⁷

In 1958, the *maxim nulla poena sine lege* entered into article 7 of the 1958 Basic Principles of the Criminal Legislature of the USSR and Union Republics.³⁸ However, as M. A. Kaufman maintains, judges continued to punish non-criminal conduct, but they ably camouflaged this practice.³⁹

On 28 June 1935, the 1871 German Penal Code was amended to permit judges to mete out punishment for acts which were not specified in it.⁴⁰ Nevertheless, in the Third Reich the use of this possibility was not excessive.⁴¹ It may be speculated that this is probably so because “legislation could

²⁸ Maris, *supra* note 22, at 77

²⁹ Устав уголовного судопроизводства 1864 г. // Свод законов Российской Империи. Т. XVI. Ч. 1. СПб., 1912. 446

³⁰ Ф. П. Дубровин, ‘О размерах допустимости аналогии при применении уголовного закона (окончание)’ [1899] 6 Журнал Министерства юстиции 29–30

³¹ Glaser, *supra* note 8, at 32–33

³² Постановление ВЦИК от 01.06.1922 «О введении в действие Уголовного Кодекса РСФСР» (вместе с Уголовным Кодексом РСФСР) // СУ РСФСР, 1922, № 15, ст. 153

³³ *Ibid.*

³⁴ Постановление ВЦИК от 22.11.1926 «О введении в действие Уголовного Кодекса РСФСР редакции 1926 года» (вместе с Уголовным Кодексом РСФСР) // СУ РСФСР, 1926, № 80, ст. 600

³⁵ П. В. ‘Понятие аналогии в советском уголовном праве и практика ее применения’ [1939] 3 Советская юстиция 12

³⁶ *Ibid.*

³⁷ ‘К разработке проекта общей части Уголовного кодекса СССР’ [1938] 20–21 Советская юстиция 18

³⁸ Основы уголовного законодательства Союза ССР и союзных республик 1958 г. // Ведомости ВС СССР, 1959, № 1, ст. 6

³⁹ М. А. Кауфман, ‘Пробелы в уголовном праве и способы их преодоления’ (автореф. дис. ... док. юрид. наук. М., 2009) 40

⁴⁰ Preuss, *supra* note 19, at 847; Glaser, *supra* note 8, at 33

⁴¹ Hall, *supra* note 7, at 175–176; ‘The Use of Analogy in Criminal Law’ [1947] 47 Columbia Law Review 616; M. Boot, ‘Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court’ (Intersentia 2002) 87

be enacted with lightning speed since the Fuehrer had unlimited legislative power.”⁴² In addition, “from the beginning those who were considered of real danger to the regime were dealt with by methods other than the criminal law.”⁴³ The amendment was abolished on 31 January 1946.⁴⁴

2. Theoretical Analysis

The brief historical analysis presents two legislative approaches: the *maxim nulla poena sine lege* can be either accepted or denied by the sovereign. The second option implies not only the legislative rejection of the principle, but also the sovereign’s tacit consent to judicial violation of the principle when it is declared to be legally binding.

These two approaches are based on different theoretical concepts. Scholars advocating the *maxim nulla poena sine lege* stress the inviolability of civil freedom. The latter can be conceived of as “an opportunity to do everything which is not prohibited by the law.”⁴⁵ Its paramount importance was expressed by V. Spasovich as follows: “Harm caused by a villainy committed with impunity as it was omitted by the law cannot be compared with terrible damage produced by the punishment without legitimate grounds and with the restriction of civil freedom which results from it.”⁴⁶

On the other hand, researchers who defend the opposite approach argue that due to this *maxim* acts which are not criminal but at the same time detrimental to society and present the risk of disorder for the state cannot be punished and in this way prevented in a timely manner.⁴⁷ It is therefore not surprising that F. Liszt described a criminal code which adopts this *maxim* as the “*magna charta* of the delinquent.”⁴⁸

According to P. Danckert, these two approaches were thoroughly discussed in the draft of the 1851 Prussian Penal Code.⁴⁹ As a result, the principle *nulla poena sine lege* prevailed.⁵⁰ At the present time, its primacy is recognised virtually all over the world: the *maxim* is embodied in article 11 of the Universal Declaration of Human Rights⁵¹ and article 15 of the International Covenant on Civil and Political Rights.⁵²

Under these circumstances, judges are legally obliged to punish only those acts which were declared to be criminal at the time of commission. Nevertheless, rigid adherence to the *maxim nulla poena sine lege* appears to do more harm than good. This conclusion is based, in particular, on the considerations of J. Locke and R. Jhering.

In his work ‘Two Treatises of Government,’ J. Locke argued, “Where the legislative and executive power are in distinct hands ... there the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves

⁴² ‘The Use of Analogy in Criminal Law,’ *supra* note 41, at 616 (footnote omitted)

⁴³ *Ibid.* (footnote omitted)

⁴⁴ Boot, *supra* note 41, at 87

⁴⁵ В. Д. Спасович, ‘Учебник уголовного права. Т. I’ (СПб. 1863) 170

⁴⁶ *Ibid.*

⁴⁷ Preuss, *supra* note 19, at 847–848; Rejewski, *supra* note 4, at 2–3; ‘The Use of Analogy in Criminal Law,’ *supra* note 40, at 628–629

⁴⁸ Glaser, *supra* note 8, at 34

⁴⁹ P. Danckert, ‘Die Grenze zwischen der extensiven Auslegung und der Analogie im Strafrecht’ (Inaugural-Dissertation zur Erlangung der Doktorwürde. 1967) 41

⁵⁰ *Ibid.* 43

⁵¹ G.A. Res. 217A(III), U.N. Doc. A/810 (1948)

⁵² 1966, 999 U.N.T.S. 171

should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz. That as much as may be all the members of the society are to be preserved: for since many accidents may happen, wherein a strict and rigid observation of the laws may do harm ... This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the law-making power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe. This power, whilst employed for the benefit of the community, and suitably to the trust and ends of the government, is undoubted prerogative, and never is questioned.”⁵³

Similar ideas were formulated by R. Jhering. As he maintained, “Law exists for the sake of society, not society for the sake of law. Hence, it follows that when in cases ... the relations are such that the government finds itself facing the alternatives of sacrificing either the law or society, it is not merely empowered, but in duty bound, to sacrifice law and save society. For higher than the law which it violates stands the consideration for the preservation of society, in the service of which all laws must stand.”⁵⁴

The cited arguments lend support for the view that the legal principle *nulla poena sine lege* can be neglected. However, they differ in one respect. Whereas R. Jhering maintained that the law should be sacrificed only “for the preservation of society,” that is when a non-criminal act poses a serious threat to it, J. Locke argued that the executive power is authorised to act against the law “for the public good.” Consequently, according to the latter opinion, judges are empowered by prerogative to neglect the maxim *nulla poena sine lege* not only in cases when non-criminal conduct presents a grave danger to society, but also when the benefit of the community brought by non-observance of the principle greatly outweighs the harm inflicted by its infringement.

Considering the aim of ensuring the good of the society, it is to conclude that J. Locke’s stance is the correct one. Moreover, this view was often adopted by the judiciary. A case concerning the unauthorised appropriation of the electricity is a good example here. In addition, the Nuremberg Tribunals diluted the rigidity of the maxim *nulla poena sine lege*, even though it “was recognized at this time as a general principle of criminal law and a principle of justice.”⁵⁵

However, the breach of legality caused by the violation of this legal maxim is always detrimental to society as its people may follow the example of judges. As R. Pound put it, “If the courts do not respect the law, who will?”⁵⁶

It is necessary therefore to camouflage the breach of legality. One of the possible methods for achieving this goal is the employment of a so-called creative legal fiction. It is “an assumption which conceals or attempts to conceal the fact that under the guise of application of a legal rule a certain state body formulates and implements a ruling which cannot be derived from this legal rule.”⁵⁷

A creative legal fiction is used when a judge, for example, while punishing non-criminal conduct states that he applies an existing legal rule to reach a guilty verdict. This way camouflages the breach of legitimacy behind a veil of legal application and gives an impression, though a false one, that a court’s decision is legally justified.

For instance, in 1921, this method was used by the Dutch Supreme Court in a case concerning the unauthorised appropriation of electricity. To punish this non-criminal act, the court resorted to article

⁵³ J. Locke, ‘Two Treatises of Government’ (London 1821) 327–329

⁵⁴ R. Jhering, ‘Law as a Means to an End’ (Boston 1913) 317

⁵⁵ Mokhtar, *supra* note 8, at 53

⁵⁶ R. Pound, ‘An Introduction to the Philosophy of Law’ (Clark, New Jersey 2003) 123

⁵⁷ E. Tikhonravov, ‘The Process of Filling Gaps in the Law as a Specific Political Activity’ In ‘Integrating Social Sciences into Legal Research: International Conference of PhD Students and Young Researchers’ (Vilnius: Vilnius University 2014, available at: http://www.tf.vu.lt/dokumentai/Admin/PhD_konferencija_2014/Conference_Papers_2014.pdf) 304

310 of the penal code. This provision “dated from a time – 1881 – that no legislator had ever thought of the possibility of stealing something immaterial like energy”⁵⁸ and referred therefore only to a tangible object. Nevertheless, the court held that electricity is similar to “tangible property” and applied article 310 of the penal code to arrive to a guilty verdict.⁵⁹

Conclusion

The findings of this paper reinforce the view that non-criminal acts should be punished by courts when the benefit of the community brought by the violation of the legal principle *nulla poena sine lege* greatly outweighs the harm inflicted by its infringement. In this case, however, creative legal fictions should be employed to conceal the breach of legality.

Bibliography

Multilateral Treaties and Conventions:

1. International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171.
2. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948)

Municipal Law:

3. Declaration of Human and Civil Rights of 1789, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf
4. Устав уголовного судопроизводства 1864 г. // Свод законов Российской Империи. Т. XVI. Ч. 1. СПб., 1912.
5. Основы уголовного законодательства Союза ССР и союзных республик 1958 г. // Ведомости ВС СССР, 1959, № 1, ст. 6
6. Постановление ВЦИК от 01.06.1922 «О введении в действие Уголовного Кодекса РСФСР» (вместе с Уголовным Кодексом РСФСР) // СУ РСФСР, 1922, № 15, ст. 153
7. Постановление ВЦИК от 22.11.1926 «О введении в действие Уголовного Кодекса РСФСР редакции 1926 года» (вместе с Уголовным Кодексом РСФСР) // СУ РСФСР, 1926, № 80, ст. 600

Doctoral Theses, Books and Articles:

8. B. Ackermann, 'Das Analogieverbot im geltenden und zukünftigen Strafrecht' (Breslau–Neukirch 1934)
9. C. W. Maris, 'Milking the Meter – On analogy, Universalizability and World Views' In 'Legal knowledge and analogy: fragments of legal epistemology, hermeneutics, and linguistics' (Dordrecht: Kluwer Academic Publishers, 1991)
10. E. Ehrlich, 'Die juristische Logik' (Tübingen 1925)
11. E. Rejewski, 'Die Stellung des Strafrichters zur 'Schuldfrage' unter dem Gesichtswinkel der Abgrenzung der ausdehnenden Auslegung zur Analogie' (Inaugural–Dissertation zur Erlangung der Doktorwürde. Breslau–Neukirch 1937)
12. E. Tikhonravov, 'The Process of Filling Gaps in the Law as a Specific Political Activity' In 'Integrating Social Sciences into Legal Research: International Conference of PhD Students and Young Researchers' (Vilnius: Vilnius University 2014, available at:

⁵⁸ Maris, *supra* note 22, at 71

⁵⁹ *Ibid.*

http://www.tf.vu.lt/dokumentai/Admin/PhD_konferencija_2014/Conference_Papers_2014.pdf

13. J. Hall, 'Nulla Poena Sine Lege' [1937] 47 The Yale Law Journal 165
14. J. Locke, 'Two Treatises of Government' (London 1821)
15. L. Preuss, 'Punishment by Analogy in National Socialist Penal Law' [1936] 26 Journal of Criminal Law and Criminology 847
16. P. J. A. v. Feuerbach, 'Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts' (Giessen: Georg Friedrich Heyer's Verlag 1847)
17. P. Danckert, 'Die Grenze zwischen der extensiven Auslegung und der Analogie im Strafrecht' (Inaugural-Dissertation zur Erlangung der Doktorwürde. 1967)
18. R. Jhering, 'Law as a Means to an End' (Boston 1913)
19. R. Pound, 'An Introduction to the Philosophy of Law' (Clark, New Jersey 2003)
20. S. Glaser, 'Nullum Crimen Sine Lege' [1942] 24 Journal of Comparative Legislation and International Law 29 A. Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects' [2005] 26 Statute Law Review 41
21. The Use of Analogy in Criminal Law [1947] 47 Columbia Law Review 613 M. Boot, 'Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court' (Intersentia 2002)
22. V. Krey, 'Studien zum Gesetzesvorbehalt im Strafrecht: Eine Einführung in die Problematik des Analogieverbots' (Berlin: Duncker & Humblot 1977)
23. В. Д. Спасович, 'Учебник уголовного права. Т. I' (СПб. 1863)
24. И. В. Гессен, 'Творческая роль суда (примеры из практики)' [1897] 6 Журнал Министерства Юстиции 204
25. И. И. Аносов, 'Заметки к вопросу о применении аналогии в уголовном праве' [1926] 5 Бюллетень Средне-азиатского государственного университета 1
26. К разработке проекта общей части Уголовного кодекса СССР [1938] 20–21 Советская юстиция 18
27. М. А. Кауфман, 'Пробелы в уголовном праве и способы их преодоления' (автореф. дис. ... док. юрид. наук. М., 2009)
28. П. В. 'Понятие аналогии в советском уголовном праве и практика ее применения' [1939] 3 Советская юстиция 8
29. Ф. П. Дубровин, 'О размерах допустимости аналогии при применении уголовного закона' [1899] 5 Журнал министерства юстиции 107
30. Ф. П. Дубровин, 'О размерах допустимости аналогии при применении уголовного закона (окончание)' [1899] 6 Журнал Министерства юстиции 1

ENVIRONMENTAL PROTECTION VS ENERGY SECURITY IN SHALE GAS ACTIVITIES

Jonas Urbanavičius¹

Abstract

One of the purposes of law is to find a balance between two competing interests: protection of individual rights and security of the society. In addition, qualitative criteria and minimum standards for such a compromise must be set.

In the changing World, new concepts that materialize those competing interests constantly arise. A person's right to a clean environment as well as the energy security are among such new concepts. In most cases, none of them is to be found in main legislative documents (Constitutions, founding Treaties). However, both concepts are recognized as fundamental by courts through the interpretation of legislation.

Right to a safe environment is one of a new generation human rights. Supranational courts have established Governments' obligation to take all feasible measures in order to ensure the quality of environment is not deteriorating. However, in certain cases this right (as any other human right) may be restricted. There is no definite list of elements that can justify such a restriction. However, national security is universally established to be one of such elements. In the modern world, energy security is perceived as one of the dimensions of national security. Such a position is confirmed both at the national and supranational levels.

Question of qualitative standards arises when searching for a balance between the protection of environmental rights and the energy security. Currently, there are no clearly established requirements to be observed during such a scrutiny, although certain practice already exists in the legislation and jurisprudence.

Author analyses the link between the protection of environmental rights and the energy security, with the aim to establish qualitative EU law standards of the relationship between individual and collective security measures. The analysis is based on the author's research of the unconventional hydrocarbons' activities from the perspective of the EU environmental legislation.

Keywords: environmental rights, energy security, unconventional hydrocarbons

Introduction

One of the purposes of law is to find a balance between two competing interests: protection of individual rights and security of the society. In addition, qualitative criteria and minimum standards for such a compromise must be set.

In the changing World, new concepts materializing those competing interests constantly arise. A person's right to a clean environment as well as the energy security are among such new concepts. In most cases, none of them is to be found in main legislative documents (Constitutions, founding Treaties). However, both concepts are recognized as fundamental by courts through the interpretation of legislation. Currently, there are no clearly established requirements to be observed when searching the

¹ External PhD student, Faculty of Law, Vilnius University; Lecturer, Director, Institute of Europe, Kaunas University of Technology; Jonas.Urbanavicius@ktu.lt. Author's research interest is the application of the EU (and national) environmental law for the activities related to the unconventional hydrocarbons' activities, as well as interaction between environmental and energy law.

balance between the two concepts, although certain practice already exists in the legislation and jurisprudence. Author analyses the link between the protection of environmental rights and the energy security, with the aim to set qualitative EU law standards of the relationship between individual and collective security measures. The analysis is based on the author's research of the unconventional hydrocarbons' activities from the perspective of the EU environmental legislation.

1. Existence of Environmental Rights

Concern over the worsening environmental situation in various parts of the World emerged into the discussion on the right to a clean environment as a human right. This discussion touches upon different questions: from the very existence of such rights to problems of the distinction between substantive and procedural human rights to a clean environment. According to authors that do not argue the existence of such rights, substantive environmental rights (whatever their title is: 'a right to an environment', a right to a 'healthy', 'safe', 'decent' environment) belong to the third generation human rights (or so-called 'solidarity rights')².

International environmental law does not provide for a precise legal instrument that would be specifically drafted to create a universal substantive environmental law³.

The first international law document mentioning environmental rights (although only in the procedural context) was the UN Declaration for Human Rights⁴. Environmental rights finally found their way to the list of the commonly accepted international law principles in another widely known 'soft law' instrument: the Principle I of the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (so-called Rio Principles), stating that '[h]uman beings are at the centre of concerns for sustainable development'⁵.

Environmental rights have a certain degree of dualism: they both have a substantive and a procedural element, substantive being the right to a clean environment, the procedural – the right to participate in the environmental decision-making process⁶. Some authors consider this dichotomy being the evidence of co-existence of separate concepts of environmental rights⁷.

2. Substantive Environmental Rights

Substantive environmental rights are not embedded in universal international law instruments. However, they may be found in some regional treaties and other instruments of international law. In addition, European Court of Human Rights has numerous times interpreted European Convention on Human Rights as ensuring the protection of the environment⁸.

The legal system of the European Union does not entrench any substantive environmental rights either, although the discussion on a fundamental right to a clean environment at EU level began in 1989. The European Parliament then adopted a resolution on fundamental rights and fundamental freedoms; in this Resolution, it was stated that the preservation, protection and improvement of the quality of the environment was an integrative part of all Community policy⁹.

Currently, high level of environmental protection is declared as one of the goals of the European

² M.Fitzmaurice, 'Contemporary Issues in International Environmental Law' (London: Edward Elgarve 2009) 171-172.

³ S.Turner, 'A Substantive Environmental Right: an Examination of the Legal Obligations of Decision-Makers Towards the Environment' (Kluwer 2008), 6-7.

⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217, U.N.GAOR, 3rd Sess., Part 1, at 71, U.N. Doc. A/810 (1948).

⁵ U.N. Doc. A/CONF. 151/5/Rev.1 (1992).

⁶ A.Postiglione, 'Human Rights and the Environment' [2010] 'The International Journal of Human Rights', Vol. 14, No.4, 526.

⁷ For a discussion, see I.Žvaigždienė, 'Aplinkos apsauga žmogaus teisių kontekste' ['Environmental Protection in the Context of Human Rights'] [2011] Mokslo darbai: Teisė, Vol. 78, 152-167.

⁸ For a more thorough analysis of the EctHR Practice see M.Fitzmaurice, *op.cit.*, see fn 1, at p.181-206.

⁹ European Parliament, Resolution of April 12, 1989 [1989] OJ C120/51, point 24.

Union¹⁰, and is seen as a reflection of a right to a clean environment¹¹. This principle is believed to be observed when the application of integration and precautionary principles is ensured¹². According to the Court of Justice of the European Union, this principle does not require the highest technically feasible level of protection to be adopted¹³. In addition, various factors (geographic, economic, social, geopolitical) may be taken into account when balancing interests and determining the content of the principle of high level of environmental protection¹⁴. Energy security is explicitly confirmed as one of such factors¹⁵.

Finally, entrenchment of the environmental rights to national Constitutions may be crucial to the protection of the environment as they become a part of nation's legal system and thus offer the potential for individuals to challenge decisions of the state¹⁶. It was identified¹⁷ that out of the 193 nations of the World (in 2005), 117 have the protection of the environment or natural resources mentioned in their Constitutions in one or another way.

3. Procedural Rights

Having regard to the fact that substantial rights and principles *per se* are neither substantial enough nor all-encompassing, they must be complemented by procedural rights. Moreover, the lesser the level of substantive human rights protection is and the bigger its gaps are, the more need of complementary procedural guarantees arises¹⁸.

The first legal document to have procedural environmental rights embedded in it, is the UN Declaration of Human Rights¹⁹. This document recognized that citizens should be provided with mechanisms with which to voice their opinions in relations affecting them, to participate in decision-making processes and to have forms of redress where those decisions encroached upon their rights²⁰. This notion is thoroughly elaborated in the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) that grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice²¹.

4. Energy Security

The relationship between the environmental protection and energy security depends on different understanding of the energy security concept. This concept emerged as a result of the 1970s oil crisis related to the turmoil in the Middle East. Currently, energy security is not separable from the national security in general²².

¹⁰ Art. 3 of the Treaty on European Union, [2010] OJ C83/01.

¹¹ S. Bogojevic, 'EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?' [2014, online] In: S. Douglas-Scott, N. Hatzis (eds.) EU Human Rights Law, (London: Edward Elgar Publishing). Online access: <<http://ssrn.com/abstract=2475334>>, [last accessed 07-03-2015].

¹² H. Veinla, 'Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law' [2004, online], *Juridica international*, IX. p. 89-98. Online access: <<http://www.juridicainternational.eu/?id=12623>> [last accessed 07-03-2015].

¹³ CJEU Judgement C-233/94, Germany v Parliament and Council, 13 May, 1997, ECLI:EU:C:1997:231. See p. 48.

¹⁴ CJEU Judgement C-341/95, Gianni Bettati v Safety Hi-Tech Srl, 14 July, 1998, ECLI:EU:C:1998:353.

¹⁵ See discussion below.

¹⁶ S. Turner, *supra* 3, 27.

¹⁷ Materials for the 61st Session of the United Nations Commission on Human Rights, Geneva March 2005, online access: http://earthjustice.org/sites/default/files/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTrev.pdf [last accessed 07-03-2015], 86-109.

¹⁸ U. Beyerlin, T. Marauhn, 'International Environmental Law' (Oxford: Hart Publishing 2011), 393.

¹⁹ *Supra* 4

²⁰ Arts. 19, 2(1), 8.

²¹ <http://www.unece.org/env/pp/welcome.html> [last accessed 07-03-2015].

²² D. Yergin, 'Ensuring Energy Security' [2006] *Foreign Affairs*, Vol 85 No 2, 69.

According to the International Energy Agency, energy security can be defined as the uninterrupted availability of energy sources at an affordable price²³. European Commission adds to this definition the need to respect environmental concerns and to look towards sustainable development²⁴. NATO emphasizes three dimensions of the energy security: importance of energy sources for the national security, physical security of the energy infrastructure, energy effectiveness of military units²⁵.

In other definitions of the energy security, emphasis is put not only on availability of energy sources, but also on availability of energy supply or energy related services (electricity, heat production, transport sector), as well as on impacts to the economy in general²⁶.

In Lithuania, energy security is also understood as the security of the supply of energy sources; in addition, energy security is regarded as one of the dimensions of the national security, as well as one of the prerequisites of the energy independence²⁷.

Taking into account results of the research of the concept of the energy security, different definitions of the energy security can be summarized as the absence of, protection from or adaptability to threats that are caused by or have an impact on the energy supply chain.²⁸

In the European Union, energy security issues for the first time were addressed in the context of the EU regional policy, when additional funding was foreseen to ensure electricity supply to remote mountain areas in Italy²⁹. Later, security of oil and gas supply to the EU became a part of the EU energy security legislation³⁰.

Energy security is also one of the issues of political agenda. In the European Commission Green paper on the energy security, both supply and demand sides of the energy security are addressed (e.g., energy efficiency)³¹. In addition, Council of the European Union has numerous times addressed energy security. Moreover, a separate meeting was dedicated to this issue in 2009³².

In 2014, European Commission published the EU energy security strategy³³. In this document, shale gas and other unconventional hydrocarbons are mentioned as factors that add to the security of energy supply in Europe³⁴.

Court of Justice of the European Union has also confirmed energy security to be an important interest of national security. In the *Campus Oil* judgement, the Court stated the energy security in the light of possible energy supply disruptions might be treated as a public interest and public security issue

²³ International Energy Agency information [online]. Online access: <<http://www.iea.org/topics/energysecurity/>>, [last accessed 07-03-2015].

²⁴ European Commission Communication 'Energy: European strategy for the security of gas supply. Green Paper', COM(2000)769, 1 December, 2000, not published in OJ.

²⁵ NATO's role in energy security [online], NATO, 13.08.2014. Online access: <http://www.nato.int/cps/en/natohq/topics_49208.htm>, [last accessed 07-03-2015].

²⁶ See: C.Winzer, 'Conceptualizing Energy Security' [2011], EPRG Working Paper 1123, CWPE 1151.

²⁷ On the Approval of the National Energy Independence Strategy, Parliament of the Republic of Lithuania, XI-2133, 26 June, 2012, Valstybės žinios, 10-07-2012, Nr. 80-4149.

²⁸ Ibid, p. 24.

²⁹ Council Regulation (EEC) No 2618/80 of 7 October 1980 instituting a specific Community regional development measure contributing to improving security of energy supply in certain Community regions by way of improved use of new techniques for hydro-electrical power and alternative energy sources, OJ L 271, 1980, p. 23-27. Later, some islands of Greece were added to the scope of this Regulation: Council Regulation (EEC) No 218/84 of 18 January 1984 amending Regulation (EEC) No 2618/80, OJ L 27, 1984, p. 19-21.

³⁰ Council Regulation (EC) No 2964/95 of 20 December 1995 introducing registration for crude oil imports and deliveries in the Community, OL L 310, 1995, p. 5-6; Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OL L 295, 2010, p. 1-22.

³¹ European Commission, COM(2000)769, supra 24.

³² In the conclusions of the meeting, energy efficiency, diversification of energy suppliers, sources and supply routes, and promotion of the Union's energy interests vis-à-vis third countries were emphasized: Presidency Conclusions of the Brussels European Council (19/20 March 2009). 2009.04.29, Nr. 7880/1/09 REV 1, p. 24.

³³ European Commission Communication 'European Energy Security Strategy' 28 May, 2014, COM(2014)330, not published in OJ.

³⁴ Ibid, p. 13.

in the context of the free movement of goods³⁵. Court of the European economic area supports such a position³⁶.

To conclude, energy security is regarded as an important element of the national security, and, in exceptional circumstances, may be used as a justification for restriction of other economic rights.

5. Relationship Between Energy Security and Environmental Protection

There are not many researches on the relationship of the environmental protection and the energy security. Moreover, existing studies are mostly limited to the analysis of the impact of energy security to climate change³⁷.

Energy security, in contrast with high level of environmental protection or a right to a clean environment, currently is not regarded as an independent principle of law, but an independent concept at most (and a constitutive element of the national security at least). For this reason, when ensuring energy security, main principles of law must be followed and fundamental rights ensured. In this regard, it is important to analyse to what extent application of environmental principles may be restricted in case the need to ensure energy strategy arises. In the Lithuanian national security strategy, energy security issues are addressed in a more thorough way, compared to the protection of environment: in a case of energy security, not only principles, but also particular measures are listed; meanwhile, in case of environmental protection, only main principles are listed³⁸.

In addition, both in the national and the EU legislation, simpler rules, including on the environmental impact assessment are envisaged for the energy sector projects that have national or European importance and fulfil certain criteria regarding their importance, significance for the energy security, etc.³⁹. Thus, the situation may arise when during the evaluation of similar projects (e.g., LNG terminals in Portugal and in Lithuania), environmental protection will be weighed differently against energy security.

6. Environmental Protection vs Energy Security in the Context of the Exploitation of Unconventional Hydrocarbons

Exploitation of unconventional hydrocarbons' is one of the new energy industries in Europe. In the US, the so-called 'shale-boom' lead to lower gas prices for consumers⁴⁰, the same is expected to happen in Europe. However, the activity undoubtedly may have severe effects on the environment and

³⁵ CJEU Judgement C-72/83, *Campus Oil Limited*, 10 July 1984, ECLI:EU:C:1984:256, p. 51; CJEU Judgement C-503/99, *Commission v Belgium*, 4 June, 2002, ECLI:EU:C:2002:328, p. 45-47.

³⁶ EFTA Court Judgement E-2/06 *EFTA Surveillance Authority v The Kingdom of Norway*, 26 June, 2007, EFTA Ct. Rep., 2007, p. 164, see p. 81.

³⁷ See, for example: W.McCibbin, P.Wilcoxon, 'Energy and Environmental Security' [2007], Brookings Institution, online access: < http://www.brookings.edu/global/pubs/200702_01energy.pdf >, [last accessed 07-03-2015]; B.K.Sovacool, 'Environmental Issues, Climate Changes, and Energy Security in Developing Asia' [2014], Asian Development Bank Economics Working Paper Series, No 399; A.Bigano, M.Hafner, P.Criqui, 'Energy Security Through Environmental Sustainability: the SECURE Project' [2012], Review of Environment, Energy and Economics (Re3); European Commission, 'Macroeconomic impacts of shale gas extraction in the EU' [2014], DG ENV – Ref.: ENV.F.1/SER/2012/0046r.

³⁸ Law on The Basics of National Security of Lithuania, 19 December, 1996, VIII-49, Valstybės žinios, 1997, Nr. 2-16.

³⁹ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 2013, p. 39-75, see Art. 7-9 str.; Law on Energy of the Republic of Lithuania, 16 May, 2002, IX-884, Valstybės žinios, 2002, 56-2224.

⁴⁰ United States Department of Labor, 'The effects of shale gas production on natural gas prices' [2013], Vol 2/No 13. Online access: < <http://www.bls.gov/opub/btn/volume-2/the-effects-of-shale-gas-production-on-natural-gas-prices.htm> >, [last accessed: 07-03-2015].

its various elements⁴¹. Consequently, discussions on the impact of this activity on citizens' environmental rights arose, and this led to the need to perform a legal analysis of the abovementioned activity in the light of the environmental protection.

When analysing unconventional hydrocarbons' activities in the context of environmental rights, one needs to find a standard for such an evaluation. In this regard, the EU principle of high level of environmental protection may be taken as a basis. Thus, in order to make sure exploitation of unconventional hydrocarbons does not infringe environmental rights of citizens, one could evaluate whether the abovementioned principle is implemented in a proper way, when applying various pieces of the EU (or national) legislation to the exploitation activity. As stated in the previous part, the content of the principle itself is contentious and depends on many factors. First, the principle includes two other principles of the EU environmental law and policy: integration principle and precautionary principle. Integration principle means that environmental concerns must be taken into account when drafting any piece of the EU legislation. In the context of the exploitation of unconventional hydrocarbons, it is concluded that although most aspects of the activity are covered by the EU legislation⁴², some legal gaps remain. Among them: regulation of the flow back of the used fracking fluid, voluntary character of the environmental impact assessment⁴³. On the other hand, precautionary principle allows decision makers to take restrictive measures regarding potentially harmful activity or product even when there is a lack of definite scientific proof regarding such an impact⁴⁴. CJEU declared that in application of this principle, environmental interests should prevail over economic interests⁴⁵. However, in other instances the CJEU in its practice seems to contradict its own earlier judgements when applying the principle and evaluating scientific knowledge that lead to its application⁴⁶.

Similarly, EU Member States do not agree on the content of application of this principle for unconventional hydrocarbons activities: some countries ban (France, Bulgaria) or limit the activity, others allow the activity to be carried on (United Kingdom, Spain), both groups basing their decision on the application of the precautionary principle⁴⁷.

In the context of energy security, unconventional hydrocarbons are regarded not as a guarantee of energy independence, but rather as an alternative source of energy supply. Many authors, especially in the context of the Russian energy aggression, emphasize the latter element⁴⁸. In addition, the role of the unconventional hydrocarbons in ensuring low prices of energy resources (thus, increasing affordability of resources) may also not be forgotten⁴⁹.

Decisions of national courts could be one of the indicators when searching the balance between

⁴¹ M.Broomfield, 'Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe' [2012]. AEA report for European Commission DG Environment, Ref: ED57281, Issue Number 17c

⁴² For the list of the applicable EU legislation, see, e.g. M.Broomfield, supra 41; M.Altmann et al., 'Impacts of shale gas and shale oil extraction on the environment and on human health' [2011], European Parliament, IP/A/ENVI/ST/2011-07, PE 464.425.

⁴³ J.Urbanavičius, 'Aplinkosauginio skalūnų dujų gavybos teisinio reglamentavimo Europos Sąjungoje problematika' [Environmental issues of the EU legislation on shale gas extraction] [2013] Mokslo darbai. Teisė. Vol 87, 181-193.

⁴⁴ N. De Sadeleer, 'Environmental Principles: From Political Slogans to Legal Rules' (USA: Oxford University Press 2002), 75.

⁴⁵ CJEU Judgement T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00, T-141/00, *Artegoda GmbH and Others v Commission*, 26 November, 2002, ECLI:EU:T:2002:283, p. 184.

⁴⁶ Compare e.g. CJEU Judgement C-3/00 *Denmark v Commission*, 20 March, 2003, ECLI:EU:C:2003:167, and CJEU Judgement T-198/12 *Germany v Commission*, 14 May, 2002, ECLI:EU:T:2014:251.

⁴⁷ See, e.g., French law on the fracking ban: LOI n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique, JORF n°0162 du 14 juillet 2011 page 12217; on the other hand, see argumentation of the Spanish Constitutional Tribunal in judgements from 24 June, 2014, BOE-A-2014-7787, and 22 July, 2014, BOE-A-2014-8767.

⁴⁸ See, e.g.: G.Erbach, 'Shale Gas and Energy Security, Briefing' [2014], European Parliamentary Research Service, PE542.167; A.Goldthau, W.Hoxtell, 'The Impact of Shale Gas on European Energy Security' [2012] Global Public Policy Institute, GPPi Policy Paper No 14.

⁴⁹ A.Erbach, supra 48.

environmental protection and energy security. French Constitutional Council upheld a decision to ban this activity on the grounds of the application of precautionary principle⁵⁰. On the other hand, Spanish Constitutional Tribunal in a similar cases (although with slightly different circumstances) in principle concluded that the importance of the energy security interest prevails over environmental considerations⁵¹.

Thus, no clear conclusion can be drawn regarding the relationship between environmental protection and energy security in the light of the exploitation of unconventional hydrocarbons

Conclusion

Two main conclusions may be drawn from the analysis.

First, both environmental rights and energy security may be treated as higher value interests in the society. However, only environmental rights are entrenched in the constitutional level documents. In addition, environmental protection is given priority by courts over other interests. Thus, despite the importance of energy security may in exceptional circumstances be put to the first place, minimal environmental protection still has to be ensured.

In addition, neither energy security nor environmental protection have static content. Depending on the level of knowledge or technologies available, on geopolitical situation and on other factors, the proportion between the two interests may swing to either side. For this reason, it is not possible to find a universal measure for this relation. Nor the balance between the two may be based solely on legal arguments. Therefore finding such a balance and taking a final decision remains the issue of political will.

Bibliography

Books, articles:

1. M.Altmann et.al., 'Impacts of shale gas and shale oil extraction on the environment and on human health' [2011], European Parliament, IP/A/ENVI/ST/2011-07, PE 464.425
2. U.Beyerlin, T.Maruhn, 'International Environmental Law' (Oxford: Hart Publishing 2011)
3. A.Bigano, M.Hafner, P.Criqui, 'Energy Security Through Environmental Sustainability: the SECURE Project' [2012], Review of Environment, Energy and Economics (Re3)
4. S. Bogojevic, 'EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?' [2014, online] In: S.Douglas-Scott, N.Hatzis (eds.) EU Human Rights Law, (London: Edward Elgar Publishing). Online access: <<http://ssrn.com/abstract=2475334>>, [last accessed 07-03-2015].
5. M.Broomfield, 'Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe' [2012]. AEA report for European Commission DG Environment, Ref: ED57281, Issue Number 17c
6. European Commission, 'Macroeconomic impacts of shale gas extraction in the EU' [2014], DG ENV – Ref.: ENV.F.1/SER/2012/0046r
7. N. De Sadeleer, 'Environmental Principles: From Political Slogans to Legal Rules' (USA: Oxford University Press 2002)
8. G.Erbach, 'Shale Gas and Energy Security, Briefing' [2014], European Parliamentary Research Service, PE542.167
9. M.Fitzmaurice, 'Contemporary Issues in International Environmental Law' (London: Edward

⁵⁰ Conseil Constitutionnel. Décision n° 2013-346 QPC. Société Schuepbach Energy LLC [Interdiction de la fracturation hydraulique pour l'exploration et l'exploitation des hydrocarbures - Abrogation des permis de recherches], 11 October, 2013.

⁵¹ Supra 47.

- Elgarve 2009)
10. A.Goldthau, W.Hoxtell, 'The Impact of Shale Gas on European Energy Security' [2012] Global Public Policy Institute, GPPi Policy Paper No 14
 11. W.McCibbin, P.Wilcoxon, 'Energy and Environmental Security' [2007], Brookings Institution, online access: < http://www.brookings.edu/global/pubs/200702_01energy.pdf >, [last accessed 07-03-2015]
 12. A.Postiglione, 'Human Rights and the Environment' [2010] 'The International Journal of Human Rights', Vol. 14, No.4
 13. B.K.Sovacool, 'Environmental Issues, Climate Changes, and Energy Security in Developing Asia' [2014], Asian Development Bank Economics Working Paper Series, No 399
 14. S.Turner, 'A Substantive Environmental Right: an Examination of the Legal Obligations of Decision-Makers Towards the Environment' (Kluwer 2008)
 15. J.Urbanavičius, 'Aplinkosauginio skalūnų dujų gavybos teisinio reglamentavimo Europos Sąjungoje problematika' [Environmental issues of the EU legislation on shale gas extraction] [2013] Mokslo darbai. Teisė. Vol 87, 181-193
 16. H.Veinla, 'Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law' [2004, online], Juridica international, IX. p. 89-98. Online access: <<http://www.juridicainternational.eu/?id=12623>> [last accessed 07-03-2015]
 17. C.Winzer, 'Conceptualizing Energy Security' [2011], EPRG Working Paper 1123, CWPE 1151.
 18. D.Yergin, 'Ensuring Energy Security' [2006] Foreign Affairs, Vol 85 No 2
 19. I.Žvaigždinienė, 'Aplinkos apsauga žmogaus teisių kontekste' ['Environmental Protection in the Context of Human Rights'] [2011] Mokslo darbai: Teisė, Vol. 78, 152-167

Other materials:

20. Materials for the 61st Session of the United Nations Commission on Human Rights, Geneva March 2005, online access: http://earthjustice.org/sites/default/files/library/references/2005_ENVIRONMENTAL_RIGHT_S_REPORTrev.pdf [last accessed 07-03-2015]
21. International Energy Agency information [online]. Online access: <<http://www.iea.org/topics/energysecurity/>>, [last accessed 07-03-2015].
22. European Commission Communication 'Energy: European strategy for the security of gas supply. Green Paper', COM(2000)769, 1 December, 2000, not published in OJ
23. NATO's role in energy security [online], NATO, 13.08.2014. Online access: < http://www.nato.int/cps/en/natohq/topics_49208.htm >, [last accessed 07-03-2015].
24. European Commission Communication 'European Energy Security Strategy' 28 May, 2014, COM(2014)330, not published in OJ.
25. United States Department of Labor, 'The effects of shale gas production on natural gas prices' [2013], Vol 2/No 13. Online access: < <http://www.bls.gov/opub/btn/volume-2/the-effects-of-shale-gas-production-on-natural-gas-prices.htm> >, [last accessed: 07-03-2015]

Supranational legislation, international documents:

26. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217, U.N.GAOR, 3rd Sess., Part 1, at 71, U.N. Doc. A/810 (1948)
27. UN Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5/Rev.1 (1992).

28. European Parliament, Resolution of April 12, 1989 on fundamental rights and fundamental freedom [1989] OJ C120/51
29. Treaty on European Union, [2010] OJ C83/01
30. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June, 1998.
31. Council Regulation (EEC) No 2618/80 of 7 October 1980 instituting a specific Community regional development measure contributing to improving security of energy supply in certain Community regions by way of improved use of new techniques for hydro-electrical power and alternative energy sources, OJ L 271, 1980, p. 23-27.
32. Council Regulation (EEC) No 218/84 of 18 January 1984 amending Regulation (EEC) No 2618/80, OJ L 27, 1984, p. 19-21.
33. Council Regulation (EC) No 2964/95 of 20 December 1995 introducing registration for crude oil imports and deliveries in the Community, OL L 310, 1995, p. 5-6
34. Presidency Conclusions of the Brussels European Council (19/20 March 2009). 2009.04.29, Nr. 7880/1/09 REV 1
35. Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OL L 295, 2010, p. 1-22
36. Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 2013, p. 39-75

National legislation:

37. Law on The Basics of National Security of Lithuania, 19 December, 1996, VIII-49, Valstybės žinios, 1997, Nr. 2-16.
38. LOI n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique, JORF n°0162 du 14 juillet 2011 page 12217
39. On the Approval of the National Energy Independence Strategy, Parliament of the Republic of Lithuania, XI-2133, 26 June, 2012, Valstybės žinios, 2012, Nr. 80-4149.
40. Law on Energy of the Republic of Lithuania, 16 May, 2002, IX-884, Valstybės žinios, 2002, 56-2224

Judgements:

41. CJEU Judgement C-72/83, Campus Oil Limited, 10 July 1984, ECLI:EU:C:1984:256
42. CJEU Judgement C-233/94, Germany v Parliament and Council, 13 May, 1997, ECLI:EU:C:1997:231
43. CJEU Judgement C-341/95, Gianni Bettati v Safety Hi-Tech Srl, 14 July, 1998, ECLI:EU:C:1998:353
44. CJEU Judgement C-503/99, Commission v Belgium, 4 June, 2002, ECLI:EU:C:2002:328
45. EFTA Court Judgement E-2/06 EFTA Surveillance Authority v The Kingdom of Norway, 26 June, 2007, EFTA Ct. Rep., 2007, p. 164
46. CJEU Judgement T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00, T-141/00, Artogodan GmbH and Others v Commission, 26 November, 2002, ECLI:EU:T:2002:283
47. CJEU Judgement C-3/00 Danmark v Commission, 20 March, 2003, ECLI:EU:C:2003:167

48. CJEU Judgement T-198/12 Germany v Commission, 14 May, 2002, ECLI:EU:T:2014:251
49. Conseil Constitutionnel. Décision n° 2013-346 QPC. Société Schuepbach Energy LLC [Interdiction de la fracturation hydraulique pour l'exploration et l'exploitation des hydrocarbures - Abrogation des permis de recherches], 11 October, 2013
50. Spanish Constitutional Tribunal, Judgement from 24 June, 2014, BOE-A-2014-7787
51. Spanish Constitutional Tribunal, Judgement from 22 July, 2014, BOE-A-2014-8767

GENDER SECURITY AS THE MAIN PURPOSE OF LAW

Anna Useinova¹

Abstract

In our earlier researches we already studied “Security” in some aspects. As the result published book “Legal Aspect of management system of Financial and Economic security of Enterprise” and some articles about labour law security. And now we want to pay attention scientific society on the special, unusual side of this theme – gender security.

Question about gender safety is very urgent. But basically in radical context. Recently there is a tendency of “battle of the sexes”, which becomes dangerous. And in order to deal with the consequences, it is necessary to investigate the background. Basically this side of gender theme not researched, although it is very important to the overall security. Why? Because there is gender-based violence, discrimination based on sex, charges by men against women etc. In developed countries it is not so obvious as in countries with economic difficulties. But this problem is not yet solved in the whole world.

This theme can be considered as individual (female, male) security, group security (sex) and the overall security of mankind.

We convinced that this aspect of security will open horizons and new ways to protection of human rights. Because it is one of the main purposes of law. For the reason that the time is come for this theme and its importance cannot be underestimate.

Keywords: gender, security, law, human rights, human equality

Introduction

As traditional concept “security” did not understanding in context of “male and female relationships”. States, governments, legislation as usual carry it to the personal area. A lot of aspects did not regulate by law, until crime or another offence will not be accomplished.

Another side – is reference gender questions to the area of philosophy, theoretical field. But there is no whole understanding, that “gender” and “security” are nearly, close concepts.

Crimes on gender ground, offences to a sexual attribute, social changes – relate to safety and order. Therefore big responsibility assigned to law scientists, lawyers. They must pay attention of state and citizens on problems of security in sphere of gender.

Deeply studied this questions in parities of sex, they could prevent those tendencies, which are observed now in the World. According to our supervisions there is a modern line, and last researches of scientists from whole of the world more and more carefully investigate influence of gender aspects on formation of the legislation.

1. Gender and Security

We said – “last time”, but we mean “the last few decades”. Because except modern lines, for reliability and objectivity of conclusions, it is necessary to study also historical background, past of this problem. Find answers in the past – as the expert in the field of history of the state and law, we would formulate it so.

Therefore, we will analyze and give some examples.

¹ Ph.D., Law, Senior Lecture, V.N. Karazin Kharkiv National University, Ukraine.

As we can see there is range of questions that are studied in this field: Gender Analysis of the Impact of the 2014 Floods in Serbia; OSCE Study on National Action Plans on the Implementation of the United Nations Security Council Resolution 1325; Violence in the Family in the Republic of Moldova. Judicial practice and national and European normative acts; Handbook on Promoting Women's Participation in Political Parties; Integrating a Gender Perspective into Internal Oversight within Armed Forces; Integrating Gender into Internal Police Oversight; Integrating Gender into Oversight of the Security Sector by Ombuds Institutions & National Human Rights Institutions; Women in politics and about politics; Women as Agents of Change in Migrant, Minority and Roma and Sinti Communities in the OSCE Region – Proceedings from an Experts Roundtable².

This is just a little part of the problems, which researched during last time. But as we can see anyhow they are about gender and safety in various aspects.

If we look and analyze some document we can see even more:

Conference / meeting document:

- Women Building Democracy: Mediation Process and Mentoring Networks 23 October 2014;
- Gender Equality Review Conference, 10-11 July 2014: Annotated Agenda 3 June 2014;
- Session 1, Talking Points by Ambassador Miroslava Beham, OSCE Senior Adviser on Gender Issues 24 January 2014;
- Session 1, Statement by Ms. Saraswathi Menon, Director of Policy Division, UN Women 24 January 2014;
- Video Address by H.E. Ms. Phumzile Mlambo-Ngcuka, UN Under-Secretary General, Executive Director, UN Women 24 January 2014.

Legal documents:

- Law on Gender Equality in Albania 27 March 2009;
- National Strategy on Gender and Against Domestic Violence 15 July 2008;
- Law on Measures against Violence in Family Relations 22 January 2008;
- Petition for protection order 17 December 2007.

Decision / declaration:

- Permanent Council Decision No. 1006 29 July 2011;
- Ljubljana Ministerial Decision No. 15 on preventing and combating violence against women 6 December 2005;
- Ministerial Council Decision No. 14/04 - 2004 OSCE Action Plan for the Promotion of Gender Equality 7 December 2004;
- Permanent Council Decision No. 638 - 2004 OSCE Action Plan for the Promotion of Gender Equality 2 December 2004;
- OSCE Commitments Relating to Gender Equality and Non-Discrimination 13 May 2003.

Report:

- Gender Balance Report, June 2014;
- Etc.

Very important, that it is materials (publications, annual reports, books, brochures, factsheets, guides, manuals, handbooks, periodicals, journals, magazines, official documents, decisions, declarations, interviews, legal documents, recommendation, reports, statements, speeches, agreements etc.) of Organization for Security and Co-operation in Europe (OSCE). And "The Parliamentary Assembly of the OSCE is the parliamentary dimension of the Organization for Security and Co-operation in Europe, whose 57 participating States³". Besides "respect for human rights and fundamental freedoms, democracy, and the rule of law is at the core of the OSCE's comprehensive concept of security. The Charter for European Security adopted at the OSCE Istanbul Summit declares that: "The full and equal exercise by women of their human rights is essential to achieve a more peaceful, prosperous and democratic OSCE area. We are committed to making equality between men

² The resources library of the OSCE materials Available at <http://www.osce.org/resources?activities=122>

³ About the OSCE PA Available at: <http://www.oscepa.org/about-osce-pa>

and women an integral part of our policies, both at the level of our States and within the Organization"⁴. In our opinion it shows the importance of these issues and global trend.

Nevertheless Convention to Eliminate All Forms of Discrimination Against Women was "made" by the United Nations only in 1979. Decision on necessity of its development and a plan of action in this direction have been accepted at the First World conference by position of women which took place in Mexico City in 1975. For the first time the question about the rights of women as integral part of human rights has raised!

In our opinion disagreements of sexes have big historical precondition. It is connected, first of all, with the question of authority. Patriarchy or matriarchy? How state posts should be distributed and the questions connected with this. Well-known scientist B. Rubakov resulted examples of research of societies and the early states which was management by women⁵.

Nowadays: in Indonesia there is an island with PASTORS – women. Also matriarchal societies of Crete. It only a small part of materials unknown to the broad audiences of a society, examples of matriarchy. Therefore the question is not solved yet. And if the question is not solved, that means that contradictions still exist. Therefore there is a threat of safety, safety of sexes.

We have mentioned already the professor B. Rubakov. It is not casual. Because there is an opinion, that basically in gender problems are engaged women. However according to our researches it is not so. For example, "The Subjection of Women", 1869 of John S. Mill⁶. One of his books, which did not have the commercial success. He has offered the amendment to the Bill about reform 1867, replacing the term "person" (equivalent in English language to concept "man") to the term "person".

Exactly for the understanding of gender issues it is necessary to know the terminology. "Gender refers to the particular roles and relationships, personality traits, attitudes, behaviors and values that society ascribes to men and women. 'Gender' therefore refers to learned differences between men and women, while 'sex' refers to the biological differences between males and females. Gender roles vary widely within and across cultures, and can change over time. Gender refers not simply to women or men but to the relationship between them. Gender mainstreaming is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels"⁷.

The peace and welfare of the world require maximum participation of women on equal terms with men in all fields⁸. But it is very significant to promote gender safety and equality in to judicial systems of the States. Because to protect their rights people petition it into the court!

Gender is important for justice reform to:

- Ensure that States meet their responsibilities under international law.
- Respond to the particular justice needs of all parts of the community.
- Build trust in the justice sector.
- Ensure a representative and legitimate justice sector.
- Reform discriminatory laws and advance protection of human rights.
- End impunity for gender-based violence (GBV).
- Ensure equal access to justice.
- Strengthen oversight and monitoring of the justice sector.⁹

⁴ Decision No. 638 2004 OSCE Action plan for the promotion of gender equality Available at <http://www.osce.org/pc/14713?download=true>

⁵ Рыбаков Б. Рождение Руси / Борис Рыбаков. – М. : Эксмо : Алгоритм, 2012. – 352 с.

⁶ John Stuart Mill (20 May 1806 – 8 May 1873) British philosopher, political economist and civil servant. He was an influential contributor to social theory, political theory and political economy. He has been called "the most influential English-speaking philosopher of the nineteenth century".

⁷ UN Economic and Social Council, Report of the Secretary-General, Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System: Mainstreaming the Gender Perspective into all Policies and Programmes in the United Nations System, 12 June 1997 Available at <http://www.osce.org/ru/odihr/75287?download=true>

⁸ United Nations General Assembly resolution 347180 of 18 December 1979 (CEDAW)

So, why it is important to promote gender safety in judicial system, legislation. Because: "Law is the most formal expression of government policy. Without legal protections, women have no recourse when they face discrimination that affects all aspects of their lives, including security, bodily integrity, family life, community status, and political, economic and social prospects. Legal reform is needed to realize gender justice¹⁰".

Some scientists allocate such problems, connected with safety in this case, for women in departure of justice. In many cases corruption in judicial bodies does not resolve to women win judicial disputes in open and transparent litigation¹¹. With this statement we agree, though with some notes. However the following thesis is actually truthful. The majority of victims in violence over gender ground – women, mostly with children. And it can be not simply organized care of children during judicial proceeding¹². It is indicative that "children" in the past, now and, with a high probability, in the future will be the essential factor which influence on the destiny of the woman. Especially as a subject of the law. In our early researches we have found and come to conclusion that exactly children as the special factor was allocated in work of judges-women on territory of Ukraine in the beginning of 20 century¹³. Therefore by development modern gender sensitive legislation it is necessary to consider these aspects.

If we address to the European experience, we found out that these countries following right this way. In Germany for working women stipulated privileges. And last tendencies in sphere of public policy specify that women with children need to provide appropriate conditions¹⁴. But it concerns not only women. Last researches of Moscow scientist¹⁵ confirm that men more and more often take maternity leave on care of the child. Therefore for observance gender balance it is necessary to provide mutual privileges and protection to both of sexes.

Of course it is very important to study, investigate problem, but even more importantly – it is to make decisions.

One of the examples of making conclusions in this area is a working group on Women and the Constitution¹⁶, composed of several civil society organisations, was formed and, in consultation with the Gender Affairs Unit, organized consultations with women's groups all over the country on basic issues affecting women in East Timor. At the end of this process a Women's Charter of Rights in East Timor was agreed upon, with eight thousand signatures collected, mostly from women, supporting the Charter. The Charter was then presented to the Members of the Constituent Assembly. This raising of public consciousness around the issues of gender equality and non-discrimination resulted in The Constitution of East Timor. The Constitution includes the following provisions:

- One of the fundamental objectives of the state is to promote and guarantee the effective equality of opportunities between women and men and non-discrimination on grounds of gender.
- Women and men shall have the same rights and duties in all areas of family life and political, economic, social, and cultural areas.
- Marriage shall be based upon free consent by the parties and on terms of full equality of rights between spouses.

⁹ Квест Ш. Гендер и реформирование системы правосудия. Справочное пособие Гендер и РСБ. Available at <http://www.osce.org/ru/odihr/75287?download=true>

¹⁰ Statement of the Honorable Navanethem Pillay, Judge, International Criminal Court (Conference on Gender Justice in Post-Conflict Situations, New York City, New York, 15-17 Sept. 2004.)

¹¹ Квест Ш. Гендер и реформирование системы правосудия. Справочное пособие Гендер и РСБ. Стр. 4 Available at <http://www.osce.org/ru/odihr/75287?download=true>

¹² Квест Ш. Гендер и реформирование системы правосудия. Справочное пособие Гендер и РСБ. Available at <http://www.osce.org/ru/odihr/75287?download=true>

¹³ Becoming and development of Judicial System of Ukraine 1921-1929. Historical and Law Analysis. Kharkiv. HTMT. 275 pages. (2012).

¹⁴ Deutsch perfect. Einfah Deutsch lernen. Frankfurt. Der neue Boom der Finanzmetropole. Wie die Deutshe arbeiten. 2014.

¹⁵ G. Sillaste

¹⁶ The La'o Hamutuk Bulletin, vol. 2. no. 5 Aug. 2001, Issue tbcus: Women and the Reconstruction of East Timor Available at <http://members.pcug.org.au/~wildwood/01augwomen.htm>

- Women are entitled to maternity leave without loss of remuneration or any other benefits¹⁷.

Conclusion

In analyze of problem "Gender and security" we can see that this question is interested on the high world level. Especially on the level of global security. So it is very important to create, develop and elaborate the area of general security, but do not miss any part of it, even the gender security. Because still a lot of problems are exist and unsolved. For example: "Many societies tend to blame the victim of GBV, especially sexual violence. As a result of the fear of stigma, most victims never report the incident. This is more so for males (who may be ashamed)¹⁸".

In our article we focused on activity and practice OSCE and other international organizations, Courts, because it shows the importance of gender security for global society. It demonstrates influence of it on legislation, judicial system, whole state and everyday human life.

Our task was to pay attention scholars on this aspect of security.

Because this field includes a lot of questions, that requires timely and quick solution. Subject of gender safety has a wide field for study: it is different countries and different times. Within the limits of one article probably it is possible to put only the certain circle of questions, to mention some of it. In our following works we will continue this important research. And also, we hope, that have drawn attention of scientific community to these problems.

Bibliography

1. About the OSCE PA Available at: <http://www.oscepa.org/about-osce-pa>
2. Becoming and development of Judicial System of Ukraine 1921-1929. Historical and Law Analysis. Kharkiv. HTMT. 275 pages. (2012).
3. Decision No. 638 2004 OSCE Action plan for the promotion of gender equality Available at <http://www.osce.org/pc/14713?download=true>
4. Deutsch perfect. Einfah Deutsch lernen. Frankfurt. Der neue Boom der Finanzmetropole. Wie die Deutshe arbeiten. 2014.
5. Квест Ш. Гендер и реформирование системы правосудия. Справочное пособие Гендер и РСБ. Available at <http://www.osce.org/ru/odihr/75287?download=true>
6. Рыбаков Б. Рождение Руси / Борис Рыбаков. – М. : Эксмо : Алгоритм, 2012. – 352 с.
7. Statement of the Honorable Navanethem Pillay, Judge, International Criminal Court (Conference on Gender Justice in Post-Conflict Situations, New York City, New York, 15-17 Sept. 2004.)
8. The La'o Hamutuk Bulletin, vol. 2. no. 5 Aug. 2001, Issue tbcus: Women and the Reconstruction of East Timor Available at <http://members.pcug.org.au/~wildwood/01augwomen.htm>
9. The resources library of the OSCE materials Available at <http://www.osce.org/resources?activities=122>
10. UN Economic and Social Council, Report of the Secretary-General, Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System: Mainstreaming the Gender Perspective into all Policies and Programmes in the United Nations System, 12 June 1997 Available at <http://www.osce.org/ru/odihr/75287?download=true>
11. United Nations General Assembly resolution 347180 of 18 December 1979 (CEDAW)

¹⁷ The La'o Hamutuk Bulletin, vol. 2. no. 5 Aug. 2001, Issue tbcus: Women and the Reconstruction of East Timor Available at <http://members.pcug.org.au/~wildwood/01augwomen.htm>

¹⁸ Квест Ш. Гендер и реформирование системы правосудия. Справочное пособие Гендер и РСБ. Available at <http://www.osce.org/ru/odihr/75287?download=true>

EMERGENCY, LAW AND SECURITY

Aušra Vainorienė¹

Abstract

This paper aims to contribute to the discussion about the law's purpose of security by looking at situations where the rule of law is put to the test – states of emergency. Emergencies often are a threat to the people, the state and also to the law. The state of emergency puts a great tension to the rule of law and the principle of democracy. The focus of the analysis are the ways in which the state itself comprehends the lack of certainty that occur in emergency. The main question is if exceptional uncertainty may be domesticated and become universal under the rule of law? In this paper different doctrines are examined and compared in order to analyse if it is possible to determine universal components of a general theory of emergency.

Keywords: emergency, security, rule of law

Introduction

Security as the purpose of law is ensured *inter alia* by legal certainty. In fact, legal certainty is an essential element that explains and justifies the rule of law². Therefore, conduct in the political community is regulated. State officials must be able to perceive certainly if the act in which they want to engage is legally allowed. The citizens must be able to make decisions knowing the consequences of their actions, determining whether particular act is forbidden or not. These are the ways in which legal certainty provides security. Definition of security in this paper is being free from danger or threat and able to make plans, knowing that your freedom, rights, property and legitimate interests will be protected against transgressors³.

Legal order should also make sense in cases where security is under threat and certainty is distorted by “exceptional” or “emergency” situations that surpass the notion of normality. However, legal certainty requires ordinary conditions which makes it possible to foresee the consequences of particular act. If such conditions are absent, the guarantee of certainty cannot be accomplished. There are some potential issues of material nature when normal conditions cannot function effectively. For instance, laws does not comprise a clause that would give solution to the crisis; or a provision seems to address the conflict, but its content or scope is not clear; or it determines a solution that seems suitable in relation to the nature of issue, but is forbidden in the system. The events that alter the conditions of normality are fundamentally temporal. Effectively managing the crisis necessitates urgent decisions, or else irreversible damage could occur.

If we cannot count on law and legal certainty in emergency, what are we to do? The issue can be approached in different angles (from subject's perspective). For example, from a viewpoint of an individual who must solve a conflict, but he cannot find a clear normative solution for it. Comparably, from a viewpoint of a state by spreading knowledge about this kind of situations and providing principles of how legal order determines possible responses.

¹ LL.M. (University of Edinburgh), PhD student at the Vilnius University, Faculty of Law, Department of Public Law, E-mail: ausra.vainoriene@tf.vu.lt.

² N, McCormic 'Rhetoric and the Rule of Law' at D. Dyzenhaus ed. 'Redrafting the Rule of Law: The Limits of Legal Order' (Bloomsbury Publishing, 1999) 163

³ Oxford Dictionaries, available at <<http://www.oxforddictionaries.com/definition/english/security>>

The aim of this paper is to analyse the ways in which the state itself comprehends the lack of certainty that occur in emergency. In other words, the purpose of regulating uncertainty by constructing the rule of law that is created to cope with emergency. The idea that exceptional uncertainty may be domesticated and become universal. This kind of discussion usually evolves around the state of emergency or emergency powers claimed by sovereign. Thus it relates with problems of public law and constitutional theory or the human rights law (in context of the state of siege, the global war against terrorism, the response to natural disasters or the international financial crisis).

State of emergency has become a popular topic again especially since the events of September 11, 2001 and the following reactions of states like the United States and the United Kingdom⁴. Some debates led to the recovering of previous debates, some grown from historical background (similarly critical), others produced indications about the transformation of the rule of law itself. Much of the academic work concentrated on the balance between state security and human rights – a discussion with broad political debates and a revival of Carl Schmitt's political philosophy. This balance between security and public order in one side and civil and political rights in the other is only a small part of what a theory on states of emergency comprehends⁵. In his paper different doctrines are examined and compared in order to analyse if it is plausible to determine universal components of a general theory of emergency apart from the traditional theoretical debate about the exception.

1. The limits of normality

Possibly the best way to elucidate the notion of state of emergency is by recreating the issue in modern liberal democracies. Having in mind the principles that lead the conduct of a state in normal times, one can deduce guidelines of state conduct in emergency⁶. We have a constitutional frame constructed on a system of separated powers and a catalogue of human rights enforceable by individuals against the state. If a conflict appears between constituents of this community, in normal times, we can presume that it will be solved by authorities as stated in the constitutional division of functions. That is either since the circumstances of conflict is regulated by general laws and it only requires that executive implement the existing rule or because it requires that judiciary adjudicate a disagreement as to the content or width of the rule. The exercise of both of these functions is restricted by respect for human rights.

This characterises a legal-political order functioning ordinarily. Assume that an issue emerges that cannot be solved under the normal location of powers or with appropriate respect to human rights. The problem might have the nature of crisis, emergency that threatens the existence of the state or its community, for example, an invasion or natural disaster like the typhoon in Philippines (2013). The only way to manage the crisis is to take actions that are not allowed under the current legal order. In a way that involve conducting contrary to the principle of separated powers (i.e. permitting executive to legislate) or restricting constitutional human rights (i.e. pre-emptive detention).

From the perspective of normative system, a plain answer is that the alternatives do not exist as the legal order does not validate measures contrary to itself. However, in emergency circumstances the state has to change the legal order, since the state as such, its legal order and structure, or its people

⁴ The particular influence of G. Agamben 'State of Exception' (2005). In some level this debate gained insights from a renewed interest in the German public law jurist Carl Schmitt. See C. Schmitt 'Political Theology: Four Chapters On The Concept Of Sovereignty' (1934). On Schmitt's ideas, see D. Dyzenhaus' Law As Politics. Carl Schmitt's Critique Of Liberalism' (1998)

⁵ It is more commonly economic reasons, internal armed conflicts and humanitarian crisis, such as natural disasters or diseases, lead governments to declare states of exception. Empirical data on declaration of the states of emergency: <http://www.emergencymapping.org>.

⁶ A. Zwitter 'A Rule of Law in Times of Crisis – A Legal Theory on the State of Emergency in Liberal Democracy' [2012] Vol. 98 No. 1 Archives for Philosophy of Law and Social Philosophy.

are threatened⁷. The question arises if this is a reality that goes beyond the legal system and functions as an inevitable measure or can this kind of option exist within the legal order?

Regarding this issue, the scholarship is trying to give explanations by striking dualisms, such as the norm/exception relationship⁸, accommodation approach/strict approach⁹, ordinary government/exceptional government¹⁰, the dichotomy legal/extra-legal¹¹. These arguments are proposed as normative ideas or as illustrations of how the rule of law functions. Nevertheless, stating that the exceptional is outside the legal order does not end the dispute because it does not reply how exception relates to law. Great part of scholarship concentrated particularly on the consequences for the rule of law in deciding to perceive emergencies as 'legal' or 'extra-legal'¹².

2. The legal/extra-legal dispute

In a crisis of an immensity that seriously harms the state or its citizens and of such gravity that the state can effectively respond only by changing its order, it is stated that exception is the only way. Such events demand taking necessary measures that would allow to secure the state order, even though they imply a temporary violation of laws ('extra-legal model'). This model responds to the immanent limitations of normality – regulating the crisis in the outline of normal structure is to project the system to wrecking¹³.

The advocates of extra-legal model disagree in explaining how exception concerns the rule of law. Some say that these are fundamentally distinct elements and the exceptional simply escapes the law¹⁴, others argue that it is a political issue thus the exception must be handled through the political process¹⁵.

Influential advocate of this model, O. Gross, asserts that it serves as a tool to protect the rule of law¹⁶. He cannot see possible accommodation between the rule of law and exception. The idea that legal order endeavours to identify and approve exceptional event which requires to break the order itself, is damaging to the conception of the rule of law¹⁷. The law cannot endorse its breach. Therefore, Gross suggests to admit that reaction to emergency is inescapable but opposite to legal order. Thus respect for the rule of law lies exactly in embracing officially the extra-legal nature of actions. All acts in the

⁷ "Certain situations can so threaten the constitutional(ity of the) state that the binding constitutional provisions cannot, or at least, not with the necessary speed, [...] handle state of emergencies sufficiently". Jakab, A. 'German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse' [2005] 7 German Law Journal 453, 454

⁸ W. E. Scheuerman 'Between the Norm and the Exception. Frankfurt School of Law and the Rule of Law' (Cambridge, 1997)

⁹ E. A. Posner, A. Vermelue 'Accommodating Emergencies' in 'The Constitution In Wartime: Beyond Alarmism And Complacency' (Ed. M. Tushnet, 2005) 55

¹⁰ J. Ferejohn, P. Pasquino 'Emergency Powers' in 'The Oxford Handbook Of Political Theory' (Eds. J. S. Dryzek, B. Honig, A. Phillips, 2006) 332, 336

¹¹ K. L. Scheppele, 'Legal and Extralegal Emergencies', in 'The Oxford Handbook Of Law And Politics' (Eds. K. E. Whittington, R. D. Kelemen, G. A. Caldeira, 2008) 165

¹² W. V. Iriarry 'Exception And Necessity: The Possibility Of A General Theory Of Emergency' [2010] <http://www.law.yale.edu/documents/pdf/sela/VazquezIriarry_Eng_CV.pdf>

¹³ The nature of legal norms is universal; they are inapplicable to exceptional emergency because it cannot be predicted, rationalised or normalised. K. L. Scheppele, *supra* note 10, 165-66.

¹⁴ "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law". C. Schmitt, *supra* note 3, 6

¹⁵ M. Tushnet, 'The Political Constitution of Emergency Powers: Some Conceptual Issues', in 'Emergencies and the Limits of Legality' (Ed. V. Ramraj, 2008) 145

¹⁶ "Going completely outside the law in appropriate cases may preserve, rather than undermine, the rule of law in a way that consistently bending the rule of law to accommodate emergencies will not." O. Gross 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' 1097

¹⁷ "Bringing emergencies into the law contaminates the law itself by making it accommodate practices that will of necessity spoil the law". G. Agamben, *supra* note 3, 32-3. See W. E. Scheuerman 'Emergency Powers and the Rule of Law after 9/11' [2006] 14 The Journal Of Political Philosophy 61, 70-71

extra-legal sphere encounter a public judgment, which include approbation of actions, resigning, criminal charges, civil claims or impeachment¹⁸. This theory aims to protect legal order and produce proper accountability of the authorities managing emergency.

In contrast, the “legal model” criticises the extra-legal approach because liberal democracy is described by its accordance to the rule of law. The value of democracy lies precisely in restricting the scope of actions of the state in order to protect individuals. In general, the justification of the legal model is the same that describe the legal order in modern Western states: stability, perspicuity, accessibility, predictability, consistent laws¹⁹. The issue here is the supposed incapability to manage emergency without breaking main principles. Ultimately, there appears to be a logical issue with claiming that a clear norm could exist for the unexpected.

If we are committed to the liberal legal system, it is crucial to admit that there will be actions that are clearly illegal. The question is, whether this attitude works in imminent danger. Active supporter of the legal model, D. Dyzenhaus, admits that it is impossible to address emergency in the same way as an ordinary issue. He suggests constructing inventive institutional experiments, which involve flexibility but is subject to judicial control²⁰. It is an arguable way knowing the history of judicial deference in emergency cases. The role of judges is limited in this kind of cases, the representative case is *Korematsu v. U.S.*²¹, where judges gave priority to national security factors and upheld the resolution to detain Japanese that were US citizens in concentration camps.

Nevertheless, controversial precedent with a lack of will of a judicial to scrutinise emergency powers, is used by Dyzenhaus to reason for the legal model indicating that the legal order gave room for dissenting opinions in the case²². For him, it shows that the legal order is capable of giving options that comply with the rule of law.

The legal approach acknowledges the necessity of flexibility for government to manage emergencies but it does not explain where are its limits. In states with written constitutions, restrictions are placed by constitutional provisions in line with judicial clarification, though it does not make it less complicated. States with unwritten constitutions proposed that the limits must be drawn from the fundamental values or constitutional common law²³.

3. Brief Historical Background

Traditionally contemporary constitutions contain clauses that explicitly apply to the emergency powers. However, the scholar discourse rarely draw attention to it. Thus usefulness of the above debate is constrained to acknowledging the historical context²⁴.

The deliberation on emergency events has been existing in the historical development of political and government procedures²⁵. The first important historical and normative reference is around 500 BC – the “Roman dictatorship”. In times of emergency the Roman Senate could determine that it was necessary to appoint a dictator²⁶. This system enables to separate different elements of

¹⁸ O. Gross, F. Aoláin, ‘Law in Times of Crisis. Emergency Powers in Theory and Practice’ (2006). 134-62.

¹⁹ V. Ramraj, ‘No Doctrine More Pernicious? Emergencies and the Limits of Legality’, in ‘Emergencies And The Limits Of Legality’ 3, 11 (Ed. Victor V. Ramraj 2008)

²⁰ D. Dyzenhaus, ‘The Constitution of Law. Legality in a Time of Emergency’ (2006) 63

²¹ The decision of the Supreme Court of the United States in *Korematsu v. U.S.*, 323 U.S. 214 (1944)

²² Dyzenhaus, *supra* note 19, 66.

²³ T. Poole, ‘Constitutional Exceptionalism and the Common Law’ [2009] 7 Int. Jnl. Of Constitut. Law 247

²⁴ Scheppele, *supra* note 8, 166

²⁵ See J. Ferejohn, P. Pasquino, *The law of the exception: A typology of emergency powers*, 2 Int. Jnl. Of Constitutional Law 210, 211 (2004)

²⁶ Dictator was appointed by one of the consuls in exceptional circumstances (war or the suppression of a revolt) and they were attributed to him by the exceptional situation, that was sovereign control exercised within the walls of the city, as such not subject to constitutional limits. The exorbitant power of the dictator was counterbalanced by its temporality: the dictator was nominated only for the duration of the task that he was entrusted, and not more than six months. Thus, the dictator was

constitutional design in terms of how to manage emergencies. Moreover, the Roman dictatorship was based on a separation of powers: the Senate declared emergency, consuls had the power to nominate the dictator and the dictator employed emergency powers²⁷. It is important compared with later establishments, when emergency powers were given to executive.

In modern age, France establishes the tradition of formal legal structure of emergency powers by proclaiming the state of siege²⁸. The French tradition of accepting these powers within constitution is called a neo-Roman model²⁹. In this approach, the obligations of the state of emergency are entrusted to one elected official³⁰. That is quite abstract arrangement, which does not involve a description of the powers employed by the President. Other states, like Germany, obtained more constitutional procedures of emergencies. The constitution consider thoroughly the proclamation of a state of emergency, its period, stages of development, termination, allocation of duties in authorities, full control of executive by parliament³¹.

Noteworthy is that distinct legal handling of the subject correlate with respective legal traditions. Common law have developed it by means of the doctrine of martial law, recognised as the switch to military to reinstate state's order³². Simultaneously, French and German examples demonstrate a will to codify these powers in universal rules³³. Although some states do not have particular constitutional clauses, it is common to regulate certain processes of the state of emergency in statutes³⁴. There also is important international law that though recognises state's discretion to derogate from rights in emergency, still endeavour to determine restrictions on certain guarantees that could not be violated in any case³⁵.

4. Unclear definition of emergency (identification problems)

Different legal traditions define emergencies individually. The discussed emergency is the "extreme circumstances" that threaten the very existence of the legal order³⁶. In fact, there are different kinds of unpredicted events, for which there are no solution in the legal order, but they do not constitute

a special magistrate, but legitimate, because his institution was provided by the constitution and his power was justified by the state of necessity. Gross, Aoláin *supra* note 17, 17-26

²⁷ Irizarry, *supra* note 11

²⁸ Scheppelle, *supra* note 10, 168-69.

²⁹ Ferejohn, Pasquino, *supra* note 24, 213

³⁰ The contemporary version of this practice included in the following Articles of the Constitution of the Fifth Republic (1958): When the institutions of the Republic, the independence of the Nation, the integrity of its territory or the compliance with its international commitments are threatened in a serious and immediate manner and regular operation of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council. He shall inform the nation through a message. Such measures must be inspired by the desire to provide the constitutional public authorities, in the shortest time, the means to accomplish their mission. The Constitutional Council shall be consulted about it. Parliament shall convene as of right. The National Assembly shall not be dissolved during the exercise of extraordinary powers. (Art. 16) The state of siege shall be decreed by the Council of Ministers. Its extension beyond twelve days may only be approved by Parliament. (Art. 36)

³¹ Jakab, *supra* note 6. German specificity is historically related to their negative experience with emergency provisions in the Weimar Constitution.

³² W. Feldman, 'Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege', [2005] 38 Cornell Int'l L.J. 1021

³³ More than half of the 28 European constitutions regulate emergency powers. A. Khakee, 'Securing Democracy? A Comparative Analysis of Emergency Powers in Europe 11' [2009] Geneva Centre for the Democratic Control of Armed Forces, Policy Paper No. 30.

³⁴ K. Roach, 'Ordinary law for emergencies and democratic derogations from rights', in *Emergencies And The Limits Of Legality* (Victor V. Ramraj ed. 2008) 229

³⁵ Khakee, *supra* note 32, at 9

³⁶ Feldman, *supra* note 31, at 1026.

an “emergency”³⁷. Nevertheless, there is no clear restriction to use emergency measures even in those cases. Accordingly, “when emergency powers are used, they are almost never the sort of total emergencies that cover all or even most aspects of political life as one might imagine from the theory. Many fly under the radar of constitutional alarm”³⁸. There are ordinary crises and exceptional ones.

One more important claim is that the emergency has objective features. Obviously, certain circumstances can be clearly categorised as emergencies because of their nature and gravity, for example severe earthquakes or a widespread epidemic. However, even these cases could be arguable provided that we can tell apart for what purpose we plan to assign the notion of emergency to a situation. In this sense, it is interesting that “a new vision begins to emerge that is not limited to contemplating disaster and violence as natural phenomena or inevitable, but looks at risks and conflicts as socially produced, of which the disaster and violence are merely extreme manifestations”³⁹. The concept of tragedy as a manifestation of earlier circumstances is very important since it regards the distribution of duties in the structure of emergency powers. Thus “the root causes that explain the catastrophe and, in particular, conditions of access to resources that are extremely uneven for different social groups” can be determined⁴⁰. This fact may be significant in deciding who should carry the largest burden related to emergency measures.

The political nature of the emergency also must be examined. The attempt to establish the declaration of emergency under a constitutional or statutory framework, reveal that it is not entirely legal problem. Instead we encounter a administrative-governmental kind of determination that basically lies on discretionary powers. Eventually, “the politically accountable organs will necessarily have to make the epistemic judgment of whether or not an emergency exists that would justify the invocation of emergency powers”⁴¹.

The issue is how to restrain the excessive use of emergency as a pretext to execute extraordinary measures that normal political-legal structure will not authorise⁴². On that account it is rather typical for government to benefit from the discussions of crisis and emergency in a way that promote social solidarity behind their policies or enforce the “rationality” of them⁴³. The issue appears when attempting to employ the same account to justify the official activation of exceptional powers.

That is exactly why extra-legal model is somehow naïve to claim that the rule of law will be secure and protected by forcing executive to acknowledge publicly that they are acting unlawfully. Though the proposal of transparency is desirable, the fact is that there is small possibility that this would happen whilst an official anyhow seek for justification in the rule of law⁴⁴.

5. Inherent conditions of the state of emergency

Some common aspects for the legal regulation of emergencies may be found analysing the inherent features of actual emergencies. It is possible to single out components that apply to both the emergency circumstances and the regulatory frame of emergency powers. Emergency circumstances

³⁷ Schmitt wrote about this: “not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.” Schmitt, *supra* note 3, 12

³⁸ Scheppelle, *supra* note 10, at 174. See also Ferejohn, Pasquino, *supra* note 22, 216

³⁹ Irizarry, *supra* note 11

⁴⁰ *Ibid*, 84

⁴¹ J. Ferejohn, P. Pasquino, ‘Emergency Powers’, in ‘The Oxford Handbook of Political Theory’ (Eds. J. S. Dryzek, B. Honig, A. Phillips 2006) 332, 347

⁴² “As Schmitt prophesied, crisis management constitutes a paramount activity for contemporary government, as it struggles to tackle a host of oftentimes unprecedented political, military and economic challenges, at least some of which pose major threats to the existing political and legal order. The necessity for emergency action, in short, appears more widespread than classical liberalism conceded”. Scheuerman, *supra* note 14, 63.

⁴³ Irizarry, *supra* note 11

⁴⁴ “After all, there is normally nothing to be gained politically – and much to be lost – by a leader’s admitting to constitutional infidelity”. S. Levinson, J. Balkin, ‘Constitutional Crises’ [2009] 157 Univ. Of Penn. L. Rev. 707, 724

are distinguished by conditions of: a) temporality (unpredicted and of unknown end), b) gravity (threat to life of state or people), c) recognition (identification and official declaration), d) reaction (necessitates urgent action and changes in state functioning)⁴⁵.

When deciding on system for the recognition of emergency powers, these aspects must be considered: who declares state of emergency, the procedures for that, duration and the status of rights (which and to what extent may be suspended). Describing how to manage exception also necessitates making principal determination about who should do it. The issue is complicated and we must acknowledge that there are a number of decisions to make while we search for its own solution in the political-constitutional structure.

Conclusion

There are familiar aspects of the way law approaches the problem of emergencies. With reference to that, there are a number of things to learn. Large part of the debate about emergency powers depend on a static viewpoint of the way in which political and legal order is constituted. Thus, the assessment if a system is prepared or not to face an emergency, includes analysing the distribution and power relationships. This type of research is carried out in extra-legal model and it has the only possible conclusion that legal order does not have capacity to manage emergencies without degrading in the process.

The drawback of this theory is that it overlooks an appropriate account of the evolutionary aspect of political and constitutional system. The troubles of discovering a compromise sufficient to the state of exception within the legal order, should be similar to continuous debates on how to limit state's authority while keeping the capacity for institutional action necessary for the protection of collective interest. It is a process and as such, it occasionally capacitates developments and in other times moves very slowly. In this sense, the conceptual development of legal certainty and security, as in other greatest categories of philosophy and theory of law, has not been the outcome of logical development but of political accomplishments of society. Worthwhile is to continually maintain the faith that the collective interests necessitates constant research and challenges for the best solution.

Bibliography

1. G. Agamben, 'State of Exception' (Chicago: University of Chicago Press, 2005).
2. D. Dyzenhaus, 'Redrafting the Rule of Law: The Limits of Legal Order' (Bloomsbury Publishing, 1999)
3. D. Dyzenhaus, 'The Constitution of Law. Legality in a Time of Emergency' (2006)
4. D. Dyzenhaus, 'Law As Politics. Carl Schmitt's Critique Of Liberalism' (1998).
5. J. Ferejohn, P. Pasquino 'Emergency Powers' in 'The Oxford Handbook Of Political Theory' (Eds. J. S. Dryzek, B. Honig, A. Phillips, 2006)
6. J. Ferejohn, P. Pasquino, 'The law of the exception: A typology of emergency powers', [2004] 2 Int. Jnl. Of Constitutional Law.
7. W. Feldman, 'Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege' [2005] 38 Cornell Int'l L.J.
8. O. Gross, F. N. Aoláin, 'Law in Times of Crisis. Emergency Powers in Theory and Practice' (2006).
9. W. V. Irizarry 'Exception And Necessity: The Possibility Of A General Theory Of Emergency' < http://www.law.yale.edu/documents/pdf/sela/VazquezIrizarry_Eng_CV.pdf>
10. A. Jakab, 'German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse' [2005] 7 German Law Journal 453-474.

⁴⁵ Zwitter, *supra* note 10

11. A. Khakee, 'Securing Democracy? A Comparative Analysis of Emergency Powers in Europe' [2009] Geneva Centre for the Democratic Control of Armed Forces, Policy Paper No. 30.
12. S. Levinson, J. Balkin, 'Constitutional Crises' [2009] 157 Univ. Of Penn. L. Rev. 707-724
13. Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/security>
14. T. Poole, 'Constitutional Exceptionalism and the Common Law' [2009] 7 Int. Jnl. Of Constitutional Law.
15. E. A. Posner, A. Vermelue 'Accommodating Emergencies' in 'The Constitution In Wartime: Beyond Alarmism And Complacency' (Ed. M. Tushnet, 2005)
16. V. Ramraj, 'No doctrine more pernicious? Emergencies and the limits of legality' in 'Emergencies and the Limits of Legality' (Ed. V. Ramraj, 2008)
17. K. Roach, 'Ordinary law for emergencies and democratic derogations from rights', in 'Emergencies and the Limits of Legality' (Victor V. Ramraj ed. 2008).
18. K. L. Scheppelle, 'Legal and Extralegal Emergencies', in 'The Oxford Handbook Of Law And Politics' (Eds. K. E. Whittington, R. D. Kelemen, G. A. Caldeira, 2008)
19. C. Schmitt, 'Political Theology: Four Chapters On The Concept Of Sovereignty' (Chicago: University of Chicago Press, 2005).
20. W. E. Scheuerman, 'Between the Norm and the Exception. Frankfurt School of Law and the Rule of Law' (Cambridge, 1997)
21. W. E. Scheuerman, 'Emergency Powers and the Rule of Law after 9/11' [2006] 14 The Journal Of Political Philosophy 61-87.
22. M. Tushnet, 'The Political Constitution of Emergency Powers: Some Conceptual Issues' in 'Emergencies and the Limits of Legality' (Ed. V. Ramraj, 2008)
23. A. Zwitter, 'The Rule of Law in Times of Crisis – A Legal Theory on the State of Emergency in Liberal Democracy' [2012] Vol. 98 No. 1 Archives for Philosophy of Law and Social Philosophy.

REGULATION OF LIBERAL PROFESSIONS: PUBLIC PROTECTION OR RESTRICTIONS ON COMPETITION

Evelina Agota Vitkutė¹

Abstract

Representatives of liberal professions (notaries, bailiffs, attorneys, architects, auditors, medicals, engineers, etc.) render high standard intellectual services, which constitute 1/3 of all services market in EU. Professional services are very particular – they create value not only for their clients, but also for the public. Due to this, traditionally liberal professions are intensively regulated. In the year 2004 the European Commission started to urge Member States to initiate deregulation of liberal professions in order to facilitate entrance to free service market and, therefore, enhance competition. At the same time, professional associations of liberal professions have delivered strong arguments why deregulation may have negative impact to the public. Aim of the paper is to determine the actual *raison d'être* of maintaining extensive regulation of liberal professions, i.e. education and qualification requirements, requirements for rendering services, restrictions of advertising, etc. It is sought to evaluate whether liberal professions actually do have specific status and what are the main features of their services. Positions of the European Commission and associations of liberal professions are analysed separately. Several examples of topicalities related to liberal professions' regulation in Lithuania are given. Conclusion is drawn that regulation of liberal professions should be maintained in order to protect both – customers and public interest. However, arguments for deregulation should not be totally ignored and certain vectors for liberalising regulation of liberal professions may be considered by regulator and representatives of liberal professions themselves. As well, it is proposed to consider self-regulation as most suitable and flexible way to constantly reflect changes in the market. Proposals for Lithuanian context are also provided.

Keywords: liberal professions; self-regulation; deregulation; information asymmetry; consumer protection; restriction of competition.

Introduction

Representatives of liberal professions (notaries, bailiffs, attorneys, architects, auditors, medicals, engineers, etc.) render high standard intellectual services. It is widely renowned that activities of the representatives of liberal professions are very important to European Union (“EU”) seeking to become most competitive knowledge economy in the world and implementing the goals of *Europe 2020* strategy. It has been estimated that representatives of liberal professions create up to 9% of gross domestic product of entire European Union and their activities constitute 1/3 of all services market in EU². Due to these reasons the European Commission (“EC”) actively takes actions aimed at encouraging Member States to implement wide scope regulatory (or deregulatory) reforms, which would enhance the growth of service market.

¹ PhD student at Vilnius University, Faculty of Law. Main research interests: regulatory matters and methods, tools for creation of better regulatory environment, regulation of liberal professions. Evelina also works as attorney-at-law.

² European Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Professional Services – Scope for more reform – Follow-up to the Report on Competition in Professional Services’, COM(2005) 405 final [2005], p. 3; European Commission, ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Evaluating national regulations on access to professions’, COM(2013) 676 final [2013], p. 2.

However, proposals of the EC are primarily opposed by professional associations of liberal professions that have strong arguments why deregulation may have negative impact to the public. Member States (with some unitary exceptions³) themselves also tend not to initiate substantial reforms. Particularly in Lithuania certain inconsistent tendencies may be noticed. Firstly, in case of mostly developed liberal professions (e.g. attorneys) scope of self-regulation is constantly being extended. Secondly, in case of less regulated liberal professions (e.g. architects) there are initiatives to extend state regulation for the purpose of ensuring higher protection of the public. These different tendencies show that regulation of liberal professions clearly raises a conflict between two legal values – protection of public interest and promotion of competitive environment for business.

Aim of the paper is to determine the actual *raison d'être* of maintaining extensive regulation of liberal professions, i.e. education and qualification requirements, requirements for rendering services, restrictions of advertising, etc. It is sought to evaluate whether liberal professions actually do have specific status and what are the main features of their services. Positions of the EC and associations of liberal professions in relation of self-regulation methods (as particular regulation method in case of liberal professions) are assessed. The paper is supported by conceptual ideas of European researches that make research on regulatory aspects related to liberal professions.

In writing this paper, main research methods were employed. The analytical method was used in assessing institutional positions and scientists' papers related to regulation of liberal professions. The comparative method was used in analysing regulatory methods of liberal professions implemented. The logical, systemic and critical methods were used in order to determine the main purpose of maintaining regulation of liberal professions and encouraging the spread of self-regulation means. The teleological research method was used in analysing *travaux préparatoire* material – preparatory documents of the EU institutions, drafts, resolutions, reports of working groups, etc.

1. Concept of Liberal Professions

Certain occupations, such as attorneys, notaries, bailiffs, auditors, architects, are widely known as liberal professions. However, there is neither extensive list of liberal professions nor a common definition thereof; understanding of liberal professions differs around the countries. For example, in Lithuania the Constitutional Court uses the term “state regulated profession⁴” instead of “liberal profession⁵”. Meanwhile, at the statutory level the exemplary list of liberal professions is provided exclusively for tax purposes⁶ and it includes not only “traditional” liberal professions, but also such occupations as lobbyists, finance consultants, journalists or brokers. Attribution of the latter occupations for the liberal professions is highly questionable.

In order to emphasize specifics of liberal professions, researchers compare them with other occupations, which require less specialised skills or intellectual training⁷ or oppose professions to “business” because engagement in professional activities is not (or not entirely) the actual trade in the

³ Poland may be regarded as the leader in deregulation of professions. Polish Government has express intentions to deregulate (to certain extent) approx. 60% regulated professions (230 out of 380), including such liberal professions as attorneys and notary public. For more information, please refer: <https://www.premier.gov.pl/en/news/news/deregulation-opening-access-to-over-230-professions.html>.

⁴ Constitutional Court of the Republic of Lithuania, Resolution in case No 44/06, Official Gazette, 2008, No. 4-136 [2008].

⁵ It could be regarded that the concept of “state regulated profession” used by the Constitutional Court of the Republic of Lithuania has the meaning of “liberal profession” as they both have the same main features – (1) perform functions of public interest, (2) pursue independent (private) professional activities for the remuneration, (3) they are controlled by the state.

⁶ Law on Personal Income Tax, Official Gazette, 2002, No. 73-3085 [2002], Article 2(38).

⁷ R. Van Den Bergh, ‘Theory and Evidence on the Regulation of the Latin Notary Profession’, http://www.bmg.eur.nl/fileadmin/ASSETS/bmg/ECRI/Onderzoeksrapporten/ECRI_2006_Regulation_latin_notary_profession.pdf [2006], p. 6.

legal sense⁸. It seems that the concept of liberal professions may be best explained by enlisting main features typical to liberal professions rather than providing a concise definition.

Directive on the recognition of professional qualifications determines that liberal professions are “practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interest of the client and the public⁹”. The EC sees liberal professions as “occupations requiring special training in the liberal arts or sciences¹⁰”. The Court of Justice of the European Union (“**ECJ**”) describes liberal professions to be: “<...> of a marked intellectual character, requiring a high level qualification and are usually subject to clear and strict professional regulation¹¹”. Researchers also emphasize certain more “soft” attributes of liberal professions such as relatively elevated socio-economic status¹², the high level of income and commitment to high ethical standards¹³.

Despite possible different variations of the concept, it may be concluded that liberal professions have several particular features:

- 1) provision of services requires specific education and high professional expertise;
- 2) services are provided personally and independently by professional;
- 3) services are always of intellectual nature;
- 4) activities of professionals are regulated, they are bound by high ethical standards;
- 5) services are important not only to direct clients of professional but also to third persons and general public.

The latter fact that in all cases the representatives of liberal professions have to combine both – private and public interests – is of particular importance. Firstly, in all cases representatives of liberal profession provide services to their clients in accordance with private service agreements. It is widely recognised that there is a great imbalance or so-called “information asymmetry” between the client and professional¹⁴. Usually customers have no information about the quality of the service rendered as any assessment of them requires specialised skills or knowledge. Secondly, services of liberal professions are important for third persons and general public¹⁵. Usually, liberal professionals perform certain functions within the society, which could be defined as public functions, the execution thereof, due to certain reason, has been historically transferred to private persons¹⁶. For example, legal professions contribute to the effectiveness of justice system; auditors enable to show actual financial status of business, architects ensure that buildings comply with safety and environmental requirements, etc. Finally, liberal professionals also have to pursue their personal interests. They have to ensure that their services are sold to the clients as services fees are direct income for professionals and their families¹⁷.

⁸ I. E. Wendt, ‘EU Competition Law and Liberal Professions: an Uneasy Relationship?’ (Leiden: Martinus Nijhoff Publishers) [2012], p. 1; G. Shaw, ‘Notaries – a profession between state and market’, report submitted for subsequent discussion at the 38th annual Congress of the French Notarial Organisation, http://www.notaries.org.uk/articles/articles/profession_between_state_and_market_files/page4_1.pdf [2007], p. 4.

⁹ European Parliament and Council Directive (EC) 2005/36 on the recognition of professional qualifications, OJ L255/22 [2005], recital 43 of the preamble.

¹⁰ European Commission, ‘Communication from the Commission. Report on Competition in Professional Services’, COM(2004) 83 final [2004], p. 3.

¹¹ Adam, Case C-267/99, ECR I-7467 [2001], paragraph 39.

¹² G. Shaw [2007], p. 4.

¹³ I. E. Wendt [2012], p. 21-22.

¹⁴ R. Van Den Bergh [2006], p. 6-7; C. Chaserant, S. Harnay, ‘The regulation of quality in the market for legal services: taking the heterogeneity of legal services seriously’, *European Journal of Comparative Economics*, Vol. 10, n. 2, p. 267-291 [2013], p. 270, 286; T. L. Adams, ‘Professional Self-Regulation and the Public Interest in Canada’, <http://pascal.iseg.utl.pt/~socius/interim/?download=adams-public.pdf> [2013], p. 8.

¹⁵ C. Chaserant, S. Harnay [2013], p. 27; T. L. Adams [2013], p. 20

¹⁶ Constitutional Court of the Republic of Lithuania [2008]; Constitutional Court of the Republic of Lithuania, Resolution in case No 16/08, *Official Gazette*, 2010, No. 34-1620 [2010].

¹⁷ G. Lastauskienė, ‘Advokato profesija: prieštaras jos pobūdis ir kontrolė’, *Jurisprudencija*, 20(4), p. 1473-1491 [2013], p. 1476.

This may lead to so-called “moral hazard” situation¹⁸. Professionals may be tended to provide more services to their clients than actually need, just for the purpose of obtaining more income.

Basically the above-mentioned specifics determine the rationale to regulate of liberal professions. It is necessary to ensure sufficient qualification and ethical requirements for persons engaged in the provision of such services.

2. Scope and Method of Regulating Liberal Professions

For the purpose to ensure public interests and high quality of services rendered by liberal professions, a number of issues related to the activities of liberal professionals are regulated. Main regulated aspects are education and qualification requirements for persons willing to become member to particular liberal profession, licencing, accreditation or certification procedures, requirements for maintenance of required qualification, ethical requirements, disciplinary liability application procedures, etc.¹⁹

That has to be particularly noted is the way the liberal professions are regulated. In most cases liberal professions are regulated specifically – not only by the state regulation, but also by self-regulation tools²⁰. Self-regulation, as a specific regulatory method of liberal professions, is also emphasized by the Lithuanian Constitution Court, which points out that self-regulation ensures required control over professions that pursue activities, which should be regulated by the state, but have been transferred to the private sector²¹. These self-regulation actions are executed by specific professional associations, which should not be mixed with other organizations exclusively formed by the private sector to set standards, monitor for compliance, and enforce their rules²². Professional associations of liberal professions usually are established by the laws, which directly stipulate competence and discretion of such professional authorities.

I. E. Wendt, a researcher of regulation of liberal professions in the EU, says that in most cases the proportion of chosen methods and scope of liberal professions regulation directly depend on traditions dominant in particular country – each Member State has a specific mixture of state regulation, self-regulation, customs and practice²³. For example, in Lithuania situation among different liberal professions varies substantially. Certain liberal professions, such as attorneys, notaries, bailiffs, dentists, auditors, have defined self-regulatory structures; they actively participate in self-regulation processes through relatively strong professional self-regulation institutions²⁴. Meanwhile regulation of other liberal professions, such as architects, engineers, is very fragmentary; they do not have unitary self-regulation authorities.

¹⁸ R. Van Den Bergh [2006], p. 7; C. Chaserant, S. Harnay [2013], p. 27.

¹⁹ R. Schultze, ‘What Does it Mean to be a Self-governing Regulated Profession’, *Journal of Property Tax Assessment & Administration*, Volume 4, Issue 3, p. 41-53 [2008], p. 41-51; European Council of the Liberal Professions, ‘Independence and the European Liberal Professions’, http://www.ukipg.org.uk/meetings/professional_regulation_working_party/Independence_and_the_European_Liberal_Professions.pdf [2010], p. 3.

²⁰ I. E. Wendt [2012], p. 1, 16, 20.

²¹ Constitutional Court of the Republic of Lithuania [2008].

²² D. Castro, ‘Benefits and Limitations of Industry Self-Regulation for Online Behavioural Advertising’, <http://www.itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf> [2011], p. 3.

²³ I. E. Wendt [2012], p. 1, 16, 20.

²⁴ Lithuanian Bar Association, <http://www.advoco.lt/en/welcome.html>; Lithuanian Chamber of Notaries, <http://www.notarurumai.lt/index.php/en/>; Lithuanian Chamber of Bailiffs, <http://www.antstoliurumai.lt/index.php/pageid/1080>; Lithuanian Dental Chamber, <http://odontologurumai.lt/en/?style=default>; Lithuanian Chamber of Auditors, <http://lar.lt/www/page.php?4>; Law on the Bar, Official Gazette, 2004, No. 50-1632 [2004]; Law on Notaries, Official Gazette, 1992, No. 28-810 [1992]; Law on Bailiffs, Official Gazette 2002, No. 53-2042 [2002]; Law on Dentist Practice, Official Gazette, 1996, No. 35-855 [1996]; Law on Chamber of Dentists, Official Gazette, 2004, No. 4-35 [2004]; Law on Audit, Official Gazette, 1999, No. 59-1916 [1999].

On one hand self-regulation shows the maturity level of professions, on other hand, self-regulation is regarded as progressive method to ensure proper scope of liberal professions regulation. Already mentioned information asymmetry may be detected not only between professionals and their customers, but also between professionals and the state, as regulator²⁵. Particularly self-regulation helps to tackle this issue. Researchers emphasize a number of advantages of self-regulation compared with exclusive state regulation, for example:

1) Representatives of liberal professions acquire more autonomy as they are entitled to define themselves main requirements for respective professional qualification and activities²⁶.

2) Self-regulation institutions may actively represent the interests of their members (representatives of particular liberal professions) when cooperating with state institutions²⁷. Such institutions also are usually involved in processes where state adopts decisions important for the activities of particular liberal profession.

3) When the largest scope of regulatory activities and controls are transferred from the state to self-regulation institutions, the state is able to save certain financial resources²⁸. Usually it is quite costly for the state to obtain information about specific service sector, adopt legal acts, participate in evaluating activities of separate professionals, etc.

4) Decrease of state regulation enhances the higher independence of professionals, also ensures more flexibility in changing applicable requirements²⁹; allows reflecting the current service standards and ethical requirements in the best way³⁰.

5) Active professional self-regulation institutions are usually perceived by the society as a guarantee of qualitative services. This allows to more easily trusting the representatives of particular profession, therefore, the prestige of certain liberal professions increase.

6) By entrusting to perform regulation of particular profession to professional self-regulation institutions, the state shows that it has taken necessary steps to ensure control of profession. At the same time, the interference of state is decreased – this is beneficial for the state not to directly participate in adopting decisions important for professionals³¹, i.e. are formally less responsible.

It may seem that quite extensive scope of regulation applied for liberal professions are well grounded. Regulation of professions significantly contribute to ensuring security to both – consumers of services and for the general public that may be influenced by the activities of such professions. Widely applicable self-regulation also may be regarded as combining important values – respect to traditions of liberal professions to have the ability to regulate themselves and also minimization of state interference into private activities. Nevertheless, regulation of liberal professions may cause to certain threats competitive environment.

3. Debates on Deregulation in Order to Enhance Competition

Debates regarding possible competition constrains created by the regulation of liberal professions were mostly widely raised at the EU level. In the year 2004, the EC issued the communication in which it was pointed out that although some regulation of liberal professions was justified, in some cases more

²⁵ C. Chaserant, S. Harnay [2013], p. 286.

²⁶ European Council of the Liberal Professions [2010], p. 12.

²⁷ T. L. Adams [2013], p. 15.

²⁸ C. Chaserant, S. Harnay [2013], p. 284; National Consumer Council, 'Models of self-regulation: overview of models in business and the professions', http://www.talkingcure.co.uk/articles/ncc_models_self_regulation.pdf [2000], p. 21.

²⁹ C. Chaserant, S. Harnay [2013], p. 285; National Consumer Council [2000], p. 21.

³⁰ National Consumer Council [2000], p. 21

³¹ E. G. Randall, 'Understanding Professional Self-Regulation', p. 3-4; A. Green, 'Self-Regulation and the Protection of the Public Interest', <http://www.law-lib.utoronto.ca/investing/reports/rp26.pdf> [2003], p. 3; W. Lahey, 'Self-Regulation and Unification Discussions in Canada's Accounting Profession', http://unification.cpacanada.ca/wp-content/uploads/2012/05/Self-Regulation-and-Unification-Discussions-Final_title.pdf [2012], p. 7, 8; D. Castro [2011], p. 5, 6, 8; National Consumer Council [2000], p. 21; R. Van Den Bergh [2006, 2], p. 11; European Council of the Liberal Professions [2010].

pro-competitive mechanisms could and should be used instead of certain traditional restrictive rules³². The EC defined five main categories of potentially restrictive regulation of liberal professions:

- 1) service price fixing or recommendations regarding service prices;
- 2) regulations or restrictions of advertising;
- 3) requirements for the entry to particular professions;
- 4) reserved rights to provide specific services;
- 5) regulation of governing business structure and multi-disciplinary practices³³.

In order the potentially restricting regulations would be evaded, the EC proposed certain actions for Member States – to review existing rules taking into consideration whether those rules are necessary for the public interest, whether they are proportionate and whether they are justified³⁴. As main benefits arising from opening access to professions were noted the following issues: firstly, consumers would have more choice at better prices, secondly, deregulation would enhance national competitiveness and employment, and, finally, it would also allow professionals themselves to take advantage of the single market³⁵. These proposals of the EC were also supported by the European Parliament³⁶.

Researchers emphasise that such initiatives of the EC did not arise in a vacuum but followed a number of similar discussions that took place within other organizations, e.g. at the Organization of Economic Cooperation and Development³⁷ and at the academic level³⁸. For example, according to G. Brosio, in many countries a deregulation movement for the professions emerged: politicians and the general public became increasingly aware that excessive regulation and self-regulation of the professions promote the interests of professionals instead of benefiting their clients or the general public. It was sought to liberalise the market of professional services by reducing the monopoly powers of some professions and by searching for alternatives to the current practice of self-regulation³⁹. At the same time, the practice of the ECJ also led to initiate application of competition rules to associations of liberal professions⁴⁰. Nevertheless, the actions undertaken by the EC were very well noticed and probably had deeper effect to certain jurisdictions.

Propositions of the EC may be assessed as having two different angles. First of all, they could be a basis to review regulatory requirements as such (e.g. to verify whether prohibition to advertise services of attorneys is actually necessary) and to define whether the state has reasonably decided to regulate certain matters. In order to decide on possible scope of deregulation, it is required to prepare particular economic assessment⁴¹ of the professional services market, and, in particular, give more consideration to what is meant by the public interest in different markets. This would facilitate to set the framework for the review of existing regulation⁴². Secondly, it could be reviewed if widely applicable self-regulation model is effective and self-regulation authorities do not abuse their powers. Many researches

³² European Commission [2004], p. 3.

³³ European Commission [2004], p. 3; European Commission [2005], p. 4.

³⁴ European Commission [2004], p. 4; European Commission [2005], p. 4; European Commission [2013], p. 10.

³⁵ European Commission [2013], p. 4-5.

³⁶ European Parliament, 'Resolution on Follow-up to the Report on Competition in Professional Services 2006/2137(INI)' [2006], clause 3.

³⁷ Organisation for Economic Co-operation and Development, 'Competitive Restrictions in Legal Professions', <http://www.oecd.org/regreform/sectors/40080343.pdf> [2007], p. 9.

³⁸ C. Chaserant, S. Harnay [2013], p. 272; L. S. Terry, 'The European Commission Project Regarding Competition in Professional Services', *Northwestern Journal of International Law & Business*, Vol. 29, Iss. 1 Winter [2009], p. 4.

³⁹ G. Brosio, 'The regulation of professions in Italy', <http://www.feem.it/userfiles/attach/Publication/NDL1997/NDL1997-036.pdf> [1997], p. 17.

⁴⁰ Wouters and other, Case C-309/99, ECR I-1577 [2002], paragraphs 58-59; Mauri, Case C-250/03, ECR I-1267 [2005], paragraph 31; Macrino and Capodarte, Case C-94/04, ECR I-11421 [2006].

⁴¹ B. Arruñada, 'The Economics of Notaries', *European Journal of Law and Economics*, No. 3(1) [1996], p. 5-37; B. Arruñada, 'Managing Competition in Professional Services and the Burden of Inertia', <https://repositori.upf.edu/bitstream/handle/10230/545/827.pdf?sequence=1> [n.d.], p. 4-6; I. Paterson, M. Fink, A. Ogus, et al., 'Economic Impact of Regulation in the Field of Liberal Professions in Different Member States', http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf [2003].

⁴² European Commission [2005], p. 5.

have pointed out that the risk that self-regulation authorities may be tended to restrict entrance to market is quite high⁴³. This direction could lead to the review of applicable self-regulation systems and introduction of certain balanced control on professional associations, if necessary.

Initiative of the EC to deregulation liberal professions obtained certain criticism. It was noted that these proposals were not grounded enough as in-depth country and context-specific studies were not conducted in order to examine whether or how the suggested changes would affect the administration of justice or rule of law⁴⁴, impact to the already mentioned “information asymmetry” and public interests. It was also pointed out that deregulation solves only part of the problem – enhances price competition, and, probably increases number of active professionals. However, on the other hand, reduce the quality of services, which is important to both – clients and the society⁴⁵. In 2013 the representatives of liberal professions asked the institutions of EU to respect the added value of the liberal professions to European society and make sure that the liberal professions are not assessed solely on the basis of market-economy criteria⁴⁶. However, in case these proposals and concerns would be also taken into consideration, the EC initiative should be regarded as very valuable basis to review existing systems for regulation of liberal professions.

Intensity of the debates at the EU level has been very high. Meanwhile, actions in Lithuania are quite limited and inconsistent. There have not been any thorough reviews of regulation on liberal profession. Also, tendencies of regulation of separate profession differ substantially. For example, Law on the Bar has been recently supplemented by the provision allowing attorneys to advertise their services⁴⁷. It has been stipulated that detailed rules on how such advertising may be executed will be determined by the Council of the Lithuanian Bar⁴⁸. Also, in case of notaries, it has been constantly considered to review certain notarial functions and amend the regulated fee system⁴⁹. Meanwhile, architects have started to consider establishment of an obligation for all persons having a professional qualification of architect to become members of Lithuanian Chamber of Architects, i.e. it is sought to establish an effective self-regulation institution of architects⁵⁰. However, the Ministry of Environment, as main regulatory body in architecture, seeks to maintain its powers and has initiated contravening proposals for regulation⁵¹. Within this context, the position of the Lithuanian Parliament would be interesting – it will have to support one or another view. For example, the Legal Department of the Parliament seems not to support the idea of Lithuanian Chamber of Architects to create effective self-regulation authority. The Legal Department has even raised a question whether architects may be

⁴³ D. Castro [2011], p. 8; C. Chaserant, S. Harnay [2013], p. 284; National Consumer Council [2000], p. 22; E. Kavoliūnaitė-Ragauskienė, ‘Notarų veiklos liberalizavimo galimybė europos sąjungos lotyniškojo notariato tradicijos valstybėse’ (Vilnius: Lietuvos teisės institutas) [2014], p. 14. L. S. Terry [2009], p. 20.

⁴⁴ L. S. Terry [2009], p. 2.

⁴⁵ C. Chaserant, S. Harnay [2013], p. 278.

⁴⁶ Council of European Dentists; Standing Committee of European Doctors; European Council of Engineers Chambers; Federation of Veterinarians of Europe, ‘Charter for Liberal Professions’, http://www.fve.org/uploads/publications/docs/charter_for_liberal_professions_fin.pdf [2013], p. 4.

⁴⁷ Law Amending and Supplementing Articles 2, 4, 7, 8, 10, 13, 14, 15, 16, 17, 19, 23, 25, 30, 32, 33, 35, 36, 39, 42, 53, 58, 60, 61, 64, 68, 69, 70 and Annex of the Law on the Bar, Official Gazette, 2013, No. 79-3999 [2013].

⁴⁸ Council of the Lithuanian Bar, ‘Description of Requirements and Control of the Usage of Advertising of Attorney’s Activities’, <http://www.advoco.lt/lt/teisine-informacija/savivaldos-sprendimai/70/download/42020.html> [2014].

⁴⁹ Teisingumo ministerija, ‘Siūloma atsisakyti biurokratine našta virtusių notarų paslaugų’, <http://www.tm.lt/naujienos/pranesimasspaudai/1326> [2009]; G. Štaraitė-Barsulienė, ‘Mediacijos taikymo galimybės notaro veikloje’, Socialinių mokslų studijos No. 4(1) [2012], p. 233-250; D. Paurys, ‘Notarinis registras: ar dar neatėjo poreikis permainoms?’, Notariatas No.14 [2012], p. 46-21; L. Gumuliauskeinė, ‘Ar perduoti notarams civilinės metrikacijos įstaigų funkcijas?’, Notariatas No. 9 [2010], p. 10-21; J. Čiomanas, ‘Notariato ateitis – e. notaro sistema’. Notariatas No 14 [2012], p. 43-45.

⁵⁰ D. Bakšienė, ‘Atlikta mokslinė analizė architektų profesinės savivaldos klausimais’, <http://www.architektorumai.lt/pages/posts/atlikta-moksline-analize-architektu-profesines-savivaldos-klausimais-334.php> [2014].

⁵¹ Draft Law No. 14-12353 on the Amendment of Articles 3, 6, 8, 9 and 11 of the Law on of the Republic of Lithuania on the Chamber of Architects No. X-914 [2014].

qualified as liberal profession, which, as such, is entitled to obtain self-regulatory powers⁵². These examples show that current situation of liberal professions regulation should be reconsidered in Lithuania. Initiatives pursued at the EU level may be a good basis to start wider and in-depth discussions regarding this matter.

Conclusion

1. Specific features of liberal professions and services provided by such professionals clearly show that certain aspect of liberal professions should be regulated. Such need is based on very important motives – to secure persons and entities using professional services and also to secure the public interest, which is influenced by the activities of liberal professions.

2. Scope of regulation should be reasonable and minimally required. Such values as competition in service market in respect of free entrance of new players and also lower prices for consumers should be also respected. These criteria are a good basis to initiate review of regulatory requirement and assessment whether they are actually required. When defining the best recipe of liberal profession regulation, a clear balance between two important values – protection of the public and enhancement of competition – should be found.

3. Self-regulation of liberal professions should be supported. It is not only traditional, but also a progressive regulatory model. Conferring certain powers to professions to regulate their own activities may be also regarded as form of deregulation. In such case the state clearly reduces its interference in the professional activities. Nevertheless, it is important to create effective check and balance system for self-regulations, i.e. to ensure independence, transference and accountability tools in professional associations.

4. Lithuania has a number of liberal professions actively participating in local service market. However, despite intensive debates at the EU level, Lithuanian authorities do not tend to initiate more broad review or reform of regulation of liberal professions. All regulatory aspects are solved at *ad hoc* cases. This leads to inconsistent and, in certain cases (e.g. in case of architects), ungrounded, regulatory changes. Best practices used at the EU level should be taken into consideration when deciding on the reforms of liberal professions' regulation in Lithuania.

Bibliography

1. Adam, Case C-267/99, ECR I-7467 [2001].
2. B. Arruñada, 'Managing Competition in Professional. Services and the Burden of Inertia', <https://repositori.upf.edu/bitstream/handle/10230/545/827.pdf?sequence=1> [n.d.].
3. B. Arruñada, 'The Economics of Notaries', *European Journal of Law and Economics*, No. 3(1) [1996].
4. C. Chaserant, S. Harnay, 'The regulation of quality in the market for legal services: taking the heterogeneity of legal services seriously', *European Journal of Comparative Economics*, Vol. 10, n. 2, p. 267-291 [2013].
5. Constitutional Court of the Republic of Lithuania, Resolution in case No 44/06, Official Gazette, 2008, No. 4-136 [2008].
6. Constitutional Court of the Republic of Lithuania, Resolution in case No 16/08, Official Gazette, 2010, No. 34-1620 [2010].
7. Council of European Dentists; Standing Committee of European Doctors; European Council of Engineers Chambers; Federation of Veterinarians of Europe, 'Charter for Liberal Professions',

⁵² Legal Department of the Parliament of the Republic of Lithuania, 'Opinion No. XIIP-2765 regarding the Draft Law on the Amendment of Articles 1, 2, 3, 4 and 11 and on Annulment of Article 18 of the Law on of the Republic of Lithuania on the Chamber of Architects No. X-914' [2015].

- http://www.fve.org/uploads/publications/docs/charter_for_liberal_professions_fin.pdf [2013].
8. Council of the Lithuanian Bar, 'Description of Requirements and Control of the Usage of Advertising of Attorney's Activities', <http://www.advoco.lt/lt/teisine-informacija/savivaldos-sprendimai/70/download/42020.html> [2014].
 9. D. Bakšienė, 'Atlikta mokslinė analizė architektų profesinės savivaldos klausimais', <http://www.architekturumai.lt/pages/posts/atlikta-moksline-analize-architektu-profesines-savivaldos-klausimais-334.php> [2014].
 10. D. Castro, 'Benefits and Limitations of Industry Self-Regulation for Online Behavioural Advertising', <http://www.itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf> [2011].
 11. D. Paurys, 'Notarinis registras: ar dar neatėjo poreikis permainoms?', *Notariatas* No.14, p. 46-21 [2012].
 12. Draft Law No. 14-12353 on the Amendment of Articles 3, 6, 8, 9 and 11 of the Law on of the Republic of Lithuania on the Chamber of Architects No. X-914 [2014].
 13. E. G. Randall, 'Understanding Professional Self-Regulation', p. 3-4; A. Green, 'Self-Regulation and the Protection of the Public Interest', <http://www.law-lib.utoronto.ca/investing/reports/rp26.pdf> [2003].
 14. E. Kavoliūnaitė-Ragauskienė, 'Notarų veiklos liberalizavimo galimybė europos sąjungos lotyniškojo notariato tradicijos valstybėse' (Vilnius: Lietuvos teisės institutas) [2014]
 15. European Commission, 'Communication from the Commission. Report on Competition in Professional Services', COM (2004) 83 final [2004].
 16. European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – Professional Services – Scope for more reform – Follow-up to the Report on Competition in Professional Services', COM(2005) 405 final [2005].
 17. European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Evaluating national regulations on access to professions', COM(2013) 676 final [2013].
 18. European Council of the Liberal Professions, 'Independence and the European Liberal Professions', http://www.ukipg.org.uk/meetings/professional_regulation_working_party/Independence_and_the_European_Liberal_Professions.pdf [2010].
 19. European Parliament and Council Directive (EC) 2005/36 on the recognition of professional qualifications, OJ L255/22 [2005].
 20. European Parliament, 'Resolution on Follow-up to the Report on Competition in Professional Services 2006/2137(INI)' [2006].
 21. G. Brosio, 'The regulation of professions in Italy', <http://www.feem.it/userfiles/attach/Publication/NDL1997/NDL1997-036.pdf> [1997].
 22. G. Lastauskienė, 'Advokato profesija: prieštaras jos pobūdis ir kontrolė', *Jurisprudencija*, 20(4), p. 1473-1491 [2013].
 23. G. Shaw, 'Notaries – a profession between state and market', report submitted for subsequent discussion at the 38th annual Congress of the French Notarial Organisation, http://www.notaries.org.uk/articles/articles/profession_between_state_and_market_files/page4_1.pdf [2007].
 24. G. Štaraitė-Barsulienė, 'Mediacijos taikymo galimybės notaro veikloje', *Socialinių mokslų studijos* No. 4(1), p. 233-250 [2012].
 25. E. Wendt, 'EU Competition Law and Liberal Professions: an Uneasy Relationship?' (Leiden: Martinus Nijhoff Publishers) [2012].

26. Paterson, M. Fink, A. Ogus, et al., 'Economic Impact of Regulation in the Field of Liberal Professions in Different Member States', http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf [2003].
27. J. Čiomas, 'Notariato ateitis – e. notaro sistema'. *Notariatas* No. 14, p. 43-45 [2012].
28. L. Gumuliauskienė, 'Ar perduoti notarams civilinės metrikacijos [staigų funkcijas?]', *Notariatas* No. 9, p. 10-21 [2010].
29. L. S. Terry, 'The European Commission Project Regarding Competition in Professional Services', *Northwestern Journal of International Law & Business*, Vol. 29, Iss. 1 Winter [2009].
30. Law Amending and Supplementing Articles 2, 4, 7, 8, 10, 13, 14, 15, 16, 17, 19, 23, 25, 30, 32, 33, 35, 36, 39, 42, 53, 58, 60, 61, 64, 68, 69, 70 and Annex of the Law on the Bar, Official Gazette, 2013, No. 79-3999 [2013].
31. Law on Audit, Official Gazette, 1999, No. 59-1916 [1999].
32. Law on Bailiffs, Official Gazette 2002, No. 53-2042 [2002].
33. Law on Chamber of Dentists, Official Gazette, 2004, No. 4-35 [2004].
34. Law on Dentist Practice, Official Gazette, 1996, No. 35-855 [1996].
35. Law on Notaries, Official Gazette, 1992, No. 28-810 [1992].
36. Law on Personal Income Tax, Official Gazette, 2002, No. 73-3085 [2002].
37. Law on the Bar, Official Gazette, 2004, No. 50-1632 [2004].
38. Legal Department of the Parliament of the Republic of Lithuania, 'Opinion No. XIIP-2765 regarding the Draft Law on the Amendment of Articles 1, 2, 3, 4 and 11 and on Annulment of Article 18 of the Law on of the Republic of Lithuania on the Chamber of Architects No. X-914' [2015].
39. Macrino and Capodarte, Case C-94/04, ECR I-11421 [2006].
40. Mauri, Case C-250/03, ECR I-1267[2005].
41. National Consumer Council, 'Models of self-regulation: overview of models in business and the professions', http://www.talkingcure.co.uk/articles/ncc_models_self_regulation.pdf [2000].
42. Organisation for Economic Co-operation and Development, 'Competitive Restrictions in Legal Professions', <http://www.oecd.org/regreform/sectors/40080343.pdf> [2007].
43. R. Schultze, 'What Does it Mean to be a Self-governing Regulated Profession', *Journal of Property Tax Assessment & Administration*, Volume 4, Issue 3, p. 41-53 [2008].
44. R. Van Den Bergh, 'Theory and Evidence on the Regulation of the Latin Notary Profession', http://www.bmg.eur.nl/fileadmin/ASSETS/bmg/ECRI/Onderzoeksrapporten/ECRi_2006_Regulation_latin_notary_profession.pdf [2006].
45. R. Van Den Bergh, 'Theory and Evidence on the Regulation of the Latin Notary Profession', <http://www.seor.nl/media/files/law-and-economics-notaries.pdf> [2006].
46. T. L. Adams, 'Professional Self-Regulation and the Public Interest in Canada', <http://pascal.iseg.utl.pt/~socius/interim/?download=adams-public.pdf> [2013].
47. Teisingumo ministerija, 'Siūloma atsisakyti biurokratine našta virtusių notarų paslaugų', <http://www.tm.lt/naujienos/pranesimasspaudai/1326> [2009].
48. W. Lahey, 'Self-Regulation and Unification Discussions in Canada's Accounting Profession', http://unification.cpacanada.ca/wp-content/uploads/2012/05/Self-Regulation-and-Unification-Discussions-Final_title.pdf [2012].
49. Wouters and other, Case C-309/99, ECR I-1577 [2002].

COULD THE LEGISLATOR REPLACE THE COMMON SENSE OF A PATIENT?

Joanna Wiszniewska¹

Abstract

Safety of patients is doubtless one of the most important factors that shall determine the legislation in the field of pharmaceutical law. Broadly defined pharmaceutical products, like drugs, food supplements or medical devices are particular category available in trade. It is worth to consider whether all such products should be advertised and, if so, whether there should be any limitation in that field.

The main purpose of this paper is to critically examine to what extent the EU law imposes the frames for advertising the pharmaceutical products and the pharmacies itself. This will give the opportunity to have insight into whether the Polish Pharmaceutical Law reflects the idea to protect the safety of patients as a particularly sensitive group of individuals. Many surveys show that advertisement causes an increased medicines intake in the society. Therefore, the second aim of the paper is to discover how the different advertising regimes for particular pharmaceutical products could influence the decisions of the patients.

Last but not least, I would like to consider whether the restrictions in advertisement should be extended also to entrepreneurs who run pharmacies. In 2012 in Poland was introduced law that prohibits all kinds of advertisement of pharmacies and their activity, which is the strictest regulation in the Europe. No legal definition of "advertisement" was introduced; therefore the law is extremely inconsistently interpreted by the Pharmaceutical Inspectors. It is forgotten that the owners of the pharmacies are entrepreneurs so any limitation of their activity must be considered not only from the perspective of safety of patients but also from the point of view of economic freedom.

In conclusion, it will be argued that it is impossible to predict all social threats that could be called out by pharmaceutical products and their advertisement. The safety of patients should be an important factor in creating pharmaceutical law but no legislator could replace the common sense of a patient. Therefore, it seems to be more efficient to educate the society than to ban another activity in the field of pharmacy.

Keywords: drugs advertising, pharmacies, safeguard, public health

Introduction

It is a common truth that advertising is the key to business success. However, we shall constantly keep in mind what and whom we would like to sell. It is also worth to consider if every product can be advertised or should there be any exceptions? This paper discusses the advertisement of drugs, medical devices and food supplements and their possible influence on behaviour of consumers (patients) as well as the new Polish regulation that prohibits all kinds of advertisement of pharmacies and their activity.

¹ PhD candidate, Intellectual Property Law Institute, Jagiellonian University in Krakow (Poland); MPharm, Faculty of Pharmacy, Jagiellonian University in Krakow, 2011, MA, Faculty of Law and Administration, Jagiellonian University in Krakow, 2012. Legal counsel at training. Research activities include intellectual property law – particularly patent and trademarks law at national and international level as well as broadly defined pharmaceutical and medical law.

1. The Drug is Not Always the Same

Broadly considered drugs are particular category of products available in sale. On the one hand, they comply with the regular trade rights. It suggests then that they should be presented in the very pleasant way in order to increase their sales. On the other hand, the drugs have strong influence on human body and, consequently, they should not be taken in an irrational or impulsive manner. The products available in a pharmacy may be divided into three main categories: medicinal products², medical devices and food supplements. Every group is legally separately defined.

The main European regulation connected with drugs and their advertisement is Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use³. The Community code was implemented into national legal systems of the EU member states. Though, the implementation is not uniformed in every country. The legislator has defined the advertising of medicinal product (art. 86), specified the advertising rules (art. 88- 96) and laid down the absolute prohibition of any advertising of a medicinal product in respect of which a marketing authorization has not been granted in accordance with Community law (art. 87). It is worth to remember that the main aim of the Community code is to safeguard public health. However, this objective must be attained by means which will not hinder the development of the pharmaceutical industry or trade in medicinal products within the Community⁴.

In the Polish legal system the legal definition of a medicinal product may be found in art. 2 point 32 of Pharmaceutical Law⁵. Within the meaning of the Act 'a medicinal product shall mean any substance or combination of substances presented as able to prevent or treat disease in human beings or animals, or administered with a view to making a medical diagnosis or to restoring, correcting, or modifying physiological functions of an organism through pharmacological, immunological or metabolic action'.

Two terms that are connected to drugs but often confused and wrongly considered as synonyms are medical devices and food supplements. The term 'medical device' was defined in art. 2 pass. 1 point 38 of Act of Medical Devices⁶. The main difference between a drug and a medical device is that the aim of a drug is to insert the active substance into organism, whereas a medical device shall act single-handed, with some help of pharmacological attributes, if necessary. The category of medical devices is extremely capacious and consists of e.g. endoprostheses (hip implants), pacemakers but also some pills or solutions for oral intake.

A food supplement is, in fact, a food agent, that supplements the diet with the necessary substances⁷. The form of a food supplement may be identical to the form of a drug (e.g. capsules, tablets, ampoules) but the substance itself must not show any attribute of a medicinal product. Therefore, a food supplement shall never prevent or treat human or animal disease. If it is so, the product shall be considered not as a food supplement but as a drug⁸.

It is also worth mentioning that some of food supplements or cosmetics may fulfil criteria of a drug. They shall then be considered as a drugs and fall within the regulations of Pharmaceutical Law⁹. In case of any doubts as a setting may be used only opinion of relevant scientific institute¹⁰.

² For the purpose of this paper the terms „medicinal product” and „drug” will be used synonymously.

³ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311, 28.11.2001, p. 67 (Community code).

⁴ Preamble to the Community code relating to medicinal products for human use, point 2 & 3.

⁵ Ustawa z dnia 6 września 2001 r. Prawo farmaceutyczne [2001] Dz. U. 2008 r. Nr 45 poz. 271 (Pharmaceutical Law).

⁶ Ustawa z dnia 20 maja 2010 r. o wyrobach medycznych [2010] Dz. U. 2010 r. Nr 107 poz. 679.

⁷ Art. 3 passage 3 point 39 ustawa z dnia 25 sierpnia 2006 r. o bezpieczeństwie żywności i żywienia [2006] Dz. U. 2010 r. Nr 136 poz. 914.

⁸ See: verdict of Naczelny Sąd Administracyjny w Warszawie 19th May 2009, II GSK 899/08 [2009] <http://orzeczenia.nsa.gov.pl/doc/1034539D82> (10.03.2015)

⁹ Art. 3a of Pharmaceutical Law.

¹⁰ See: abovementioned verdict of Naczelny Sąd Administracyjny w Warszawie II GSK 899/08.

2. The Limitations Connected with Advertisement in Pharmaceutical Industry

From the above mentioned it is obvious how much difficulties it could present to subordinate the product to the correct category. Moreover, the legislator provides different regimes according to the possibility and the manner in which advertising could be conducted. The rules connected with drugs are enclosed in art. 53-64 of Pharmaceutical Law. Such an advertisement may not be misleading, must not be directed to children and shall inform about rational drug intake¹¹.

The marketing activities may not include presenting the drug by doctors, pharmacists, scientists or celebrities as it could indicate the connection between the drug and their social respect and confidence. It is also forbidden to imply that people who play in a drug advertisement may have medical or pharmaceutical education¹² or that by intake of a drug a healthy person may improve his health¹³.

As it has already been stated above, there is a great risk of confusing a drug with a food supplement or, sometimes, even with a cosmetic¹⁴. Therefore legislator forbids to suggest that a drug could be a food supplement, a cosmetic or other product¹⁵. Practically, much more often an inverse situation takes place. In order to improve the image of food supplements the advertisements recurrently them with some attributes that only a drug could have¹⁶.

3. Advertisement From the Perspective of Pharmacist

It could seem that the above mentioned law regulations are complete and coherent and, therefore, shall cause no difficulties to follow. Moreover, a general rule can be derived that the security of patient is the highest value that should be protected. For this reason, legislator introduced so many prohibitions into advertisement regulations.

Unfortunately, in practice, the regulations do not seem to work. A patient can rarely correctly subordinate a product to its category (drug/medical device/food supplement) and mostly remembers only part of the name of the product or its logo that he noticed in the advertisement¹⁷.

The Marketing Authorisation Holders make sometimes use of the risk of such confusion. Paradoxically, the law regulations partially favour such actions. On the one hand, it is much easier to introduce to market a new vitamin complex as a food supplement than as a drug because the rules are much less strict. On the other hand, the advertisement of medical devices and food supplements do not fall within the restrictions for drugs. As a result, such vitamin complex may be promoted by a doctor or a nutritionist. Moreover, the patients would almost automatically connect the prestige of these professions with a particular product, even if no forbidden attributes are suggested. Quite often patients – contrary to pharmacists advice – choose products under the influence of association: if product X is advertised by a doctor, it will cause better effects¹⁸. On the other hand, it is a common opinion that an OTC product cannot do any harm because it is not a drug¹⁹.

It is worth to mention once again that it is forbidden to suggest that a healthy person could improve his health by taking a drug. Such a ban is applicable only to drugs.

¹¹ The detailed discussion of this topic exceeds the frames of this paper.

¹² Such a situation may take place when an actor portrays a doctor or a pharmacist.

¹³ Art. 55 passage 2 point 1 letter b of Pharmaceutical Law.

¹⁴ The risk is more serious when the products are in the same or very similar form e.g. tablets or capsules.

¹⁵ Art. 55 passage 2 point 1 letter d of Pharmaceutical Law.

¹⁶ Such actions were prohibited according to art. 130 of Pharmaceutical Law.

¹⁷ Such conclusions were made by Author during her work in community pharmacy in Poland.

¹⁸ It is completely unimportant whether patient can explain why or how better the product should work.

¹⁹ Patients often identify a drug with a prescribed medicine (Rx) whereas all other pharmaceutical products they consider as one group. It does not matter that e.g. some analgesics are registered as drugs with all its consequences like overdosing or overusing

According to the WHO definition of health it 'is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'²⁰. It is then difficult to find a completely healthy person. Another important factor, that increases the patient's sensitivity to advertisement, is the prevalent interest in one's health state. Unfortunately, quite often such interest is just cursory and the only source of information is Internet. On this basis, many products were introduced to market. It could be dangerous, as in the pharmaceutical business it is almost impossible to separate the increase in sales from the increase in products intake. The first may cause that patient lose some money, the second may cause serious consequences to his health.

4. Advertisement From the Perspective of Statistics

The amount that is spent on advertising in pharmaceutical business is huge. In 2013 the general budget amounted to 3,7 billion PLN²¹. The amount that an average Pole spends on OTC drugs is also disturbing – in 2012 it was 66 EUR²². In 2011 consumers spent 1,429 billion PLN on products against cold and flu and 922 million PLN on vitamins, minerals and food supplements²³. It should be emphasized that people responsible for advertisement should take into consideration that patients are often not able to state themselves the need or the efficiency and safety of the intake of the chosen products²⁴.

There is a straight connection between an aggressive advertisement of the drugs and decisions of consumers. E. Ulatowska – Szostak²⁵ conducted survey on 640 people and showed that over half of those questioned admitted that they had bought drugs/vitamins/food supplements under the influence of an advertisement but, in fact, they did not need those products.

Moreover, many of those questioned showed greater confidence to products that were advertised than to those without any marketing activities. Furtherly, only small group of people were looking for some additional information about the product that they wanted to purchase²⁶.

5. Advertising Pharmacy and its Activity

In 2012 in Poland was introduced law that prohibits all kinds of advertisement of pharmacies and their activity²⁷. The only allowed exception is information about address and opening hours. It is the strictest regulation in the Europe and it cannot be traced back in any regulation of European Union. Furthermore, no legal definition of "advertisement" was introduced. For this reason, there is a great space for administrative recognition and the law is inconsistently interpreted by the Pharmaceutical Inspectors, who are supervising pharmacies and their activity²⁸. It seems to be left out that the owners of pharmacies are entrepreneurs so any limitation of their activity must be considered not only from the

²⁰ <http://www.who.int/about/definition/en/print.html> (10.03.2015).

²¹ <http://www.egospodarka.pl/107354,Branza-farmaceutyczna-a-wydatki-na-reklame-2013,1,39,1.html> (10.03.2015)

²² OTC market in Central Europe 2013. Development forecasts for 2013-2015, in: <http://biotechnologia.pl/farmacja/aktualnosci/ile-wydaje-na-leki-otc-przecietny-polak,13098> (10.03.2015)

²³ http://wyborcza.biz/biznes/1,100896,15169465,Polacy_lekomani_Zjadamy_1_2_mld_tabletek_rutinoscorbinu_.html#ixzz35bFNUGNq (10.03.2015)

²⁴ Materiał na posiedzenie Sejmowej Komisji Ochrony Konkurencji i Konsumentów 7.IV.1999, Informacja na temat reklamy leków, paraleków i preparatów witaminowych. Czas Aptekarski 1999; 6-7: 370-372.

²⁵ Uniwersytet Medyczny im. K. Marcinkowskiego w Poznaniu; E. Ulatowska – Szostak, 'Wpływ reklamy na zakup leków, parafarmaceutyków i preparatów witaminowych w opiniach klientów aptek – porównanie lat 2002 i 2007' [2008] Probl Hig Epidemiol 2008, 89(3): 441-444.

²⁶ Ibidem, p. 444.

²⁷ Art. 94a of Pharmaceutical Law.

²⁸ There are plenty of such decisions available in Internet e.g. <http://bip.wiif.waw.pl/172.php>. See also Komunikat Nr 1/2014 Głównego Inspektora Farmaceutycznego z dnia 26 czerwca 2014r. w sprawie programów lojalnościowych, <https://www.gif.gov.pl/pl/decyzje-i-komunikaty/komunikaty/602,Komunikat-Nr-12014-Glownego-Inspektora-Farmaceutycznego-z-dnia-26-czerwca-2014r-.html> (10.03.2015).

perspective of safety of patients but also from the point of view of economic freedom. Therefore, it is now almost impossible to conduct in pharmacy any pro-patient activity e.g. pharmaceutical care program, bonus program, etc. as it is recognized to be the prohibited advertisement. Unfortunately, the legislator in justification of the amendment to Pharmaceutical Law had not explained why pharmacies are so dangerous place that patients shall not get almost any information about them. For sure such regulation does not safeguard public health. It is ever harder to understand this prohibition when it is taken into consideration that the staff of the pharmacy must be highly qualified and may provide patient with necessary information how to minimize the risk of overdosing or overtaking the drug.

Conclusion

Any advertising activity in pharmaceutical business should be conducted with great deliberation. It is unacceptable to create the false connotation about the action or effectiveness of a drug. One should therefore always remember that just like a drug there is no advertisement without side-effects. The legislator made some effort in order to protect patients as a special group of consumers, but no one could replace their prudence and the common sense. Therefore it seems to be more efficient to educate patients about the possible dangers than to forbid further activities in pharmaceutical business.

Bibliography

Legislations:

1. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311, 28.11.2001, p. 67 (Community code).
2. Ustawa z dnia 6 września 2001 r. Prawo farmaceutyczne [2001] Dz. U. 2008 r. Nr 45 poz. 271 (Pharmaceutical Law).
3. Ustawa z dnia 20 maja 2010 r. o wyrobach medycznych [2010] Dz. U. 2010 r. Nr 107 poz. 679.
4. Ustawa z dnia 25 sierpnia 2006 r. o bezpieczeństwie żywności i żywienia [2006] Dz. U. 2010 r. Nr 136 poz. 914.

Cases:

5. Naczelny Sąd Administracyjny w Warszawie 19th May 2009, II GSK 899/08 [2009] <http://orzeczenia.nsa.gov.pl/doc/1034539D82> (10.03.2015)

Digital sources:

6. <http://www.who.int/about/definition/en/print.html> (10.03.2015).
7. <http://www.egospodarka.pl/107354,Branza-farmaceutyczna-a-wydatki-na-reklame-2013,1,39,1.html> (10.03.2015)
8. OTC market in Central Europe 2013. Development forecasts for 2013-2015, in: <http://biotechnologia.pl/farmacja/aktualnosci/ile-wydaje-na-leki-otc-przecietny-polak,13098> (10.03.2015)
9. http://wyborcza.biz/biznes/1,100896,15169465,Polacy_lekomani__Zjadamy_1_2_mld_tabletek_rutinoscorbinu_.html#ixzz35bFNUGNq (10.03.2015)
10. <http://bip.wiif.waw.pl/172.php> (10.03.2015)
11. Komunikat Nr 1/2014 Głównego Inspektora Farmaceutycznego z dnia 26 czerwca 2014r. w sprawie programów lojalnościowych, <https://www.gif.gov.pl/pl/decyzje-i>

komunikaty/komunikaty/602,Komunikat-Nr-12014-Głównego-Inspektora-Farmaceutycznego-z-dnia-26-czerwca-2014r-.html (10.03.2015).

Articles:

12. 'Materiał na posiedzenie Sejmowej Komisji Ochrony Konkurencji i Konsumentów 7.IV.1999, Informacja na temat reklamy leków, paraleków i preparatów witaminowych' [1999] Czas Aptekarski 1999; 6-7: 370-372.
13. E. Ulatowska – Szostak, 'Wpływ reklamy na zakup leków, parafarmaceutyków i preparatów witaminowych w opiniach klientów aptek – porównanie lat 2002 i 2007' [2008] Probl Hig Epidemiol 2008, 89(3): 441-444.

ANNEX 1. CONFERENCE PROGRAM



INTERNATIONAL
NETWORK
OF DOCTORAL
STUDIES IN LAW

3rd International Conference of PhD Students and Young Researchers

SECURITY AS THE PURPOSE OF LAW

9-10 April 2015, Vilnius University Faculty of Law

CONFERENCE PROGRAM

Day One: 9th of April, 2015, Vilnius University Faculty of Law, Saulėtekio av. 9, Vilnius

9.30 - 10.00	Registration (Room JR4)		
10.00 - 10.10	Opening of the Conference		
10.10 - 11.00	What security do we need in modern labour law? – Lecture - Professor Dr. Tomas Davulis, Vilnius University Faculty of Law		
SESSION I			
Section I (Room JR4) Moderator: Assoc. Prof. Dr. Vaidotas Vaičaitis		Section II (Room 302) Moderator: Dr. Izabela Skomerska-Muchowska	
11.15-11.30	Three critiques of security naturalization, securitization & liberal political rationality Cara Röhner, Maximilian Pichl	11.15-11.30	Security as a legitimate reason for creating double standards on human rights? Miroslav Kaštyl
11.30-11.45	Certainty in legal justification: new challenges André Ferreira Leite de Paula	11.30-11.45	The UN Security Council's targeted sanctions regime and the issues of responsibility and international law Gintarė Pažerekaitė
11.45-12.00	Emergency, Law and Security Aušra Vainorienė	11.45-12.00	EU election observation a tool for building secure democracies Gergė Kocsis
12.00-12.15	Rule of Law is the basis for security – convergent philosophy between the West and the Middle East Malek Hamad	12.00-12.15	National minorities' right to education: how security can be achieved via the national education in the light of international and EU expectations? Dóra Bogárdi
12.15-13.00	Discussion and Conclusions	12.15-13.00	Discussion and Conclusions
13.00-14.00	Lunch		
SESSION II			
Section I (Room JR4) Moderator: Francesca Sperotti		Section II (Room 302) Moderator: Dr. Indrė Isokaitė	
14.00-14.15	Legal measures of job security under the European and Polish labour law – how effective is the law interference into the relation between the employer and employee Anna Stokłosa	14.00-14.15	Peacekeeping: an asset or risk to international security András Hárs
14.15-14.30	Maintenance of security of employers and employees within social partnership in labour: Kazakhstan's experience and perspectives for development Muslim Khassenov	14.15-14.30	Case study on fundamental right vs. public interest – military radar construction Fruzsina Dóra Hubay
14.30-14.45	Current issues of legal regulation of occupational safety in Ukraine Olena Rym	14.30-14.45	Security of civilian population from the consequences of aerial warfare in the light of the Hague Rules of aerial warfare of 1923 Mateusz Piątkowski
14.45-15.30	Discussion and Conclusions	14.45-15.00	Principle of distinction in remote warfare: "Long live the king!" Neringa Mickevičiūtė
		15.00-15.30	Discussion and Conclusions

Day Two: 10th of April, 2015, Vilnius University Faculty of Law, Saulėtekio av. 9

SESSION III			
Section I (Room JR4) Moderator: Prof. dr. Eric Millard		Section II (Room 302) Moderator: Dr. Hab. Monika Namysłowska	
9.30-9.45	Security and certainty in different concepts of law Claudia Caria	9.30-9.45	Achieving banking stability through law of European Union Lenka Petrusková
9.45-10.00	Safeguard of children rights in the intercountry child adoption Ana Pliener	9.45-10.00	Mandated disclosures in the information age and the information overload problem Ricardo Pazos
10.00-10.15	Instagram mania – personal safety and privacy challenged by a social network Endre Dudás	10.00-10.15	Labour law as a tool for risk and security distribution. The case of post-crisis Poland Karol Muszynski
10.15-10.30	Defamation as a criminal offence in the context of the protection of freedom of expression Aušra Dambrauskienė		
10.30-11.00	Discussion and Conclusions	10.15-11.00	Discussion and Conclusions
11.00-11.30	Coffee Break		
SESSION IV			
Section I (Room JR4) Moderator: Prof. dr. Lorenz Schulz		Section II (Room 302) Moderator: Assoc. Prof. dr. Vīgita Vēbraite	
11.30-11.45	Punishment of non-criminal acts: historical and theoretical analysis Evgeny Tikhonravov	11.30-11.45	Regulation of liberal professions: public protection or restrictions on competition Evelina Agota Vitkutė
11.45-12.00	Crime of illicit enrichment as the threat to public security Skirmantė Makūnaitė	11.45-12.00	European civil procedure in maintaining security of private relations Victor Terekhov
12.00-12.15	Defense of crime victims: some aspects Anton Liutynskii	12.00-12.15	State liability in international commercial arbitration Nėrika Lizinska
12.15-12.30	Security of home. Actions amounting to the search of the household Teresa Bedulekaja	12.15-12.30	Legal security as the purpose of post-arbitration litigation – perspective of Polish and Swedish arbitration laws Aleksandra Orzel
12.30-13.00	Discussion and Conclusions	12.30-13.00	Discussion and Conclusions
13.00-14.00	Lunch		
SESSION V			
Section I (Room JR4) Moderator: dr. Izabela Skomerska-Muchowska		Section II (Room 302) Moderator: Dr. Elena Masnevaite	
14.00-14.15	Energy security: the concept and the major problems encountered in relation to its implementation Justinas Poderis	14.00-14.15	Police dogs – servicing the security Orsolya Horváth
14.15-14.30	Environmental protection vs. energy security in shale gas activities Jonas Urbanavičius	14.15-14.30	The use and transfer of PNR to ensure security Dalma Gabriella Hubay
14.30-14.45	Protection of the right to the company's name in the Polish civil law Justyna Kopalka	14.30-14.45	Could the legislator replace the common sense of a patient? Joanna Wiszniewska
14.45-15.00	Human security and the development of biomedical science Jurgita Randakevičiūtė	14.45-15.15	Discussion and Conclusions
15.00-15.30	Discussion and Conclusions		

More information about Conference: e-mail phdconference@tf.vu.lt
International Network of Doctoral Studies in Law : <http://lawphd.net/>