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FOREWORD BY THE ORGANISERS

We are delighted to present you already the fourth edition of international conference papers of the PhD students and young researchers. This year the international conference is once again devoted to very relevant and many discussions raising topic “Interdisciplinary approach to law in modern social context”. It has been already acknowledged that law is inherently shaped by other sciences and disciplines and it is necessary to research modern law in different social aspects. So it is not surprising that papers of this edition analyze many interdisciplinary angles, such as law and economics; law and technologies; bioethical aspects of law; influence of international relations, state policies and social environment on law; also many other even unexpected approaches to law.

Conference papers are presented by PhD students and young scholars from France, Germany, Italy, Kazakhstan, Lithuania, Poland, Portugal, Russia, Spain, Ukraine and United Kingdom. This shows that in 2014 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 Ouest-Nanterre-La Défense University Faculty of Law and Lodz University Faculty of Law and Administration already created an international platform to develop academic and scientific activities, to enhance quality of doctoral studies in law and to help the interchange of information and ideas among PhD students and professors.

We hope that while we wait for the next year conference, this edition of papers will be a perfect way to deepen knowledge in interdisciplinary aspects of law for scholars, students and practitioners in different fields of interest.

CONTENTS

EMPLOYMENT NON-COMPETITION CLAUSES – IMPACTS OF SOCIAL NETWORK.....	9
Duarte Abrunhosa e Sousa	
TRANSPARENCY IN ACCOUNTING AND CORPORATE GOVERNANCE, POLITICS, AND LAW – TOWARDS IMPROVED REGULATION OF LOBBYING (THE CASE OF LITHUANIA).....	15
Monika Ambrasaitė	
AN INTERDISCIPLINARY APPROACH TO COMBAT ISIS: LEGAL, POLITICAL, AND SOCIO – ECONOMIC	26
Alaa Al Aridi	
A NEW SHIFT IN ECONOMIC RELATIONS: IS THERE A NEED TO RETHINK EMPLOYMENT RELATIONS?.....	37
Aušra Bagdonaitė	
THE IMPORTANCE OF THE COGNITION OF SOCIAL RELATIONS IN DEFINING AND IMPLEMENTING THEIR LEGAL REGULATION	45
Daiva Bakšienė	
LEGAL PRECEDENTS AND INNOVATION	53
Johanas Baltrimas	
INTERDISCIPLINARY APPROACH: A USEFUL BUT CHALLENGING TOOL FOR THE REGULATION OF SCIENCE AND TECHNOLOGIES	62
Margo Bernelin	
LAW BY TECHNOLOGY OR TECHNOLOGY BY LAW? – AN ILLUSTRATION USING THE EXAMPLE OF VIDEO SURVEILLANCE.....	69
Sebastian Bretthauer	
PHILOSOPHICAL ANALYSIS OF LEGAL LANGUAGE: DEFINITION OF TERMS “LIFE” AND “PERSON”	79
Milda Burnytė	
“CROSS-DISCIPLINARY” APPROACHES TO LAW: A THEORETICAL ANALYSIS	85
Balthazar Durand – Jamis	

THE ECONOMIC CRISIS AND ITS CHECKMATE TO OUR TRADITIONAL INHERITANCE SYSTEM: SHOULD WE NOT RESTART THE GAME?	99
Mónica García Goldar	
THE IMPLICATIONS OF BIOETHICS ON DIFFERENT CONCEPTS OF LAW: HUMAN CLINICAL RESEARCH PERSPECTIVE	104
Justina Januševičienė	
CYBERSECURITY IN BRAVE NEW WORLD	111
Karolis Jonuška	
SOCIAL PARTNERSHIP INFRASTRUCTURE FOR EMPLOYEMENT MAINTENANCE: ECONOMIC, LEGAL AND INSTITUTIONAL INSTRUMENTS	118
Muslim Khassenov	
THE RECONCILIATION OF PROFESSIONAL, PRIVATE AND FAMILY LIFE — THE KEY MEASURES	129
Inga Klimašauskienė	
LIMITED LIABILITY COMPANY WITHOUT SHARE CAPITAL AS THE EXAMPLE OF ECONOMIC, POLITICAL AND INTERNATIONAL LEGAL APPROACH TO TRADE LAW IN POLAND	136
Justyna Kopałka – Siwińska	
BASIS AND EXPLANATION OF A LEGAL NORM: SOME PROBLEMS WITHIN THE CONTEXT OF CRIMINAL AND CRIMINAL PROCEDURE LAW	142
Anton Liutynskii	
FOREIGN POLICY ANALYSIS AND COMMON FOREIGN AND SECURITY POLICY	149
Luigi Lonardo	
SOCIOLOGICAL APPROACH TO LEGAL PROVISION FOR NATIONAL TAX SECURITY	164
Kirill Maslov	
SHARIA COUNCILS IN WESTERN SOCIETY – COMPROMISE OR SURRENDER (WITH PARTICULAR REFERENCE TO THE UNITED KINGDOM)	171
Karolina Mendecka	
UNDERSTANDING HUMANITY IN REMOTE WARFARE.....	181
Neringa Mickevičiūtė	

THE APPLICATION OF THE WORK-LIFE BALANCE CONCEPTION AS AN EXAMPLE OF AN INTERDISCIPLINARY APPROACH TO LABOUR LAW	187
Irmina Miernicka	
EFFICIENCY OF LAW IN INNOVATION ENVIRONMENT	195
Yuliya Milto	
CONVERGENCE OF MEASURES OF CRIMINAL LAW	203
Kateryna Novikova	
MINIMUM WAGE AND FREEDOM OF CONTRACT: AN INTERDISCIPLINARY PERSPECTIVE ...	209
Ricardo Pazos	
THE GENERAL ANTI-TAX AVOIDANCE MEASURE IN THE TIMES OF TAX PLANNING	218
Agnė Petkevičiūtė	
HUMAN RIGHT PROTECTION AND RIGHT TO LIFE IN ARMED CONFLICT – ON THE CROSSROAD BETWEEN THE HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW	227
Mateusz Piątkowski	
RIGHT TO HAVE RIGHTS FOR IRREGULAR MIGRANT WORKERS? INTERRELATION BETWEEN MIGRATION LAW, LABOUR POLICY AND INTERNATIONAL HUMAN RIGHTS	237
Nastazja Potocka-Sionek	
THE INDIVIDUAL CONSTITUTIONAL COMPLAINT AS AN EFFECTIVE INSTRUMENT FOR THE DEVELOPMENT OF HUMAN RIGHTS PROTECTION AND CONSTITUTIONALISM	246
Dovilė Pūraitė – Andrikienė	
ENVIRONMENTAL EXILE FROM SMALL ISLAND DEVELOPING STATES AS A COMPLEX RESEARCH PROBLEM.....	253
Anna Reterska – Trzaskowska	
PSYCHOLOGICAL ASPECTS OF THE REGULATIONS FOR MOBBING IN THE POLISH LABOUR CODE	263
Katarzyna Rozmus – Grzesiak	
INTEGRATION OF ENVIRONMENTAL CONSIDERATIONS INTO PUBLIC PROCUREMENT REGULATION AND PRACTICE	269
Rimantė Rudauskienė	

THE RIGHT TO WITHDRAW A PUBLIC PROMISE OF REWARD UNDER GERMAN LAW – WHAT ADDITIONAL INSIGHTS CAN BE GAINED FROM A LAW AND ECONOMICS PERSPECTIVE? ...	279
Henriette Karoline Sigmund	
IMPACT OF ECONOMIC CHANGES IN POLAND ON DECISION – MAKING IN THE FIELD OF ESTABLISHING AND RUNNING BUSINESS AND POLICY – MAKING AND RESOLVING DISPUTES	286
Krzysztof Skawiańczyk	
COMPETITION LAW – BETWEEN LAW AND ECONOMICS.....	292
Vytenis Skorupskas	
THE INFLUENCE OF THE EUROPEAN LAW ON THE NATIONAL CRIMINAL LEGISLATION OF UKRAINE.....	299
Anna Sokhikian	
LEGAL, SOCIAL AND ECONOMIC FACTORS OF FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION	305
Anna Stokłosa	
LAW, MEDICINE, ETHICS AND ASSISTED PROCREATION: RECONSIDERING THE LEGAL PROCREATIVE RELATIONSHIP	313
Nastė Sušinskaitė	
LAW AND MODERN TECHNOLOGIES IN CROSS-BORDER JUDICIAL COOPERATION	322
Victor Terekhov	
TRYING TO SQUARE THE CIRCLE: THE ECB’S JANUS-FACED CHARACTER POST SSM AND ITS IMPLICATIONS FOR EFFECTIVE BANKING SUPERVISION	331
Gerrit Tönningesen	
THE DOCTRINE OF THE «MARGIN OF APPRECIATION» IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS.....	339
Kristina Trykhlid	
THE POSSIBILITIES OF CRIMINAL LAW TO MEASURE THE SOCIAL MATURITY OF YOUNG ADULTS (18-20 YEARS).....	349
Laura Ūselė	

NEUROSCIENCE IS COMING TO THE LAW: WHAT IS HAPPENING AND WHAT SHOULD WE KNOW ABOUT IT?	357
Dovile Valanciene	
ISSUES OF ARBITRATOR'S LIABILITY AS REGARDS THE RIGHT TO FAIR TRIAL: WHAT WAY TO CHOOSE FOR POLICY-MAKER?	370
Tadas Varapnickas	
ANNEX 1. CONFERENCE PROGRAMME	379

EMPLOYMENT NON-COMPETITION CLAUSES – IMPACTS OF SOCIAL NETWORK

Duarte Abrunhosa e Sousa¹

Abstract

In modern society, social networks replaced public spaces. Places like the “speakers corner” in Hyde Park, London, are now sterile because it is more efficient to be perceived in Facebook, Instagram, Twitter or LinkedIn.

Nowadays, people’s perception of things is more instantaneous. Instead of reading closely information, people are pleased only with titles or simple posts in some of these social networks.

Understanding human behaviour regarding social network as a new public space is very important to see the potential impact in the breach of employment non-competition clauses. In fact, in 2014 a Danish Court decided that updating the LinkedIn profile could be a breach of an employment non-competition agreement. So, only by studying the importance of social network in society and economy it’s possible to determine if the information shared by the employee in Facebook, Instagram, Twitter or LinkedIn can cause damages to the employer.

The present work aims to understand how employment non-competition clauses can be breached by posts or profile updates in social networks and the role of different knowledges regarding this issue.

Keywords: social network, employment, non-competition, law, economics, humanities.

Introduction

Employment non-competition agreements are an important and recent trend connected to work relations. In some activity sectors², employers try to protect their trade secrets and other interests by imposing contractual clauses to employees that limit their access to work. Non-competition agreements usually take their effect after the end of the employment relationship by limiting employees to not celebrate a contract with a competitor of the former employer. These agreements can also provide non-solicitation clauses where employees are bound not to make any solicitation of clients with whom they had professional contact while working for the former employer.

Naturally, when enforceable, these agreements are limited in time because employees cannot have their right to work restricted for a large period of time. So, it’s important to analyse the balance between this right and employers’ interest in protecting their trade secrets or lists of clients.

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² In sectors like IT, pharmaceutical industry, food industry, among others, trade secrets can be very important and decisive in a context of competition. Therefore, employment non-competition clauses can be relevant to protect these companies’ know-how and avoid employees’ solicitations by competitor companies.

Employment non-competition clauses are largely accepted in Europe. On the other hand, in USA there is a different treatment of this subject in each state³. For example, in California non-competition clauses are forbidden and this prohibition is pointed out has the steam of their economy⁴.

The breach of these agreements by employees can allow employers to ask for damages. So, it is vital to understand the limits of these clauses to avoid unnecessary and unfair situations⁵. In the present work, the main focus is the casual link between the use of social network and the damages caused.

1. Social networks as a new public space

Nowadays we live in a society in constant change. The transitions between the different changes are now faster than ever. In fact, we are always receiving information in our lives, but sometimes this information is perceived at the same time that the facts occur. Remember, for example, the 9/11 events where the second attack to WTC was broadcast live to all over the world.

Nevertheless, we must bear in mind that TV and internet were vital for the acceleration of the share of information. However, in the last 5 years the biggest influencer in this subject is, without any doubt, the concept of social network.

We could always imagine today's society in the past, but it was difficult to picture a world where everyone could share information and experiences in social networks through laptops and smartphones. As a matter of fact, by the first time in history, we can recognize that the public spaces start to become replaced by Facebook, Instagram, Twitter or LinkedIn. People use to share experiences in restaurants, parks, among other public spaces. Some of the most important events in history where shared *in loco* directly by people, like the Martin Luther King's speech in the Lincoln Memorial, Washington (1963) or Live Aid Concert in the Wembley Stadium (1985). Notwithstanding, these kind of moments are now perceived not only by people directly present in the place where the event occurs, but also by all in the new technologies "*instruments*" at everyone's disposal. Social networks helped by turning easier this perception and accessible to all at all the time. So, when someone goes to a concert and shares a video of their favourite song in Facebook allows the access of that precise moment to their contacts. In addition, nowadays we are in a context in which everything we do can be shared one minute later in one or more social networks.

It is important to point out that all the generations knows how to use social networks. In reality, it's not a "tool" used only by young people. Also, social network are not just a trend, but are present in our lives for a relevant period of time. People are quite aware that sharing ideas in the most popular social networks is more significant than going to the Speakers Corner in London with a megaphone⁶.

³ Due to the different rules regarding employment non-competition clauses in USA, the American research is very developed on cross-border problems.

⁴ The major IT hub Silicon Valley is located in California. IT companies depend especially on their know-how for developing their businesses. So, it might seem that the prohibition of employment non-competition clauses could be a problem for the economy in this American state. However, in California is stated as an improvement regarding the other states since allowing an employee to compete against the former employer is a desirable act [for more complex development about this subject, please consult Alan Hyde and Emanuele Menegatti, *Legal protection for employee mobility*, Comparative Labor Law, (2015) 195 – 219, Ronald J. Gilson, *The legal infrastructure of High Technology industrial districts: Silicon Valley, Route 128 and covenants not to compete*, NYU Law Review 575, (1999) 608-609, Alan Hyde, *Working in Silicon Valley – Economic and legal analysis of a high velocity labor market*, Routledge (2003) and Gillian Lester and Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants* IRLE working paper series (2009), available at <http://escholarship.org/uc/item/1596b2b8>].

⁵ T. Leigh Anenson underlined the importance of equity when analysing employment non-competition cases in USA [cfr. T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, Vol. 42, No. 1-6, American Business Law Journal (2005) 1-62]. Also David Cabrelli pointed out the difficulties to draft a non-competition covenant in "*appropriate terms*" [cfr. David Cabrelli, *Post-Termination Covenants in the Spotlight Again*, Industrial Law Journal Vol 33 (2004) 167 – 179].

⁶ When Umberto Eco received his Honoris Causa Doctorate at the University of Turin in 2015, mentioned that he believed social networks were raising a legion of idiots (cfr. in Italian <http://www.lastampa.it/2015/06/10/cultura/eco-con-i-parola-a-legioni-di-imbecilli-XJrvezBN4XOoyo0h98EfiJ/pagina.html>).

So, with any doubt, the traditional personal contact between people was partially replaced by social networks like Facebook and others.

2. Importance of multidisciplinary study

In order to understand how social network can be used to breach employment non-competition agreements, we need to embrace the knowledge provided by different fields of studies. Without this effort it is impossible to reach important conclusions.

First, we will take into account human sciences like psychology or sociology. The human behaviour regarding social networks has an increase interest in this subject. The relevance of their role in our society depends on the importance given by people. So, an employee can only cause damages through social networks if the specific platform is suitable for that effect. It is impossible for an irrelevant social network to provide any damages. These platforms should belong to our daily life to become a significant factor. So, if social networks are not an important source of information regardless of their significance, they are irrelevant for our study. Clearly this not the case!

Furthermore, we can ask how people today receive information. Do people need to read large amounts of information, or a small sentence is enough? In fact, presently people are most of the time pleased with small packs of information provided by social networks⁷. Sometimes even old news are shared without taking into account their lack strictness. Also, one sentence shared millions of times in Facebook can be more impacting than a PhD thesis published in paper.

Secondly, all the facts regarding social network are only relevant for this analyses if they can have a relevant impact in companies' activities. Therefore, it's important to understand how deep companies' are related to social networks in their businesses.

Facebook, Twitter, LinkedIn and Instagram can be used for professional reasons with different intensities. So, it's important to approach how this use is made.

The widest social network at present time is Facebook. In the same network, we have not only people who want share connections with friends and family, but also people who try to make an exclusively professional use. This professional use can be divided in the following situations: i) dissemination or marketing of a professional activity or business that already exist outside the network⁸; ii) personal marketing of a professional to engage reputation among his network's friends; iii) economic activity developed directly through Facebook; iv) services provided to other companies or people who want to use Facebook professionally.

The advantage of Facebook is that you can find here not only professionals but also people that are not searching for professional contacts. So, business opportunities are wider.

In contrast to Facebook, LinkedIn is a truly professional network. Here professionals try to make contact with other professionals. When using LinkedIn you know that you are among people or companies with the same interests. This way, without any doubt, LinkedIn is a totally professional network⁹. Most companies' pages at this network aim not only to promote their brand, but also to show their skills as an employer. Also, it's common for companies to recruit new employees through LinkedIn.

Twitter and Instagram are also used for professional reasons. Twitter is wider for this kind of use. It is very common for a user to be approached by professionals in order to become a future follower of their company or project. This social network is also frequently applied for academic purposes. On the other hand, Instagram is growing fast in the last few years and is very well implemented in the younger generations. Nevertheless, the professional application of Instagram is more difficult due the limitations to images and small sentences provides by this social network.

⁷ For example, in Twitter, tweets are limited to 140 characters, so this size is consider as enough to share an information or idea.

⁸ For this matter, we can see the example of Coca-Cola that has almost 97 million "likes" at their Facebook account in March of 2016 (please check <https://www.facebook.com/coca-cola/>).

⁹ There is a big struggle in this network to stay "professional". However there are same people that use LinkedIn like Facebook.

So, at this moment we can assume that social networks are not neutral for companies. The information shared can reach to millions of people in just a few hours. This information can destroy or upgrade a business¹⁰. Therefore, the above mentioned reality is relevant for the economy of companies.

Thirdly, the role of social networks as a new public space is also mentioned in some studies in the field of architecture. There has been a virtualization of space in cities¹¹. For this reason, the modern cities structure is also changing due to the impact of platforms like Facebook, Twitter, LinkedIn and Twitter.

The study of the impact of social networks in our society is common to different fields of study. Labour law is just one of these fields.

3. The Danish Case

The connection between social network and employment non-competition clauses is not very obvious¹². However, a Danish case¹³ decided by the Western High Court changed this unpredictability.

In this case, after the termination of their employment contract, two employees were bound to work for a competitor of the former employer. Still, since they had to respect a non-competition agreement for one year, the new employment contract was postponed. During this agreement period, employees decided to update their LinkedIn profile with the designation of the new employer. However, LinkedIn doesn't have any function to allow sharing a future employer so, for all the network's users, both employers were already working for a new company.

Employees' former employer interpreted that action as a violation of the non-competition agreement and demanded damages in court. The Arhus District Court decided that the update in LinkedIn described was a breach of the agreement. The decision was changed by the Western High Court that ruled that i) despite all, in the activity sector where employees worked, personal relations were not considered important and ii) the agreement didn't rule the use of social network. Therefore, both former employees didn't pay any damages.

This case shows that it is possible to have a causal link between a breach of a non-competition clause and social networks.

4. Danish Case Commentary

For the case's commentary, it's important to point out that the author believes the Western High Court decision have made two statements that need a more profound examination.

Firstly, the court found that it was important to analyse the sector of activity in order to prepare a fair decision. In fact, it realized that since employees worked with trading through stock exchanges and brokers, personal relations were not important in this field. So, if both employees were, for example, sellers, the decision could be different? The author believes that in this case, a court ruling might be diverse. A salesman needs not only his selling skills, but also all the connections nurtured with clients. Sometimes, these connections are an important asset for the employer. However, this asset could be aggregated not to the company but to the employee. In

¹⁰ Imagine what happens to a company's reputation with several stores when someone shares a bad review about their goods or if in LinkedIn is spread the idea that the company is a bad employer. Contrarily, a good marketing campaign in social networks can be very impacting in future clients.

¹¹ Expression used by Raquel Ferreira Daroda, from Brazil, that studied new technologies and the public space in contemporary cities (cfr. R. Ferreira Daroda, *As novas tecnologias e o espaço público da cidade contemporânea*, [2012], available at http://www.ufrgs.br/propur/teses_dissertacoes/Raquel_daroda.pdf).

¹² In Labour law the study of social networks is more connected to the right of employer to dismiss an employee or regarding the excess of use during working times. In Portugal there are two important decisions that recognize as a fair motive for dismissing an employee the use of Facebook to defame the employer. These judgments were provided by Tribunal da Relação do Porto (Case n.º 101/13.5TTMTS.P1 available at <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/917c9c56c1c2c9ae80257d5500543c59?OpenDocument>) and Tribunal da Relação de Lisboa (Case n.º 431/13.6TTFUN.L1-4 available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ecca98e591fa824780257d66004b4283?OpenDocument&Highlight=0,facebook>).

¹³ Even though the author had access to the full judgment from the Western High Court, due to the difficulties with Danish language, decided to support the case description from the text provided by Tina Reissman (T. Reissman, *Updating LinkedIn profiles and non-compete clauses*, [2015] available at <http://www.internationallawoffice.com/Newsletters/employment-benefits/denmark/plesner/Updating-LinkedIn-profiles-and-non-compete-clauses>).

these cases, sharing with the world the future employer can have the effect of anticipating the loss of clients loyal to the employee¹⁴. This way, the former employer can have direct damages from a simple gesture like updating the LinkedIn profile.

At this point we can recognize the importance of knowing the role of social networks in our daily life. If they were irrelevant, it was impossible for an employer to suffer damages by their use. The author believes that these damages can easily occur. Moreover, in some sectors social networks are even more impacting¹⁵ than in the examples given.

Secondly, the court ruled that the employer had not set detailed guidelines for the use of social networks in the non-competition agreement. However, the author's opinion is that social networks are part of our daily life. Therefore, we must bear in mind that a non-competition agreement can be breached by all means without exception. Of course preventing the use of social networks for professional purposes in the agreement is a good technique¹⁶. But one thing is to limit the utilization of LinkedIn; other is to agree not to compete. With an agreement not to compete, the employer's intention is to avoid damages provided by the action of a former employee. Accepting that the employee can benefit himself or the future employer from the use of social networks in direct competition with the former employer, just because the guidelines were not included in the agreement, it's the same than refusing his right to protect trade secrets or client lists.

Regarding these two points, the court's decision has important merits, but was too formal about the limits of the written agreement.

5. The right of privacy

Another common issue in the discussion about social networks is the right of privacy of their users. And when the subject is even more specific and concerns Labour law, this topic is always one of the main preoccupations.

In Labour Law is vital to protect the employee from any abusive conduct from the employer. That's why the use of social networks for labour purposes is permanently in thin ice. But when someone is using social networks is always protected by his right of privacy? Well, as already mentioned, Facebook, Instagram, Twitter and LinkedIn are the new public spaces. So, the right question is: when the privacy of a social network's user is protected against the employer's action?

The answer to this question needs another one: what is the difference between an action perpetrated in a public event with 100 people and the same action committed in the Facebook in front of all the contacts? People act in social networks and in the real life almost in the same way¹⁷. Also, it's common knowledge that is very difficult to control information that is shared, for example, in Facebook. When using these social networks, people know the range of their posts, updates or tweets. Therefore, it's not expectable to think in any right of privacy in these situations.

Regarding Labour law, it doesn't make any sense that an employee could be protected by the right of privacy after using a social network to have some visibility. If we take into account the impact in the breach of non-competition agreements, only the professional use of social networks can be relevant. When someone publishes something in these platforms with a professional content, do not wish to have his privacy protected. By the contrary, the intention is to reach visibility.

To understand if it is possible to use information shared by an employee in a social network as relevant fact in the breach of a non-competition agreement, we must think in the dichotomy: expectation of privacy or expectation of visibility. The use of a social network by the employee with expectation of privacy should protect him from an abusive utilization by the employer. However, if employee shares something with an expectation of visibility, the protection is not justifiable.

¹⁴ If clients are loyal to the employee it is expected that they do follow him to the next employer. So, in some sectors this movement of clients is common.

¹⁵ Imagine, for example, a web marketer whose market is mainly online. In this case, the use of social network to breach a non-competition agreement is more evident than in other situations like in metallurgy industry.

¹⁶ About this idea, the author position only takes it into account if the limitation regarding the use of social networks considers activities in competition with the former employer.

¹⁷ However some people can assume different characters in social networks that do not correspond to reality.

In the Danish case, both employers updated their profiles to share with all the connections the new employer. Clearly, this update had an expectation of visibility. This way, the fact is relevant to analyse the breach of the non-competition agreement.

Conclusions

Social networks are an important instrument in our daily life. In the last 5 years, they deeply replaced the most traditional public spaces. At present time, a significant amount of contacts between people is already made through Facebook, Instagram, Twitter or LinkedIn.

This new paradigm is a challenge for several fields of study, since they change the way people live. Regarding Labour law, social networks are a new trend of study. Also, with the development of companies, non-competition agreements are assuming a common position in some employment contracts.

Even though the casual link between social networks and the breach of employment non-competition agreements is not very obvious at the first look, the reality is that the use of these platforms can cause damages to the employer. To support this idea, we must take into account other fields of studies in order to understand this important role of social networks.

Finally, the right of privacy emerging from the use of social networks will depend on the expectation of the user in the post, tweet or update – expectation of privacy or expectation of visibility. The professional use of these platforms is mainly related to a goal of visibility. So, in these cases employees' cannot invoke their right to privacy.

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TRANSPARENCY IN ACCOUNTING AND CORPORATE GOVERNANCE, POLITICS, AND LAW – TOWARDS IMPROVED REGULATION OF LOBBYING (THE CASE OF LITHUANIA)

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Abstract

The main purpose of regulation of lobbying is to ensure transparency in interaction between public authorities and lobbyists. It is stated that regulation of lobbying is often unable to achieve this purpose on a more significant level, but the purpose itself is practically excluded from scientific legal discussion on regulation of lobbying. Transparency is a diffuse category whose content significantly depends on the field in which the category is being applied. The concept of transparency is most common and widespread in the context of the EU's political thought and legal regulation, accounting and corporate governance. Considering the *status quo* of the research of regulation of lobbying, there is a reason to believe that interdisciplinary initiative directed to the analysis of the purpose of regulation of lobbying, i.e. transparency, utilizing the latest insights of accounting and corporate governance research, political science, and jurisprudence can potentially enrich the scientific discussion on the topic of regulation of lobbying (in the case of Lithuania).

Keywords: lobbying regulation, transparency, accounting and corporate governance research, political science, jurisprudence.

Introduction

The main purpose of regulation of lobbying is transparency of interaction between public authorities and lobbyists. It is stated that regulation of lobbying, as in the case of Lithuania, is often not able to achieve its purpose on a more significant level, but the purpose itself is either excluded from scientific legal discussion on regulation of lobbying, or touched fragmentarily and/or in the narrow scope. In order to provide guidelines for improved regulation of lobbying the subject is mainly analysed within the limits of jurisprudence, which means that both legal and extralegal aspects of regulation of lobbying are explored primarily in the context of legal regulation, practice of its application and legal research². No less important is the fact that scholars are usually focusing on specific problems and avoid to approach regulation of lobbying from a wider perspective.

Principle of transparency was 'imported' to Lithuanian legal system from the EU. The concept of transparency has gained popularity over the past twenty years, so it is a relatively new and emerging concept. Transparency is a diffuse category, whose content significantly depends on the field in which the category is being applied. The concept of transparency is most common in the context of the EU's political thought and legal regulation, accounting and corporate governance³, therefore these phenomena are being widely analysed by researchers of these fields. Considering the *status quo* of the research of regulation of lobbying, there is a reason to believe that interdisciplinary initiative directed to the analysis of the purpose of regulation of lobbying, i.e. transparency, by utilizing the latest insights of accounting and corporate governance research, political science, and jurisprudence can potentially enrich the scientific discussion on the topic of regulation of lobbying (the case of Lithuania).

Analysing the concept of transparency and its distinguished significant attributes in accounting and corporate governance research, political science, and jurisprudence and then identifying the common points

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² M. Ambrasaitė, 'Naujoji Lietuvos lobizmo reglamentavimo ekstrateisinė koncepcija: pokyčiai ir gairės ateičiai' [2015] *Politologija* 4(80), 3-5

³ J. Ahlberg, K. Jonnergård, 'The Success Story of Transparency within Research on Corporate Account and EU Policy - A Conceptual Analysis' [2014] *Working Papers Series in Corporate Governance* 1, 1

and differences of these attributes is a way to create a conceptual framework in which the purpose of regulation of lobbying could be perceived in the wider context which would allow looking at the 'construction' of regulation of lobbying from alternative perspectives and could potentially inspire a debate on the possibility of introducing additional and/or alternative legal or complex means that would ensure transparency within the processes of lobbying.

1. Transparency in accounting and corporate governance research

After Enron, WorldCom and other accounting scandals the call went forth for more 'transparency' in accounting and corporate governance. In response, companies were quick to publicly pledge greater transparency in their financial reporting and their governance. Simultaneously academic accountants began to identify the attributes and mechanisms of corporate transparency. For their part, legislators and regulators mandated changes to reporting practices in a bid to increase transparency⁴.

Despite plentiful academic literature regarding transparency in accounting and corporate governance research, scholars have not reached the consensus on definition of the concept of transparency in discussed academic field yet. In most cases in accounting and corporate governance research transparency is referred to as 'corporate transparency'. Definitions of corporate transparency vary. In literature both wide enough and narrower definitions can be found. For example, sometimes corporate transparency is defined as companies' public reporting on activities and operations by providing the necessary information for investors, journalists, and citizens to monitor their behaviour⁵, but it can also be defined as the extent of adopting, promoting, and developing new analytical methodologies that bring clarity and consistency to the information available to investors and analysts⁶.

Although there is a plethora of definitions of corporate transparency, most of the research on the issue discussed is based on the Bushman, Petrovski and Smith's second approach to define corporate transparency. Their first approach – defining corporate transparency as the widespread availability of relevant, reliable information about the periodic performance, financial position, investment opportunities, governance, value, and risk of publicly traded firms⁷ – is more sophisticated, but the second one is more precise and clear, and thus has become widely recognized and used. In the this case Bushman, Petrovski and Smith identify the content of the concept of corporate transparency as availability of firm-specific information to those outside publicly traded firms, dividing it into financial transparency, which focuses on intensity and timeliness of financial disclosures, and governance transparency, which focuses on intensity of governance disclosures⁸ (second approach).

Sometimes the terms 'corporate transparency' and 'corporate disclosure' are used interchangeably, but in order to reveal the notion of corporate transparency it is worth noting that, as Danker states, there is evidence that both, though related, are different. According to Danker, the literature widely suggests that corporate transparency is not limited to disclosure of financial matters alone but takes a much more inclusive and broader stakeholder-driven approach. The term 'disclosure' belongs to the financial and accounting disciplines, while the term 'corporate disclosure' is rather more diverse in terms of its traditions, with links to the humanities, and may be said to have a 'softer' approach. Corporate transparency is broader than corporate

⁴ M. Stein, S. Salterio, T. Shearer, "Transparency' in Accounting and Corporate Governance: Making Sense of Multiple Meanings' (20 January 2015, Social Science Research Network, <<http://ssrn.com/abstract=2565833> or <http://dx.doi.org/10.2139/ssrn.2565833>> [last accessed: 6 March 2016]) 3

⁵ Transparency International Belgium, 'Transparency in Corporate Reporting: Assessing 10 Listed Belgian Companies. Trac 2 Belgium' (Brussels: Transparency International Belgium 2012) 5

⁶ S. A. Patel, G. Dallas, 'Transparency and Disclosure: Overview of Methodology and Study Results-United States, Standard & Poor's, United States' (16 October 2002, Social Science Research Network, <<http://ssrn.com/abstract=422800>> [last accessed: 6 March 2016]) 14

⁷ R. Bushman, J. Petrovski, A. Smith, 'Transparency, Financial Accounting Information, and Corporate Governance' [2003] FRBNY Economic Policy Review 76

⁸ R. Bushman, J. Petrovski, A. Smith, 'What Determines Corporate Transparency?' [2004] Journal of Accounting Research 42(2), 207

disclosure, which suggests a box-ticking approach to compliance: the latter spells out the fiduciary obligations of the firms to the principals and shareholders and its highly regulated, while corporate transparency extends the scope of corporate reporting to social reporting beyond financial reporting⁹.

Thus, from foregoing, it can be concluded that term 'corporate transparency' in accounting and corporate governance research indicates the availability of a wide range of firm-specific information to target audiences. The audience (investors and analysts or/and general public) is dependant on the content of the disclosed information. Therefore it is important not only what sort of information is being disclosed, but also what the needs of the target audience are. In this context it must be emphasized that companies around the world are learning that customers and governments are not interested in more information, more numbers, more reports or more sophisticated press briefings – what civil society is seeking is trustworthy, relevant and understandable information about how a company is running its business, what are the features of its products and what services it offers to the market¹⁰. This implies that the disclosure of certain firm-specific information itself does not always mean that the company has implemented the principle of corporate transparency. The concept of corporate transparency requires that disclosed information would be useful for its target audience, i.e. the target audience must get it on time, it must be concise but sufficient, accurate and understandable so as to enable the receivers of mentioned information to take well-grounded decisions.

2. Transparency in political science

Over the past few decades, a global trend of transparency in politics has been observed. The spread of democratic government worldwide, the emergence of a global civil society, the proliferation of international regimes requiring states to disclose information, and the widespread availability of information and communication technologies have all likely contributed to the this trend¹¹. In the context of the EU as the EU went on with its political integration and as the decision-making power was transferred to supranational governance, transparency has become one of the most debated issues in EU governance in recent years¹². This trend of transparency in politics does not remain unnoticed by scholars of political science.

Sometimes transparency in politics is referred to as 'government transparency' but it cannot be treated as a common term because it is not widespread enough. Transparency in politics is more often referred to simply as 'transparency', so in this chapter both these terms will be used as synonymous. In political science as well as in the accounting and corporate governance research the concept of transparency remains somewhat shrouded in conceptual ambiguity. There is no single definition of what constitutes transparency. Fox has defined government transparency as the publicizing of incumbent policy choices¹³, Ferrati – as the availability and increased flow to the public of timely, comprehensive, relevant, high-quality and reliable information concerning government activities¹⁴, Transparency International EU Office – as a possibility for the public to obtain relevant and timely information on the activities and decision-making processes of public

⁹ M. Danker, 'Understanding Stakeholder Activism, Managing Transparency risk' in G. Aras, D. Crowther (eds.), 'Development in Corporate Governance and Responsibility. Volume 5. The Governance of Risk' (Bingley: Howard House, 2013) 43

¹⁰ J. Fontrodona, A. Vaccaro, 'Academic view: The myth of corporate transparency' (7 September 2010, *The Economist*, <http://www.economist.com/blogs/newsbook/2010/09/myth_corporate_transparency> [last accessed: 6 March 2016])

¹¹ C. Creamer, B. A. Simmons, 'Transparency at Home: How Well Do Governments Share Human Rights Information with Citizens?' in A. Bianchi, A. Petters (eds.), 'Transparency in International Law' (Cambridge: Cambridge University Press, 2013) 239

¹² H. Inaç, Ü. Güner, 'The Socio-Political Analysis of EU's Institutional Deficits within the Extent of Democratic Governance' [2006] *Perceptions* 106

¹³ J. Fox, 'Government Transparency and Policymaking' [2007] *Public Choice* 131(1-2), 24

¹⁴ D. Ferranti, et al., 'How to Improve Governance: A New Framework for Analysis and Action' (Washington, DC: Brookings Institution, 2009) 7

authorities¹⁵, Ginsberg, Carey, Halchin and Keegan – as disclosure of government information, the access, comprehension, and use of this information by the public¹⁶.

In political science research the concept of government transparency is closely linked with the concept of democracy. It is stated that transparency increases the quality of citizens as political beings. Therefore, increased transparency is vital for a democratic life to survive. Without effective transparency, political responsibility, political control and the true exercise of political rights and duties make the democracy becomes inhibited or impaired¹⁷. In this context the lack of government transparency is understood as one of the causes of democratic deficit, while increased transparency – as one of the cures for it since democratic deficit is said to exist where institutions fall short of some of the general principles of democracy (e. g. participation, competition for power, election of political leadership by universal suffrage, transparency or accountability)¹⁸.

Transparency is of essential importance for legitimacy of democratic government and trust in the public authorities – ‘a lack of information and debate is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole’¹⁹. A transparent political process is easy to follow for all stakeholders. Transparency promotes publicity, but the correlation is not perfect. There is no publicity of political actions, no matter how transparent the policy-making process, if people are not interested. But transparency makes publicity possible – the more transparency, the greater the chance that the public will be watching²⁰. And if the public is watching, the greater the chance that it will participate in the decision-making process. In other words, some degree of transparency is a necessary condition for publicity, public participation and also for accountability, since those who seek to hold the government accountable must be able to observe what the government is actually doing. Likewise transparency itself contributes to good governance and is an impediment to corruption: ‘sunlight is the best disinfectant’²¹.

As is apparent, transparency as possibility for the public to obtain relevant, timely, and reliable information on the activities of public authorities is perceived in political science as an integral part of larger framework of democracy. Government transparency is associated with other crucial principles of democracy, such as accountability, publicity, participation, competition for power, etc. These principles are in causal relation one with another – if implementation of one of these principles fails on a large scale, it is highly likely that this failure will prevent the implementation of the others. This interaction stresses the need of effective transparency that is based on active disclosure and is organically prospering in the framework of democracy. The mentioned sort of transparency could be achieved through analysing a) what demands the general public is placing on the information on government activities, b) what the purposes of demanding particular information are, and c) the public’s ability is to perceive and access this information (in accordance with the standard of an average clever person), and then, with the help of e-governance, applying the results of this analysis to remedy the weaknesses of existing transparency regime.

3. Transparency in jurisprudence

In modern democratic states (ever since eighteenth century) the transparency of the legislative process as well as of judicial proceedings has been considered a necessary element of democracy and the rule of law. On the

¹⁵ Transparency International EU Office, ‘The European Union Integrity System’ (Brussels: Transparency International EU Office, 2014) 24

¹⁶ W. Ginsberg, et al, ‘Government Transparency and Secrecy: An Examination of Meaning and Its Use in the Executive Branch’ (14 November 2012, Federation of American Scientists, <<https://www.fas.org/sgp/crs/secrecy/R42817.pdf>> [last accessed: 6 March 2016]) 3

¹⁷ H. Inaç, Ü. Güner, ‘The Socio-Political Analysis of EU’s Institutional Deficits within the Extent of Democratic Governance’ [2006] *Perceptions* 112-113

¹⁸ V. Miller, J. Lunn, ‘Research Paper 14/25: The European Union: a democratic institution?’ (29 April 2014, House of Commons Library, <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP14-25>> [last accessed: 6 March 2016]) 17

¹⁹ Kingdom of Sweden and Turco v Council, Case C-39/05 P and 52/05P [2008] ECJ 59

²⁰ D. Naurin, ‘Taking Transparency Seriously’ (Brighton: Sussex European Institute, 2002) 9-10

²¹ D. Ferranti, et al., ‘How to Improve Governance: A New Framework for Analysis and Action’ (Washington, DC: Brookings Institution, 2009) 6

contrary (and for a much longer period of time) the operations of executive branch have been partly secret. Transparency in this regard has been created by worldwide freedom of information laws. In addition, transnationally active NGOs, international organizations and international treaty regimes have pressed for the transparency of states²². The principle of transparency is of fundamental importance to the EU law – we can discover countless directives and regulations that refer to the principle of transparency. The obligations in EU law that are derived from the principle of transparency vary widely, and range from the obligation to provide the widest possible access to documents held by the EU institutions to a prohibition on changing the terms of a contract concluded after a procurement procedure²³.

Analysis of jurisprudence on the transparency issue shows that transparency in law has gained the quality of a legal principle. In this case it must be noted that (despite that there is pretty much no dispute that transparency is a legal principle) in research of the EU legal system there is a broad discussion on to what extent transparency can be treated as a legal principle. It is stated that access to documents as the most developed aspect of transparency in the EU law has evolved into a general principle of law²⁴, while the consensus on the principle of transparency in the broader sense is not yet reached. Some authors argue that transparency has already become a general principle of the EU law²⁵, while others say that transparency, although it has the potential to evolve, is still too vague and lacking in autonomy at the moment²⁶.

In the light of the discussion outlined above it should be mentioned that scholars who are analysing the principle of transparency not in all cases are trying to define it. Sometimes, instead of formulating a definition, it is treated as sufficient to simply identify the core elements of the emerging principle. The following features are considered to be such core elements: clear language, physical access to information and, closely linked to that, publication or notification, the predictability of public authorities' actions/behaviour, and consistency in the interpretation and application of the law²⁷. Though it is also claimed that all transparency obligations are in fact part of one and the same phenomenon and that they are all concerned with the availability, accessibility, and comprehensibility of information – a transparent government is one that provides people with the information they need in order to ascertain and understand the state of the world and to predict how their actions will affect that world, and that does not unnecessarily complicate that world²⁸.

Transparency within the EU law is seen as having two functions: the first function is facilitation of decision-making, while the second is facilitation of outside scrutiny of the behaviour of public authorities. Combining these functions and three different citizens types – citizen, homo economicus and homo dignus – Buijze has discerned six categories of transparency obligations: (A) collection and dissemination of information on matters of public interest to stimulate public debate; (B) dissemination of information on government activity with the purpose of allowing the citizen to influence or monitor its behaviour; (C) collection and dissemination of information that will stimulate the proper functioning of the market and increase efficiency, by increasing the quality of the decisions that economic actors make; (D) dissemination of information on activities of public authorities that affect homo economicus with the purpose of allowing them to influence or monitor that behaviour to protect their rights with the purpose of promoting the internal market; (E) collection and dissemination of information that helps people in individual decision-making; (F) dissemination of information on activities of public authorities which affect a given individual with the purpose of allowing him or her to influence or monitor that behaviour to protect his or her rights²⁹.

It should also be noted that the principle of transparency overlaps to a significant extent with other principles of law – accountability, participation, legal certainty, equal treatment, the duty to give reasons, the

²² A. Bianchi, A. Petters (eds.), 'Transparency in International Law' (Cambridge: Cambridge University Press, 2013) 537

²³ A. Buijze, 'The Six Faces of Transparency' [2013] Utrecht Law Review 9(3), 3

²⁴ M. E. Leeuw, S. Prechal, 'Transparency: A General Principle of EU Law?' in U. Bernitz, C. Cardner, J. Nergelius, 'General Principles of EC Law in a Process of Development' (Alphen aan den Rijn: Kluwer Law International B.V., 2008) 239

²⁵ A. Buijze, 'The Principle of Transparency in EU Law' (s-Hertogenbosch: Uitgeverij BOXPress, 2013) 63

²⁶ M. E. Leeuw, S. Prechal, 'Dimensions of Transparency: The Building Blocks for a New Legal Principle?' [2007] Review of European Administrative Law 1, 61

²⁷ Ibidem

²⁸ A. Buijze, 'The Six Faces of Transparency' [2013] Utrecht Law Review 9(3), 4

²⁹ A. Buijze, 'The Principle of Transparency in EU Law' (s-Hertogenbosch: Uitgeverij BOXPress, 2013) 278

rights of defence and effective judicial protection etc. Academics are pointing out that there are obligations that are derived from the principle of transparency that fall outside the scope of traditional principles and, in addition, the principle of transparency can aid in the interpretation of other principles³⁰. In part, transparency here builds upon existing legal values and at the same time it further elaborates these values. It also leads to a new amalgamation of these elements, it provides a new – integrated – perspective and, potentially, new dynamics. There are those who believe that the unclear content of the category of transparency may also explain why transparency is often linked to other well-established principles of law³¹.

In the this case it is important to note that within law, transparency is seen as a legal principle, and the scholars firstly analyse those transparency obligations that are widespread within the law, and only later move on toward generalization, i.e. identification of the core elements of the principle or attempts at defining it. The quality of transparency as a legal principle implies that transparency is understood not as a value of high generality that exists above or aside the law but as a value that exists within the law and has obligations (with its own mechanisms of enforcement) of which the principle of transparency consists and/or which are derived from it. It is no less important that the academics are capturing the stage of development of transparency as legal principle. The fact that transparency at the moment is emerging not fully formed but evolving, means that transparency obligations which are developing within various fields of law are in the process of shaping its content.

4. Implications to the regulation of lobbying

So what implications for the regulation of lobbying can be provided by the insights into accounting and corporate governance research, political science and jurisprudence on the transparency issue? First of all, the different ways in which transparency is perceived in these academic fields, seem to share a common core. Transparency is associated with the availability of subject-specific information to the target audiences. This information has been assigned significant attributes that characterize it. Relevance, timeliness, and reliability of the data are considered such common, highly interrelated attributes.

As mentioned earlier, the main purpose of the regulation of lobbying is transparency of interaction between public authorities and lobbyists. It means that regulation of lobbying must ensure that information on lobbying processes is available. Target audience in this case is comprised of all the stakeholders, widely speaking – general public. At the moment lobbying in Lithuania is regulated mainly by the Law on lobbying activities³² (LLA) which is recognized as ineffective. As a response to this situation the Project of the law to change the Law on lobbying activities (new edition)³³ (PLCLLA) was introduced in 2015.

According to LLA, a report on lobbying activities for the previous calendar year must be filed to the Chief Official Ethics Commission (COEC) by every registered lobbyist once a year. The reports must contain the following data: 1) identity of the lobbyist; 2) identities of each client; 3) the title of the legal act (or its draft) which the lobbyist is seeking to influence; 4) lobbyist's income gained from lobbying activities; 5) lobbyist's expenditure on lobbying activities. All this data except income and expenditure is available on the COEC website³⁴. It is also legally allowable to publish other information on lobbying activities on the mentioned website, but it does not happen in practice.

PLCLLA expands the extent of the information that the lobbyists are required to disclose and increases frequency of reports. According to the project the lobbyists should also provide the COEC with the identities of the representatives of public authorities whom the lobbyists were seeking to influence. Once a year the lobbyists should submit the information about their income gained from lobbying activities and expenditure on lobbying activities, while the other information must be submitted not later than within 2 working days from the

³⁰ Ibidem 273

³¹ M. E. Leeuw, S. Prechal, 'Dimensions of Transparency: The Building Blocks for a New Legal Principle?' [2007] Review of European Administrative Law 1, 61-62

³² Lietuvos Respublikos lobistinės veiklos įstatymas [2000] Valstybės žinios 56-1644

³³ Lietuvos Respublikos lobistinės veiklos įstatymo pakeitimo įstatymo projektas (nauja redakcija) [2015] e-seimas XIIP-2731

³⁴ Vyriausioji tarnybinės etikos komisija, 'Lobistams' (14 March 2016, Vyriausioji tarnybinės etikos komisija, <<http://www.vtek.lt/#lobistams>> [last accessed: 14 March 2016])

start of the lobbying activities on a particular legal act or its draft. One should also note that this term is planned to be extended from 2 to 7 working days³⁵. According to the PLCLLA all the indicated information should be published on the COEC website.

So does the abovementioned information on lobbying activities meet the relevance, timeliness and reliability criteria? Relevance is defined as the quality or state of being closely connected or appropriate³⁶, so in the sense of 'being closely connected', the information to be disclosed under provisions of LLA and PLCLLA can be treated as relevant. However, assessing whether this information is appropriate (suitable or proper in the circumstances³⁷) is more complicated. The appropriateness of the information depends on what its target audience – all stakeholders, general public – might or should use the information for. There is a reason to believe that the functions of the principle of transparency within EU law that have been indicated earlier in the article, i.e. facilitation of decision-making and outside scrutiny of the behaviour of public authorities, can be interpreted as the purposes of stakeholders. In order to fulfil those purposes or, in other words, to enable the stakeholders to create a clear picture on lobbying processes that are going on at the moment, the information to be disclosed under provisions of lobbying regulation should be useful.

In the this case the insights into accounting and corporate governance research on transparency issue should be treated as important. As it is argued in the aforementioned academic field, usually there is no need for extremely comprehensive and sophisticated information about the subject – first of all the information must be useful, i.e. sufficient, but also concise, accurate, and clear/understandable. There is no doubt that the information which is disclosed under the provisions of LLA and should be disclosed under the provisions of PLCLLA, is concise, accurate, and clear/understandable. But there is a reason to believe that in both cases (albeit in the case of PLCLLA the requirements of disclosure are slightly wider) the information is not sufficient.

Since the target audience of information disclosed under regulation of lobbying is all the stakeholders, or general public as a whole, the sufficiency of information on lobbying activities must be assessed in accordance with the standard of an average clever person. If we will look at the report on lobbying activities of 2014, published on the COEC website, we will see that, for example, lobbyist G. Karsokas was lobbying on behalf of the client 4finance on the Law on consumer credit of Republic of Lithuania³⁸. This law consists of 42 articles³⁹ and is not the most extensive among the laws mentioned in the report on lobbying activities of 2014. What does it imply? An average clever person who is not a qualified lawyer or a lobbyist, will understand from the presented information on lobbying activities that the consumer credit provider was seeking better statutory conditions for its business. It is clear but is it enough?

As the Law on consumer credit of Republic of Lithuania is voluminous, the picture of this particular lobbying episode is very general, i.e. it is not apparent what specific provisions of the law were intended to be changed and how, and what particular conditions of consumer credit business were sought to be improved (what was the lobbying interest). This means that in order to understand what is actually going on, an average clever person will need additional information on the lobbying interest of 4finance. If the person will get that information, they will be able to decide whether or not they have any interest in this particular lobbying episode and if they want to participate in this lobbying process, to start a public debate on the issue, to follow the process as a watchdog etc. In order to get the additional information on lobbying the stakeholders will need additional resources which can result in a significant part of stakeholders giving up on the particular lobbying process at the very beginning – while still at the primary stage of identifying whether they have any interest in that process.

³⁵ M. Petrauskienė, 'Atsakingas lobizmas: skaidrus poveikis teisės aktų leidybai' (14 March 2016, Lietuvos Respublikos Seimas, <http://www3.lrs.lt/pls/inter/w5_ivairus.sp_konf> [last accessed: 14 March 2016])

³⁶ Oxford Dictionaries, 'Relevance' (Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/relevance>> [last accessed: 14 March 2016])

³⁷ Oxford Dictionaries, 'Appropriate' (Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/appropriate>> [last accessed: 14 March 2016])

³⁸ Vyriausioji tarnybinės etikos komisija, 'Lobistams' (14 March 2016, Vyriausioji tarnybinės etikos komisija, <<http://www.vtek.lt/#lobistams>> [last accessed: 14 March 2016])

³⁹ Lietuvos Respublikos vartojimo kredito įstatymas [2011] Valstybės žinios 1-1

PLCLLA would provide the stakeholders with a little more specific picture of a particular lobbying episode as it would require to publish the identities of the representatives of public authorities whom the lobbyists were seeking to influence. It would allow the stakeholders to identify which person or persons could possibly give them the necessary additional information. But in the current situation two things must be noted: First, considering the political and social climate within the country it is very likely that the representatives of public authorities might begin to avoid the contact with lobbyists thereby making the provision in question inefficient. And second, under the PLCLLA the identified representatives of public authorities may not have any information on particular lobbying interest or may not want to provide it to the stakeholders.

Thus it can be concluded that in both cases (under LLA as well as under PLCLLA) the information that is or would be required to be disclosed, cannot be classified as sufficient, which means that it is not appropriate after all, and lacks the relevance. In order to ensure that the information is relevant it should be supplemented with data on the lobbying interest – the lobbyists should also be required to state the purpose of a particular lobbying episode and specify which provisions of the legal act or its draft the lobbyist is aiming to influence.

As is apparent from the political scientists' research on transparency issue, a transparent political process is easy to follow for all stakeholders. Therefore there is reason to assume that, while analysing the sufficiency of the information (that is disclosed under regulation of lobbying) with respect to its relevance, the limits of regulation of lobbying in the strict sense must be overstepped. Presumably, an effective and functioning legislative footprint should appear. The laws that regulate legislative procedures and codes of conduct for politicians and civil servants, must clearly state that when introducing the drafts of legal acts, all proposals received by interest groups must be submitted, despite their form and other features⁴⁰. Also, these proposals must be submitted on time.

One more criterion of information with regards to transparency is timeliness (occurring at a favourable or useful time⁴¹). The timeliness of information on lobbying activities required by the provisions of LLA is critically poor – information becomes available to the public so late that it is very unlikely that it will be really useful to its target audience. In most cases the mentioned information reaches the public when the lobbying episodes in question have already ended. So at the moment the information that is being disclosed on lobbying processes in Lithuania is more of a set of interesting facts for the political history lovers rather than a functioning tool of democracy.

According to PLCLLA the crucial part of information on lobbying activities would be submitted to the COEC not later than within 2 working days from the beginning of lobbying activities on a particular legal act or a draft of a legal act. Having compared the provisions of LLA and PLCLLA it becomes obvious that if the project would be adopted and take effect with regards to the timeliness of the disclosed information, that would be a huge step forward. But, there always is a 'but'. First of all, the considered provision of PLCLLA identifies the moment when the required information must be submitted to the COEC but within the project there is no provision that would define the deadlines when the COEC themselves must publish the information they received from the lobbyists. Second, as mentioned earlier, there already is a call to prolong the term during which the information must be submitted from 2 working days since the beginning of lobbying activities on a particular legal act or its draft to 7 working days.

Taking into account the existing information technologies, the timeliness of information disclosed under regulation of lobbying is closely dependant to the mechanism of its submission and publication. At the moment lobbyists submit their reports on lobbying activities to the COEC in paper format, COEC processes this information and publishes parts of it on its website. This whole procedure is technically obsolete. A new mechanism should be created and implemented, which would allow to submit and publish the disclosed lobbying information at the speed that would correspond to contemporary standards. This mechanism should take the shape of an easy to use e-system where each lobbyist could register an online account. They could log in to the lobbying e-system from any geographical location using laptops and/or smartphones and submit

⁴⁰ Transparency International Lietuvos skyrius, 'Politikos užkulisiai: lobizmo (ne)skaidrumas Lietuvoje' (Vilnius: TI Lithuania, 2015) 2

⁴¹ Oxford Dictionaries, 'Timely' (Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/timely>> [last accessed: 14 March 2016])

the reports on lobbying activities through their online accounts. These accounts should be directly linked to the COECs electronic infrastructure so that the moment when the report has been submitted, the disclosed information would appear on the COEC website. It should be also noted that the proposed e-system would significantly reduce the administrative burden⁴².

And finally, does the information disclosed under regulation of lobbying meet the reliability (the quality of being trustworthy⁴³) criterion? Information which is made publicly available under the lobbying regulation is submitted by the lobbyists themselves. Naturally, the lobbyists are obliged to submit trustworthy information, but whether they really do so, remains a question. In the formal legal sense information reliability must be ensured by the provisions of LLA and PLCLLA which grant the right to the COEC to verify the reports on lobbying activities and inspect the activities of lobbyists. However, one must admit that with respect to the nature of lobbying as a latent phenomenon and the limited powers of COEC, the provisions considered cannot be said to sufficiently ensure the reliability of information on lobbying activities.

Therefore there is a reason to believe that, along with the legal tools that seek to ensure the reliability of information disclosed under lobbying regulation, contributions to higher reliability of such information could be made by promoting the integrity culture in public authority institutions, developing of positive image of lobbying in the eyes of general public, stimulating the rise of professional communities of lobbyists and development of the standards of professional conduct, increasing the prestige of lobbyist profession etc. In simple terms, a more positive climate for lobbying must be fostered in the society – the general public must see lobbyists as an integral and necessary part of the democratic society, while lobbyists must see their activities as honourable, which would impose on them a duty to disclose the reliable information on lobbying activities not only because it is required by the provisions of the law but also because their professional ethic and personal conscience says so. Therefore the regulation of lobbying (as it is at the moment) should not be isolated within the legal system and not 'naked'. The latter must be understood as the call to look at the regulation of lobbying through the lens of transparency *per se* i.e. regulation of lobbying should be an element of a wider framework that ensures transparency in lobbying processes.

Conclusions

The accomplished analysis reveals that transparency perceptions in accounting and corporate governance research, political science and jurisprudence seem to have a common core. Transparency has been associated with availability of relevant, timely and reliable subject-specific information to the target audiences. While discussing the topic of regulation of lobbying in the context of its purpose – transparency, the following insights into the abovementioned academic fields are also highly important: (1) usefulness of disclosed information to its target audience, (2) notion of transparent political process as a process which is easy to follow, (3) facilitation of decision-making and outside scrutiny of the behaviour of public authorities as functions of principle of transparency within the law.

Within the limits of jurisprudence, regulation of lobbying can be understood as one of the sets of transparency obligations which are widespread throughout the legal system. Since it is recognized that transparency as legal principle is evolving and not yet fully formed, lobbying regulation could contribute to the process of shaping its content, but in order to do so, lobbying regulation as a set of transparency obligations should be sufficiently developed i.e. it should correspond to existing purified significant attributes of transparency and should form new ones within its scope.

As the research presented in this article shows, in the case of Lithuania regulation of lobbying (the existing regulation as well as its upcoming edition) has low potential to achieve its purpose. Information on lobbying activities that is made available to public under LLA does not satisfy the criteria of relevance and

⁴² M. Ambrasaitė, 'Правовое регулирование лоббирования в условиях информационного общества' in 'Проблемы правотворческой и правоприменительной практики в условиях развития информационного общества: Сборник научных статей: в 2-ух частях: Часть 1' (Гродно: ГрГМУ, 2015)190

⁴³ Oxford Dictionaries, 'Reliability' (Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/reliability>> [last accessed: 14 March 2016])

timeliness on a large scale, and the criterion of reliability on a lower scale. Assessment of provisions of PLCLLA shows that the upcoming edition would increase the timeliness. However, this evaluation is of a hypothetical nature and the actual situation concerning the timeliness criterion (in case the PLCLLA would be adopted and take effect) would depend a lot on the implementation of PLCLLA i.e. what mechanism would be introduced for submission and publication of disclosed information.

In order to achieve higher transparency of lobbying processes in Lithuania the regulation of lobbying should be supplemented by obligations to lobbyists to disclose their lobbying interests and to disclose required information on a timely manner (PLCLLA provision on the disclosure terms is considered as suitable), as well as by obligations to COEC to publish the disclosed information as soon as possible and to create, introduce, and maintain an easy-to-use e-system for the submission and publication of information on lobbying activities. It is equally important to adopt provisions on the basis of which an effective and functioning legislative footprint could appear and, alongside the legal tools, to invoke additional measures to strengthen transparency in lobbying within a wider framework.

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AN INTERDISCIPLINARY APPROACH TO COMBAT ISIS: LEGAL, POLITICAL, AND SOCIO-ECONOMIC

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Abstract

Starting as a branch of Al Qaeda and transforming to a new phase of armed group, imposing a territory control and governance as a state and then proclaiming itself as a Caliphate in the prophetic Islamic Method, ISIS has clearly challenged the international law from different approaches. The aim of this article is to address the problem imposed by ISIS and combat it from an interdisciplinary approach, therefore it examines the international legal obligations of ISIS as well the legality of countermeasures by states against it in accordance with the United Nations charter (Use of force and Self-Defense), International Humanitarian law, International Human Rights law. On the other hand legal or military means are not the only solution, but rather complementary political, economic and sociological measures will be fruitful with the long struggle to combat ISIS ideology. ISIS is a hybrid non-state armed group and cannot be targeted except by hybrid means.

Keywords: non-State armed groups, jus ad bellum, jus in bello, terrorism, international relations, conflict management.

Introduction

In recent years a shift in warfare has been clearly recognized, and the rise of non-state armed groups with new means of confrontation has destabilized the international order and challenged the international peace and security. Variety of examples of such groups can be mentioned, but still the most significant group that attracted the universal attention was what is so called the Islamic State (ISIS). The Islamic State in Iraq and Syria/Levant, ISIS/ISIL, has smartly invested the sectarian division, poor Iraqi governance and military capabilities, Syrian civil war and the destabilized region to capture Mosul in Iraq and expand its operation to Syria declaring a Caliphate in June 2014 in accordance to Islamic Law (Sharia Law), ruled by god deputy of Earth the Caliph Abu Bakr Al Baghdadi, the fifth Successor of prophet Muhammad that they claim his roots goes back to the same family tree of the prophet².

From my point of view, ISIS that started as a branch of al Qaeda in Iraq by the late Abu Musaa'b al Zarqawi at 2004 and flourished to be what's so called Caliphate, is just a new Hybrid phenomenon, it is a non-state armed actor, with a clearly expressed agenda based on religious ideological and historical acts aiming to gain political victories. Moreover it reflects a multinational business, a terroristic group with transnational criminal actions, part of it network, part organization and part movement. But for sure it doesn't qualify the statehood level according to different reasons as it doesn't fulfill the Montevideo criteria³, nor the doctrine of international recognition. As simply conquering and subjugating people does not necessarily mean an acceptable definition of statehood as it used to be in previous centuries. ISIS is a Hybrid group that requires Hybrid response to combat.

According to this short introduction, My Study will examine combating ISIS from different approaches and the challenges it constitutes to International law and order. Starting from the Legality to use force against non-state armed group in particular ISIS, then the Role of IHL, IHRL and Islamic law in dealing with the

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² The Last acknowledged caliphate was the Ottoman Empire that ended at 1923.

³ Montevideo Convention on the Rights and Duties of States, signed at the International Conference of American States in Montevideo Uruguay, 26 December 1933, came into force 26 December 1934, Art. 1, 3.

behavior of it, and how would International criminal court respond for crimes committed?. Moreover, what Political, Economic and sociological countermeasures can be adopted to defeat the ideology and power of ISIS. Combating terrorism also requires a long-term comprehensive approach that combines security and development policies parallel to legal measures in confrontation.

1. The legality of the military intervention against ISIS

ISIS has been involved since the outbreak of the Syrian and Iraqi conflict in several terroristic attacks beyond the borders of the conflict. Attacks targeted Beirut by two suicide bombers at 12th of November 2015⁴, Paris attacks 13th of November 2015 that were described by President Francois Hollande as an “Act of War” organized by the Islamic State militant group⁵, after that San Bernardino Attack considered by the FBI as an act of terrorism⁶, in addition to more than 100 attacks held responsible by ISIS or its affiliates from 2015 till date. Challenging by that the legality to use of force as a self-defense by those targeted states against ISIS, especially that the airstrikes by the coalition that started after those attacks has targeted ISIS military forces in Iraq and Syria. Bearing in mind that, International law permits such use of force in other’s state territory with latter’s consent, Security Council authorization or self-defense triggering article 51 of UN charter⁷.

Attacks by ISIS do constitute to an armed attack triggering article 51 and excluding by that article 41 of UN charter⁸, especially that such attacks caused injury and death of civilians and qualify to an act of aggression⁹ towards victim states with sufficient gravity and an act of most grave forms of use of force that constitute an armed attack according to the ICJ in its Nicaragua case¹⁰. Therefore those attacks by ISIS have clearly crossed the threshold of armed attack. But according to the ICJ in Palestine Wall case, this inherent right of self-defense qualifies in cases of armed attack by state against another state¹¹, but at the same point it didn’t exclude the use of this right against non-state actor¹². According to the collective and individual defense against ISIS in Iraq, such response is not arguable since it is occurring with the consent of Iraqi government that requested the international assistance to combat ISIS¹³, giving by that the legality of military interventions at the territory of Iraq controlled by ISIS. And the argument made by article 2 of the 1975 resolution of the *Institute de Droit International (IDI)* on the principle of Intervention in civil wars that third states shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another state¹⁴, I consider it fail to qualify to the case of Iraq as I agree with scholars who consider that exception of this prohibition is when the intervention only directed against a universally recognized terrorist group according to the UN security council resolution 2249(2015) in respect with ISIL, and this was illustrated in the case of French intervention in Mali case¹⁵. On the other hand, in the Syrian part of the conflict, strikes are not legally justified, without the Syrian government consent; even though Syria seems to have acquiesced with the

⁴ G. Botelho, P. Cruickshank and C. E. Shoichet, CNN, Beirut Suicide Bombings kill 43: suspect claims ISIS sent attackers, (November 16, 2015) <http://edition.cnn.com/2015/11/12/middleeast/beirut-explosions/>

⁵ Paris Attacks : What happened on the night,(9 December 2015), www.bbc.com/news/world-europe-34818994

⁶ G. Botelho and R. Ellis, San Bernardino shooting investigated as “Act of Terrorism” , (December 5,2015) , www.edition.cnn.com/2015/12/04/us/san-bernardino-shooting/index.html

⁷ Michael Scharf, How the War Against ISIS Changed International Law, Case Research Paper Series in Legal Studies, Case Western Reserve University, March 2016, p.8.

⁸ A. Randelzhofer, “Article 51 UN Charter”, the Charter of the United Nations: A Commentary, Bruno Simma (ed.), vol. I, 2002, p. 79

⁹ General Assembly, 1974, Definition of Aggression, Article 3 (a-g)

¹⁰ Case Concerning Military and Paramilitary Activities in and Against Nicaragua, NICARAGUA v. UNITED STATES OF AMERICA, ICJ Judgment 27 June 1986,para. 191-195.

¹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep 2004 , para 139

¹² Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda, ICJ Rep 2005, para 147

¹³ United Nations Security Council Document, Letter from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, 20 September 2014, S/2014/691.

¹⁴ M. Dietrich Schindler, Le Principe de Non-intervention Dans les Guerres Civiles, Session de Wiesbaden, Insitute de Droit International 1975 , http://www.justitiaetpace.org/idiF/resolutionsF/1975_wies_03_fr.pdf

¹⁵ T. Christakis and K. Bannelier, under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, Leiden Journal of International Law , September 2013, issue 4 , Vol.26.

operations¹⁶; or a Security Council resolution for collective defense vetoed by Russia. Moreover, self-defense is not applicable, as according to the ICJ only such defense can be used against state or non-state actors under effective control of a state¹⁷. And in all cases this is not qualified in the Syrian part of the conflict. Several legal rationales have been made especially by US, France and UK (humanitarian intervention, ungoverned land standard, hot pursuit) all those cannot be legally justified. One of the most convincing arguments is the self-defense against NSA's is permissible if the host state has been unwilling or unable to eliminate the threat imposed. In this matter, ISIS controlling the territory of Syria to conduct attacks against other states with complete inability to stop those attacks by the Syrian government, in accordance to the Corfu Channel case 1949, where the ICJ stated that states have an obligation to ensure that their territory is not used in detriment of other states so Syria fails to respect this obligation¹⁸, and this complies with the law of neutrality.

From my point of view supported by the recent legal article of Mr. Michael Scahrf, the crystallization of new international norm is about to occur permitting the self-defense against NSA's not attributable to a state and without its effective control, this can be justified by the Caroline case that considered self-defense against NSA is lawful¹⁹. Especially after the definition made by the Special Tribunal of Lebanon (STL)²⁰ about terrorism that eliminated the obstacle used before that one man's terrorist was another man's freedom fighter.²¹ And this new paradigm has been noticed from the 1373 and 1368 resolution that according to the UN special Rapporteur self-defense against terrorists is permissible if they are operating from a state unwilling or unable to control²². Thus such evolvement has been supported by the 2249 UN security council resolution that was adopted after the attacks made by ISIS beyond the territory of conflict stating that ISIS is global and unprecedented threat to international peace and security, calling states for all necessary measures to eradicate self-havens established by this group in Syria²³, the SCR 2249 yet argued that intervention in Syria and Iraq is possible in compliance with international law in particular UN Charter²⁴. Although such resolution didn't express explicitly the use of force against ISIS but it does show according to Michael Scahrf that this resolution provided final push to establish a new change in the international law of self-defense to armed attacks against NSAs; in particular ISIS; as long as those actions respect the principles of *jus in Bello* and does only target the group not the state in which it operates from. Until then the political and legal coordination is working together on moving forward towards this new formation and strikes against ISIS continues in the legitimate manner²⁵. In all cases, this right might cause abuses; therefore equilibrium needs to be found. However, military actions against ISIS play a big role in stopping its expansion and eliminate some murderers and their violent leaders, but for sure cannot be solved as the only countermeasure taken.

¹⁶ A Syrian government spokesperson has reportedly stated, "We are facing one enemy. We should cooperate.", see L. Arimatsu and M. Schmitt, The Legal Basis for the War Against ISIS Remains Contentious, The Guardian, 6 October 2014, <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>

¹⁷ (Nicaragua v. U.S.A), Judgment, Ibid, p. 195, <http://www.icjci.org/docket/files/70/6503.pdf>

¹⁸ The Corfu Channel Case (United Kingdom v Albania), ICJ Rep 1949, p 22

¹⁹ R.Y. Jennings, The Caroline and McLeod Cases, American Journal of International Law 1938 Vol. 32, 82-89

²⁰ Special Tribunal of Lebanon established 30th May 2007 under UN SC Resolution 1757, considered a hybrid Tribunal since it is the first international tribunal that try crimes under national laws (The Lebanese criminal code) related to crimes of terrorism. <http://www.stl-tsl.org/>

²¹ Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal of Lebanon (STL), p 83, 102

²² M. Scahrf, Ibid. p.37-38.

²³ S.C. Res. 2249 (Nov. 20, 2015).

²⁴ P. Hilpold, The Evolving Right of Counter-Terrorism: An Analysis of SC Resolution 2249 (2015) in view of some basic contributions in International Law Literature, Questions of International Law QIL, 29 January 2016, para.5 <http://www.qil-qdi.org/the-evolving-right-of-counter-terrorism-an-analysis-of-sc-resolution-2249-2015-in-view-of-some-basic-contributions-in-international-law-literature/>

²⁵ M. Scahrf, Ibid. 53-54.

2. The interplay of IHL, IHRL and Islamic Law

IHL prohibits acts of terror and that is explicitly noticed in its provisions²⁶. In this matter as IHL applies equally to all parties no matter if such party was aggressor or self-defender as long as this party has military formation with organized structure and command able to comply and respect IHL rules. Likewise, in the war led by USA against Afghanistan (Taliban Government) after the terroristic attacks of 9/11, the war was considered an International armed conflict (IAC), therefore IHL applied. But after the spread of terrorist in the world and ongoing violence taking place in various areas addressed by variety of groups loosely organized sharing common ideology, made such issue controversial if such violence considered armed conflict or such groups reached the level of an armed group able to comply with IHL especially that this law doesn't apply to violence not considered armed conflicts²⁷, yet such conflicts are addressed by International and domestic laws. In this matter ICRC didn't consider it a global dimension conflict but multifaceted fight against terrorism.

In all cases, ISIS is involved in a non-international armed conflict in Syria and Iraq, no matter what this group claims. NIAC is an armed conflict between governmental and non-governmental forces or between those armed groups within the territory of a high contracting state²⁸, which is governed by the Geneva conventions and Add. Protocol II, applying as a *lex specialis*. ISIS beheadings of captives, civilians and journalists, clearly showed that this group doesn't comply with rules and customs of warfare. Though IS claims to follow the rules of Islamic law, but as long as it is part of the armed conflict in Syria and Iraq, therefore it is bound by IHL. Common article 3 of the GC 1949 states that, armed groups must respect the rules of IHL²⁹. Such requirement is also set forth in Article 19(1) of the Hague convention for the protection of Cultural Property, article 22 of its Add. P.II and in article 1(3) of the amended Protocol II to the convention of Certain Conventional Weapons. In the same token, ISIS violates both Islamic and IHL from different aspects, that used as cardinal argument to combat IS's ideology and legacy. GC and its additional protocols find their primary sources as mentioned in article 38 of the ICJ statute, on the other hand Islamic law; as a legal system represented by civilizations; can also be taken as source from which to derive general principles of law³⁰. The Islamic law primary sources are the Quran and Sunna (the traditions of Prophet Muhammad), has been violated by the militants of IS. E.g. the executions of captives as ISIS refers its executions to medieval scholars such as Ibn Nuhaas who mentioned that Islamic leader may decide to execute war captives if it is deemed necessary³¹. While the primary source (Qur'an) doesn't mention execution as a possible outcome³². In Islamic law killing is prohibited except as a penalty for grave crimes³³. As a conclusion, IHL and Islamic law are compatible according to the prohibition of torture and release upon cessation of hostilities³⁴.

Other face of ISIS violations has been occurring outside the conflict, therefore not governed by IHL. The UN Special Rapporteur on Counter-Terrorism and Human Rights "Ben Emmerson" considered that the

²⁶ Article 4(2) (d) of Additional Protocol II and Article 33 of the Fourth Geneva Convention.

²⁷ M. Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research HPCR, (Harvard University 2006,) 24.

²⁸ Although not spelled out in the text, it has always been assumed that the provision applies to hostilities between government forces and one or more armed groups as well as those between two or more such groups, see Commentary to Article 1 of APII.

²⁹ ICRC, *Geneva Conventions 1949*.

³⁰ J. Cockayne. *Islam and International Law: from a Clash to a Conversation between Civilizations'*, (Geneva, *International Review of the Red Cross* 2002,) Vol. 84, No. 847, pp. 597-626, p.623.

³¹ *Abi Zakaryya Al Dimashqi Al Dumayati" Ibn Nuhaas"*, *The Book of Jihad* (814 Hijri), Translated by Noor Yamani, 6 may 2014, p. 161-162, http://api.ning.com/files/qnlif5STwXWJlIDpiD8eR4ZJaME0iAeChqROisCh9REBFkr*W8yLdvIlgQU-DjaJtNHTh1BG5Tmz20bVZDZmrci6TNPb5IEYS/MashariAlAshwaqilaMasarialUshaaqRevisedEdition.pdf.

³² *The Holy Qura'n*, 47:4., see also F. Muhammadin, *A Comparison between International Humanitarian Law and Islamic laws of war: the Islamic State of Iraq and Sham and Treatment towards Prisoners of War in Syria*, p. 9, https://www.academia.edu/10170786/A_Comparisn_between_International_Humanitarian_Law_and_Islamic_Laws_of_War_The_Islamic_State_of_Iraq_and_Shams_ISIS_and_Treatment_Towards_Prisoners_of_War_in_Syria

³³ *The Holy Qura'n*, 4:92-93, 5:32.

³⁴ Fajri Muhammadin, *Ibid*, p.9 -10.

threshold for ISIL to be bound by Human rights obligations has clearly been met³⁵. Though IHRL governs states and doesn't apply to NSA but the effective control on population and territory held by ISIS and the governance it claims in areas outside the conflict zone constituted acts violating IHRL. Non-State armed groups that exercise a territory control have customary HR obligations according to the human rights committee³⁶. HR complement IHL in armed conflicts especially with regard to rights of political participation and social economic rights³⁷. This is so important issue to be used against ISIS, as this group will be held accountable for its crimes and protecting by that the Inherent dignity and equal right to all members of human family³⁸, and third states will have an obligation not to send any weapons to it in accordance to article 7(3) of the Arms Trade Treaty³⁹. Such violations have been recognized by the European parliament in its resolution on the systematic mass murder of religious minorities by ISIS, requesting several measures to be taken by European and non-European states⁴⁰. ISIS therefore bears international humanitarian and human rights law obligations, in addition to the Islamic laws that they claim to adopt. In practice this group has violated the three laws, and the role of the ICC in this matter for crimes committed must be examined.

3. Role of the ICC

The International Criminal Court can play a cardinal role in prosecuting ISIS for crimes committed, supported by the security council resolution 2170 that requested MS to take all necessary and appropriate measures with their obligation under international law to counter incitement of terrorist acts, perpetrated by individuals or entities associated with ISIL and bring them to justice⁴¹. As well the UN Human Rights Council adopted Resolution S/22-1 that asked for coordinating to avoid impunity and ensuring full accountability⁴². The challenge is that neither Iraq nor Syria MS to the Rome Statute according to article 13(a)⁴³, that results the lack of territorial jurisdiction according to article 12(2). However, important role can be played by ICC prosecutor against nationals of state parties involved in crimes in accordance to the personal jurisdiction⁴⁴, that would be subject to the principle of complementarity if the state of nationality is unwilling or unable to prosecute those fighters itself⁴⁵. In this matter several legislative measures had been adopted by states against their nationals involved with ISIS such as UK⁴⁶. Moreover, in order to prosecute the leaders of ISIS that are protected by the territorial jurisdiction as nationals to non-member state to Rome statute, the UN Security

³⁵ Report of the Special Rapporteur Ben Emmerson, on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/29/51, Human Rights Council Twenty ninth session, (United Nations General Assembly, 16 June 2015) 9-10

³⁶ Human Rights Committee, General Comment 26, CCPR/C/21/Rev.1/Add.8/Rev.1, Dec. 8, 1997. See also, U.N. H.R.C. Rep. of The Independent International Commission of Inquiry on the Syrian Arab Republic, Feb. 15, 2012-Aug. 15, 2012, {11, U.N. Doc. A/21/50; GAOR, 21st Sess., Supp. No. 50 (2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf.

³⁷ T. Rodenhäuser, International Legal Obligations of Armed Opposition Groups in Syria, International Review of Law, 2015, p.4.

³⁸ The Universal Declaration of Human Rights, Preamble, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948)

³⁹ The Arms Trade Treaty, United Nations General Assembly, New York 27 March 2013, [http://www.un.org/disarmament/ATT/docs/ATT_text_\(As_adopted_by_the_GA\)-E.pdf](http://www.un.org/disarmament/ATT/docs/ATT_text_(As_adopted_by_the_GA)-E.pdf)

⁴⁰ European Parliament resolution on the systematic mass murder of religious minorities by ISIS, European Parliament, 2016/2529(RSP), 27.1.2016, <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2016-0157&format=XML&language=EN>

⁴¹ S.C. Res. 2170 (Aug. 15, 2014).

⁴² H.R.C. Res. S/22-1 (Sept. 3, 2014)

⁴³ Article 13 of Rome Statute 1: A State Party refers the situation to the Court pursuant to Article 14; (2) The UN Security Council refers the situation to the Court under Chapter VII of the UN Charter; or (3) The Prosecutor opens an investigation proprio motu under Article 15 on the basis of information on crimes within the jurisdiction of the Court. Rome Statute of the International Criminal Court, art. 13, July 17, 1998, 2187 U.N.T.S. 90

⁴⁴ Statement of the Prosecutor of the International Criminal Court, F. Bensouda, on the Alleged Crimes Committed by ISIS, International Criminal Court, Apr. 8, 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx

⁴⁵ Aldo Zammit Borda, Explainer: How to Prosecute Islamic State Fighters for War Crimes, News week, 3-7-2016, <http://europe.newsweek.com/islamic-state-war-crimes-execution-437962?rm=eu>

⁴⁶ Tracking Britain's Jihadists, BBC News (May 21, 2015), <http://www.bbc.co.uk/news/uk-32026985>.

Council referral to the situation to the Court under Chapter VII of the UN Charter will be the best solution, such measures been adopted at the Darfur-Sudan 2004, and Libya case. Efforts been noticed by the former chief prosecutor for the ICC that requested to open formal investigation concerning the crimes committed by ISIS against the Yazidi population in Iraq, considering that once sufficient evidence gathered, then warrants for the arrest of perpetrators must be requested to be brought to trial if captured⁴⁷. I agree here with Dr. Brennan in her article that: "This contribution can be step to map the application of the Rome Statute to members of ISIL in order to gain understanding of the challenges in prosecuting them before the ICC⁴⁸."

4. Combating ISIS financially

The Islamic state is one of the best funded terrorist organization globally with annual budget of 2 billion \$ mainly from different sources, including Ransom Payment they receive from kidnapping with the help of international brokers who gets commission of the delivery of those funds. Second Taxes that is considered the largest source of financing this group that is estimated by 360 million \$ including salary taxes and taxes imposed on Christian under the right to live. Third the OIL sales, utilities and mining as ISIS in Syria controls 60% of Oil production capacity and 10% in Iraq, earning around 150 million \$ per month by 2014, In addition to seizure of banks, sex and slavery business, Sales of Antiquities and Donors especially from wealthy Arab Countries⁴⁹. ISIS unlike Al Qaeda, 80 % of its finance is produced from the territories it controls.

The international convention for the suppression of the financing of terrorism 1999 and the UN Security resolution 1373 plays a cardinal role in combating financing terrorism, but ISIS abilities; according to Adam Szubin, undersecretary for terrorism and financial intelligence at the US treasury; has over stepped them⁵⁰ According to Christiane Duhaime in White paper on Islamic State funding, he stated that while global efforts on countering funding stage has been noticed but still the critical stage is the delivery that stands as a mediator between funding and the terroristic acts⁵¹, therefore eliminating this stage will automatically neutralize ISIS and its actions. The international community had an important role in cutting of resources to terrorists such as ISIS. And recently the adoption of the UN SC resolution 2253 that is based on UN Charter Chapter VII and has direct effect that aims to enforce a framework to reveal and disrupt illegal financing of IS and groups related to it by means of trade in oil, artifacts and other illegal sources⁵², such resolution binds individual and states for any support made to ISIS calling members to move vigorously and decisively to cut the flow of funds to IS⁵³. Variety of measures must be taken by states such as closely monitoring funds traveling to states and regulations of digital payment systems especially that according to the investigations the attacks in Paris was funded through digital cards of small amounts that didn't attract attention.

Several steps been taken, the most noticeable is the work of the Financial Action Task Force (FATF)⁵⁴ that identified variety of terrorist financing methods terrorist use to raise, move and use funds. Its main task is

⁴⁷I. Coles, Former ICC chief prosecutor pushes for Yazidi Genocide case, 2 September 2015, <http://www.reuters.com/article/us-mideast-crisis-yazidis-icc-idUSKCN0R21NQ20150902>

⁴⁸ A. M. Brennan, Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles, the American Society of International Law, Volume 19, Issue 21, 17 September 2015, https://www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles#_ednref14

⁴⁹ Carnegie Endowment for International Peace: <http://carnegieendowment.org/2014/10/23/remarks-by-u.s.-treasury-under-secretary-david-s-cohen-on-attacking-isil-s-financial-foundation>.

⁵⁰ G.Dyer, Syria: UN backs move to squeeze ISIS finances, The Financial Times, December 17 2015, <http://www.ft.com/intl/cms/s/0/76731fec-a488-11e5-8218-6b8ff73aae15.html#axzz43uoA8ihu>

⁵¹ C. Duhalme, Terrorist Financing and the Islamic state "Examination of terrorist Financing and ways to Mitigate the Risks", White Paper on Islamic State Funding, Duhaime Law 2015, p.3.

⁵² United Nations Security Council resolution 2253(2015), adopted by the Security Council at its 7587th meeting, on 17 December 2015, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2253.pdf

⁵³ See, Article: UN Security Council unanimously adopts resolution targeting ISIS finances, <https://www.rt.com/news/326356-un-security-isis-finances/>

⁵⁴ The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard, <http://www.fatf-gafi.org/>

to (i) disrupt financial flows, (ii) deprive ISIL of its resources, and (iii) prevent ISIL from abusing relevant financial and economic sectors⁵⁵. The report of the FATF recommended important measures that aims to disrupt ISIL's External funding sources by identifying the origin, middlemen, buyers, carriers, traders and routes through which oil is trafficked, supported by preventive measures and effective supervision and enforcement to ensure Money or value transfer services are not abused by this group⁵⁶. Keeping in mind that, this control must distinguish between the legitimate and illegitimate donations for vulnerable population in need for humanitarian assistance in territories of ISIS in accordance to UNSCRs' 2139 and 2165⁵⁷. In this matter UNSCR 2191 (2014) renewed the decision to create additional routes and to establish a monitoring mechanism for a period of twelve months, until 10 January 2016⁵⁸.

5. Political and Social measures

Immediate actions to eliminate ISIS are impossible; while medium and long term political plan can. ISIS rise took advantage of the destabilized region to enhance its control and power, mainly in Iraq and Syria. Sectarianism considered a main reason of ISIS power that smartly invested the disenfranchised Sunni's who found ISIS as their safe haven from the Shia's control in Iraq, especially after Nour Al Maliki government's policy that gave bigger influence of Iran and its affiliates in Iraq. Military actions would help to stop ISIS but political reforms will bring back the trust of Iraqis and Syrians in fair central governments. This as well applies to the Syrian regime that enhanced violence by crimes committed from beginning of the peaceful protests where Syrians find that the Regime violates their inherent human rights. Such step shall be accompanied with diplomatic partnership, cooperation and intervention by stable neighboring regional powers such as Egypt, Saudi Arabia, Turkey and Iran, in parallel with UN negotiations to stop the civil war in Syria. ISIS propaganda claims that it fights the western control and protects the Islamic interest under what is so called Caliphate, therefore the west should not slip into fighting without building an international coalition including Islamic states to defeat and stabilize the region, support for Iraqi and Syrian political and security transition and to find a peaceful settlement for the civil war in Syria with transition of power from Assad regime⁵⁹. Such efforts been discussed by the Geneva peace talks but as the proposals are going through the implementation of Federalism, but such offer will enhance the power of de facto authority of the NSA including ISIS, especially that such division will be ruled in accordance with sectarian and religious federals. Moreover, neighboring countries, in particular Turkey, will not accept a self-administration for Kurds on its borders that can be a reason for more violence and military interventions giving a favor to ISIS. In this matter, Several insurgents groups have already declared their will to pursue armed resistance to prevent such federal aspiration⁶⁰. Extremist ideology flourishes in environment of instability especially in states controlled by oppression such as Syrian Regime⁶¹. Therefore, without peaceful transition in power and the implementation of UN SC resolution 2254 that calls for democratic elections after 18 months of a new formed government in Syria without Al Assad, a copy for the Yemeni Scenario; according to Maha Yahya a specialist in post-conflict reconstruction in Middle east⁶²; will be the result. Therefore, a democratic transition of power accompanied by all measures

⁵⁵ Report on the Financing of the terrorist Organization Islamic State in Iraq and the Levant (ISIL), Financial Action Task Force (FATF), February 2015, p.9 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf>

⁵⁶ Ibid, p. 40

⁵⁷ Ibid, p. 39

⁵⁸ UN SCR 2191, Security Council 17 Dec 2014.

⁵⁹ B. Katulis, H. Lang and V. Singh, Defeating ISIS: An Integrated Strategy to Advance Middle East Stability, Center for American Progress, 10 September 2014, <https://www.americanprogress.org/issues/security/report/2014/09/10/96739/defeating-isis-an-integrated-strategy-to-advance-middle-east-stability/>

⁶⁰ K. Barakat, Divisive federalism is Syria: One outcome of Geneva's Failure, The New Arab, 22 March 2016, <https://www.alaraby.co.uk/english/comment/2016/3/22/divisive-federalism-in-syria-one-outcome-of-genevas-failure>

⁶¹ Z. Savellos, Military Action Against ISIS is only a Fraction of the Solution, The Stanford Political Journal, 15 January 2016, <http://stanfordpolitics.com/2016/01/military-action-against-isis-is-only-a-fraction-of-the-solution-2/>

⁶² M. Yahya, Syria war: UN envoy opens peace talks in Geneva, Al Jazeera, 14 March 2016, <http://www.aljazeera.com/news/2016/03/syria-war-envoy-opens-peace-talks-geneva-160314093532404.html>

military and politically against ISIS and its affiliates will be the only political solution to end up the civil war in Syria and focus on getting rid of ISIS.

I would like to refer to an important article by Wardah Khalid that highlighted cardinal measures, stating that fighting ISIS requires understanding its ideology and the climate that made it stronger. The author suggests non-military alternative actions, mainly by stopping marketing ISIS by media publications and implementing plans to discourage western youth from falling for Islamic state group propaganda⁶³. Moreover, it is important to address the political and economic grievance in such regions that encourages civilians to join ISIS campaign such as education, unemployment, long term political stability and humanitarian assistance.⁶⁴ Combating ISIS ideology requires economic reforms, as the efforts from 1980's in Arab World has resulted to unprecedented macro-economic growth that failed to be equally distributed to different segments of societies⁶⁵. I agree with the author in her article that it is needed to retain the good elements of Neo-liberalism especially that recent studies proved that the recruitments targeted low socio-economic society. And unless major reforms were made including labor market reforms, promotion of Blue Collar Jobs, and fight unemployment, then the power of ISIS ideology will not wane even if it lost its territory or financial powers⁶⁶. ISIS even with its brutality and terrorism provides a sense of citizenship and self-governance for oppressed and disenfranchised population accompanied by smart marketing propaganda for its ideology⁶⁷. Moreover, criminalizing the encouragement of terrorism is an important step and it will be by measures of law enforcement and intelligence to combat the phenomena of extremism that is encouraged by head of mosques in western states and the Middle East.

Conclusions

Despite the fact that ISIS imposes a great challenge to the International law, but the examination of the legal countermeasures proved that it is sufficient to govern such phenomena. The use of force against this armed group has crystallized due to the state practice and legal justifications to deal with non-state armed groups engaged in terroristic acts and such groups will not have safe havens, yet such permission should be well implemented not to be abused by states violating fundamental principles of international Law as we explained. Moreover IHL and IHRL interplay and complement each other in favor of the behavior of such group in armed conflict or in areas not affected by war; such application can give a key role to the ICC and national courts to prosecute any party involved in war crimes or violations to the international laws. On the other hand, clearly important that legal or military measure must be accompanied with economic and political reforms to siege the ideology that ISIS adopts taking advantage of resources and destabilized regions to impose its control, as I fully believe that ISIS is not the problem, but its ideology flourishing in failed or failing destabilized regions is.

At the end, an interdisciplinary approach to combat ISIS is the only solution, due to the fact that laws govern political wars that are a result of sociological and economic failure. Therefore, a long term plan starting from now and following the steps mentioned in the study will definitely find its way to eliminating a hybrid group through hybrid measures.

⁶³ Wardah Khalid, Bombs Are Not the Answer “ 5 non-military ways to stop the Islamic State”, Feb. 18, 2015, <http://www.usnews.com/opinion/blogs/world-report/2015/02/18/stopping-the-islamic-state-group-without-the-bombs>

⁶⁴ Ibid. pp.2

⁶⁵ N.Field , To Beat ISIS, Focus on Economic Reforms,The Arabist, 16 November 2015, <http://arabist.net/blog/2015/11/16/to-beat-isis-focus-on-economic-reforms>

⁶⁶ Ibid.

⁶⁷ ISIS publishes its propaganda through a DABIQ magazine to spread its ideology in a very professional way attracting by that sympathizers from all over the world, e.g. <http://media.clarionproject.org/files/islamic-state/islamic-state-dabiq-magazine-issue-7-from-hypocrisy-to-apostasy.pdf>

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A NEW SHIFT IN ECONOMIC RELATIONS: IS THERE A NEED TO RETHINK EMPLOYMENT RELATIONS?

Aušra Bagdonaitė¹

Abstract

In this paper, the sharing economy as a marginal economic category in the connection to employment and labour law as the historically developed legal relations to protect workers from an employer's domination as well as to secure their dignity by emphasising the importance of the insurance of labour standards in this changed world of work is analysed. As these economic relations creates the putative ambiguous status of working individuals, this research focuses on the separation of employees from self-employees as well as possible introduction of a new status of employment in labour law.

Keywords: sharing economy, gig-economy, service providers, dependent contractor.

Introduction

The evolution of technologies, especially high-speed networks, smart phones and possibility for the internet giants to own an incredible amount of customers' data², has become the good soil for the arise of online platforms such as Uber, Lift, DogVacay, TaskRabbit, Amazon, Ebay, Airbnb, Crowdfunder, etc. offering their customers comfortable, cheaper and flexible services. Such assumptions allowed to create economic relations with the usage of online platforms as well as apps, which are now known as a sharing economy (or by other synonyms as the on demand economy, collaborative economy, peer to peer (P2P) economy). Notwithstanding, that these smart titles of these economic relations sometimes are misleading. Therefore, by clarifying the terms and definitions of the sharing economy, the starting point is to analyse sharing economies of technological platforms, which connect service providers with customers via apps, creating the most consideration for their links to employment relations.

Under these new economies, service providers are treated as self-employees. They are allowed to provide services on flexible working schedules and are attracted to be the part of this new model of economy by entering into a business partnership and enjoying the autonomy in these relationships. Regardless their work is called 'tasks', 'rides' or other titles in order to avoid being labelled as employment relations, however, their status as self-employees remains doubtful. The legal uncertainties concerning both the informalisation of formal economy and the possible misclassification of employment relations occur. As labour law has a long-standing history, however, it has been developed on the traditional industry based economy, as employees were mostly men as breadwinners and usually working for one employer for a long time with a lack of autonomy. Therefore, it raises the question whether labour law is outdated and creates mismatch between workers facing modern market realities and the legal requirements that govern them.

This new shift in economic relations is related to the perception of the regulation scope in labour law. The above-mentioned economic situation can cause a significant decrease in persons having employment relations as well as limit their access to social security. As there are legal possibilities to check their status as being self-employees or employees under labour law, however currently existing tests are not sufficient

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² See more in V. Mayer-Schönberger, K. Cukier. 'Big data: A revolution that will transform how we live, work, and think' (Boston, New York: Houghton Mifflin Harcourt 2013).

enough to ensure a clear answer for workers on technological platforms. Therefore, a need for a new status of employment should be considered.

1. What a sharing economy has to do with sharing?

The sharing economy has become like a magic words for online businesses, which literally promotes themselves by using a word 'share' with the aim of appealing to people's natural moral nature to share with others like in this popular phrase – 'sharing is caring'. However, there is only a thin line in relation to a 'true' sharing economy as some kind of caring category and sharing just as an artificial title of the new forms of businesses, which actually have nothing to do with real sharing³. As long as all these new forms are put under the same roof of the sharing economy, in order to have a fruitful discussion about new economic relations with the link to employment relations, there is a need to bring some clarity into it.

According to the Investopedia, a sharing economy is an economic model in which individuals are able to borrow or rent underutilised assets owned by someone else⁴. This concept has three main elements: (1) individuals are able to use assets temporarily; (2) these assets should be underutilised; (3) their owners remain ownership rights to them. There are no doubts that such economic behaviour, which involves all these three elements, leads to a 'caring' category as people being environmentally friendly and strengthening the role of an active society by sharing material things with others, even for money. For example, if you have an additional room in your house and you rent it occasionally by using Airbnb platform, while such action has all above-mentioned elements, this may be the sharing economy. On the other hand, if you buy a house in order to rent it by using the same Airbnb, the element of an underutilised asset might be absent, as the main goal of such purchase was to run a rental business via an online platform. Thus, the latter activity can be defined as the product service economy while there is not any sharing involved. The same happens when few individuals sell their unnecessary things to others by using online platforms. By such behaviour they lose ownership rights to their belongings, therefore, this might be just the second hand economy, which in old-fashioned ways takes place in flea markets or specialised shops, but now it is also possible to run such activities online. This shows that the product service economy and the second hand economy even being labelled as sharing economies are actually rental or sales business via online platforms.

Besides that the mentioned above examples of sharing economies lack a sharing component, however as their fundamental attribute the usage of technological platforms can be distinguished. In connection with such platforms as well as by given the title of the sharing economy, also, there is the gig-economy. Despite of the aforementioned three element of the sharing economy, for instance, considering Uber's economic activities, a 'sharing' component becomes more complex because of people involved in the performance of this 'sharing'. It is difficult to put human resources in the category of 'underutilised assets' as a core stone of the sharing economy. Regardless that there is the real crowdsourcing company, which has such grotesque name as 'People as a Service'⁵, creating a dissonance with the first fundamental principle of the Philadelphia Declaration of the International Labour Organisation (hereinafter – ILO): 'The Labour is not a commodity'⁶.

It can be agreed with G. M. Eckhardt and F. Bardhi 'that it is an access economy rather than a sharing economy'⁷, while in reality this economy has actually a little to do with real sharing and the economic relations, which is covered by this economy, have different characters. It follows that it can be made the exclusion of 'true' sharing economy, the product service economy, the second hand economy and the gig-economy.

³ See more in I. Maselli, K. Lenaerts, M. Beblavy, 'Five things we need to know about the on-demand economy'[2016] CEPS Essay 21/8; also see: Smarter regulation for the sharing economy, source: <https://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy>.

⁴ Sharing economy, source: <http://www.investopedia.com/terms/s/sharing-economy.asp>.

⁵ People as service, source: <http://peopleasaservice.co/>.

⁶ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), source: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration.

⁷The sharing economy isn't about sharing at all, source: <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all>.

Nevertheless, all these economies change tremendously the world of labour and existing social models⁸, however, as long as they do not use workforce as the sharing component, they do not directly invade into possible employment relations. Consequently, more interesting and what directly matters for labour law is the gig-economy which covers on demand work via apps as well as crowd work on crowdsourcing platforms, matches demand and supply of work, gathers service providers as workforce as well as maximises flexibility and minimizes costs.

2. Is labour law still useful?

Labour law standards were achieved throughout the 19-20th centuries where workers sought better working conditions while employers sought flexible and less costing workforce. As new economic relations change the way people work, it raises the question whether these standards are relevant in the 21st century, in spite of tremendous achievements of labour law in saving an employee from factual and legal inequality and an employer's domination.

By the creation of a new shift in economy, the gig-economy has established a strong freelancers market⁹ with a prosperous growth¹⁰. However, despite of its attractiveness, not everybody shows satisfaction with such market. Regardless of being only the tip of the iceberg, the world has seen the rise of Uber as the most illustrative and the most attention-grabbing case because of trade unions' strikes, Uber subcontractors' lawsuits as well as awareness of the legal regulation issues related to this company's activities. Uber business model has brought the new debate on employee vs. independent contractor status and this has developed in even a major discussion of all workforce in this gig-economy. Despite of different opinions, which were expressed mostly in the press, as well as by several specialised institutions in the United States of America it was not found that Uber drivers are employees¹¹, it shows up that such technological platforms have been adjudged by various scholars, researchers as well as the ILO drawing attention that service providers should be treated as employees.

ILO has stated its opinion about these new economic relationships addressing the labour dimension of the gig-economy. This organisation emphasises that the classification of workers in the gig-economy as independent contractors allows shedding not only potential vicarious liabilities and insurance obligations towards customers but also a vast series of duties connected to employment laws and labour protections, - depending on various jurisdictions – compliance with minimum wage laws, social security contributions, anti-discrimination regulation, sick pay and holidays. Moreover, ILO has found that service providers in the gig-economy not only lack of workers protection as issues concerning minimum wages and employment benefits but also access to fundamental labour and human rights.¹² Therefore, the gig-economy weakens the most important historically developed three elements of labour protection: the imposition of minimum labour

⁸ As for example, activities towards Airbnb platform could lead to job loss of hotels' staff. See more in: Hotel workers' union sees threat in Airbnb, source: <http://america.aljazeera.com/articles/2015/5/8/hotel-workers-union-sees-threat-in-airbnb.html>.

⁹ There's an app for that, source: <http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and>.

¹⁰ There are currently an estimated 53 million Americans freelancing, approximately 34 percent of the total workforce. This number is expected to balloon to 50 percent by 2020, see more in: 5 Predictions for the freelance economy in 2015, source: <http://www.forbes.com/sites/waldleventhal/2014/11/24/5-predictions-for-the-freelance-economy-in-2015/#692d9d491425>. Freelance numbers have increased by 45% from just under 6.2 million to 8.9 million in 2013, making them the fastest growing group in the EU labour market, see: Future working: the rise of Europe's independent professionals, source: http://wp.efip.org/wp-content/uploads/2014/03/Future_Working_Full_Report.pdf.

¹¹ Florida says Uber driver isn't an employee after all, source: <http://www.wired.com/2015/10/florida-uber-decision-reversal/>; Employee or independent contractor? Uber wages battles to answer critical question for on-demand economy companies and their workers, source: <http://www.lexology.com/library/detail.aspx?g=5dd9aa96-3a34-4274-a25a-ec35272aaaa5>.

¹² V. De Stefano, "The rise of the "just-in-time workforce": on-demand work, crowdwork and labour protection in the "gig-economy" (Geneva: ILO, Conditions of work and employment series, No. 71 2016), p. 5, 10.

standards, the responsabilization of the employer for work-related risks, and the facilitation of collective action among employees¹³.

Others lay down more elaborated issues with these new economies as these platforms offering flexibility and autonomy for service providers alter the balance between working and family life because of the intensification of work, excessive connection to work-linked devices and working more hours as these hours are not recorded. Consequently, it is connected with blurring of the frontier between working and rest time, which rises health issues related to levels of stress. Moreover, considering working conditions as remuneration it shows up that technologies play a role in the increase of in equality of incomes. This is caused by the increase, on the one hand, of low-skilled and ill-paid jobs, on the other hand, very highly paid top-levels jobs where the winner takes all in the digital economy.¹⁴

This shows that the awareness raised concerning the harm of the gig-economy has a diverse nature in labour law. However, these issues are quite similar to those of all non-standard forms of employment. Especially, taking into account that according to the Conclusions of the ILO Tripartite Meeting of Experts on Non-Standard Forms of Employment stating that 'these non-standard forms of employment include, among others, fixed-term contracts and other forms of temporary work, temporary agency work and other contractual arrangements involving multiple parties, disguised employment relationships, dependent self-employment and part-time work'¹⁵. Therefore, this determines that service providers via technological platforms can be treated as only the part of changing patterns in the whole labour market with predominance of 'bogus' self-employment as well as flexible forms of employment with a lack of security options.

While economic relations have changed greatly in comparison with the time when labour law standards were developed, labour law is still valuable in these new economic relations. As M. Weiss indicates, that the assumptions, on which labour law were based, as follows, that there is a need to compensate the bargaining power of the employees, that labour is not a commodity, that employees are personally dependent and that the employees' human dignity has to be protected, have to be remained to be as valid as ever¹⁶. Nevertheless, the legal boundaries between self-employees and independent contractors as well as the scope of application of labour law are still unclear.

3. Do we need a new status of employment?

Analysing the legal status of service providers and considering that in fact online platforms with service providers do sign contracts under civil law, such as, for example, licence agreements and treat them as self-employees, there are many criteria established to check the status of independent contractors vs. employees. In Europe, concerning the qualification of employment relations, 'subordination' as the key element has been prevalent. This legal element indicates that the employee is subject to the management and control of the employer with regard to the way in which the work is carried out. However, as the current economic reality offers more autonomic and flexible ways to work, under these conditions sometimes the employment relationship is objectively ambiguous, some other times is deliberately disguised¹⁷. The criterion of subordination can be estimated as outdated or can only be the integrative part with other criteria, such as, for example, economic dependence.

¹³ I. Martin, P. Barré, 'Back to basics: a critical assessment of CSR as work law in network firms' [2013], papers of Labour Law Research Network Inaugural Conference, p. 5.

¹⁴ C. Degryse, 'Digitalisation of the economy and its impact on labour markets' [2016] ETUI Research Paper-Working Paper, p. 41-44.

¹⁵ Conclusions of the Meeting of Experts on Non-Standard Forms of Employment, source: http://www.ilo.org/wcmsp5/groups/public/--ed_norm/--relconf/documents/meetingdocument/wcms_354090.pdf.

¹⁶ M. Weiss, 'Re-inventing labour law' in 'The idea of labour law', ed. G. Davidov, B. Langille (Oxford: Oxford University Press 2011), p. 47.

¹⁷ F. Rosioru, 'The changing concept of subordination' [2013], source: <http://adapt.it/adapt-indice-a-z/f-rosioru-changing-concept-subordination/>, p. 19. (150-185)

In the United States of America, for instance, Labor Commissioner of the State of California under the control test¹⁸ found that an Uber service provider was an employee¹⁹. However, after this decision on Uber, U. S. Department of Labour issued administrator's interpretation No. 2015-1 concerning of misclassification of employees as independent contractors where it stresses that the common law control test should be rejected. According to this documentation, the multi-factorial 'economic realities' test which focuses on whether the worker is economically dependent on the employer or in business for him or herself²⁰ should be prevalent. Courts have not used yet this test on the gig-economy companies, though, as far as it is a matter of interpretation, there are thoughts that such companies as Uber should be concerned about this²¹.

Nevertheless that these tests can be litmus for the separation of actual self-employment, however, they can lack of capacity in establishing employment relationships in the marginal gig-economy. For example, B. Rogers points out that control test does not clarify how much control must be exercised for workers to be employees, nor how the aspect of control interacts with aspects of the parties' relationship. Concerning 'economic realities' test which is based on workers' economic dependence, he indicates vice versa that employers are often economically dependent upon workers and this point explains labour law's longstanding hostility towards strikes during the course of a collective bargaining agreement.²²

It is offered to include persons labelled as being self-employed but in reality being employees into the scope of application of labour law, even if might be difficult to exactly identify their status²³. This statement refers to an ongoing legal discussion addressing that labour law seems unable to provide a proper definition of those persons who fall between dependent work and self-employment by indicating them as being in a grey zone²⁴. As a solution of this ambiguity, it is suggested to classify such workers by introducing a third category as dependent contractors²⁵. Under this status, they could enjoy their autonomy and flexibility while receiving some employment protection as the right to unionize, minimum- wage and overtime eligibility, antidiscrimination rights. This offered notion 'dependent contractor' actually is not new, because such classification exists, for example, in Austria, Germany, Italy, Portugal, Spain and the United Kingdom.

For instance, in Germany, Section 12a of the Act on Collective Agreements gives a statutory definition of this third category of working individuals as it was incorporated in 1974 by calling them 'employee like persons'. Accordingly, individuals are economically dependent and need social protection comparable to that of an employee if they fulfil the following conditions: (1) they have to perform their contractual duties personally and essentially without the help of employees; (2) either the major part of their work is performed for one person or more than on average half of their income is paid by one person.²⁶ These dependent contractors do not enjoy the full protection of labour law. However, in comparison with self-employed individuals, they have more guarantees and are treated the same way as employees concerning disputes resolution in labour courts, minimum standards for annual and public holidays as well as their working conditions can be regulated by

¹⁸ The control test has been formed in the case of the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. gd. 341

¹⁹ Labor Commissioner of the State of California, *Berwick v. Uber Technologies, Inc.*, 3 June.

²⁰ Administrator's Interpretation No. 2015-1, source: http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm.

²¹ The US government just reminded companies like Uber why they could be in serious trouble, source: <http://www.businessinsider.com/us-department-of-labor-reminds-companies-of-1099-classification-rules-2015-7>

²² B. Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' [2016], *Harvard Law & Policy Review*, Forthcoming, Temple University Legal Studies Research Paper No. 2015-33, p. 13-19.

²³ M. Weiss, 'Re-inventing labour law' in 'The idea of labour law', ed. G. Davidov, B. Langille (Oxford: Oxford University Press 2011), p. 50.

²⁴ *Cit. op.* 17, p. 22.

²⁵ What if there were a new type of worker? Dependent contractor, source: <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>; <http://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy/>.

²⁶ M. Weiss, M. Schmidt 'Labour law and industrial relations in Germany'(Kluwer law international 2010), p. 47

collective agreements and they are entitled to non-discrimination.²⁷ In other countries, the definition of the dependent contractor is quite similar as indicated in German law.²⁸

As it seen from the example of German legal regulation, with the tailored adaptation of such 'employee like persons' perception it might be possible to apply it for workers under the gig-economy ensuring that at least they will be covered by the part of labour law guarantees. However, it can be difficult to assess whether the sources of workers' income are the platforms or apps or the final clients and consumers on those apps, especially taking into account crowd work²⁹. Moreover, by returning to the aforementioned idea that workers of online platforms raise quite similar problematic aspects as all non-standard forms of employment, the intermediate category of employment only for workers under the gig-economy could just create the solution of one segmented workers category by leaving aside those who suffer as well from misclassification.

More broadly, all labour market transitions have a common feature – the risk of social inclusion, as workers risk losing their jobs thus no longer playing an active role in labour market³⁰. This is particularly relevant, as dependent contractor's status cannot provide the protection from dismissal and social security protection equal to employees. Therefore, working individuals in the gig-economy could be treated as employees towards a broader concept – the anti-domination principle as a notion that a good and just democratic society must protect all its members against domination. Under this principle, workers should be classified as employees in two distinct situations: where they are subject to the dyadic domination via putative employer's economic power or its power over their work; and where workers have so few skills that they are subject to structural domination.³¹ Regardless, that this notion does not bring overall clarity, however, it shows what is morally and structurally problematic about such work relationships and could be a starting point for deeper considerations.

Conclusions

With the respect to both the marginality of economic relations as well as their different natures in the sharing economy, the sharing component sometimes is missing or even misleading in the light of its fundamental elements and social goals established. The gig-economy as the part of this vague sharing economy, based on technological platforms, which connect service providers and consumers, is of a great importance to employment relations because of inclusion of workforce in its economic activities while decreasing the scope of application of labour law and causing a rise in numbers of self-employees.

However, there is still a need for labour law, considering not only particular rights, which this law could provide for workers in the gig-economy, but especially the assumptions of its creation, as such, for example, that labour is not a commodity. As labour law standards were developed under absolutely different conditions in comparison with the nowadays economy, however, their assumptions are derived from the human dignity which does not depend on economic patterns and could not be realised without fundamental labour and human rights since they are basis for these standards

There is a lack of clear boundaries, separating employees from self-employees, as most of the criteria are only a result of the judicial evaluation based on their formation case by case. In addition, taking into account the specific nature of platforms' workers relations, the new status of employment or the third category as a dependent contractor could be the possible answer for the gig-economy. Regardless the potentiality of this suggested solution, it could be difficult to stipulate precise legal definitions for all cases as the gig-

²⁷ Id. p. 48

²⁸ F. Rosioru, 'The changing concept of subordination' [2013], article available at: <<http://adapt.it/adapt-indice-a-z/f-rosioru-changing-concept-subordination/>>, (150-185) p. 28.

²⁹ Cit. op. 12, p. 19.

³⁰ L. Lilach, 'Integrative employment and social security rights'[2012], *The International Journal of Comparative Labour Law and Industrial Relations* 29, No. 3, 331. (325-348)

³¹ Dyadic domination arises when one party in a relationship has such disproportionate power that the other is subject to its arbitrary whims and demands. Structural domination arises when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities even when all individual act within the limits of accepted rules and norms. See more in cit. op. 22, p. 19, 20.

economy covers both on-demand workers via apps as well as crowd work on crowdsourcing platforms. Moreover, a segregate category of workers could be formed, despite looking at the big picture, which includes also non-standard employment. This follows that there is a need for legal discourse with aim of the reconsideration of the limits of labour law and possibilities to provide these workers with the employment status in the gig-economy.

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THE IMPORTANCE OF THE COGNITION OF SOCIAL RELATIONS IN DEFINING AND IMPLEMENTING THEIR LEGAL REGULATION

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Abstract

The article uses one of the areas of social relations — architecture as one of the factors for forming human environment — to examine the importance of interdisciplinary cognition of social relations in defining and implementing their legal regulation.

Both the European Court of Human Rights and the Constitutional Court of the Republic of Lithuania define environmental quality as a necessary factor to ensure human rights and their proper implementation. However, none of the legal documents define or can define the content and — especially — the expression of contextuality, integrity, ergonomics, functionality, aesthetics and other concepts, important to environmental quality. On the contrary — keeping in mind the specifics of these categories, it is evident that the pre-defined norms would more likely prevent environmental quality than ensure it, since quality in environmental solutions and their conformity to international and national regulatory documents, as well as public interests, can be met only on the basis of a detailed analysis of the location and the needs of its future users.

However, despite the nature of the social relations, which promotes non-regulation, the law must define measures to ensure the balance of the economic, ecological and social public interests, as well as protect the human rights and freedoms affected by architectural decisions. Appropriate evaluation of the nature of regulated relations becomes particularly important during periods of social or economic crisis, when legislative solutions need to be made fast and at the same time (highly desirable) define both their short-term and long-term effect.

Therefore, the duty of the state to ensure the public interest and the specifics of the regulated relations show the significance of the special doctrine of architecture, environmental psychology and other related academic fields, in implementing the legal objectives of social harmony, coordination of different public interests and protection of human rights and freedoms.

Keywords: legal regulation, architecture, environment, public interests, human rights and freedoms.

Introduction

Numerous international and national documents acknowledge the significance of architecture to the public². Yet another example of that significance is the fact that the occupation of an architect is attributed to state-

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² The Council Resolution 2001/C73/04 [2001] states that architecture is a fundamental feature of the history, culture and fabric of life of each country, constituting the heritage of tomorrow, while the architectural quality is a constituent part of both the rural and urban environment. The Council Conclusions of 13 December 2008 state that architecture plays an integrating and innovative role in implementing sustainable urban development, reconciling the sometimes differing requirements of building and landscape conservation and contemporary creation, inhabitants' legitimate aspirations and controlling urban sprawl, contributing to the urban population's cultural enrichment and quality of life and to the cities' economic, commercial and tourism-related vibrancy. The Directive 2005/36/EC of the European Parliament and the Council [2005] declares that architectural design, the quality of buildings, their harmonious incorporation into their surroundings, respect for natural and urban landscapes and for the public and private heritage are a matter of public interest. The List of the Directions of Architectural Policy, approved by the Government of the Republic of Lithuania [2005], also states that the quality of architectural activity affects the well-being of people's lives, the cultural and social development, as well as civic consciousness, also has a direct influence on the country's cultural, ecological, social and economic climate, and that this influence is strategically important to the state.

regulated professions, i.e. the occupations, which provide services important both to the client and the public³.

What sometimes hinders the understanding of the importance of architecture in post-soviet countries is the attitude, which identifies architecture exclusively to aesthetics, thus reducing its value to mere psychological satisfaction or disappointment in looking at the beauty of the buildings and their artistic expression, which during the soviet era was downgraded to the to-be-discarded remnants of the bourgeois society⁴. Currently psychological well-being is acknowledged as a part of human health⁵, thus the significance of architecture is undeniable even from this narrow point of view. However, in reality the concept of architecture is much wider and includes the functional, spatial and visually perceived artistic development of buildings and objects of landscape and territorial planning⁶ (or, as concluded by the court, the environment, which must be participated by a professional architect⁷).

Keeping in mind the above-mentioned aspects, it becomes evident that architecture affects not only the human psychological, but also physical health, also has a direct influence on social well-being, the success of economic activity, as well as the protection of natural and cultural heritage, landscape, human health and other constitutional values. Thus the field of architecture undoubtedly implements the public interest, i.e. that, what is objectively significant, necessary and valuable to the society⁸. In addition to that, architecture is not only the means for environmental development, but also a measure for coordinating factual public interests, in other words — the means of social engineering or mediation. This fact is also acknowledged in academic literature⁹. It should be noted that the coordination of the public interests *per se* is regarded as a public interest¹⁰, thus the process of architectural formation alone should be also regarded as a public interest.

According to the Constitution of the Republic of Lithuania, it is the duty of the state to guarantee the public interest¹¹. The major means of implementing this objective is legal regulation, thus, deriving a direct link between the significance of architecture and the objectives of the state, it would seem that architectural solutions must be regulated by regulatory legal acts. Nevertheless, the specifics of architecture determine something else. Since the field of architecture solves various social, cultural, economic, ecological and other issues, it becomes obvious that its quality, i.e. an optimal balance of all these interests, may be found only in each specific situation. None of the preconditions of architecture formation can be evaluated in advance, therefore, the legal regulation of its solutions is not an appropriate measure to ensure the balance of the public interests. In other words, this decision-making takes place “beyond the limits of the legislation”, although the results achieved are directly related to the implementation of the legislative objectives — ensuring public harmony, coordinating different interests, as well as protection of human rights and freedoms. Such specifics of the presented social relations should be considered in developing the legal regulation of territorial planning and construction, which is relevant to architecture. However, according to the research conducted, currently both the lawmaking process and the courts dissociate from the significance and specifics of architecture for the most part.

³ European Parliament and Council Directive (EC) 2005/36 on the recognition of professional qualifications [2005] OJ L255/22, recital 43 of the preamble

⁴ This attitude was mostly reflected by the Resolution of the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers of the USSR "Regarding the elimination of excesses in design and construction", adopted in 1955. D. Čebatariūnaitė, D. 'Ideologija fizinėje erdvėje: butų interjerai sovietinėje Lietuvoje "atšilimo" laikotarpiu' [eng. Ideology in Physical Environment: Apartment Interiors in the Soviet Lithuania During the "thaw" period] [2006] 8

⁵ Health is one of the personal and population's greatest physical, spiritual and social values. The Law on the Health System of the Republic of Lithuania [1994] Official Gazette No. 63-1231

⁶ Law on Construction of the Republic of Lithuania [1996] Official Gazette No. 32-788

⁷ Decision of Vilnius Regional Administrative Court, Case No. I-9719-463/2014 [2014]

⁸ Resolution of the Constitutional Court of the Republic of Lithuania of 21 September 2006

⁹ A. Z. Khan. K. Allacker 'Architecture and Sustainability: Critical Perspectives for Integrated Design' (Leuven: ACCO Uitgeverij 2015) 4; A. Madanipour 'Urban Design, Space and Society' (Hampshire: Palgrave Macmillan 2014) 30-31

¹⁰ E. Šileikis, 'Viešasis interesas ir teisėti lūkesčiai politinių partijų finansavime: bendrieji ir specifiniai aspektai' [eng. Public Interest and Legitimate Expectations in Funding Political Parties: General and Specific Aspects] [2015] 1(87) 5-43

¹¹ Resolutions of the Constitutional Court of the Republic of Lithuania of 30 December 2003, 13 December 2004, 29 December 2004, 16 January 2006

The issues of legal regulation in the field of architecture remain untackled by scientists — no new academic works, focusing on this topic, have been published in Lithuania for a while. Vilnius Gediminas Technical University started filling this gap with “The Criteria of Architectural Quality”, a collection of interdisciplinary scientific articles¹². Another partial contribution is the article on “The Issue of Protecting Social Interests during Territorial Planning”¹³. The doctoral thesis “Public Interest and the Conditions for Its Implementation in the Field of Architecture”¹⁴ aims at the very same purpose.

This article, the purpose of which is to discuss the importance of the issues related to the cognition of architectural relationships, uses document analysis and systematic methods to examine the specifics of architecture in legislative documents regulating territorial planning and constructions, as well as court practice of Lithuania. The issue of forensic examination, as the major means of conveying the special knowledge to the court, is discussed individually. The end of the article contains the conclusions of the provided data.

1. The evaluation of the specifics of architecture in the legal acts

First of all, it should be noted that there is no individual law, which would regulate architectural relationships in Lithuania. The List of the Directions of Architectural Policy, approved back in 2005, stated that the provisions of architectural design analysis, maintenance, management and development are defined in the majority of the laws of the Republic of Lithuania¹⁵. This situation remains unchanged to this day — although the concept of the Law on Architecture was approved already in 2009¹⁶, the draft law itself remains in the stage of development. Thus, the field of architecture is defined by two major laws — the Law of Territorial Planning and the Law on Construction.

The purpose of the Law on Territorial Planning is to ensure harmonious territorial development and rational urbanisation, also to create conditions for harmonious natural and built environment, as well as urban quality by preserving valuable landscape, biodiversity and the values of the natural and cultural heritage¹⁷. Keeping in mind the already-discussed architectural specifics, it becomes obvious that namely the planning of specific territories could define the main safeguards to prevent the architectural decisions made during the construction process from violating the public interests. Nevertheless, based on this law, the definition of architectural requirements in the documents of territorial planning is optional, i.e. their importance is not rated by the legislator. It also should be noted that as of 2014 the defining provision was supplemented with an instruction, stating that architectural requirements may be determined solely based on legislation, i.e. the document of territorial planning can merely repeat the requirements established by the normative legislation. Moreover, all the procedure of detail planning became optional. Therefore, as it was discussed above, this type of regulation would not only be unfounded, but it would also hinder the appropriate balance of the public interest.

¹² ‘Architektūros kokybės kriterijai’ [eng. The Criteria of Architectural Quality]. A collection of scientific articles (Vilnius: VGTU leidykla Technika 2015)

¹³ G. Lastauskienė, D. Bakšienė ‘Visuomenės interesų apsaugos problema teritorijų planavimo procese’ [eng. The Issue of Protecting Social Interests During Territorial Planning] [2015] 96 52–70

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¹⁵ Resolution No. 554 of the Government of the Republic of Lithuania “Regarding the Approval of the List of the Directions of Architectural Policy” [2005] Official Gazette No. 64-2302

¹⁶ Resolution No. 643 of the Government of the Republic of Lithuania “Regarding the Approval of the Concept of the Law on Architecture of the Republic of Lithuania” [2009] Official Gazette No. 78-3239

¹⁷ Law on the Territorial Planning of the Republic of Lithuania [2013] Official Gazette No. 63-1231

Furthermore, this is the only law currently defining the contents of the public interest in the regulated area¹⁸. It should be noted that, in spite of different purposes of harmonising the interests, this definition gives priority to the right to property. What is even more important — despite the doctrine of the Constitutional Court, stating, that it is impossible to pre-define the areas of life subject to threats for the public interest or to define, where the public interest should be ensured by public authorities¹⁹, the list of values defining the public interest is finite. Moreover, it does not make a direct reference to architecture, although its essential basics are defined namely during the process of territorial planning.

At first sight the Law on Construction focuses more attention on the quality of architecture by defining the essential architectural requirements of the building²⁰. However, it is necessary to pay attention to several important aspects. Firstly, these requirements, as it seems from the title of the standard itself, focus only on the architecture of buildings and not on the entire environment. Secondly, considering the above-mentioned interests implemented in the field of architecture, it becomes evident that the list of criteria is too narrow to ensure their protection. Thirdly, they determine that the requirements for architecture must be defined by individual administrative acts, adopted by directors of municipality administrations. Keeping in mind the requirements of legality and reasonability, applicable to these acts, the qualifications of authorised persons, the mandatory assurance of the rights of the builder and lack of time for a detailed analysis, we can reasonably doubt the possibility of professional coordination of different public interests.

Another important fact is that the third parties' protection requirements, defined by the Law on Construction, are clearly related only to the subordinate legislation²¹. The volume of the project expertise is also limited to the requirements of the legal acts²² and this law does not provide a collegial expert evaluation of the architectural quality, which requires special knowledge. Finally, neither the Law on Construction, nor the Code of Administrative Offences²³, which came into force earlier, nor the new Code of Administrative Offences²⁴ defined or will define any legal responsibility for the major infringements of the requirements for the building.

Thus, one of the provisions of the Law on Territorial Planning and the Law on Constructions, indicated in this chapter, shows that the Lithuanian legal regulations identify architectural quality of the human environment solely as the implementation of the regulations defined in the legal acts.

¹⁸ The law states that the public interest in territorial planning consists of the following: 1) the quality of life of the society, based on objective needs and resources, the priority of property rights protection, promotion of investment, defined by the regulations of territorial planning, quotas for green areas, public health protection regulations, other requirements defined by the law; 2) the protection and rational use of landscape, natural and immovable cultural heritage, agricultural land with rich soil, forests, underground resources and other natural resources, as well as sustainable formation of cultural landscape; 3) the social or engineering infrastructure, necessary for the functioning of the state and municipal functions or territories, as well as the development of these territories; 4) projects of state importance; 5) public information and participation in the decision-making process. Law on the Territorial Planning of the Republic of Lithuania [2013] Official Gazette No. 63-1231

¹⁹ Resolution of the Constitutional Court of the Republic of Lithuania of 21 September 2006

²⁰ The architecture of a building must be as follows: 1) It does not contradict the major building requirements, defined by the EU Regulation No. 305/2011; 2) The building blends in with its environment; 3) It meets the special architectural requirements, special requirements regarding the protection and management of protected territories and the special requirements of heritage protection, defined by a director of municipality administration (or an authorised officer of that municipality administration); 4) The building meets its purpose; 5) It does not contradict to the requirements of the building's engineering systems and technological engineering systems. Law on Construction of the Republic of Lithuania [1996] Official Gazette No. 32-788

²¹ According to this law, a building must be constructed and built, and a construction plot must be improved in such a way that during the construction and use of the completed building, the living and working conditions enjoyed by the third parties prior to the beginning of the construction, can be changed only in compliance with the provisions of normative technical construction documents and normative documents pertaining to the safety and purpose of the construction works. The Law on Construction of the Republic of Lithuania [1996] Official Gazette No. 32-788

²² The expertise of the project of the building involves only the architectural solutions, which are regulated by normative technical construction documents and the documents mandatory for the preparation of the project. Law on Construction of the Republic of Lithuania [1996] Official Gazette No. 32-788

²³ Code of Administrative Offences of the Republic of Lithuania [1985] Official Gazette No. 1-1

²⁴ Code of Administrative Offences of the Republic of Lithuania [2015] Register of Legal Acts No. 2015-11216

2. The use of the doctrine on architectural issues in court practice

In order to harmonise public interests and ensure the protection of human rights in the field of architecture, more initiative should be shown by courts, however it is hindered by certain legal requirements and normative approach towards them.

In 2015 a group of scientists from the Law Institute of Lithuania conducted a detailed analysis on the identification of the public interest by analysing 836 court decisions. The findings of this analysis were published in a study, which has an undoubted scientific and practical value²⁵. However, keeping in mind the topic analysed, one cannot fail to notice that, aside from several reference titles, the study used the word “architecture” only twice and only together with the word “heritage”. In truth, there are only a few cases, related to defending the public interest in the field of architecture (which is not regarded as heritage or located in any protected territories).

Limited court practices may come from the Law on the Prosecutor's Office, which states that prosecutors defend the public interest in cases of violation of the law acts, which involve the violation of the legal and legitimate personal, society's and state interests, and that violation is to be regarded as a violation of the public interest²⁶. Moreover, the prosecutors' initiative to defend the public interest at court is limited to the above-mentioned definition of the public interest, provided in the Law of Territorial Planning. One of the examples of the refusal on behalf of the Prosecutor's Office to defend the public interest is the response of the Prosecutor General to the request submitted by Užupis district community, which, among else, emphasized the negative effect of the building to the landscape of Vilnius Old Town, its authenticity, as well as other criteria, indicated in the regulation on the protection of Vilnius Old Town. The response states that “in the absence of infringements of legal acts, which would violate the public interest, and in the absence of reasonable conviction that the material legal requirements will be satisfied, the Prosecutor has no legal basis to go to court.”²⁷. This example once again shows that the law does not acknowledge the specifics of the field or architecture, which would encourage to refrain from defining specific requirements, which may prevent from searching for an optimal balance of the public interests in each specific situation, while the general requirements of evaluative nature, which could be used for expert evaluations, remain simply unused.

The same position can be observed in cases, where the claimants defend their interests by emphasizing architectural quality. For example, in the case, where the claimants tried to challenge a detailed plan of the neighbouring plot, clearly appealing to the quality, style and compositional integration of the future buildings with the surrounding elements of natural and urban environment, as well as their correctness in the already developed environment and landscape protection, etc., the court unequivocally stated the following: “The wishes of the residents to see buildings, etc. around them, which meet their tastes and preferences, are understandable and logic in domestic sense, however, the interests of these claimants are not defended or guaranteed by the law. <...> the factors that cause the public dissatisfaction could be prohibited only if they exceeded the limits defined by the legal acts.”²⁸. Thus, this was a clear example of the normative approach to law, deriving the claimants' interests solely from the legal acts and failing to acknowledge the fact that the architectural quality significant for the society lies not only in the limits defined by legal acts, but also (and more often) beyond.

It is very likely, that the decision of the court regarding the solutions of the detailed plan based the doctrine on the issues of architecture would be different. This doctrine, considering professional or court expert conclusions, is actually used in court practice, for example, in need to define the contents of the concept of traditional architecture and its solutions²⁹. However, the use of the special doctrine is inconsistent —

²⁵ L. Bieliūnienė et al. ‘Viešojo intereso atpažinimo problema Lietuvos teisėje: kriterijai ir prioritetai’ [eng. The Issue of Identifying the Public Interest in Lithuanian Law: Criteria and Priorities] (Vilnius: Eugrimas 2015)

²⁶ Law on the Prosecutor's Office of the Republic of Lithuania [1994] Official Gazette No. 81-1514

²⁷ Decision of the Office of the Prosecutor General No. 13.12-14 to reject the complaint regarding the decision of Vilnius City District Prosecutor No. 2.1.5-81 to refuse to apply the measures for defending the public interest [2016]

²⁸ Decision of the Supreme Administrative Court of Lithuania., Case No. A-469-1240-06 [2006]

²⁹ Decision of the Supreme Administrative Court of Lithuania, made in the administrative case No. A¹⁴-63-07 [2007]

sometimes the court explains similar concepts by itself³⁰, sometimes it states that the doctrine had to be used by the public administration subjects that have made the contested decision³¹ and sometimes does not consider the claimants' architectural arguments at all³².

Keeping in mind the aspects discussed, it becomes obvious that expert opinions are greatly important to ensure architectural quality, therefore this procedure and its issues deserve a separate discussion.

3. The issues of forensic examination as a measure to convey special knowledge to the court

In the civil, administrative and criminal proceedings forensics is defined as a proceedings measure to clarify the issues, which require specific scientific, medical, artistic, technological or craft-related knowledge. Nevertheless, this procedure is not mandatory and the court may use it at its own discretion or regarding the request of the parties to the proceedings, including cases, when the applicable legislation is considered as only of evaluative nature, and when the clarification of the content requires specific knowledge. Forensic conclusions do not have preliminary power, are regarded merely as one of the means of proof and must be evaluated according to the same rules as other evidence³³.

Forensic examination is defined by the Law on Forensic Examination³⁴, which, among else, obliges the Ministry of Justice to compile and arrange a list of Forensic experts. From the perspective of the topic in question, we should note that the qualifications of forensic experts in the field of territorial planning and construction are defined by their qualification certificates. In accordance with the researched hypothesis, the document defining the acquisition of the qualifications of an architect states, that in order to qualify, an architect merely is required to pass an examination on legal knowledge and have experience counted in years³⁵. Special knowledge does not create a basis to issue or to refuse to issue the qualifications certificate. Accordingly, the legal knowledge of the architects in the list of forensic experts is checked, but the level of the specific knowledge remains unknown. Moreover, currently the list of forensic experts contains only three persons with a degree in architecture³⁶, which is very little to choose from and makes the possibility of collegial expertise (which is much more effective in defining compliance to the evaluation criteria) very limited.

Another problem aspect, which should be tackled, is the types of forensic examination. The Law on Forensic Examination defines the duty of the Council Coordinating Forensic Experts to approve the list of the types of forensic examination³⁷. Such list was approved by this institution in 2015³⁸. It should be noted that in this case the list is finite and it would seem it does not leave the court any opportunity to assign forensic examination according to the need of the case. The establishment of such list also reflects the normative approach to the law, based on which the state may pre-define the norms for the society's behaviour with no consideration of the interests of the society. In addition to that, this list raises doubts regarding the conformity to the courts' duty to perform a full and impartial investigation of all cases, unlimited by any restrictions.

Also, there is not a single word related to architecture in the list of the types of forensic examination. We could say that architecture falls under the technical activity of construction, but it was already mentioned that the qualification granted in these fields does not guarantee the level of the specific knowledge necessary for

³⁰ Decision of the Supreme Administrative Court of Lithuania, Case No. A⁵⁰²-2322/2013 [2013]

³¹ Decision of Vilnius Regional Administrative Court, Case No. I-3194-580/2012 [2012]

³² Decision of the Supreme Administrative Court of Lithuania, Case No. A⁸²²-36/2011 [2011]

³³ 'Lietuvos vyriausiojo administracinio teismo praktikos, taikant Administracinių bylų teisenos įstatymo normas, apibendrinimas' [eng. The Summary of the Practices of the Supreme Administrative Court of Lithuania With Application of the Provisions of the Law on Administrative Proceedings] [2012] 23 542-877

³⁴ Law on Forensic Examination [2002] Official Gazette No. 112-4969

³⁵ Order of the Minister of the Environment of the Republic of Lithuania No. D1-341 "Regarding the approval of the description of the procedure for the qualification requirements for architects and their certification, certificate suspension or revocation, legal recognition and issue of related documents" [2005] Official Gazette No. 93-3466

³⁶ Official site of the Ministry of Justice of the Republic of Lithuania [interactive] [2016; accessed on 21-03-2016] <http://tm.lt>

³⁷ Law on Forensic Examination [2002] Official Gazette No. 112-4969

³⁸ Resolution No. KT-9 of the Council Coordinating Forensic Experts, "Regarding the approval of the list of the types of forensic examination" [2015] Register of Legal Acts No. 2015-18969

evaluating architecture. Moreover, the list in question does not consider the artistic and creative aspect of architecture, since the examination of copyrights is intended only for phonograms and audio-visual works.

In conclusion, it would seem the specifics of architecture has not been covered not only in the legislation related to territorial planning and construction or courts, which continue to use the normative approach in their practice, but also in the activity of forensic examination dedicated especially for these fields.

Conclusions

In conclusion to this research, it should be said that the current Lithuanian legislation does not acknowledge the fact that the architectural solutions made regarding issues that are not covered by the law are substantially significant in coordinating the public interests and ensuring the protection of human rights and freedoms. Both territorial planning and construction regulations keep to the opinion that definitions of the legal norms and the control of their implementation is enough to ensure the quality of the human-developed environment, while the implementation of the interests that do not fall under the scope of these norms are left to their own devices, i.e. the area of mutual agreements between private designers and builders, representing their private interests.

The court and prosecutors' practice, which includes the same area in question, shows a normative approach to law, which involves deriving public interests exceptionally from legal acts thus preventing the possibility of defending the interests that were not directly defined, including those, which are defined using evaluative-type criteria. Some cases of administrative proceedings provide references to the special doctrine; however, this approach is not consistent.

Forensic examination is one of the major ways to convey the specific architectural knowledge to the court; however, it is also subject to reasonable questions, such as it being mandatory (even in cases, which clearly require specific knowledge), expert qualifications and the individuality of their activity. The legal acts currently do not define any collegial institutions for expert assessment of architecture, thus once more confirming the approach of the lawmaking to the specifics of architectural relationships.

Interdisciplinary cognition of architectural relationships should encourage both legal scientists and lawmaking subjects to look for adequate measures to ensure the society's interests, while the courts should make decisions based not only on the legislation, but also the principles of high-quality environmental development, which meets the public interests.

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LEGAL PRECEDENTS AND INNOVATION

Johanas Baltrimas¹

Abstract

The paper includes overview of relevant legal literature and foreign practice. Analysis mainly focuses on criteria, according to which, a decision to depart from precedent may be based. It raises questions when it is acceptable to distinguish cases, when the precedent seems applicable at first sight; when to overrule a precedent on the basis of a mistake in the judgment, which is being overruled; etc. Findings are compared with the status quo of Lithuanian doctrine of precedent and some suggestions are made for optimal harmonisation of flexibility and stability of case law.

Keywords: legal reasoning, judicial precedents.

Introduction

Technological advances are one of the key elements in sustainability of our everyday life and effective economic growth. Legal regulation must keep up with their pace, otherwise, law can block technological development or innovation might lead to unwanted results. Doctrine of precedent in its essence is a rigid concept and it meets challenges with such innovations like self-driving cars, which present legal dilemmas of liability in cases of accidents; service of “Uber”, which raises issues of fair taxation; contemporary social media in regard of privacy matters and so on.

In the context of such novelties, parties often might have very serious basis to expect that court will follow its own established rules and they will not be discriminated by different treatment. Departure from previous rules can be viewed as a sign of unstable, incoherent legal system. However, technological innovation may require different treatment and in such cases courts are burdened with a difficult task – they may have to persuasively justify departure from rules which would be applicable, if interpreted literally.

Law constantly needs to prove its ability to provide fair and economically useful solutions. In many cases lawyers face a dilemma – to follow the settled jurisprudence or break the established rules and by way of interpretation reveal new legal principles. Hopefully, this paper will provide a contribution for development of well-defined rules on when it is appropriate to depart from precedents, which would help to successfully integrate technological and other kind of innovation into legal system.

1. Prerequisites for doctrine of precedent

Sometimes question “why” might be annoying for some matters, where truth seems obvious. However, it is an important question in the context of judicial precedents. More detailed answers can enhance our ability to persuasively justify our decisions in particular cases. Authority of precedents sometimes is linked with the prevailing tradition of law – judicial precedents are said to be a common feature in the UK, USA and other associated legal systems, but in the European continental tradition their binding force often is not recognised. Connection of geographical location and authority of precedents might seem odd – do people experience different sense of justice, when similar cases of their peers are solved more or less favourably, compared to their case? So, before continuing to the question of departure from precedents, it is worth to identify the reasons for (not) following precedents.

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2. Justification for binding force of precedent

Binding force of judicial precedents can be justified by reasons of several sorts. Most important of them are the principles of equality² and stability of law.³ Where similar cases are decided differently it naturally raises the issue of discrimination. Incoherent departures from precedent make law less predictable, uncertain and in particular cases it violates legal expectations of parties. This makes it hard to choose which behaviour will be punishable by law and some actions might be recognised as illegal, although they could have been soundly considered as legal beforehand. Importance of these two values is further supported by the fact that sometimes there is no one objectively fair answer to legal questions- sometimes we just have to pick one and stick with it. Bearing in mind, that concept of justice varies in time and different societies, when we choose the answer in arguable cases we should pick the one which is consistent with the values of the legal system within which the case is being dealt with, i. e., follow relevant precedents.

When precedents are inconsistently ignored, judicial decisions can also be less persuasive⁴ and cause serious doubts, about whether they were influenced by illegitimate factors.⁵ Vice versa, obligation to follow established case-law can be considered as a safeguard which protects judicial impartiality, independence and, to some extent, functions as a mean to prevent corruption.

Besides that, when case-law provides a clear answer in particular case, it may influence persons not to litigate, since parties of the dispute can see clearer whether the outcome would be in their favour. Having this in mind the “guilty” party may simply decide to negotiate and this would lead to lesser amounts of unnecessary litigation.⁶ Also, it is often noted that doctrine of precedent makes judicial process more efficient,⁷ because it lets judges not to reconsider all over again questions of law which have already been decided.

3. Against binding force of precedents

On the other hand, there are reasons against binding force of judicial precedents. Perhaps the most important is the fact that discussion might lead to improvements of practice⁸ – when solution, which accidentally became the first, is strictly binding, this shuts the door for practice which can be fairer, economically useful and superior in other ways. Usually law recognises that judicial decisions might be wrong

² T. Bustamante, C. B. Pulido, et al, ‘On the Philosophy of Precedent. Proceedings of The 24th World Congress Of The International Association For Philosophy Of Law And Social Philosophy, Beijing, 2009’ (Stuttgart: Franz Steiner Verlag 2012) 37-38, 84; J. Stone, ‘Precedent and Law: Dynamics of Common Law Growth’ (Sydney: Butterworths 1985) 228; A. R. Miguel, ‘Equality before the Law and Precedent’ [1997] 10 Ratio Juris 388; M. Jacob, ‘Precedents And Case-Based Reasoning in the European Court of Justice: Unfinished Business’ (Cambridge: Cambridge University Press 2014) 13, 70.

³ T. M. Benditt, ‘The Rule of Precedent. Precedent in Law’ (Oxford: Clarendon Press 1987) 89-91; T. Bustamante, C. B. Pulido, et al, ‘On the Philosophy of Precedent. Proceedings Of The 24th World Congress Of The International Association For Philosophy Of Law And Social Philosophy, Beijing, 2009’ (Stuttgart: Franz Steiner Verlag 2012) 37-38; M. Jacob, ‘Precedents And Case-Based Reasoning In The European Court of Justice: Unfinished Business’ (Cambridge: Cambridge University Press 2014) 13, 70, 145.

⁴ M. J. Gerhardt, ‘The Power of Precedent’ (Oxford: Oxford University Press 2008) 146; R. A. Posner, ‘Jurisprudencijos problemos’ (Vilnius: Eugrimas 2004) 75.

⁵ S. Brenner, H. J. Spaeth, ‘Stare Decisis: The Alteration of Precedent on the Supreme Court, 1946-1992’ (Cambridge: Cambridge University Press 1995) 1.

⁶ V. Fon, F. Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis’ [2006] 26 International Review of Law and Economic 519-535; R. H. Caminker, ‘Why Must Inferior Courts Obey Superior Court Precedents?’ [1994] 46 Stanford Law Review 851; T. Bustamante, C. B. Pulido, et al, ‘On the Philosophy of Precedent. Proceedings Of The 24th World Congress Of The International Association For Philosophy Of Law And Social Philosophy, Beijing, 2009’ (Stuttgart: Franz Steiner Verlag 2012) 85; M. J. Gerhardt, ‘The Power Of Precedent’ (Oxford: Oxford University Press 2008) 177.

⁷ R. H. Caminker, ‘Why Must Inferior Courts Obey Superior Court Precedents?’ [1994] 46 Stanford Law Review 839-843; T. Bustamante, C. B. Pulido, et al, ‘On the Philosophy of Precedent. Proceedings of The 24th World Congress Of The International Association For Philosophy Of Law And Social Philosophy, Beijing, 2009’ (Stuttgart: Franz Steiner Verlag 2012) 37-38; F. Schauer, ‘Thinking Like a Lawyer. A New Introduction to Legal Reasoning’ (Cambridge: Harvard University Press 2009) 43; J. Stone, ‘Precedent and Law: Dynamics of Common Law Growth’ (Sydney: Butterworths 1985) 228.

⁸ R. H. Caminker, ‘Why Must Inferior Courts Obey Superior Court Precedents?’ [1994] 46 Stanford Law Review 860-864; V. Fon, F. Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis’ [2006] 26 International Review of Law and Economic 532; A. Marmor, ‘Should Like Cases Be Treated Alike?’ [2005] 11 Legal Theory 34.

and therefore, judicial process can be renewed to fix the mistake. However, it is allowed just as long as the mistake influences interests of parties.

Doctrine of binding precedent is sometimes criticised relying on principle of separation of powers,⁹ according to which courts do not have the legislative power – they are supposed to merely apply the law, not create it. However, this view is based on some false assumptions. Firstly, almost all theoretical paradigms agree that courts make law to some extent. Whether they just reveal parts of legal rule from between the lines of statutes or create new rules, such function is inevitably destined by abstract or rigid statutory rules - the extent of judicial legislation is often caused by the discretion provided by statutory law. If courts follow their decisions, which were made within such discretion (i. e., respect principles of equality, legal stability), there are no valid reasons to say that it infringes limits of their power. The truth is more likely opposite – solving similar cases differently can be considered as a higher level of law-making and a bigger intervention into legislative function of the government.

Doctrine of precedent sometimes can be viewed negatively because of its complexity¹⁰ – it is often very difficult to tell whether cases share important similarities/differences. Courts sometimes might fail to mention in some relevant fact, reason and because of that precedent might be followed in a case without this fact, which should have been treated as different. This threat can be minimised if we adopt proper rules for following precedents. Explicitly formulated rules and principles sometimes might require exceptions and strict doctrine of precedent can discourage later courts to depart from these flawed rules.

4. Main theories for following and distinguishing of precedents

There are many different approaches to application of precedents and all of them have unique advantages and disadvantages. In balance of precision and convenience, six groups of such approaches can be distinguished: (1) analogy, based on similarity of facts; (2) rule model; (3) precedents, as sources of principle's content; (4) reason based model; (5) result model; (6) precedents, as sources of statutory law's meaning. The last approach is typical for legal systems where binding force of precedents is not acknowledged, but, since precedent's significance is inevitable, it is said that they are not a source of law, but merely a place where legal interpretation can be found.¹¹ This view does not imply unique rules for reasoning with precedents, instead it can be based on rules for statutory interpretation, therefore this paper further focuses on other approaches.

Analogy of judicial precedent can be defined as choosing the applicable precedent according to similarity of facts.¹² One of ways to use it, is the Goodhart's method of material facts. Almost all sets of facts include some sort of differences, but, when we decide whether precedent is from a similar case, we should be evaluating only similarities between facts which are significant – the material facts.¹³ This method provides presumptions, which help to identify which facts are material: all facts, in regard of persons, location, time are to be presumed irrelevant; all facts, presented as significant in the previous decision, are to be treated as such; all facts, presented as insignificant in the previous decision, are to be treated as such; if previous decision does not provide such distinction, all facts should be treated as significant; all conclusions, based on

⁹ L. A. Alexander 'Precedent. A Companion to Philosophy of Law and Legal Theory' (Chichester: Blackwell Publishing Ltd. 2010) 496.

¹⁰ L. Goldstein, et al, 'Precedent in Law (Oxford: Clarendon Press 1987) 91-92; A. Marmor, 'Should Like Cases Be Treated Alike?' [2005] 11 Legal Theory 35.

¹¹ D. N. McCormick, R. S. Summers, 'Interpreting Precedents. A Comparative Study' (Dartmouth: Ashgate 1997) 521; J. Komárek, 'Reasoning with Previous Decisions Beyond the Doctrine of Precedent' [2013] 61(1) American Journal of Comparative Law 157.

¹² L. A. Alexander, E. Shervin, 'Demystifying Legal Reasoning' (Cambridge: Cambridge University Press 2008) 67; D. N. McCormick, R. S. Summers, 'Interpreting Precedents. A Comparative Study' (Dartmouth: Ashgate 1997) 497; C. Sunstein, 'Commentary on Analogical Reasoning' [1993] 106 Harvard Law Review 745.

¹³ T. Bustamante, C. B. Pulido, et al, 'On the Philosophy of Precedent. Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 2009' (Stuttgart: Franz Steiner Verlag 2012) 113; L. Goldstein, et al, 'Precedent in Law (Oxford: Clarendon Press 1987) 181; A. L. Goodhart, 'The Ratio Decidendi of a Case' [1959] 22(117) Mod. L. Rev.; I. McLeod, 'Legal Method' (Palgrave Macmillan 2007) 148-150; J. Stone, 'Precedent and Law: Dynamics of Common Law Growth' (Sydney: Butterworths 1985); E. Tjong Tjintai, K. Teuben, 'European Precedent Law' [2008] 16 European Review of Private Law 831; etc.

hypothetical considerations, are *obiter dictum*.¹⁴ It is worth noting, that some facts may carry various weight and lack of a particular fact does not necessarily allows to depart from precedent, i. e., some facts may support the final conclusion, but case should be decided in the same way when they are absent. Also, it is important that existence of the same facts may not be a sufficient basis for application of precedent and we should consider whether some fact meets the requirement of intensity – for instance, if missing the deadline can be excused because of the reason x, at some point, a period of time missed can be too long to be justified by this reason. It means that, if we have these facts: (1) deadline was missed and (2) important reason x, we must not automatically apply the precedent, but also evaluate, whether the role of the reason x. Goodhart's method is usually criticised as not fully reflecting processes of reasoning with precedents and insufficient (*inter alia* because it does not provide definite criteria to determine which facts are relevant),¹⁵ therefore additional instruments of reasoning are useful.

Perhaps, the most popular approach to reasoning with precedents is the rule model, which presupposes that the binding element of precedent is a rule.¹⁶ This model in itself is not sufficient to explain actual process of following case law and does not optimally combine flexibility and stability of law.¹⁷ Among other reasons, it is because sometimes overly abstract rules from precedents might not be fitting in some future cases and rule model does not precondition departure from such rules. Rule model can be compatible with flexibility if we attribute to judges the power to amend rules from precedents or if it is agreed that courts are bound by precedential rules, which are implicit and their interpretation is a prerogative of the court in subsequent case. View towards authority of explicitly formulated rules from precedents is usually sceptical, compared to the rule, which can be extracted from precedent by way of interpretation. Some of grounds, which support deviation from explicit precedential rules, are new important circumstances of the subsequent case, for which the original rule did not account, although exception from the rule would be very appropriate. In such cases it can be said that the earlier court delivered a rule, part of which does not support the precedent (the part in regard of the new circumstances), is excessive, so it can be treated as an *ultra vires* interpretation. Also, this part can be held as defective, because it was delivered *a priori*, without considering specific circumstances and reasons.¹⁸ However, sometimes harm from application of such rules can be very small and outweighed by the previously discussed reasons supporting precedent's authority – in these cases the rule should be followed.

Another way to interpret precedents is viewing them as a source of legal principles.¹⁹ When we face a situation where several legal principles provide different answers for the case, this kind of competition can be solved by analysis of how these principles work in case law. It gives us idea of how certain principles are perceived elsewhere and which interpretation would be mostly consistent with the rest of legal system – knowing the usually sufficient difference for cases to be treated differently, lets us predict with bigger certainty which cases will be treated differently in the future.²⁰ Approach of principles may be criticised for the lack of

¹⁴ R. Siltala, 'A Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law' (Oxford: Hart Publishing 2000) 88.

¹⁵ G. Lamond, 'Do Precedents Create Rules?' [2005] 11 Legal Theory 11; F. Schauer, 'Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy' [2008] 3-454 Perspectives on Psychological Science; J. Stone, 'Precedent and Law: Dynamics of Common Law Growth' (Sydney: Butterworths 1985) 231.

¹⁶ L. A. Alexander, E. Shervin, 'Judges as Rulemakers' [2004] 15 University of San Diego Public Law and Legal Theory Research Paper Series; L. A. Alexander, E. Shervin, 'Demystifying Legal Reasoning' (Cambridge: Cambridge University Press 2008); R. Cross, J. W. Harris, 'Precedent in English Law' (Oxford: Clarendon Press 2004) 72; W. M. Landes, R. A. Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' [1976] 249(19) Journal of Law and Economics 250.

¹⁷ L. A. Alexander, E. Shervin, 'Judges as Rulemakers' [2004] 15 University of San Diego Public Law and Legal Theory Research Paper Series, p. 23; G. Lamond, 'Do Precedents Create Rules?' [2005] 11 Legal Theory 8-10.

¹⁸ R. Cross, J. W. Harris, 'Precedent in English Law' (Oxford: Clarendon Press 2004) 52; L. Goldstein, et al, 'Precedent in Law' (Oxford: Clarendon Press 1987) 100; F. Schauer, 'Thinking Like a Lawyer. A New Introduction to Legal Reasoning' (Cambridge: Harvard University Press 2009) 55-56.

¹⁹ T. Bustamante, C. B. Pulido, et al, 'On the Philosophy of Precedent. Proceedings Of The 24th World Congress Of The International Association For Philosophy Of Law And Social Philosophy, Beijing, 2009' (Stuttgart: Franz Steiner Verlag 2012) 35; L. Goldstein, et al, 'Precedent in Law' (Oxford: Clarendon Press 1987) 95; A. Marmor, 'Should Like Cases Be Treated Alike?' [2005] 11 Legal Theory.

²⁰ R. Dworkin, 'Taking Rights Seriously' (Cambridge: Harvard University Press 1978) 125-126, 128-129, 340; SILTALA, R. Law, Truth and Reason. A Treatise on Legal Argumentation. New York: Springer, 2011, p. 56-60.

certainty, however, this particular characteristic is also its greatest strength – it makes the principle approach a more accurate reflection of actual reasoning with precedents, which often involves not only “all or nothing” binding force of precedents.

Reason based model recognises reasons as the binding element of judicial precedents.²¹ This approach can move the scales towards higher flexibility, further from stability. The problem with it can be that such effect would be unproportionally vast. Predicting future decisions only on the basis of reasons can be very hard. On the other hand, sometimes explicitly provided reasoning can be formulated imperatively, reason based model can cause rigidity, which is especially harmful in instances of defective reasoning.²² Nevertheless, this model can be beneficial if we use it in a narrower sense, together with other instruments. In the narrower sense this model can treat criteria from precedent as the binding element. Practically such reasoning can be composed of these steps: (1) analysis of previous practice and identification of criteria, which were used in it while making decisions; (2) selection of facts from the present case, which fall within boundaries of these criteria; (3) presentation of facts from similar earlier cases and how they were treated according to these criteria; (4) evaluation of facts from the present case according to these criteria and coming to conclusion. In such reason based model precedents serve as sources of two objects: as sources for criteria to be taken into account and as examples, which situations are beyond boundaries of one or other outcome for the case. Bindingness of these examples should be directly linked with how following them serves the presuppositions of precedent’s doctrine.

In matters concerning application of precedents also it can be useful to use the purpose²³ on which the precedent was based and purposes of relevant legal categories, such as particular individual rights, obligations and etc. Subjective intentions of judges from the precedential case can be useful as they might help to evaluate whether following precedent is purposeful.²⁴ Purposes and intentions do not exclusively serve only flexibility or stability of law, therefore they can bring benefit as a mean to reach reasonable balance between these two values.

Another significant view is the result model. According to it, binding force of precedent means courts obligation to apply the same legal consequences for the “analogous” party, which were applied in the precedent case.²⁵ This approach requires to check, whether reasons for following precedent in the present case are weaker or stronger than reasons for departure.²⁶ So, possibility to develop case law is essential for this approach and this makes the result model more flexible. However, this model is not very definite, because it does not provide any further clues for when the reasons for departure are sufficient, therefore it is not a fully unique model, compared to others.²⁷ Also, besides the obligation to check the demand for departure, it is very scarce, therefore this approach may not be considered as a separate theory, but only a supplement for others.

These approaches are mostly focused on the evaluation whether factual differences between cases are sufficient to justify different treatment. However, specific aspects of law may cause different treatment of cases even when all relevant facts are the same. Such situations are usually resulted by different legal context.²⁸

²¹ G. Lamond, ‘Do Precedents Create Rules?’ [2005] 11 *Legal Theory* 12-13; J. Raz, ‘The Authority of Law: Essays on Law and Morality’ (Oxford: Clarendon Press 1979) 184; J. Stone, ‘Precedent and Law: Dynamics of Common Law Growth’ (Sydney: Butterworths 1985) 123, 229-230.

²² L. A. Alexander ‘Precedent. A Companion to Philosophy of Law and Legal Theory’ (Chichester: Blackwell Publishing Ltd. 2010) 499.

²³ G. Lamond, ‘Do Precedents Create Rules?’ [2005] 11 *Legal Theory* 7; J. Raz, ‘The Authority of Law: Essays on Law and Morality’ (Oxford: Clarendon Press 1979) 203.

²⁴ J. Raz, ‘The Authority of Law: Essays on Law and Morality’ (Oxford: Clarendon Press 1979) 203.

²⁵ L. A. Alexander, E. Shervin, ‘Judges as Rulemakers’ [2004] 15 *University of San Diego Public Law and Legal Theory Research Paper Series*. 10; D. Patterson, et al, ‘A Companion to Philosophy of Law and Legal Theory’ (Chichester: Blackwell Publishing Ltd. 2010) 496-497; J. F. Harty, ‘Rules and Reasons in the Theory of Precedent’ [2011] 11 *Cambridge University Press* 2.

²⁶ J. F. Harty, ‘The Result Model of Precedent’ [2004] 10 *Legal Theory* 20-21.

²⁷ D. Patterson, et al, ‘A Companion to Philosophy of Law and Legal Theory’ (Chichester: Blackwell Publishing Ltd. 2010) 498; J. F. Harty, ‘The Result Model of Precedent’ [2004] 10 *Legal Theory* 19; J. F. Harty, ‘Rules and Reasons in the Theory of Precedent’ [2011] 11 *Cambridge University Press* 2.

²⁸ This characteristic can be found in Constitutional Court’s of the Republic of Lithuania 2007-10-24 ruling; Supreme Court’s of Lithuania 2015-05-29 decision in case No. 3K-3-323-421/2015; Supreme Administrative Court’s of Lithuania 2011-09-15 decision in case No. A492-2814/2011; Supreme Court’s of Lithuania 2009-05-25 decision in case No. 3K-7-162/2009; and etc.

Depending on legal measures invoked, sometimes particular categories (for instance, guilt, reasonable doubt when deciding questions of facts and etc.) can be treated differently. So, despite the fact, that cases would be analogous, precedent might not be applicable, when relevant legal context is not the same.

5. Overruling precedents

While distinguishing precedent helps to identify whether the precedent is applicable in some particular case, there is another instrument, which allows even bigger developments of law – overruling precedents. Act of overruling a precedent can be described as an instant where a case is solved differently than the precedent case and all material facts of these cases are similar.²⁹ Usually in Lithuanian jurisprudence a proper reason to overrule judicial precedent is said to be the objective need for departure, when it is inevitably, objectively necessary and constitutionally justifiable.³⁰

Changes in social, moral, economical context are among most widely mentioned reasons to overrule a judicial precedent.³¹ European Court of Human Rights has mentioned, that changes in context must be taken into account, when we are considering following earlier cases.³² Overruling precedent is said to be eligible, when deciding a case the way it was done in precedent, is suitable for former, but not present situation and in light of new circumstances, the same empirical results, which were reached in precedent case, cannot be achieved in present case by the same measures.³³

Also, it is usually agreed that precedent loses its authority when there were amendments of the statutory law, which was applied in the precedent.³⁴ However, changes in statutory law do not necessarily deem the precedent unfit – if changes were not essential, they might not be influential enough to support the overruling of precedent. Besides amendments of statutory law, relevant changes in case law can also be the cause for overruling of another precedent. In practice overruling of precedents is sometimes based by the fact that decisions in other related cases carry demand for different outcome of the present case.³⁵ Once we are able to notice, that in some different cases alternative values, principles begin to emerge, at some point, other older precedents become incoherent, inconsistent with the rest of case law.³⁶

When there were no actual changes in relevant context, precedents are sometimes overruled by simply searching for better ways to solve the case. It is quite widely agreed that rigid law is undesirable. The first judge to solve a certain type of case does not always happen to have the best possible answer- judicial practice is usually developed gradually from case to case. If there is reason to suspect that practice can be improved by overruling precedent, it should be taken into account whether: (1) following precedent would bring significant harm and departing from it – respective significant benefits;³⁷ (2) there were dissenting opinions in

²⁹ D. N. McCormick, R. S. Summers, 'Interpreting Precedents. A Comparative Study' (Dartmouth: Ashgate 1997) 521.

³⁰ E. Jarašiūnas, 'Oficialios konstitucinės jurisprudencijos koregavimo problemos' [2009] 1(115) Jurisprudencija 59; Constitutional Court's of Republic of Lithuania 2007-10-24, 2006-03-28 rulings; Supreme Court's of Lithuania 2015-12-15 decision in case No. 3K-7-525-916/2015; Supreme Court's of Lithuania 2013-01-04 decision in case No. 3K-7-83/2013.

³¹ See, for example, M. Jacob, 'Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business' (Cambridge: Cambridge University Press 2014) 175; A. Ross, 'On Law and Justice' (New Jersey: The Lawbook Exchange Ltd. 2004) 86.

³² See, for example, European Court's of Human Rights 2012-05-22 decision in Scoppola v Italy case, application no. 126/05; European Court's of Human Rights 2006-04-12 decision in Martine v France case, application no. 58675/00.

³³ T. Bustamante, C. B. Pulido, et al, 'On the Philosophy of Precedent. Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 2009' (Stuttgart: Franz Steiner Verlag 2012) 53.

³⁴ R. A. Posner, 'Jurisprudencijos problemos' (Vilnius: Eugrimas 2004) 302; V. Vasiliauskas, 'Teisminio precedento reikšmė romanų-germanų teisinėje sistemoje' (Vilnius: Vilniaus universitetas 2004) 29.

³⁵ S. Brenner, H. J. Spaeth, 'Stare Decidisis: The Alteration of Precedent on the Supreme Court, 1946-1992' (Cambridge: Cambridge University Press 1995) 16; M. Jacob, 'Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business' (Cambridge: Cambridge University Press 2014) 169-170.

³⁶ S. Brenner, H. J. Spaeth, 'Stare Decidisis: The Alteration of Precedent on the Supreme Court, 1946-1992' (Cambridge: Cambridge University Press 1995) 8.

³⁷ J. Stone, 'Precedent and Law: Dynamics of Common Law Growth' (Sydney: Butterworths 1985) 177.

precedent case, the precedent has been neglected in practice;³⁸ (3) precedent is widely spread in social relations;³⁹ (4) precedent is workable – did it cause the intended practical consequences;⁴⁰ (5) in precedent case not all important factors and reasons were considered, including relevant statutory and case law.⁴¹ In Lithuanian judicial practice there can also be found a few unique criteria for instances, where several competing precedents in similar cases can be found. In these cases relevant factors are which precedent is newer; more widely used in judicial practice; composition of precedent court (was the decision issued by one, several judges or, perhaps, plenary session of the court).⁴²

Every time we consider departure from precedent, it is useful to evaluate the role of presuppositions for doctrine of precedent in particular case – how strong parties' legal expectations could have been, whether departure could have been predicted and etc. Also, in jurisprudence there are no objections for the obligation to provide explanations for the departure from precedent – it is vital to make precedent law clear, because, if court fails to present reasons for departure, it can create uncertainty about which precedent should be applied in similar cases; whether old precedent was overruled and should be ignored altogether.

Although judicial precedents can sometimes be unfit for newly developed technological innovation, there are instruments to ensure flexibility of case law without unnecessary neglecting reasons, which support the need for stability of case law. In sum, judicial case law can be adapted for innovation using these criteria: (1) changes in social or similar kind of context; (2) changes in the context of statutory law or judicial precedents; (3) defects of precedent, where overruling would bring significant benefits.

Conclusions

Authority of judicial precedent is supported by principles of equality, legal stability (as a way to protect legal expectations, predictability of law, legal certainty), the aim of persuasive legal reasoning, impartiality, lesser amounts of unnecessary litigation and efficiency of judicial process.

Reasons to depart from judicial precedents (i. e., reasons against strict binding force of precedents) are the demand for improvements of judicial practice and complexity of precedent's doctrine. Also, sometimes principle of separation of powers is presented as such reason, but its weight in this matter is very questionable.

Main theories on reasoning with precedents are (1) analogy, based on similarity of facts; (2) rule model; (3) precedents, as sources of principle's content; (4) reason based model; (5) result model; (6) precedents, as sources of statutory law's meaning. None of these approaches in isolation are sufficient to reflect actual reasoning with precedents or is a perfect measure to improve practice. However, they can complement each other and be beneficial, when used together.

Judicial case law can be adapted for innovation using these criteria: (1) changes in social or similar kind of context; (2) changes in the context of statutory law or judicial precedents; (3) defects of precedent, where overruling would bring significant benefits.

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³⁸ S. Brenner, H. J. Spaeth, 'Stare Indecisus: The Alteration of Precedent on the Supreme Court, 1946-1992' (Cambridge: Cambridge University Press 1995) 16; 48; M. J. Gerhardt, 'The Power of Precedent' (Oxford: Oxford University Press 2008) 10; L. Goldstein, et al, 'Precedent in Law' (Oxford: Clarendon Press 1987) 98.

³⁹ J. Stone, 'Precedent and Law: Dynamics of Common Law Growth' (Sydney: Butterworths 1985) 184-185.

⁴⁰ M. J. Gerhardt, 'The Power of Precedent' (Oxford: Oxford University Press 2008) 19.

⁴¹ T. Bustamante, C. B. Pulido, et al, 'On the Philosophy of Precedent. Proceedings of the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 2009' (Stuttgart: Franz Steiner Verlag 2012) 53.

⁴² Constitutional Court's of the Republic of Lithuania 2007-10-24 ruling; Supreme Court's of Lithuania 2015-12-01 decision in case No. 3K-3-635-915/2015; Supreme Court's of Lithuania 2015-01-07 decision in case No. 3K-3-183-248/2015; Supreme Court's of Lithuania 2015-03-13 decision in case No. 3K-3-144-313/2015.

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INTERDISCIPLINARY APPROACH: A USEFUL BUT CHALLENGING TOOL FOR THE REGULATION OF SCIENCE AND TECHNOLOGIES

Margo Bernelin¹

Abstract

The latest progress of science and technologies question the ability of law, to provide sound regulation over the matters. Indeed, access to the human body for research, human cloning or artificial intelligence challenge the legal representation of what is the beginning of life, what it means to have a right to dignity or what makes a person the subject of rights. Those evolutions are at the core of new societal dynamics as they raise contemporary moral and ethical questions for the public debate. Accessing categories of analysis from different disciplines of studies would be helpful here to find new legal solutions to modern dilemmas. However what should one expect from that process?

This article seeks to demonstrate that two elements are to be expected from an interdisciplinary approach to the regulation of science and technologies. The first one is the reach of original legal outcomes. The study of the origins of legal provisions in this area of law will demonstrate that the promises of an interdisciplinary approach are no mere illusion but concrete realisation.

The second element to expect from an interdisciplinary approach to the regulation of science and technologies is a challenging journey. Indeed, two sets of challenges will be stressed. As a result, interdisciplinary approach to law should be conducted with methodological cautions and sufficient demonstrations to overcome barriers.

Keywords: biotechnologies, biology, philosophy, legal personhood.

Introduction

The latest progress of science and technologies question the ability of law, to provide sound regulation over the matters. Indeed, access to the human body for research, human cloning or artificial intelligence challenge the legal representation of what is the beginning of life, what it means to have a right to dignity or what makes a person the subject of rights. As a consequence it raises contemporary questions: is the legal environment capable of regulating those quickly changing matters²? Should new legal institutions be created to tackle those scientific and technological (r)evolutions? Here, is it noticeable that the evolutions referred to have the capacity to profoundly affect the society, remodelling our vision of what is to be a human being. Indeed, the debate is not just legal it is also moral and ethical. New societal dynamics are thus engaged and framed around two opposed visions, one of hope for the possible benefits drawn by scientific and technological evolutions and one of fear over the misused of those evolutions³. At the centre of a legal and public debate, the regulation of science and technology could very well benefit from an interdisciplinary approach to law in

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² From the development of computers, the Internet, electronic storage devices to advances in biomedicine with in vitro fertilisation, artificial organs and cells therapies. This situation challenges legal traditional concepts such as property rights with the question of human tissue, see one of the many authors on the subject: R. Hardcastle, 'Law and the Human Body: Property Rights, Ownership and Control' (Oxford: Hart Publishing 2007).

³ This types of debate are commonly found in different area judged as risky or unethical: nuclear energy, artificial intelligence, embryo research. For a demonstration see M. Mulkay, 'Rhetoric of Hope and Fear in the Great Embryo Debate' [1993] 23 Social Studies of Science 721. For an example on the possible negative effects of drone see European Committee Article 29 Data Protection Working Party's opinion, 'n°01/2015 on Privacy and Data Protection Issues relating to the Utilisation of Drones' (16 June 2015).

order to create innovative legal solutions. Such an approach to law can be instinctively understood as the gathering of different fields of research's conclusions over one object in order to inspire for new legal solutions. However a more precise definition is needed in order to escape confusions.

First of all interdisciplinarity should be distinguished from other approaches. When *transdisciplinary* approaches try to create, from different fields of study, one common knowledge and *multidisciplinary* approaches only create a patchwork, a juxtaposition of solutions developed by those disciplinary fields⁴, *interdisciplinary* approach fits a middle ground⁵. The core idea with this last approach is to make a synthesis of solutions from various fields and to inspire the legal study. It can be the borrowing of a solution or a new perspective brought by another field. Interdisciplinarity could here be *functional*, when it aims at an occasional borrowing or it can be *critical* when the purpose of the approach is to demonstrate the limits of the solution developed by one's own disciplinary field. Interdisciplinary approach should also be distinguished from *intradisciplinarity* where inside one field of study different sub-field's approach over one object could be confronted functionally or critically⁶.

The regulation of science and technologies could well benefit from an interdisciplinary approach to law whether functional or critical⁷. Indeed, science and technologies is a subject not only grasped by legal studies but by other different fields. Here biologist, engineers, but also philosophers, sociologist or economists have all a perspective toward the evolution brought by science and technologies. Law needs therefore to be open to other fields, to learn from them in order to better understand its own objects of study. However, what should one expect from that process?

This article seeks to demonstrate that two elements are to be expected from an interdisciplinary approach to the regulation of science and technologies. The first one is the reach of original legal outcomes. The study of the history of legal provisions in this area of law will demonstrate that the promises of an interdisciplinary approach are no mere illusion but concrete realisation. Indeed, it is from the borrowing and confrontation of the work of other social sciences such as philosophy or even "hard" sciences such as biology that the legal environment has been enriched. This would be explored through two case studies: the regulation of human embryo research (where original outcomes have already come into force) and artificial intelligence (where interdisciplinary approach to law is in motion in Europe to create future regulations).

The second element to expect from an interdisciplinary approach to the regulation of science and technologies is a challenging journey. Indeed, two sets of challenges can be stressed. The first one regards the fact that the reach of a "right solution" is an illusion in itself. Here the lack of consensus among lawyers and inside other disciplines could weaken the legal solution reached. As a result, an interdisciplinary approach may only provide for a more or less balanced solution and any interdisciplinary research will need to stress, as a methodological requirement, any other conflicting position. The second set of difficulties targets the fact that the progress of science and technologies challenge traditional legal conceptions that an interdisciplinary approach may not suffice to overcome.

⁴ R. Lawrence, 'Transgresser les frontières disciplinaires : l'exemple de l'écologie humaine', in F. Darbellay & T. Paulsen et al., 'Le défi de l'inter-et transdisciplinarité -Concepts, méthodes et pratiques innovantes dans l'enseignement et la recherche' (Lausanne: Presses polytechniques et universitaires romandes 2008), see p. 226.

⁵ On the distinction of the different types of researches see S. Glanert, 'De la traductibilité du droit' (Paris: Thèse de doctorat 2009) introduction.

⁶ For instance it could result from the confrontation of solutions from private law to public law. For a French application see: B. Faure, 'La collaboration du publiciste et du privatiste au sujet des droits fondamentaux des personnes morales' in 'La personnalité morale' (Paris: Dalloz 2010) 93-100.

⁷ Indeed a field of study has been created around the idea of interdisciplinarity: Science and Technologies Studies. This discipline has a sociologist agenda but gathers lawyers, economists, and philosophers. See: Sheila Jasanoff's contribution: S. Jasanoff, 'A Field of its Own: the Emergence of Science and Technology Studies' in R. Frodeman (ed.), 'The Oxford Handbook of Interdisciplinarity' (Oxford: OUP 2010) Chapter 13.

1. The creative benefits of an interdisciplinary approach to the regulation of science and technologies

The dividing line between the human being and the biological material, between the human life and the artificial life may appear easy to draw; it is almost intuitive. Of course human blood is not the equivalent to a human being and of course a vacuum robot is not a human life. However, nowadays those easy distinctions are questioned by the latest progress of science and technologies. Indeed, since the development of in vitro fertilisation processes, it is now possible to use a human embryo developed by those techniques, for research⁸. Here is the embryo a human being or simply a biological material? The same applies to the progress of computer sciences and the development of artificial intelligence: If a robot were capable of intuition-like moves, developing emotion-like reactions with autonomy would it be qualified as a human being? Those questions can be answered, and have been answered, by the use of interdisciplinary approaches to law. Here the use of philosophy, biology or sociology has helped developing original and legitimate legal solution. Two examples may illustrate this description: the case of the English statutory definition of a human embryo and the European literature over the future governance of artificial intelligence.

Early in the regulation of science and technology, the United Kingdom has sensed the need for an interdisciplinary approach to law on those questions. It was in 1982 that the British government took the step to create an interdisciplinary committee to work on the question of the social, ethical, legal implications of human fertilisation and embryology technics in charge of making suggestion for future legislation⁹. Among the many questions raised was the definition of a human embryo for the purpose of human embryo research. The idea was that giving a statutory definition for a human embryo would confer some legal protections to it.

To provide such an answer the committee has relied on its interdisciplinary composition. It was chaired by Mary Warnock, an Oxford Professor of moral philosophy and was composed of different medical professions: gynaecologist, neuroscientist, medical researcher, psychiatrists, but also of social workers, heads of clinical and hospital establishment, a professor of theology and few lawyers¹⁰. Faced with the question whether human embryos created in vitro for fertilisation processes could be used to research, as a material, and destroyed in the process and of its definition the committee felt the need to suggest a legal solution based both on philosophy and on scientific evidence¹¹. The committee took two steps in its answer; the first one was to decide upon embryo research authorisation or ban. The committee opted for the selection of a moral view over the subject and choose in favour of utilitarianism¹². That moral doctrine upheld the fact that an action should be performed if it confers more benefits to the society than cost¹³, and that for the subject the benefit overweigh the harm and that pleasure overweigh pain¹⁴. Therefore embryo research should be allowed as it grants hope for new scientific development that the society could benefit from until the point where embryo's pain overweight in the process.

The second question was then to define was is a human embryo on which research could be performed accordingly. For that second question the committee took upon some biological evidence to distinguish two steps in the development of a human life¹⁵. The first one would be the very early development of "when the

⁸ Research will aim at clinical application such as spinal cords injuries (see the EuroStemCell Group on the subject: <http://www.eurostemcell.org/factsheet/spinal-cord-injuries-how-could-stem-cells-help>, last accessed 22 march 2016) or retinal regeneration.

⁹ The report was thus addressed to (in the order of presentation) the Secretary of State for Social Services, the Lord Chancellor, the Secretary of State for Education and Science, The Secretaries of State for Scotland, Wales and Northern Ireland), see M. Warnock, 'A Question of Life' (New York: Basil Blackwell 1985) vi.

¹⁰ See for the details on the members of the committee: M. Warnock, 'A Question of Life' (New York: Basil Blackwell 1985) iv and v.

¹¹ Ibid, M. Warnock, 'A Question of Life', point 11.1.

¹² Ibid, M. Warnock, 'A Question of Life' point 11.20.

¹³ The famous proponent of utilitarianism are Jeremy Bentham (1748–1832; 'An Introduction to the Principles of Morals and Legislation', 1789) and John Stuart Mill (1806–1873 ; 'Utilitarianism', 1881)

¹⁴ M. Warnock, 'A Question of Life' (New York: Basil Blackwell 1985) point 11.20

¹⁵ The Committee received evidence from different groups : the Royal College of Obstetricians and Gynaecologists, the British medical association, the Medical Research Council and the Royal College of obstetricians, M. Warnock, 'A Question of Life' (New York: Basil Blackwell 1985) point, 11.21.

process of creating an embryo began¹⁶ which is called the “primitive streak”. The second stage would start as soon as the embryo has developed a nervous system and is therefore capable of feeling pain¹⁷. Before that stage the cells in developments are human embryos that could be used for research, after that stage which was assumed to be fourteen days after fecundation¹⁸, those cells could not be used for scientific research according to the utilitarian principle. With this interdisciplinary approach combining moral philosophy and biology, the committee suggested that this fourteen days definition should be part of the legal definition of a human embryo used for research¹⁹. This solution was passed into law with the Human Fertilisation and Embryology Act 1990. The solution is here original based of a philosophical approach to the question that required a definition of a human embryo based then on biological evidence. The solution is original as English Law, like many other European States, did not had any legal definition of an embryo at the time, neither in Common Law or Statutory Law²⁰. A strictly legal research could have led to qualify the end result of an in vitro fertilisation process as an embryo with the classic expression “should be regarded as”. The interdisciplinary approach has helped drawn a more precise line and fixed the use of human embryo for research at fourteen days.

Another mobilisation of interdisciplinary approach to law can be found in the regulation of the most recent technological development in artificial intelligence. With de progress of computer sciences it is now possible to foresee the creation of robots that would be capable of making sense of what they perceive in front of them, capable of making autonomous decisions²¹. This progress, led noticeably by Google DeepMind’s AlphaGo program²² and Google Self-Driving Car Project²³, will take place at a large scale as every robotic company is planning to create of worldwide market for its new technologies²⁴. However some legal questions will arise. For instance if a robot, taking an autonomous decision, creates damages: who should be held legally responsible? Whereas some of the legal literature argues that no change in law is necessarily to regulate this area as principles of tort law²⁵ or consumer’s rights²⁶ may be relevant, some at the contrary argues that new legal solutions should be explored as making the user or the manufacturer responsible would not be appropriate. Indeed, Lawrence Solum has argued more than twenty years ago that artificial intelligences should be awarded legal personhood on the model of what enjoy companies or administrative bodies²⁷. Here, a European project published in 2012 takes this original position on the basis of an interdisciplinary approach to law.

¹⁶ Ibid, M. Warnock, ‘A Question of Life’, point 11.5 and then Human Fertilisation and embryology Act 1990, section 3(4).

¹⁷ Ibid, M. Warnock, ‘A Question of Life’, point 11.20.

¹⁸ Adopted into law: Human Fertilisation and embryology Act 1990, section 3(4).

¹⁹ M. Warnock, ‘A Question of Life’ (New York: Basil Blackwell 1985) point 11.20. For a recent study of the report see: N. Hammond-Browning, ‘Ethics, Embryos and Evidence: a Look Back at Warnock’ [2015] 24 (4) Med Law Rev 588-619.

²⁰ For a study of the legal position of the UK at the time see : M. Warnock, ‘A Question of Life’ (New York: Basil Blackwell 1985) point 11.16.

²¹ This technology is set to take part in medicine with more autonomous surgical robots or equipment (for a legal study of this see: I.Poirot-Mazère, ‘Robotique et médecine: Quelle(s) responsabilité(s)?’ [2013] 24(4) Journal International de Bioéthique 99. The technology is foreseen to be used as assistive robotics for disabled people, security robotics, human extensions robotics or sexual robotics. See p. 13 the EuRobotics’s report Ch. Leroux, R. Labruto ‘D3.2.1 Ethical Legal and Societal issues in robotics’, 31 dec. 2012.

²² The computer program has recently beat a professional player at the game of Go, see: <https://deepmind.com/alpha-go.html> last accessed 22nd March 2016, S. Borowiec, ‘AlphaGo beats Lee Sedol in third consecutive Go game’ [12 March 2016] The Guardian.

²³ <https://www.google.com/selfdrivingcar/> Last accessed 22nd March 2016, M. Harris, ‘Google reveals plans to increase production of self-driving cars’ [12 September 2015] The Guardian, see also: S. Gibbs, ‘Google self-driving car gets pulled over for driving too slowly’ [13 November 2016] The Guardian.

²⁴ On the changing scales see: A. Muller, *La Net Economie* (Paris: PUF 2007), Chap. V.

²⁵ N. Devejans’ Public audition at the Conference organised by the French Parliamentary Office on Science and Technology, ‘Les robots et la Loi’, http://www.assemblee-nationale.tv/video.3475094_56692ecd1b174.opecst--audition-publique-sur-les-robots-et-la-loi-10-decembre-2015, last accessed 22 march 2016. Indeed, in French Law article 1384 Civil Code could already be apply for the guardian of a thing that has caused damages. See. A. Mendoza-Caminade, ‘Le droit confronté à l’intelligence artificielle des robots: vers l’émergence de nouveaux concepts juridiques?’ [2016] Recueil Dalloz 445.

²⁶ Here the European directive already transposed in national law could be the basis for civil actions against the producer: Directive 85/374/EEC on product liability.

²⁷ L. Solum, ‘Legal Personhood for Artificial Intelligences’ [1992] 70 North Carolina Law Review 1231.

In its report 'Suggestion for a green paper on legal issues in robotics'²⁸ the European group of research *euRobotics* argues that legal solutions should be learned from engineering and philosophy. The group focussed on the notion of autonomy as in law, philosophy and engineering it opens the way for capacity and personhood. According to the report, for engineers in that domain, autonomy means being capable of operating in the *real world* without external human control for a period of time²⁹. For a philosopher or an ethicist autonomy will mean being capable of making independent choices, which includes the capacity of choosing rules for one self³⁰. From those two approaches one could draw that an autonomous robot is the one capable of making its own decisions and rules without the external control of a human. For the report this has an echo in law with the idea of legal competence or capacity. Legal capacity is defined as the ability to make legal decisions that is to say to make decisions that which will be legally binding without the interference of a third party³¹. But more accurately it can also the autonomy previously described can be linked to the idea of legal personality which can be defined as the recognition by law of a being or an entity entitled of rights and bearer of duties³². The idea of autonomy has helped to recognise the legal personhood of moral persons. For legalists whenever an entity is capable to autonomously function in law, then legal personality should be recognised³³. The report concludes that such an extension should apply to robot as soon as there are autonomous in both engineering sense and philosophical sense³⁴. The idea is to ensure that artificial intelligence could bear civil liability. For that purpose the report suggests to create a compulsory fund that would be collected from users and fabricant and to impose to each robot a registration number. This is an original legal solution drawn from an interdisciplinary approach to law by focusing on one common concept: "autonomy".

The example of embryo research and definition and artificial intelligence evidenced that an interdisciplinary approach is the future of legal studies for the regulation of science and technologies. This legal creativity should not however hide the challenges that such an approach conveys.

2. The demanding challenges of an interdisciplinary approach to the regulation of science and technologies

Applying an interdisciplinary approach to the regulation of science and technologies offers interesting and relevant perspectives especially for science and technologies' regulation. However, it is not a quiet journey. Indeed, the difficulties arising from this approach to law should be taken into account in order to overcome them and to justify the presence of methodological safeguards³⁵. Here two elements suggest that precaution and imagination are needed to overcome the barriers that may come ahead.

The first element is to rebut the idea that an interdisciplinary approach to law can tackle any right legal solution. This optimum, *the right legal solution*³⁶, is a mere illusion. The lack of consensus among lawyers and more broadly the public over a legal question and the absence of consensus inside other disciplines could weaken the legal solution reached. Indeed, the evaluation of any solution is a subjective process and, as a consequence, what would be seen as "right" for a person would not necessarily be right for her/his neighbour. Indeed, any solution is the result of a choice made in a direction, accordingly the proponent of the option disregarded will be disappointed and will contest the new rule. An interdisciplinary approach may not overcome the subjectivity of any legal solution and may not achieve a "the right solution".

²⁸ The European Robotics Coordination Action (*euRobotics*), 'Suggestion for a green paper on legal issues in robotics' [31 December 2012]. Accessible at https://eu-robotics.net/cms/upload/PDF/euRobotics_Deliverable_D.3.2.1_Annex_Suggestion_GreenPaper_ELS_IssuesInRobotics.pdf, last accessed March, 22nd, 2016.

²⁹ *euRobotics*, 'Suggestion for a green paper on legal issues in robotics' [31 December 2012], p. 11.

³⁰ *Idem*.

³¹ P.H. Collins, 'Dictionary of law' (London: Bloombury 2004, 4th ed), entry 'capacity' and also, P. Cane and J. Conaghan, 'The New Oxford Companion to Law', (Oxford: OUP 2008) entry "Person" by Ngaire Naffine.

³² P. Cane and J. Conaghan, 'The New Oxford Companion to Law', (Oxford: OUP 2008) entry "Person" by Ngaire Naffine

³³ *Idem*.

³⁴ *euRobotics*, 'Suggestion for a green paper on legal issues in robotics' [31 December 2012], p. 11.

³⁵ Evaluating such approaches to law is a focus see: C. Millier, 'Evaluation of inter- and transdisciplinary research. Experiences and reflections on best practice' [2012] 20 (3) *Natures Sciences Sociétés* 330.

³⁶ See the invitation letter to this conference.

However, it could be suggested that if the “right legal solution” is only an illusion, the “best legal solution” might be more achievable. Indeed, interdisciplinary approach to law, allows for the recognition of innovative solution based on a large consultation of various fields of research working on similar topic. This process undeniably confers authority to the rule. Here the process may very much take into account sufficient work to reach, not the right, but at least the best legal solution. In the former robot illustration we could say that creating a particular legal personhood for the most advanced robot using artificial intelligence could be the best solution, as it will create a system in which the victim of a any damages will be compensated without having to proved the owner’s breach of duty for instance. On the other hand it would not be the best solution as its implementation and relevancy are questioned. Some researchers here argue that compensation can rely on existing law (consumers’ rights, tort law...) ³⁷ and that it will be very demanding to create a system that would fit too many different forms of artificial intelligence (from the vacuum robot, to the pet robot, to the military drone or the car without driver). As a result the original solution of a new legal personhood might only be the best legal solution. This idea is specially relevant in a field of regulation such as science and technologies. Here the question to be answered may be legal but are also moral, religious, economic or scientific. Our first example illustrates this: the definition of a human embryo that is to say the definition of the beginning of a human life. Here it will be difficult to reach a strong consensus, and legal solution will hardly be qualified as “right”.

Moreover the other challenging element is that the interdisciplinary process assumes that there is a consensus among one field of study over one object research and that this consensus would be useful for legal innovation. This is not often true. Therefore, interdisciplinary approaches to law should ensure that they are quite transparent over the absence of consensus on one notion. If we refer to the example of the definition of human embryo, it should be mentioned that biologists disagreed over the definition of the primitive streak ³⁸. Indeed, the Committee noted that different groups had different visions: 21, 14 and 12 days from fecundation. The Warnock Committee chose the definition that was the most widely accepted: fourteen days. It will be therefore important for interdisciplinary approaches to law to be transparent over the work they think fit their research and to underline any counter idea in the field studied. It is a methodological requirement.

The second element suggesting that an interdisciplinary approach to law is a challenging journey is that law, such as other disciplines, has been conceived as a closed one ³⁹. As a consequence its notions and objects of research are only legally construed and need creativity to be deconstructed. It is specially the case for the dividing line between an object and a subject of right. The review of the robot example illustrates this idea. Whereas the legal personality of entities such as companies and administrative institution is classic in law as it can be evidenced since Roman law, the inclusion of a new version of it will difficultly come into force. Indeed, as Xavier Boy explained “artificiality excludes humanity” ⁴⁰. Here attaching humanity to personality will be a strong barrier, present in French law, to oppose the inclusion of artificial intelligence in it even though it will be justify with interdisciplinary work.

Another example of strong barrier is legal tradition. For instance the French legal literature has, since a hundred year, construed theories on the liability for the damages made by an object, without having to prove any fault on the part of the owner or the guardian ⁴¹. Those theories have been applied as precedents in civil cases. Having a new derogatory system for artificial intelligence, even if it is not uncommon in French law ⁴², will need to overcome the French legal tradition here. The last derogatory system to those rules imposed on the French tradition took more than ten years to become part of French law after a long battle at the European

³⁷ See A. Mendoza-Caminade, ‘Le droit confronté à l’intelligence artificielle des robots: vers l’émergence de nouveaux concepts juridiques?’ [2016] *Recueil Dalloz* 445.

³⁸ M. Warnock, ‘A Question of Life’ (New York: Basil Blackwell 1985) point 11.21.

³⁹ R. Lanneau, ‘l’interdisciplinarité comme questionnement ; penser et dépasser (?) les limites des approches juridiques traditionnelles’ in E. Bottini et al (dir.), ‘Usages de l’interdisciplinarité en droit’, (Paris : Presses universitaires de Paris Ouest, 2014), 35-52, p.39.

⁴⁰ X. Bioy, ‘Vers un statut juridique des androïdes ?’, [2013] 24(4) *Journal International de Bioéthique* 85.

⁴¹ See for a summary of ‘risk theories’ : L. Josserand, ‘ De la responsabilité des choses inanimées’ re-printed in S. Carval, ‘La construction de la responsabilité civile’ (Paris :PUF, 2001) 30.

⁴² For instance the derogatory system for traffic accident : Loi n° 85-677 tendant à l’amélioration de la situation des victimes d’accidents de la circulation et à l’accélération des procédures d’indemnisation [1985] *JORF* 6 juil. 1985 p. 7584.

Court of Justice⁴³. Indeed the 1985 Directive on product liability was only integrated in French law in 1998 after the European Court of Justice finds that France was in breach of its European obligations. As a result, even an interdisciplinary approach to law will not be sufficient to fastly obtain a translation in French law.

Conclusions

If interdisciplinary approach to law has proved and is proving that it help can reach original legal solution in highly debated area such as the regulation of embryo research or the future of artificial intelligence, it proves also to be a challenging approach. Indeed it can only achieve a balanced solution and requires methodological justification. Moreover, the way can be long for solution derived from an interdisciplinary research as they might face legal tradition as an obstacle.

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⁴³ Case C-293/91 [1993] ECR I-00001; Commission of the European Communities v French Republic (failure to transpose); Case C-52/00 [2002] ECR I-03827; Commission of the European Communities v French Republic (incorrect transposition).

LAW BY TECHNOLOGY OR TECHNOLOGY BY LAW? – AN ILLUSTRATION USING THE EXAMPLE OF VIDEO SURVEILLANCE

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Abstract

In the modern information society of the twenty-first century, making an assessment of information technology-related legal problems without taking into account the technical issues is no longer appropriate. Interdisciplinary approaches are mandatory to ensure that legal problems are not overlooked. In addition to economic, ethical and social aspects, technical aspects play an increasingly important role in the law, with technical infiltration into daily human life being reflected in the relevant laws. However, there is often a great deal of uncertainty as to whether technical innovations are compatible with existing legal standards. New questions arise, such as: Should new technologies be avoided due to legal barriers? Do legal rules need to be adapted to current technological developments? Does law determine technology or is law rather driven by technology?

Keywords: intelligent video surveillance, new technologies, privacy, data protection law, law and technology.

Introduction

The legal system is challenged continuously by technology, and not just since the beginning of industrialisation in the early eighteenth century.² On the one hand, law must limit technology, on the other, law must not retard or prevent the emergence of new technologies. Rather, legal regulations should reduce the risk associated with the use of technical systems to a socially acceptable level.³ This is even more true in today's modern information society where smartphones, laptops, computers and tablets are already part of everyone's daily lives. Even current technical developments, such as autonomous driving, Big Data and Smart Data, Industry 4.0 and the Internet of Everything, are achievements that require a legal structure. This structure must also apply to future innovations.

Therefore, today and in the future, early interdisciplinary cooperation between engineers and legal experts is necessary. Only in this way can both disciplines exchange their recent findings. Engineers can learn which legal regulations need to be taken into account, while legal experts can call attention to regulatory gaps or legal needs for adjustments, or point out legal limits. Thus, future technology and its consequences can be measured against legal standards before its launch.⁴ According to the broad range of techniques, countless fields of law can be named (such as telecommunication law, media law or computer law) that have an in-depth relation to technology.⁵ One particular form is data protection law; this was created as a reaction to technology specific hazards (of informational self-determination) and is based on a risk analysis of data processing.⁶ Therefore, data protection law can only withstand technological progress if it is designed and updated in an appropriate way that takes technical development into account.

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² Cf. Marburger, *Die Regeln der Technik im Recht* (Köln: Heymanns 1982), p. 1 et seq.; the history of technology law in detail Vec, in: Schulte/Schröder (Hrsg.), *Handbuch des Technikrechts* (Heidelberg: Springer 2011), p. 3 et seq.

³ Marburger, *Die Regeln der Technik im Recht* (Köln: Heymanns 1982), p.2.

⁴ Di Fabio, in: Vieweg (Hrsg.), *Techniksteuerung und Recht* (Köln: Heymanns 2000), p. 19.

⁵ Vec, in: Schulte/Schröder (Hrsg.), *Handbuch des Technikrechts* (Heidelberg: Springer 2011), p. 79.

⁶ Bizer, in: Schulte/Schröder (Hrsg.), *Handbuch des Technikrechts* (Heidelberg: Springer 2011), p. 564.

A particularly illustrative and recent example linking law and technology is the development of video surveillance and its data protection compliance.⁷ Therefore, this article describes the technical progress of video surveillance (1.), outlines selected data protection opportunities and the limits of European regulations (2.) and uses this concrete example to answer the question of whether the law is determined by technology or whether technology follows the law (3.). In the final section, a conclusion and outlook are given (4.).

1. The technical progress of video surveillance

From the mid-1970s on, video surveillance could be described as a technical system. Previously, video surveillance often consisted of just a single camera that was connected to a single monitor.⁸ Soon, several images from different cameras could be shown concurrently on a single monitor.⁹ The next step allowed the optional connection of multiple cameras to a monitor.¹⁰ Finally, using crossbars¹¹ enabled the display of different alarm and video scenes from different cameras on large monitor walls.¹² These basics of analogue video surveillance systems have become largely obsolete since the mid-1990s, when digital video surveillance systems came into being.¹³ The four technological pillars of digital video surveillance are compression, transfer, image analysis and the storage of video images.¹⁴

Today, video surveillance can achieve a lot, particularly in the field of image analysis. It is possible to detect changes in images, people can be tracked (“tracking”) or they can be detected based on their face (“face recognition”).¹⁵ In these cases, video surveillance is often called intelligent video surveillance.¹⁶ The special feature of such intelligent video surveillance systems is the analysis and interpretation of previously collected information.¹⁷ It is characteristic for such systems to have microprocessors independently evaluating data and performing error corrections or similar tasks.¹⁸ Video surveillance gets its “intelligence” from the fact that the system evaluates images by itself and thus replaces the intelligence of a human being who would typically be observing the area.¹⁹

The technical functioning of intelligent video surveillance can be described as follows:²⁰ Firstly, an optical lens captures the incident light, and this is followed by an image capture. This image capture ensures that the light is converted into an image. A so-called “ASIP block” (application-specific information processing)

⁷ Cf. Bier/Spiecker gen. Döhmann, *Intelligente Videoüberwachungstechnik: Schreckensszenario oder Gewinn für den Datenschutz?* [2012] CR 2012 610 et seq.; CR 2012, 610 et seq.; Roßnagel/Desoi/Hornung, *Gestufte Kontrolle bei Videoüberwachungsanlagen* [2011] DuD 2011 694 et seq.; Hornung/Desoi, „Smart Cameras“ und automatische Verhaltensanalyse [2011] K&R 2011 153 et seq.; Spiecker gen. Döhmann, *Big Data intelligent genutzt: Rechtskonforme Videoüberwachung im öffentlichen Raum* [2014] K&R 2014 549 et seq.; Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 et seq.

⁸ Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 5.

⁹ For technical realisation „quads“ were used, cf. Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 5 et seq.

¹⁰ Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 6.

¹¹ A crossbar is a control unit for switching different signal sources to one or more consumers.

¹² Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 6.

¹³ Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 7; Schmidt, *Professionelle Videotechnik* (Berlin: Springer Vieweg 2009), p. 15.

¹⁴ Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 15.

¹⁵ More examples Müller, *Videoüberwachung in öffentlich zugänglichen Räumen* (Zürich: Nomos 2011), p. 17 et seq.

¹⁶ Roßnagel/Desoi/Hornung, *Gestufte Kontrolle bei Videoüberwachungsanlagen* [2011] DuD 2011 694 (694); Bier/Spiecker gen. Döhmann, *Intelligente Videoüberwachungstechnik: Schreckensszenario oder Gewinn für den Datenschutz?* [2012] CR 2012 610 (610).

¹⁷ Bier/Spiecker gen. Döhmann, *Intelligente Videoüberwachungstechnik: Schreckensszenario oder Gewinn für den Datenschutz?* [2012] CR 2012 610 (610); Müller, *Videoüberwachung in öffentlich zugänglichen Räumen* (Zürich: Nomos 2011), p. 17; Belbachir, *Smart Cameras* (New York: Springer 2010), p. 3 et seq.

¹⁸ Belbachir, *Smart Cameras* (New York: Springer 2010), p. 3.

¹⁹ Held, *Intelligente Videoüberwachung* (Berlin: Duncker & Humblot 2014), p. 21.

²⁰ Belbachir, *Smart cameras* (New York: Springer 2010), p. 22; see also Bretthauer/Krempel, in: Schweighofer/Kummer/Hötzendorfer (Hrsg.), *Transparenz* (Wien: 2014), p. 525 et seq.

is the most important component of the intelligent camera. It is responsible for analysing and evaluating previously generated pictures and forms the “brain” of the camera.²¹ The images are processed with the help of the algorithms in this part of the camera. The algorithms can be programmed in such a way that a video image is only visible on the monitor when a predefined event occurs – for example, when a person falls down.²² Another communication interface can send commands, instructions and information to an individual. Thus, digital video cameras capture images, but these pictures are only used for downstream analysis; they cannot be viewed and evaluated by an operator purely by watching the monitor.

The advantage of intelligent video surveillance is the fact that a video image is no longer transmitted to a monitor. An image is only made visible when this is necessary – for example, if the system has made an assessment of the situation. Monitoring is now much more effective, since in recent classic camera-monitor systems the observers spent 99% of their time observing non-critical scenes.²³ Intelligent video surveillance can relieve staff because such systems can differentiate between important and unimportant scenes. At the same time, other technical mechanisms can be used to make video surveillance much more privacy-friendly. Thus, images can be made anonymous by pixelating the people.²⁴

In recent years, the technical development of video surveillance has progressed significantly. Therefore, decisions that were previously made by a person will be made by the system itself in the future.

2. Legal opportunities and limitations of video surveillance

Video surveillance using the camera-monitor principle has already led to numerous legal discussions.²⁵ The use of modern video surveillance technology will intensify this debate because it will significantly change the extent and quality of monitoring.²⁶ The new issues that arise will affect fundamental rights and data protection issues in particular, on a national and international level. At European level, the Data Protection Directive (DPD) must (still) be considered (2.1.), although this regulation will be substituted in 2018 by the European General Data Protection Regulation (GDPR) (2.2.).

2.1. Data Protection Directive 95/46/EC

The DPD contains no special regulation for video surveillance.²⁷ However, some recitals do refer to video and audio recordings.²⁸ The Court of Justice of the European Union had to verify the compatibility of the video

²¹ Belbachir, *Smart cameras* (New York: Springer 2010), 2010, p. 22.

²² In detail Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 et seq.; cf. www.kastel.kit.edu, last downloaded 2016-03-17; cf. <https://www.youtube.com/watch?v=rmpRsnWaRz4>, last downloaded 2016-03-17.

²³ Döring, *Digitale CCTV-Systeme – Moderne Technik der Videoüberwachung* (Heidelberg: ecomed 2004), p. 4.

²⁴ For example Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 (240).

²⁵ Hornung/Desoi, „Smart Cameras“ und automatische Verhaltensanalyse [2011] K&R 2011 153 (154).

²⁶ Hornung/Desoi, „Smart Cameras“ und automatische Verhaltensanalyse [2011] K&R 2011 153 (155); Bier/Spiecker gen. Döhmman, *Intelligente Videoüberwachungstechnik: Schreckensszenario oder Gewinn für den Datenschutz?* [2012] CR 2012 610 et seq.; Spiecker gen. Döhmman, *Big Data intelligent genutzt: Rechtskonforme Videoüberwachung im öffentlichen Raum* [2014] K&R 2014 549 et seq.; Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 et seq.

²⁷ DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, L 281, 23/11/1995 P. 0031-0050.

²⁸ Cf. recital 14 and recital 16; recital 14: „Whereas, given the importance of the developments under way, in the framework of the information society, of the techniques used to capture, transmit, manipulate, record, store or communicate sound and image data relating to natural persons, this Directive should be applicable to processing involving such data.“

monitoring of a publicly accessible area by an individual with the DPD for the first time in 2014.²⁹ There was no doubt that video surveillance comes under the scope of the DPD. Also, the European Commission realized that although there are a number of legal and practical questions in the context of sound and image data, these questions could be solved adequately by national legislation. Therefore, there was considered to be no further need for regulation at European level, which could consist of a special video surveillance rule.³⁰

Due to this, European Member States have often made specific rules in their national data protection laws to cover video surveillance: Germany in § 6b BDSG, Austria in § 50a ÖDSG,³¹ Lithuania in §§ 16 et seq. Law on Legal Protection of Personal Data,³² the United Kingdom in §§ 26 et seq. Regulation of Investigatory Powers Act 2000,³³ Denmark in § 26a Act on Processing of Personal Data,³⁴ Liechtenstein in § 6a Data Protection Act³⁵ and Norway in §§ 36 et seq. Personal Data Act.³⁶ Other Member States, including Latvia³⁷ and Italy,³⁸ apply data protection law without having a special regulation for video surveillance.³⁹ Therefore, the implementation of the DPD into national law is not consistent with regard to video surveillance,⁴⁰ although there is a general agreement that video surveillance qualifies as a relevant data protection process.⁴¹

2.2. General Data Protection Regulation

The General Data Protection Regulation (GDPR)⁴² has general application, is binding completely and is directly applicable in all Member States (Art. 288 para. 2 TFEU), meaning that the DPD will consequently be repealed (Art. 88 GDPR). Therefore, in future, video surveillance must be legally assessed under the provisions of the GDPR unless special clauses for certain areas allow Member States to partially follow their own rules.

At this point the GDPR has a significant disadvantage, since it does not contain specific rules for video surveillance. This means that it is necessary to refer to Art. 6 GDPR.⁴³ Here, Art. 6 no. 1 d) and Art. 6 no. 1 f) GDPR are especially relevant.⁴⁴ Art. 6 no. 1 d) GDPR can serve as legitimation when intelligent video surveillance systems are used in health facilities.⁴⁵ More often, video surveillance must be measured against

²⁹ EuGH, Urt. v. 11.12.2014 - Rs. C-212-13 = CR 2015, 100 (m. Anm. Bretthauer) = NJW 2015, 463 (m. Anm. Klar) = ZD 2015, 77 (m. Anm. Lachenmann).

³⁰ Scholz, in: Simitis (Hrsg.), BDSG (Baden-Baden: Nomos 2014), § 6 b Rn. 22; Commission of the European Communities, First report on the implementation of the Data Protection Directive (95/46/EC), COM(2003) 265 final, 2003-05-15, p. 22 et seq.; dissent: European Commission for democracy through law (Venice Commission), Opinion on video surveillance in public places by public authorities and the protection of human rights, Study No. 404/2006, CDL-AD(2007)014, p. 15.

³¹ <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001597>, last downloaded 2016-03-17.

³² http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=435305&p_query=&p_tr2=2, last downloaded 2016-03-17.

³³ <http://www.legislation.gov.uk/ukpga/2000/23/contents>, last downloaded 2016-03-17.

³⁴ <http://www.datatilsynet.dk/english/the-act-on-processing-of-personal-data/read-the-act-on-processing-of-personal-data/compiled-version-of-the-act-on-processing-of-personal-data/>, last downloaded 2016-03-17.

³⁵ <https://www.gesetze.li/lilexprod/lgsystpage2.jsp?formname=showlaw&lglbid=2002055000&gueltigdate=05022016>, last downloaded 2016-03-17.

³⁶ <http://www.datatilsynet.no/English/Regulations/Personal-Data-Act/>, last downloaded 2016-03-17.

³⁷ http://www.dvi.gov.lv/en/wp-content/uploads/legal-acts/Personal_Data_Protection_Law.doc, last downloaded 2016-03-17.

³⁸ http://www.garanteprivacy.it/web/guest/home_en/italian-legislation, last downloaded 2016-03-17.

³⁹ See also Article 29 Data Protection Working Party, Working Document on the Processing of Personal Data by means of Video Surveillance, WP 67, p. 8 et seq.

⁴⁰ Article 29 Data Protection Working Party, Working Document on the Processing of Personal Data by means of Video Surveillance, WP 67, p. 8.

⁴¹ Article 29 Data Protection Working Party, Working Document on the Processing of Personal Data by means of Video Surveillance, WP 67.

⁴² Cf. https://www.janalbrecht.eu/fileadmin/material/Dokumente/GDPR_consolidated_LIBE-vote-2015-12-17.pdf, last downloaded 2016-03-17.

⁴³ Bretthauer/Krempel/Birnstill, Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO [2015] CR 2015 239 (242).

⁴⁴ Bretthauer/Krempel, in: Schweighofer/Kummer/Hötendorfer (Hrsg.), Transparenz (Wien: 2014), p. 525, 532.

⁴⁵ Bretthauer/Krempel, in: Schweighofer/Kummer/Hötendorfer (Hrsg.), Transparenz (Wien: 2014), p. 525, 532.

Art. 6 no. 1 f) GDPR, whereas this is a decision purely concerning the balancing of interests. This means that the interests of the observed person and the interests of the observer must be in accordance. Nevertheless, the specific characteristics of the monitored situation and the used system can be taken into account.⁴⁶ Yet, in order to take the technical possibilities into account at this point, a specific video surveillance rule would be desirable. This is generally true in light of the extent of video surveillance today. There are approximately 4,500,000 cameras in use in the UK ⁴⁷ and 400,000 in Germany;⁴⁸ this is an upward trend, although there with no reliable figures.

Overall, Art. 6 GDPR is very open, broad and partially unclear.⁴⁹ A specific video surveillance regulation would result in more legal certainty and clarity, and that is absolutely necessary in a highly sensitive area like video surveillance.⁵⁰ Consenting to video surveillance – as an alternative to legal admission – is not suitable in practice.⁵¹ On the one hand, it is not possible to conclude an agreement by entering the observed area,⁵² on the other, the data subject ought to be informed about monitoring before entering the protected area.

Additionally, a modern video surveillance system must function in accordance with data protection principles (see Art. 5 GDPR).⁵³ This would ideally be taken into account during the technical development (privacy by design) of such systems.⁵⁴ It includes different principles such as data minimization (Art. 5 c) GDPR), transparency (Art. 5 a) GDPR) and storage limitation (Art. 5 e) GDPR). So far, these principles have been essentially standardised in Art. 6 DPD, on which Art. 5 GDPR is based. It should be noted that data must be limited to what is necessary according to the purposes for which it is being processed. Intelligent video surveillance can achieve this by making images anonymous.⁵⁵ Transparency can be ensured if the video surveillance system is adjusted for the observed persons, for example, allowing the data subject to interact with the video surveillance system.⁵⁶ Storage limitation can be adhered to if data is only stored when a special event occurs.⁵⁷

Finally, intelligent video surveillance must be in accordance with Art. 20 GDPR because the data subject must have the right not to be subject to a decision based solely on automated processing, including profiling, which has legal consequences for the data subject or similarly significantly affects them. The regulation is particularly intended to prevent cases such as the automatic refusal of an online credit application, or e-recruiting practices without any human intervention.⁵⁸ However, it applies to intelligent video surveillance.⁵⁹

⁴⁶ In detail Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 (242).

⁴⁷ <http://www.sueddeutsche.de/digital/ueberwachungskameras-in-grossbritannien-die-toten-augen-von-london-1.199517>, last downloaded 2016-03-17.

⁴⁸ von Stechow, *Datenschutz durch Technik* (Wiesbaden: Deutscher Universitäts Verlag 2005), p. 17.

⁴⁹ Bretthauer/Krempel, in: Schweighofer/Kummer/Hötzendorfer (Hrsg.), *Transparenz* (Wien: 2014), p. 525, 532.

⁵⁰ Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 (242).

⁵¹ Also Seifert, *Neue Regeln für die Videoüberwachung – Visuelle Kontrolle im Entwurf der EU Datenschutz-Grundverordnung* [2013] DuD 2013 650 (652).

⁵² BVerfGK 10, 330, Beschl. v. 23.02.2007 - 1 BvR 2368/06 = NVwZ 2007, 688.

⁵³ In detail Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 (242 et seq.).

⁵⁴ In detail von Stechow, von Stechow, *Datenschutz durch Technik* (Wiesbaden: Deutscher Universitäts Verlag 2005), p. 7 et seq.

⁵⁵ Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 (243); Winkler/Rinner, *Security and Privacy Protection in Visual Sensor Networks: A Survey* [2014] ACM Computing Surveys 2014 1 (11 et seq.).

⁵⁶ See also Vagts, *Privatheit und Datenschutz in der intelligenten Überwachung – Ein datenschutzgewährendes System entworfen nach dem „Privacy by Design“ Prinzip* (Karlsruhe: Universitätsverlag 2013), p. 70 et seq.

⁵⁷ In detail Bretthauer/Krempel/Birnstill, *Intelligente Videoüberwachung in Kranken und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 (244 et seq.).

⁵⁸ Recital 58 GDPR.

⁵⁹ Also Bretthauer/Krempel, in: Schweighofer/Kummer/Hötzendorfer (Hrsg.), *Transparenz* (Wien: 2014), p. 525, 533.

Such systems can be used, for example, to analyse the behaviour of people. Thus, if an unusual behaviour is detected, the system can trigger an alarm. Only under these circumstances is a full visible image transmitted. However, if it is the video surveillance system that decides whether or not an unusual behaviour has taken place, then Art. 20 GDPR is relevant.

3. Law by technology or technology by law?

The previous sections have separately considered the technical progress and the legal framework in the field of video surveillance. Now the connection between these two areas will be shown in order to determine whether law follows technology or technology is determined by law. Firstly, technical innovations and related legal (re-)actions are generally considered (3.1.), before looking in particular at the relation between video surveillance and law (3.2.).

3.1. Technical innovation and legal (re-)action

Often the argument is made that law is “lagging behind” technological development.⁶⁰ The reason is that law is static, while technology is dynamic.⁶¹ Law can only respond to technological developments, so it must be that it follows the progress of technology.⁶² Many examples suggest that law is driven by technology and not technology by law, as outlined below.⁶³

So, it is true, that law is mainly driven by technology. As early as the thirteenth century, London experienced severe environmental problems caused by the use of coal. The city reacted with different legislative and administrative measures to try and solve these problems. The invention of the steam engine in the middle of the eighteenth century initially triggered no direct legislative or administrative efforts. However, from the 1830s onwards, Prussia adopted a series of laws and regulations that are known as “Dampfkesselgesetzgebung” (steam boiler legislation).⁶⁴ During the second half of the nineteenth century, many new technologies were regulated in the chemical and optical industries, and in the fields of electrical engineering and mechanical engineering. Overall, the increasingly complex regulatory issues led to an increased coupling of legal and technical knowledge. From the middle of the twentieth century, an extensive “mechanization of life” was set in motion, e.g. in the fields of nuclear energy, microelectronics, television, production automation, aerospace and medical engineering.

In today’s modern information society, new technologies require specific answers to specific legal questions. In connection with smartphones, laptops and personal computers, the Federal Constitutional Court has created a “new” right to the guarantee of the confidentiality and integrity of information technology systems, as new types of threats to humans are no longer covered by other fundamental rights.⁶⁵ In the context of autonomous driving, many difficult legal and liability issues will arise.⁶⁶ In Big Data and Smart Data applications, legal questions concerning data protection law, copyright law, competition law, contract law and liability law must be taken into account.⁶⁷ In the areas of Industry 4.0 and the Internet of Things, questions

⁶⁰ See Géczy-Sparwasser, *Die Gesetzgebungsgeschichte des Internet* (Berlin: Duncker & Humblot 2003), p. 24 with further references.

⁶¹ Géczy-Sparwasser, *Die Gesetzgebungsgeschichte des Internet* (Berlin: Duncker & Humblot 2003), p. 24.

⁶² Géczy-Sparwasser, *Die Gesetzgebungsgeschichte des Internet* (Berlin: Duncker & Humblot 2003), p. 24 with further references.

⁶³ The examples are from Vec, in: Schulte/Schröder (Hrsg.), *Handbuch des Technikrechts* (Heidelberg: Springer 2011), p. 3 et seq.

⁶⁴ Vec, in: Schulte/Schröder (Hrsg.), *Handbuch des Technikrechts* (Heidelberg: Springer 2011), p. 24 with further references.

⁶⁵ BVerfGE 120, 274 (302); dissent Eifert, *Informationelle Selbstbestimmung im Internet – Das BVerfG und die Online-Durchsuchung* [2008] NVwZ 2008 521 et seq.

⁶⁶ Jänich/Schrader/Reck, *Rechtsprobleme des autonomen Fahrens* [2015] NZV 2015 313 et seq.

⁶⁷ See also Zieger/Smirra, *Fallstricke bei Big Data Anwendungen – Rechtliche Gesichtspunkte bei der Analyse fremder Datenbestände* [2013] MMR 2013 418 et seq.

must be answered that affect product safety issues and IT security.⁶⁸ Using SmartTV devices leads to questions about data protection law.⁶⁹ Additionally, cloud computing will raise new legal questions, especially in the field of data protection law, liability law and the law of evidence.⁷⁰ All these phenomena generate specific legal issues in connection with technology. Therefore, the state is forced to meet these technical innovations with new legal answers.⁷¹ Overall, digitisation leads to the consideration of new legal solutions and concepts. An essential characteristic of this development is that technological innovation makes the first step, which the law then reacts to.⁷² This is not a bad thing because, in terms of regulations and legislative decrees, legislation enables technical progress to have sufficient freedom. So, in the process of legal standardisation of technology, social implications can be considered.

3.2. The relation between video surveillance and law

In the field of video surveillance, technical development led directly to an increase in the usage of video surveillance technology. Video surveillance as the subject of legal regulation only became an issue due to spatial extension.

In Germany, the use of video surveillance dates back to the early 1960s, with cameras being used for traffic control.⁷³ In the mid-1970s, around 25 fixed cameras were connected to the control centre in Hannover, making it possible to watch the images from them continually on a monitor.⁷⁴ Also, mobile cameras were increasingly used. At the end of the 1980s, the police in Baden-Württemberg had 34 cars and five motorcycles that were equipped with cameras.⁷⁵ Since the mid-1990s, video surveillance has increasingly been used in different scenarios. For example, video surveillance is used today to monitor public streets and squares, public transport and meetings.

Therefore, it is surprising that it was not until 2001 that video surveillance was the subject of a special regulation in data protection law in Germany.⁷⁶ All previous data protection acts had no specific video surveillance regulation, although in 1988⁷⁷ and 1997⁷⁸ some proposals for a video surveillance standard were introduced into parliament. Also, in March 2000, the conference of Data Protection Commissioners of the Federation and the Countries outlined specific requirements for creating a video surveillance regulation.⁷⁹ Finally, the legislator created a special video regulation in data protection law because the general provisions of data protection law were considered to be insufficient.⁸⁰ On the one hand, the new standard (§ 6 b BDSG) was praised, but on the other, it was also the subject of a great deal of criticism.⁸¹

At European level, video surveillance is addressed in particular by the Art. 29 Working Party.⁸² Nevertheless, neither the DPD nor the GDPR contains a specific video surveillance regulation; only in the

⁶⁸ Bräutigam/Klindt, *Industrie 4.0, das Internet der Dinge und das Recht* [2015] NJW 2015 1137 et seq.; Hofmann, *Smart Factory – Arbeitnehmerdatenschutz in der Industrie 4.0 – Datenschutzrechtliche Besonderheiten und Herausforderungen* [2016] ZD 2016 12 et seq.

⁶⁹ Schmidtman/Schwiering, *Datenschutzrechtliche Rahmenbedingungen bei Smart-TV – Zulässigkeit von HbbTV-Applikationen* [2014] ZD 2014 448 et seq.

⁷⁰ Balaban/Pallas, *Haftung und Beweis bei geschachtelt komponierten Cloud-Services* [2013] InTeR 2013 193 et seq.

⁷¹ Vec, in: Schulte/Schröder (Hrsg.), *Handbuch des Technikrechts* (Heidelberg: Springer 2011), p. 79.

⁷² Similar Géczy-Sparwasser, *Die Gesetzgebungsgeschichte des Internet* (Berlin: Duncker & Humblot 2003), p. 254.

⁷³ <http://www.zeitgeschichte-online.de/kommentar/die-anfaenge-von-videoueberwachung-deutschland>, last downloaded 2016-03-17.

⁷⁴ Weichert, *Praxis und rechtliche Aspekte optischer Überwachungsmethoden – Zum Einsatz moderner Videotechnik* [1988] DANA (Sonderheft Videoüberwachung) 1988 4 (8).

⁷⁵ Weichert, *Praxis und rechtliche Aspekte optischer Überwachungsmethoden – Zum Einsatz moderner Videotechnik* [1988] DANA (Sonderheft Videoüberwachung) 1988 4 (9).

⁷⁶ Scholz, in: Simitis (Hrsg.), *BDSG (Baden-Baden: Nomos 2014)*, § 6 b Rn. 2.

⁷⁷ BT-Drs. 11/3730, p. 26 et seq., p. 41.

⁷⁸ BT-Drs. 13/9082, p. 12 and p. 27.

⁷⁹ DSBK, *Entschließung vom 14./15. März 2000, Risiken und Grenzen der Videoüberwachung* [2000] DuD 2000 304 et seq.

⁸⁰ Scholz, in: Simitis (Hrsg.), *BDSG (Baden-Baden: Nomos 2014)*, § 6 b Rn. 3.

⁸¹ Scholz, in: Simitis (Hrsg.), *BDSG (Baden-Baden: Nomos 2014)*, § 6 b Rn. 5 with further references.

⁸² Cf. Article 29 Data Protection Working Party, *Working Document on the Processing of Personal Data by means of Video Surveillance*, WP 67.

context of the data protection impact assessment (Art. 33 no. 2 c) GDPR) is video surveillance mentioned. It is described as “a systematic monitoring of a publicly accessible area on a large scale”. It is not specified which conditions must be fulfilled in order to classify monitoring as being “on a large scale”. Other regulations – in particular Art. 5 and Art. 20 GDPR – are not tailored specifically to video surveillance but must also be taken into account in the context of modern video surveillance technology. The considerations in this context might lead to a (yet to be created) specific video surveillance regulation. At European level, video surveillance is indeed an issue, but the GDPR represents a backward step because it contains no specific video surveillance regulation.

In the field of video surveillance, it is clear that technological progress led to an expansion of monitored areas. Video surveillance has been only selectively legally addressed. The law reacted late, since specific rules for video surveillance were in part not initiated until decades after the first use of such technology, or they still do not exist. Comprehensive and continuous legal development in the field of video surveillance, paralleling the technical development, does not exist. Nevertheless, this does not mean that technological innovations are not taken into account in the legal framework. In the field of modern video surveillance, intense research is being undertaken into the use of privacy enhancing technologies (PETs).⁸³ Such technologies can positively influence the law and inspire it to enact forward-looking legal regulation of modern video surveillance techniques. Predictive technology evaluation questions what legal problems will be caused by the usage of new technologies and systems, and what pressures must be exerted on the law to determine the relation between law and technology.⁸⁴ Nevertheless, it is also the case that in the special field of video surveillance the law primarily follows technology, and technical innovations only mobilise the law.

Conclusions

This analysis of the technical development of video surveillance and its legal framework has shown that video surveillance is often legally regulated late and sometimes partly not at all. The DPD and the GDPR contain no specific video surveillance regulation. Here some countries are already one step ahead – for example, Germany, Austria and Lithuania – as they have recognised video surveillance as a data protection problem and are regulating it. Using the example of video surveillance, it is clear that the law is often one step behind technical development, and there is a delay before it can react in the form of legal regulations. A major factor that contributes to this is the differing time horizon in the economic and legal systems. In the economy, it is necessary to bring new technological developments to market quickly so as not to squander competitive advantages. However, quickly introduced laws are often poorly formed and imprecise.⁸⁵

The usage of modern video surveillance systems will increase in future. At the same time, technical development will continue to move forward steadily in this area. Research, especially in the field of computer science and engineering, continues to deliver new approaches and concepts for modern surveillance systems. This technological progress also means that even legal regulations – if they already exist – must be continually reconsidered, or a legal framework must be provided for using advanced video surveillance systems. In particular, it is important to remember that at the European level it is necessary to have a specific video surveillance regulation for such a sensitive field. Some input could also come from regulations already in use in individual European countries. A consistent exchange of ideas between law and technology may lead to the question “law by technology” or “technology by law” being countered with the concept of “technology WITH law”.

⁸³ Bier/Spiecker gen. Döhmman, *Intelligente Videoüberwachungstechnik: Schreckensszenario oder Gewinn für den Datenschutz?* [2012] CR 2012 610 et seq.; Bretthauer/Krempel/Birstill, *Intelligente Videoüberwachung in Krankenhäusern und Pflegeeinrichtungen von morgen – Eine Analyse der Bedingungen nach den Entwürfen der EU-Kommission und des EU-Parlaments für eine DS-GVO* [2015] CR 2015 239 et seq.; Bretthauer/Krempel, in: Schweighofer/Kummer/Hötzendorfer (Hrsg.), *Transparenz* (Wien: 2014), p. 525 et seq.; Vagts, *Privatheit und Datenschutz in der intelligenten Überwachung – Ein datenschutzgewährendes System entworfen nach dem „Privacy by Design“ Prinzip* (Karlsruhe: Universitätsverlag 2013).

⁸⁴ Also Di Fabio, in: Vieweg (Hrsg.), *Techniksteuerung und Recht* (Köln: Heymanns 2000), p. 19.

⁸⁵ In detail Di Fabio, in: Vieweg (Hrsg.), *Techniksteuerung und Recht* (Köln: Heymanns 2000), p. 19 with further references.

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PHILOSOPHICAL ANALYSIS OF LEGAL LANGUAGE: DEFINITION OF TERMS “LIFE” AND “PERSON”

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Abstract

Conference paper seeks to evaluate the application of linguistic (semantic) analysis in legal argumentation. In particular cases the meaning of legal terms is vague and one clear definition could not be distinguished. The paper seeks to examine whether linguistic (semantic) arguments may be used in legal argumentation dealing with vague or abstract legal terms. The use of linguistic (semantic) arguments is especially clear in abortion cases, as well as in the context of law of assisted reproduction, when the question of definition of terms “life” and “person” arises. Conference paper seeks to prove that linguistic arguments (such as, appealing to the common or ordinary sense of a word) cannot be used because of existence of contradictory approaches in the society. Also, linguistic arguments can conflict with the principle of legal certainty.

Keywords: law, language, linguistic (semantic) analysis, life, person.

Introduction

Legal language cannot avoid abstract and general terms. The vagueness and ambiguity of legal concepts may lead to such situations when different definitions of the same term can determine different legal regulation. Definition of legal concepts also may have impact to the balance of individual rights. Therefore, the question how certain legal terms should be defined causes widespread discussions at the political level, as well as in society at large. The fundamental disagreement is clearly visible in debates on the abortion and assisted reproduction. There is no clear boundary between concepts of “fetus” and “new-born”, as well as there is no clear consensus on the status of what is called “embryo”. The controversies arise when it is aimed to ascertain whether the fetus is a person or whether the embryo is considered as a living being. Therefore, the disagreement concerning such terms as “life” and “person” raises a question about the status of linguistic (semantic) arguments in legal argumentation.

The significance of definition of terms “life” and “person” is particularly apparent in abortion cases, as well as in the context of plans to adopt laws on assisted reproduction in Lithuania. Usually, terms “life” and “person” in these cases are not used in their ordinary sense, and their definitions are based on evaluative arguments, i.e. particular usage of the term inevitably represents certain evaluative viewpoint. Therefore, in attempts to define terms “life” and “person” such arguments, as appealing to the common sense or to the common values, cannot be used because of a great variety of contradictory approaches. Moreover, according to the principle of legal certainty, in certain cases using the terms “life” and “person” requires not to apply linguistic arguments at all or to justify them with other kind of legal argumentation.

The conference paper will briefly introduce the method of linguistic (semantic) analysis and its application to legal terms. The classic definition of concepts *per genus et differentiam* will be compared with contemporary findings of analytic philosophy of law. Furthermore, the use of terms “life” and “person” will be analysed in the context of debates on abortion and assisted reproduction showing the role of evaluative decisions and means to avoid them.

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1. Origins of linguistic (semantic) analysis

Linguistic (semantic) method is based on a view that theoretical issues are caused by vagueness and ambiguity of language. Considering legal sphere, the use of general and abstract terms is determined not only by the properties of language, but also by the nature of law itself. Law seeks to regulate various and unpredictable social relations by formulating general rules of behaviour.² However, these issues may be solved or eliminated by linguistic analysis of language. The application of linguistic (semantic) method in legal theory is not a novelty of twentieth century, which is believed to be born together with an analytic philosophy of language. The insights of J. Bentham and J. Austin regarding the definition of legal terms may be considered as an attempt to reconstruct legal concepts and to apply such linguistic analysis in legal practice. J. Bentham and J. Austin, by analysing the usage of legal terms and searching for a new methodology to define them, have laid a theoretical foundation on which rested subsequent attempts to solve legal issues by examining legal language. The terms of “legal right” and “legal duty” have received an exceptional attention and later were analysed by presenting different classifications of usage of these terms.³

J. Bentham was the first legal philosopher who devoted his attention to the ambiguity and vagueness of legal concepts. Primarily, J. Bentham criticized the traditional method of definition of concepts - *per genus et differentiam*. Definition *per genus et differentiam* is a method when concrete concept is explained attributing it to the wider group of concepts (genus) and at the same time indicating qualitative distinctiveness of this concept in comparison with the other concepts in the same group. In J. Bentham’s view, such method of description is not useful seeking to explain abstract concepts. Usually, abstract concepts cannot be attributed to any wider group of concepts or genus, what leads to the circular reasoning or even makes the definition impossible.⁴ Such difficulties arise by using concepts of highest degree of abstractedness. For example, the term “life” cannot be attributed to any wider group of concepts, and usage of this term is especially broad and vague. The vagueness of term “life” leads to controversies concerning the protection of right to life. For instance, there is a discussion whether this right could be applied to prohibit a conservation and destruction of surplus of embryos⁵ created during the process of assisted reproduction.

It is important to note that J. Bentham also took a position that abstract terms do not correspond to any real object, therefore they could not be defined by referring to something. This could be illustrated by the fact that when abstract terms are attributed to particular object or state, disagreement what exactly should be considered as corresponding to that term inevitably arises. For instance, seeking to define a term “life” by referring to some object or state, it is disagreed, whether a fertilized ovum, implanted embryo, a fetus or maybe only independently from mother’s body existing new-born child should be treated as corresponding with a term “life”. The European Court of Human Rights (ECHR) has noted that an agreement on when the human life begins does not exist, and a term “life” may be interpreted differently depending on the context in which it is used.⁶ Therefore, it may be concluded, that legal issues often arise with an attempt to define abstract terms independently from the context, and not taking into account the fact that some terms in reality do not represent any object or state of affairs.

² A. Marmor, S. Soames (ed.), ‘Philosophical Foundations of Language in the Law’ (Oxford: Oxford University Press 2011) 25-27

³ W. N. Hohfeld, analysing case law, one of the first noticed that judges especially often use the term “individual right” in variety of meanings. Sometimes the meaning may change even several times in the same text. Seeking to clarify the use of term “individual right” W. N. Hohfeld (in two articles, published in 1913 and 1917) indicated the so called fundamental legal conceptions and created interpretation scheme of individual rights. According to the classic Hohfeldian scheme, the term “right” may be defined as one or several forms of legal advantage: claim, privilege, power or immunity. Similar classifications before W. N. Hohfeld were presented by J. W. Salmond and H. T. Terry, but mostly Hohfeldian scheme is still analysed in legal philosophy and used in various theories of legal rights.

⁴ J. Bentham, ‘A Fragment on Government’ (London: Printed for W. Pickering 1823) 133-134

⁵ According to the draft of the Act for Assisted Reproduction of the Republic of Lithuania No. XIP-2502(4) [2015.12.08], embryo is defined as a developing human organism from the moment of conception till the end of 8 weeks of pregnancy.

⁶ European Commission’s of Human Rights decision in case W. P. v. United Kingdom, application no. 8416/78 [1980.05.13]

2. Contemporary linguistic (semantic) analysis

The idea that meaning of a term depends on the context in which it is used and cannot be defined separately was crucial in analytic legal theory of twentieth century. This turn in linguistic analysis of legal language came after the appearance of analytical theories of language presented by L. Wittgenstein and J. L. Austin. The works of L. Wittgenstein and J. L. Austin had a huge influence for theory of H. L. A. Hart. Precisely, H. L. A. Hart claimed that certain persons, properties, events or processes are never identical to such terms as “individual rights” or “duties”. However, they are always related to them in some way.⁷ Therefore, analysis of legal terms cannot be limited to definition of concepts but should analyse their usage in language at length. H. L. A. Hart proposed the method of elucidation which aims to identify in what kind of sentences the unclear concept is used, instead of providing synonyms which would be just as unclear as the analysed term.⁸ In this regard, H. L. A. Hart followed the theory of J. Bentham. Furthermore, H. L. A. Hart suggested explaining legal terms by analysing the whole sentence in which it is used, the typical case of usage of unclear term, by indicating in which circumstances this sentence would be true. This type of linguistic analysis may be illustrated by the statement of the ECHR that the term “life” cannot be defined separately and should be analysed in the context of the whole article of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁹ However, we can never foresee all cases of usage of a concrete term, because we always are dealing with new contexts. Such feature of legal terms H. L. A. Hart defines as an *open structure*.¹⁰

Another important discovered feature of legal language was its performative nature, which was firstly explained by J. L. Austin in theory of speech acts. According to J. L. Austin, not all sentences of our language are propositions for which a method of verification may be applied (i.e. certain truth condition may be ascribed). Without propositions in our language there are many other forms of sentences (such as gratitude, question, warning, etc.), which cannot have the truth condition. And these sentences have a common feature - they perform certain act, i.e. a speaking person at the same time does/makes something. For example, a testimony of witness is not treated as simple statement of facts, but it performs certain role in a judicial process. J. L. Austin emphasizes that there are especially many performative utterances in legal sphere, which are not true or false, but which cover performance of particular conventional procedures and acts.¹¹ For example, certain words determine the relations of inheritance (a testament procedure), as well as the utterance of certain sentences causes the conclusion of matrimonial relations.¹² Performative utterances or the so called speech acts may be appropriate or inappropriate, successfully or unsuccessfully performed, to comply or not to comply with a certain procedure, but they cannot be true or false. The performative nature of legal language shows that in some cases we should not seek to find concrete definition of a vague legal term, but to consider what function it performs in a concrete situation.

Concluding, usually agreement on the ordinary sense of a particular term exists, however, in borderline cases the same term may be understood and used differently. Such vagueness and ambiguity of legal terms may be the cause of the so called hard cases, because linguistic indeterminacy causes indeterminacy defining legal rights and duties as well.¹³ Therefore, clear and vague cases of usage of the same terms may be distinguished. In vague cases, speaking in Wittgensteinian language, the space for various language games opens up. Then meaning of a term is “open”, i.e. it is dependent on the context in which it is used. But proponents of linguistic (semantic method) deny that semantic method is subjective. Linguistic practice is a collective activity. The meaning of a word does not depend only on its user, but it is limited by certain rules of linguistic practice. Such rules may be observed and analysed. Therefore, it is intersubjective. Semantic theories of law suggest that semantic method may be used in legal interpretation, seeking to determine the

⁷ H. L. A. Hart, 'Essays in Jurisprudence' (Oxford: Oxford University Press 1983) 33,42

⁸ J. Cohen, H. L. A. Hart, 'Symposium: Theory and Definition in Jurisprudence' [1955] 29 Proceedings of the Aristotelian Society 239

⁹ European Commission's of Human Rights decision in case W. P. v. United Kingdom, application no. 8416/78 [1980.05.13]

¹⁰ H. L. A. Hart, 'Essays in Jurisprudence' (Oxford: Oxford University Press 1983) 275

¹¹ J. L. Austin, 'How to Do Things with Words' (Oxford: Clarendon Press 1962) 12 – 15, 17, 19

¹² J. L. Austin, 'How to Do Things with Words' (Oxford: Clarendon Press 1962) 31 – 32

¹³ T. A. O. Endicott, 'Vagueness in Law' (Oxford: Oxford University Press 2003) 70-72

meaning of a concept in linguistic practice. And such semantic arguments would be objective.¹⁴ However, the use of linguistic arguments in legal argumentation has some risks and weaknesses.

3. The use of linguistic arguments in legal argumentation

In legal language certain level of vagueness is inevitable. This vagueness of legal language usually occurs as ambiguity or abstractness of legal terms or expressions. In order to clarify legal terms, linguistic arguments may be used. Linguistic arguments are such arguments which seek to identify the ordinary usage of a term and searches for the meaning of concept in common language, which is understandable by all competent users of certain language. Also, linguistic method seeks to identify the change of meaning depending on the context. However, legal argumentation cannot rely solely on linguistic arguments, because the choice of particular meaning may be determined by personal moral or cultural views.

Moreover, according to A. Horowitz, the role of semantics in a contemporary legal thought¹⁵ is very misleading. The interpretation of legal text is not limited only to the identification of certain meaning. The process of legal interpretation is a normative one. More precisely, legal argumentation is a moral choice. In author's opinion, linguistic vagueness and semantic considerations do not have any relevance in legal argumentation. The judge cannot remain neutral - the interpretation of legal text which she or he chooses is an evaluative decision, selection of particular moral perspective.¹⁶ However, this critical view towards linguistic method has some limits itself. The judge does not have a freedom to choose freely a particular moral position, in other words, to make a subjective decision. Legal argumentation should be based on objective arguments, and first of all on the principle of legal certainty.

For the same reasons, in order to reach agreement on the most sensible and controversial questions which could be accepted irrespective of cultural or moral background it is required to use more than linguistic arguments. The court cannot use its authority to control the definition of meaning of a term, because it could cause contradictions between different court decisions.¹⁷ Therefore, other kind of arguments – not linguistic – must be used in legal argumentation.

Concerning the vagueness of terms "life" and "person", these concepts were mostly used in abortion cases solving collisions between interests of mother and interests of fetus or between interests of parents. The ECHR noted that in the European context consensus on definition and status of embryo, as well as of fetus does not exist. In the most general case, it is agreed that embryo and fetus are attributed to the human race. Taking into consideration the possibility to treat embryo or fetus as a person to whom legal protection would be guaranteed, in most European countries the protection of embryo or fetus is established in the context of inheritance and gifts. Such protection is based on appeal to human dignity. However, embryo or fetus is not treated as a person for whom the right to life must be applied. ECHR has stated that it is neither necessary, neither possible to define who is a person. The court has to answer the question which rights must be defended regardless of different possibilities to define the unclear term. And such answer is that an embryo or a fetus cannot be treated as person and the protection of life cannot be applied, because the life of fetus is unseparated from the life of mother.¹⁸ The same argument applies concerning the use of term "everyone" which is mentioned in Article 2 of the Convention for the Protection of Human Rights and Fundamental

¹⁴ M. Klatt, 'Semantic Normativity and the Objectivity of Legal Argumentation' [2004] 90/1 Archives for Philosophy of Law and Social Philosophy 59, 65

¹⁵ A. Horowitz is criticizing Brink (1989), Moore (1985), Petterson (1996), Marmor (1992), Bix (1993), Stavropoulos (1996), who think that problems of legal argumentation, as well as issues of philosophy of law may be solved by using appropriate semantic tools.

¹⁶A. Horowitz, 'Legal Interpretation, Morality, and Semantic Fetishism' [2000] 37/4 American philosophical Quarterly 340-344

¹⁷ E. Paunio, S. Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' [2010] 16/4 European Law Journal 396-397, 407

¹⁸ European Court's of Human Rights decision in case *Vo v. France*, application no. 53924/00, [2004.07.8]

Freedoms¹⁹ and which also does not refer to unborn child. In order to justify such position, a non linguistic argument was used.

Taking into account the term “life” ECHR takes position that an agreement on when the human life begins does not exist. The collision between mother’s rights to privacy or bodily integrity and fetus right to life cannot be solved by linguistic arguments. If the Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms would include the absolute protection of life of fetus, without provision of any concrete limitation, in this case an abortion would be treated as prohibited even in those cases when continuation of pregnancy would pose a serious threat to life of pregnant women. That would mean that life of unborn child is more valuable than the life of pregnant women.²⁰

It may be concluded that the definition of ambiguous or abstract concept is always a choice between certain alternative meanings. Therefore, it has a subjective dimension and it is not completely morally and culturally neutral process. Because of the above mentioned reasons it is necessary to justify the chosen definition of the term.²¹ Otherwise, not to use linguistic arguments at all, because there is always a risk that similar cases would be solved differently.

Conclusions

The vagueness of legal language is caused not only by the properties of language, but also by the nature of law itself, seeking to regulate various and unpredictable social relations by formulating general rules.

Ambiguous and vague legal terms have the so called *open texture*, which means that meaning of a term depends on the context. Therefore, universal definition of particular legal concept which could be applied in all circumstances cannot be identified.

Legal issues often arise by not taking into account the fact that some abstract or vague legal terms do not represent any object or state; also, problems occur with an attempt to define abstract legal terms independently from the context in which they are used.

Linguistic (semantic) arguments may be dependent on moral and cultural background of interpreter; therefore they should not be used in legal argumentation or should be strengthened with other kind of arguments in order not to violate principle of legal certainty.

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¹⁹ Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms states that: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

²⁰ European Court’s of Human Rights decision in case Vo v. France, application no. 53924/00, [2004.07.8]

²¹ E. Paunio, S. Lindroos-Hovineimo, ‘Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law’ [2010] 16/4 European Law Journal 398, 400.

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“CROSS-DISCIPLINARY” APPROACHES TO LAW: A THEORETICAL ANALYSIS

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Abstract

Current discussions on law’s methodology are marked with (relatively) new concerns about the necessity to include other disciplines in legal practice and in scientific legal research. As the invitation letter for this Conference suggests, three different levels are, at least, involved in the debate. a) The first one regards the contribution of other disciplines as a way to find better answers to practical legal questions or disputes. b) The second one regards the ways in which law, as an academic discipline, benefits from a cross-disciplinary perspective. c) The third one is mainly oriented on legal education. This paper focuses on the second level.

Cross-disciplinary perspective to law is becoming a major topic in legal literature. Noting the failure of traditional legal methodologies to grasp the complexity of modern law, viewed as “law in context”, numerous authors are promoting new disciplinary approaches. However, they do not necessarily agree on the concepts to be used to describe or to prescribe an articulation between different scientific disciplines.

Through an analytical method, this paper’s purpose is to identify and clarify some of the different epistemologies concerning the ways to connect legal science and other disciplines. Therefore, it aims at presenting the main concepts and typologies used to address the problem of the articulation of various fields of knowledge and associated methodologies, as well as their critics and limits. The issue of integrating other social sciences into legal science is related to central themes in legal theory. Thus, some developments will be made, for instance, about the definition of law as a scientific objet, the “correct” point of view to give an account of law, the possible specificity of legal approach, the conditions for producing a scientific discourse, the role and function of the legal researcher, and the interaction between the law and the social.

Keywords: epistemology – interdisciplinary, pluridisciplinary and transdisciplinary approaches – legal methodology – specificity of legal point of view.

Introduction

“Disciplinary boundaries should be viewed pragmatically, with healthy suspicion. They should not be prisons of understanding.”²

“Cross-disciplinarity” or “interdisciplinary”³ approaches are the subject of a very vast literature. Nevertheless, there is no agreement between researchers on the meanings of the notions used to specify the perspectives that are deployed from more than one field of knowledge. It is possible to find some convergent elements, but the variety of discourses, concepts, practices, and methodologies seems to be a serious issue in order to build a unified theory of interdisciplinary-researches⁴.

The object of this analysis is a certain number of discourses elaborated in legal field and social sciences about interdisciplinarity. The analytical method used here tends to specify and operate distinctions between some of the conceptions of cross-disciplinary approaches to law. The authors use numerous different concepts

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² R. Cotterrell, “Why Must Legal Ideas Be Interpreted Sociologically?”, in., *Law, Culture and Society*, Ashgate, 2006, p. 50

³ The expressions “cross-disciplinary” and “interdisciplinary” are used here in a large sense, as a descriptive concept: a category embracing the different expressions and concepts used in academic discourses to speak about the articulation of different scientific disciplines, knowledge and methods. We will use these words as synonyms, with no other specification, apart in title (l.2.).

⁴ F. Darbellay, « Vers une théorie de l'interdisciplinarité? Entre unité et diversité », *Nouvelles perspectives en sciences sociales : revue internationale de systémique complexe et d'études relationnelles*, 2011, p. 65-66

concerning the possible ways to link different knowledge (1). The discussions suggest that in order to elaborate a cross-disciplinary perspective, it is necessary to renew the definitions of the objects and approaches (2). However, some challenges must be answered to succeed (3).

1. Articulations of knowledge: a plurality of concepts

To speak of cross-disciplinary approaches, numerous concepts are specified (b), which are used in different types of discourses (a).

a) *A diversity of discourses*

In reading some of the productions made in social sciences concerning “cross-disciplinary” perspectives, one can observe a large diversity in the types and levels of discourses. Indeed, these discourses are produced in different fields of knowledge, different countries, and different periods. They also employ different references and methods, applied to different objects and sources. Several modal statuses of discourses also correspond to different conceptions and approaches adopted by researchers to address the issue of cross-disciplinary approaches.

As a starting point in order to clarify discourses on interdisciplinarity we may identify general types of discourses and specify criteria for the analysis. We can distinguish three non-exhaustive and non-exclusive types of discourses:

a) Methodological

Researchers focus here on methodological questions, concerning their own or other’s epistemology, point of view, and methodology.

b) Conceptual

These discourses concern attempts to build and organize concepts related to practices of interdisciplinarity and discourses on the matter.

c) Evaluative

Evaluations are made considering the benefits or the limits of interdisciplinary methods, discourses and concepts.

These three types of discourses about interdisciplinarity can be combined together in various numbers of ways, depending on other characteristics: the objects of the discourses, their subjects, their linguistic statuses (descriptive or normative), the types of questions considered (conceptual or empirical), the methodology used, the attachment to an academic discipline, the intentions of the authors, and the type of argumentation deployed.

In legal academic discourses, authors are concerned by three main normative questions: if and how interdisciplinarity should be used in resolving legal disputes, if and how interdisciplinarity should be developed to improve legal education, if and how it can produce more accurate legal researches. In a descriptive perspective, the question is no more how interdisciplinarity should or must be used but how it is used, once more: in legal practice, in legal education and in legal research.

b) *Conceptual distinctions*

The expressions employed to address the question of interdisciplinarity are numerous⁵. One can for instance find the following words: interdisciplinarity, cross-disciplinarity, pluridisciplinarity, multidisciplinarity, a-disciplinarity, alterdisciplinarity, bi-disciplinarity, transdisciplinarity, indisciplinarity (or indiscipline), postdisciplinarity, syncretism, and so on. Some of these words are sometimes used as synonyms but sometimes the authors give them specific and incompatible meanings, depending on the functions and

⁵ F. Darbellay, op. cit., 2011, p. 71

objectives they assign to the expressions (or concepts) they use. Part of the authors employs these expressions to underline their similarity and others insist on their differences⁶.

The perspectives adopted are often ambivalent since most of the discourses⁷ are attached to one existing and identified discipline, but also take position against “monodisciplinary approaches” with the objective to move beyond disciplinary divisions and disciplinary “borders”, and even create new disciplines. Furthermore, most of the expressions connect a prefix to the term discipline. This is why thinking about articulation of disciplines requires a specification of what a discipline may be. The word discipline can designate a field of research or a field of education⁸. A scientific discipline of research could be defined using three criteria: the object or the area of the research, the methodology used, and the existence of a community of researchers sharing common interests, languages and references⁹. We may speak of a “paradigm” shared by a community of researchers, as a set of beliefs, values and techniques¹⁰. A discipline can also be seen as “a category which organizes scientific knowledge: in which it institutes a division and a specialization of work and embodies the diversity of domains considered by sciences”¹¹. To the disciplinary divisions of knowledge correspond various methods and conceptual apparatuses, as well as a specific field of investigation, with variable durations of the researches. We could also indicate that disciplines are historically situated, some disciplines are built, others disappear, and they are subject to change throughout time and space. A difficulty also arises considering the fact that even in a particular discipline, there are various sub-delimitations, methods, references, and conceptions of the role of the researcher¹².

One of the most recurring typologies in legal discourse is the one elaborated by F. Ost and M. Van de Kerkove. They operate a distinction between three possible approaches in articulating the discourse of legal science to other disciplines:

a) Pluridisciplinarity or multidisciplinary: a “juxtaposition” of different discourses from different disciplines, which keep their specific point of view on a presupposed common object. In this approach, the differences between the disciplines are seen as inducing an irreducible plurality of objects and issues¹³.

b) Transdisciplinarity: an “attempt” in which the elaboration of a new point of view is pursued defining new objects and methods, without keeping the specific approach of a discipline. The authors call it an “integration” of disciplines¹⁴.

c) Interdisciplinarity: the approach consists in starting with the theoretical field of one specific discipline and then developing issues and hypothesis partly consistent with those elaborated by other disciplines. The process here is to “articulate” knowledge, by reorganizing the different theoretical fields¹⁵.

F. Ost and M. Van de Kerkove use this typology in two perspectives. One is to describe the practice of researchers and conceptualize the possibilities open to a researcher in order to achieve a cross-disciplinary research. The other is a normative evaluation of these possibilities. The authors reject the pluridisciplinary and the transdisciplinary approach and promote interdisciplinarity. Heuristically, they consider the interdisciplinarity approach as the only one able to produce an interesting scientific discourse while trans and pluri-disciplinarity are rejected as “utopia” because they both fail in constituting an appropriate theoretical field¹⁶.

⁶ V. Champeil-Desplats, *Méthodologies du droit et des sciences du droit*, Dalloz, 2014, p. 340

⁷ Yet, interdisciplinarity may nearly be viewed as an autonomous discipline. F. Darbellay, “The Circulation of knowledge as an interdisciplinary process: Travelling concepts, Analogies and Metaphors”, *Issues in Integrative Studies*, 2012, p.2

⁸ C.-E. Sénac, « Les typologies de la recherche interdisciplinaire », in., *Usages de l'interdisciplinarité en droit*, dir. Eleonora Bottini, Pierre Brunet and Lionnel Zevounou, Presses universitaires de Paris Ouest, 2014, p. 21

⁹ *Ibid.*, p. 22

¹⁰ F. Ost and M. Van de Kerchove « De la scène au balcon. D'où vient la science du droit ? », in., *Normes juridiques et régulation sociale*, dir., F. Chazel et J. Commaille, LGDJ, 1991 p. 79

¹¹ Our translation. E. Morin, « Sur la transdisciplinarité », in., *Guerre et paix entre les sciences, disciplinarité, inter et transdisciplinarité*, *La découverte/M.A.U.S.S.*, n°10, 1997, p. 21

¹² V. Champeil-Desplats, *op. cit.*, 2014, p. 343-344

¹³ F. Ost and M. Van de Kerchove, *op. cit.*, 1991, p. 77

¹⁴ F. Ost and M. Van de Kerchove, *op. cit.*, 1991, p. 77

¹⁵ *Ibid.*, p. 77

¹⁶ *Ibid.*, p. 78

The three main concepts of cross-disciplinarity typify levels of commitment towards other disciplines. The criterion used here is based on the degree of integration achieved from different fields of knowledge. The same criterion is used by M.-C. Ponthoreau when she distinguishes “soft-interdisciplinarity” from “hard-interdisciplinarity”. The soft approach consists in using another discipline to enrich the perspective of the initial discipline. The hard approach tends to “invest” another discipline¹⁷. The interdisciplinary approach to law is viewed as a way to involve variation in the scale and perspective of analysis¹⁸. The legal approach should also manage to switch between diachronic and synchronic approaches, taking into account variables of time and space¹⁹.

J.-P. Resweber also uses the tripartition (pluri inter trans disciplinarity) but in a different perspective. The three notions do not represent three distinct approaches, but are connected together as three steps, in a continuum, to articulate knowledge. Pluridisciplinarity is not a “juxtaposition” of various understandings; it is a first step in building a deeper interdisciplinarity. The pluridisciplinary approach enables taking the time for a rigorous analysis of the question and offers a benefic confrontation of the involved points of view, showing the relativity of particular disciplines²⁰. The next step consists in pluridisciplinarity, involving transfers of concepts from one (or numerous) discipline(s) to another and an elaboration of new methodologies resulting from conflict between methodologies (general or more specific) attached to existing disciplines²¹. The last step is transdisciplinarity, a sort of achievement of the two last steps, with a formulation of a new discourse that deeply combines disciplines without abandoning them²². Another typology is proposed in J.-P. Resweber’s work²³:

a) Pluridisciplinarity: a1) convergence pluridisciplinarity: the mutual enrichment of different perspectives.
a2) Convenience pluridisciplinarity: a juxtaposition of point of views.

b) Interdisciplinarity: b1) reductionist interdisciplinarity: submission of rules and principles of various disciplines to one dominant discipline. b2) Adjacent interdisciplinarity: interaction between disciplines that put in perspective the levels of complexity and organization of their object. b3) Instrumental interdisciplinarity: transfer of structures and concepts from one discipline to another. b4) Hermeneutic interdisciplinarity: transfer of structures and concepts from one discipline to another with a dialogic perspective.

c) Transdisciplinarity: c1) systemic transdisciplinarity: operate a synthesis of all knowledge. c2) Instrumental transdisciplinarity: operate a synthesis from far to close knowledge. c3) Problematized transdisciplinarity: crossing the disciplines in the analysis of cultural issues.

Elsewhere, the productions of many researchers do not explicitly inscribe their approach in a well-defined cross-disciplinary approach. To give an account of these practices, V. Champeil-Desplats adds to the three main concepts defined above the concept of “indiscipline” divided in three sub-notions:

a) Appended or auxiliary references: this notion describes an attitude from legal researchers who consider other disciplines as external and secondary. References are employed with no critical questioning. The degrees of commitment to other knowledge are minimal²⁴.

b) Methodological eclecticism or syncretism: this notion describes successive additions of knowledge, with more focus on conciliation and articulation for syncretism. Methodological syncretism is considered as a manner to give an account of the “visible” part of law (notably concepts and institutions) as well as the “invisible” one (cultural elements: ways of reasoning and representations of law)²⁵.

c) Estheticism: using other disciplines with esthetic finalities. One version (situated mostly in the United States) is called critical estheticism and aims to employ any discourses from other disciplines to elaborate a

¹⁷ M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, Economica, 2010, p. 227

¹⁸ *Ibid.*, p. 228

¹⁹ *Ibid.*, p. 229

²⁰ J.-P. Resweber, « Les enjeux de l’interdisciplinarité », *Questions de communication*, 2011, p. 176

²¹ J.-P. Resweber *op. cit.*, 2011, p. 176-179

²² *Ibid.*, p. 183-184

²³ We use the classification made by C.-E. Sénac in his review of J.-P. Resweber’s work. C.-E. Sénac, *op. cit.*, 2014, p. 25

²⁴ V. Champeil-Desplats, *op. cit.*, 2014, p. 348-349

²⁵ M.-C. Ponthoreau, *op. cit.*, 2010, p. 225, V. Champeil-Desplats, *op. cit.*, 2014, p. 348-349

critical discourse, and another (situated mostly in France) is called stylistic estheticism and calls other disciplines in order to produce a more literary discourse²⁶.

Another angle in addressing cross-disciplinarity is to classify interdisciplinary approaches using as criteria the type of research questions and the methods. M. M. Siems proposes taxonomy of interdisciplinary legal research:

	Approaches that keep disciplines separate	Approaches that integrate 'scientific' methods into legal thinking
Legal questions	Basic interdisciplinary research	Advanced interdisciplinary research: Type 2
Non-legal questions	Advanced interdisciplinary research: Type 1	Advanced interdisciplinary research: Type 3

27

From the taxonomy above, M. M. Siems builds the following typology:

a) Basic interdisciplinary research: researchers start with traditional question in legal science (at a micro or a macro level) and take a look at productions from other disciplines to inform their question. Other disciplines are "subordinate" to legal science²⁸.

b) Advanced interdisciplinary research: b1) this type concerns approaches that start with research questions that are not directly about law, and then use the scientific disciplinary work on the subject, but keep disciplines separate²⁹. b2) This type concerns approaches which use and incorporate "scientific" methodology (as opposed to traditional legal methodology) in legal research to answer legal questions. b3) Here, the questions are not directly about law (as in b1), but the legal approaches articulate other sciences with legal sciences³⁰.

Beside the degree of integration of different knowledge, or the types of research questions and methods, it is possible to choose other criterion in order to draw distinctions between different types of interdisciplinarity. One of them is the context in which the knowledge is produced. For instance, in the legal field, different legal cultures, different branches of law, and different times and spaces are involved. Therefore, the institutional and human context in which cross-disciplinary research is developed could be another relevant characteristic³¹. Indeed, relations between sciences and disciplines are also a question of disciplinary context, for instance, a collective interdisciplinary research or an individual one, institutionalized or not. In this perspective, focusing on "micro-organization of researches practices", M. Lengwiler characterizes for types of interdisciplinarity:

a) Charismatic interdisciplinarity: researches are based on personal relations and influences more than on institutional organizations; it is also characterized by a deep concern about knowledge integration (cognitive coupling)³².

b) Methodological interdisciplinarity: researches are related to a highly formalized institutional structure that gives a high degree of organization in the researches, with comparatively consistent methodologies, and again a deep concern about knowledge integration³³.

c) Heuristic interdisciplinarity: researches are made with a high degree of organization, but they are oriented to practice, with particular financial and temporal constraints; this type is close to transdisciplinarity,

²⁶ V. Champeil-Desplats, *op. cit.*, 2014, p. 350-352

²⁷ M. M. Siems, "The taxonomy of interdisciplinary legal research: finding a way out of the desert", *Journal of Commonwealth Law and Legal Education*, 2009, p. 6

²⁸ *Ibid.*, p. 6-8

²⁹ *Ibid.*, p. 8-9

³⁰ *Ibid.*, p. 9-12

³¹ P. Brunet, « Présentation », in., *Usages de l'interdisciplinarité en droit*, dir., E. Bottini, P. Brunet et L. Zevounou, Presses universitaires de Paris Ouest, 2014, p. 271

³² M. Lengwiler, "Between Charisma and Heuristics: Four Styles of Interdisciplinarity", *Science and public policy*, 2006, p. 429-431

³³ *Ibid.*, p. 426-427

underlying other competences than disciplinary ones, and considering knowledge integration as less important than for types a) and b)³⁴.

d) Pragmatic interdisciplinarity: researches are not explicitly promoted as interdisciplinary, and the concern for knowledge integration is weak, generating divided theoretical and methodological approaches³⁵.

A differentiation could also potentially be made between intellectual interdisciplinarity (reading and using literature from other disciplines), theoretical interdisciplinarity (using interdisciplinarity in order to describe discourses and practices that affirm an interdisciplinary attachment), and empirical interdisciplinarity (using empirical methodological protocols elaborated from various disciplines).

2. A renewal in constituting objects and approaches

In order to produce a scientific interdisciplinary discourse, researchers define new objects (a) and adopt specific points of view (b).

a) (Re)defining an object called "law"

A prerequisite for a cross-disciplinary approach to law is to define (in a stipulative manner) its object and the conditions of a scientific discourse³⁶. This operation involves a double movement from the object to the science and from the science to its object. On the one hand, legal science is viewed as determined from its object. On the other hand, the object is viewed as determined by legal science. The starting point may be the specificity of the object or the conception of the science³⁷. Some approaches reveal a combination of the two, that is, elaborating a legal science conforming to a certain idea of science but partly determined by the specificities of its object. Rejecting presuppositions about any nature or essence of law, legal science intellectually constitutes its object by taking into account its characteristics³⁸. For example, H. Kelsen considers that law as a set of norms can mainly be described by a specific "normative" (but descriptive) science. Another conception may start with the assertion that science can only describe empirical facts, and therefore constitutes law as a set of facts³⁹. Defining an object is a conceptual question as well as a practical one: the delimitations of the objects are made in order to render possible a description by tools and methods of social sciences. Therefore, researchers delimit the field of observation and the sources they will use. Among positivist approaches in legal theory, M. Troper observes a relative consensus on defining the conceptual object as "positive law", "valid law", or "effective law", but the disagreements are about the object that each proposition of legal science tends to describe⁴⁰.

The concept of law can vary from a broad definition to a more restrictive one. Indeed, legal phenomenon can be seen as a complex set of psychological, social, and linguistics facts; or only as a system of valid

³⁴ Ibid., p. 431-432

³⁵ Ibid., p. 432

³⁶ It is also possible to refuse any a priori definition, defining law as what people generally call law with no other precisions. In this perspective, the concept of law may be a "family resemblance concept" regrouping various social phenomena. The goal of legal science would be to identify statistically and empirically non-exclusives "important characteristics" of these legal phenomena. F. Schauer, « On the Nature of the Nature of Law », *Archiv Für Rechts-Und Sozialphilosophie*, 2012, p. 457-467. B. Dupret also shares this idea, referring notably to the position of B. Tamanaha: the correct definition of law cannot be something different that what people call law. The common use of the term law determines what law is, and subsequently the objects of social sciences. B. Dupret, « Droit et sciences sociales. Pour une respécification praxéologique », *Droit et société*, 2010, p. 323. One objection could be made concerning the imprecision of this concept. It is not so evident that "people in general" share the same concept of law, neither that it is the same as the one(s) used by lawyers. The justification given that because people use a concept it would be appropriate for a scientific approach is not sufficiently convincing.

³⁷ M. Troper, *Pour une théorie juridique de l'Etat*, PUF, 1994, p. 38, E. Millard, *Théorie générale du droit*, Dalloz, 2006, p. 40, L. Israel, « Présentation », *Droit et société*, 2008, p. 327. A rigorous conception of science also implies a distinction between the science and its object, or between an "object-discourse" (first linguistic level) and a "scientific-discourse" (second linguistic level, meta-discourse). M. Troper, « Tout n'est pas perdu pour le positivisme », *Déviance et société*, 1987, p. 196

³⁸ H. Kelsen, *Théorie pure du droit*, LGDJ, 2010, p.77 and following, E. Millard, op. cit., 2006, p. 47

³⁹ M. Troper, op. cit., 1994, p. 39

⁴⁰ M. Troper, op. cit., 1987, p. 198

norms⁴¹. In defining law, some approaches may adopt a gradualist perspective (usually called “legal pluralism”, considering different normative orders with different degrees of “juridicity”) while others may take the attachment to the state as a necessary condition⁴². Cross-disciplinary approaches to law generally define a broad concept of law in order to take into account the complexity and the diversity of its phenomenon. One common aspect of these approaches is to renew the object called “law”. To combine disciplines implies the need to constitute new objects, which transcend traditional divisions between approaches and associated objects (for example one that assigns to legal science the objects of norms, concepts, principles, modalities of interpretation and argumentation, and to legal sociology the concrete effects of law, the behaviours, practices, and habits in a legal context)⁴³.

Here again, one can observe many different objects called “law” in social sciences. In order to be analysed by a cross-disciplinary approach, the object can only be an empirical one, at least partly susceptible of description by different social sciences. This explains why a majority of the works that combines approaches defines law as a set of facts, with a strong focus on the practice of law (the so called “law in action”⁴⁴). To give a few examples, the object may for instance be specified as a combination of legislations, practices, structures, and “institutional and human configurations”⁴⁵. It can be the practice of legal professionals engaged in a complex process to write legal decisions, with diverse interactions between legal actors⁴⁶. Adopting an ethnomethodological and conversational approach, the attention is turned to the context⁴⁷ in which legal actors produce law, their activities and language, with a focus on the “circumstantial details”⁴⁸. Associated to the study of “behaviour in legal context”, even “legal ideas” can be seen as an empirical phenomenon in a socio-legal perspective⁴⁹. One additional object is defined by a psycho-legal approach to legal decision-making⁵⁰. The object is elaborated as a combination of the mental process involved in judging and the result of this process; in other terms, the reasoning and the argumentations and justifications deployed by legal actors. Legal researchers adopting psychological perspectives see a convergence between objects: human reasoning in general is associated with legal reasoning in particular. This comes from a presupposition that, as human beings, judges do reason like other people, therefore the psychological approach to general reasoning can be used to inform legal science about legal reasoning⁵¹.

⁴¹ Ibid., p. 195-196, E. Millard, op. cit., 2006, p. 40, L. Israel, op. cit., 2008, p. 327

⁴² P. Brunet and M. Van de Kerchove, « Présentation », *Droit et société*, 2010/2 n° 75, p. 276, F. Schauer, *The Force of Law*, Harvard University Press, 2015, electronic version, p. 268, H. Dumont and A. Bailleux, « Esquisse d’une théorie des ouvertures interdisciplinaires accessibles aux juriste », *Droit et société*, 2010, p. 278

⁴³ R. Cotterrell, « Why Must Legal Ideas Be Interpreted Sociologically? », *Journal of Law and Society*, 1998, p.171, N. Bobbio, *De la structure à la fonction Nouveaux essais de théorie du droit*, trad. D. Soldini, Dalloz, Rivages du droit, 2012, p. 84-86. In comparative law, D. Nelken underlines criticisms from comparative lawyers to sociologist and from sociologist to comparative lawyers: sociologists are accused of a too instrumentalist and functionalist approach, comparative lawyers are accused of a too formalistic, microscopic, rule-based, and limited to private law approach. D. Nelken, “Towards a Sociology of Legal Adaptation”, in., *Adapting Legal Cultures*, Hart Publishing – Oxford, 2001, p. 9

⁴⁴ “Law in action” is not necessarily opposed to “Law in books”. “Law in books” can be seen as a part of legal practice. B. Dupret, op. cit., 2010, p. 325; p.328-330

⁴⁵ L. Israel, op. cit., 2008, p. 328

⁴⁶ B. Latour, *La fabrique du droit, une ethnographie du Conseil d’État*, La Découverte, 2004

⁴⁷ The notion of “context” is not easy to delimit. For some legal realists it is a specific legal context that includes what lawyers do with legal material. It may notably be practices and interpretation about texts, acts of speech, concept production, and rationalization. P. Brunet, « Quand le droit compte comme texte », *Revue interdisciplinaire d’études juridiques*, 2013, p. 57

⁴⁸ B. Dupret, op. cit., 2010, p. 324-326

⁴⁹ R. Cotterrell, op. cit., 1998, R. Cotterrell, “Socio-legal Studies, Law Schools, and Legal and Social Theory”, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 126/2012

⁵⁰ F. Schauer, “Is There a Psychology of Judging?”, in., *The Psychology of judicial decision making*, American Psychology-law Society series, 2010, p. 103, E. Sherwin, “Features of Judicial Reasoning”, in., *The Psychology of judicial decision making*, American Psychology-law Society series, 2010, p. 121

⁵¹ This is particularly obvious in the legal literature about analogical reasoning in law. C. R. Sunstein, “Analogical Reasoning”, *Harvard Law Review*, 1999, G. Lamond, “Precedent and Analogy in Legal Reasoning”, *The Stanford Encyclopedia of Philosophy*, 2006, D. Hunter, “Reason is too large, Analogy and Precedent in Law”, *Emory Law Journal*, 2001, J. H. Farrar, “Reasoning by Analogy in The Law”, *Bond Law Review*, 1997, P. Bartha, “Analogy and Analogical Reasoning”, *The Stanford Encyclopedia of*

Defining objects in order to describe empirical legal phenomenon can't put aside the issue of legal delimitation, or, in broader terms, the link between the legal and the social. If law is seen as an enclosed domain, the need for interdisciplinary approach seems less vigorous than if law is envisaged as relatively open, interacting with other social aspects and other social normative orders. For a certain number of sociologists, one way to understand the link between law and society has been to see the legal rules as an expression of a social reality (a "reflection of social structures and relations"⁵²). In these works, a constant concern is the existence of a "gap" between law and social reality⁵³. More recently, some other sociological and legal perspectives focus on law as a social construction in its interaction with society⁵⁴. The delimitation of a legal domain, and the determination of its degree of autonomy is mainly an empirical question. For instance, F. Schauer notably identifies the following elements: lawyers may qualify themselves as a specific group, they may use specific sources in practice and in research, they may employ a particular kind of language, they may reason and argue in a specific way, legal disputes are solved with special procedures, and a particular legitimation and organization of force is associated with law⁵⁵.

b) Adopting accurate points of view and methods

A closely linked issue to the definition of a relevant object for cross-disciplinary approaches is the choice of one or several points of view. This epistemological question depends on personal and disciplinary positioning⁵⁶. The main dichotomy elaborated and largely discussed about the "correct" point of view is the one commonly attributed to H. L. A. Hart. Numerous times in his book, he distinguishes the external point of view from the internal point of view from⁵⁷: "The external point of view of social rules is that of an observer of their practice, and the internal point of view is that of a participant in such practice who accepts the rules as guides to conduct and as standards of criticism."⁵⁸. The first one is a perspective adopted by people or legal practitioners accepting and recognizing legal rules (or social rules) as such. The second one is a perspective that does not accept the rules, but describes them from the outside, which is limited to the identification of regularities in behaviours.

The distinction can be seen as partly structuring the debate about relations between the sciences and the law. This epistemological and methodological "dualism" probably influences practices of research and reveals some conceptions of law⁵⁹. The dichotomy can be declined in several manners, opposing for instance: an essentialist approach to an empirical approach; a sociology of law made by lawyers to a sociology of law made by sociologists; the implication of lawyers to the critical distance of social scientist; or a normative approach to a descriptive approach. In adopting an internal point of view, the researcher pursues the objective to get closer to the conceptions and representations of legal actors⁶⁰. These conceptions of law from lawyers

Philosophy, 2013. For an opposite conception of legal reasoning: L. Alexander, « Banality of Legal Reasoning », *Notre Dame Law Review*, 1998

⁵² This expression is used by N. Nelken referring to W. Ewald, D. Nelken, "Towards a Sociology of Legal Adaptation", in., *Adapting Legal Cultures*, Hart Publishing – Oxford, 2001, p. 8

⁵³ This gap that could be reduced by reforming law, and sociologist engage in normative proposition to reform law. Another perspective consists in looking for the reasons of such a gap, viewed as problematic. Referring to the work of R. Abel, L. Israel explains that these perspectives are unjustified, when they see this gap as a problem or presuppose that law and social reality should coincide. Two elements are underlined by L. Israel: an implicit value judgment on relations between law and social, and a presupposition about the nature of law that would imply specific approaches. L. Israel op. cit., 2008, p. 326-327

⁵⁴ R. Cotterrell, op. cit., 1998, p. 193, H. Dumont and A. Bailleux, op. cit., 2010, p. 285, L. Israel, op. cit. 2008, p. 390

⁵⁵ F. Schauer, op. cit., 2012, p. 457-467, F. Schauer, op. cit., 2015, numeric version, p. 13, p. 268-271, F. Schauer, « Legal Positivism as Legal Information », *Cornell Law Review*, 1996, p. 1082-1083. Specifically on the possible specificity of legal reasoning: F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press, 2009

⁵⁶ L. Israel, op. cit., 2008, p. 382.

⁵⁷ For a substantial analysis of the debate between A. Ross and H. L. A. Hart and the different meanings of the expressions: E. Millard, « Point de vue interne et science du droit : un point de vue empiriste », *Revue interdisciplinaire d'études juridiques*, 2007, Vol. 59, pp. 59-71

⁵⁸ H. L. A. Hart, *The Concept of Law*, Second Edition, Clarendon Press, Oxford, 1994, p. 255

⁵⁹ L. Israel, op. cit., 2008, p. 382-383

⁶⁰ *Ibid.*, p. 383

are considered by some authors as the most accurate to give an account of law⁶¹. On the contrary, an external point of view is characterized by an “epistemological rupture” which implies establishing a distance with legal participant’s conceptions of law and the notions and values present in legal discourses. Both of the points of views are subjects to various critics. Two main arguments can be synthesized as follows: the researcher adopting an internal point of view would risk losing the scientific accuracy of its approach, while the one adopting an external point of view would risk losing the specificity of law⁶².

Indeed, considering the debate about the “correct” point of view to be adopted to describe law, one central issue relates to the specificity of law and to its implication concerning the need of an internal point of view. In defending the accuracy of the internal point of view, some authors argue that social sciences, in adopting an external point of view, are not able to fully understand law. D. Nelken dedicated significant developments about “law truth’s”: it is the ways of differentiation, or the specificities of law, that social sciences should take into account in order to give relevant understandings on it⁶³. D. Nelken focuses on social sciences integration into legal practice (for instance in determining the occurrence of legal facts). He keeps a distinction between “social science of law” and “social science in law”⁶⁴. To summarize, he distinguishes three possible approaches (which implies different conceptions of law and sciences) to address the conflicts between legal practice and social sciences, or other sciences:

a) The “trial pathology approach”: this type underlines the deficit in taking into account scientific data in legal practice⁶⁵. Interaction between law and sciences are seen as relatively autonomous but they can influence each other⁶⁶.

b) The “competing institution approach”: law and sciences are seen as competitive institutions producing competitive discourses, but also “co-constructing” truths and ideas of justice⁶⁷, with divergences coming from the specificities of the objectives pursued by law⁶⁸.

c) The “incompatible discourses approach”: each discourse has his specific criteria of evaluation, with a marked separation between institutions devoted to practice and institutions devoted to science (or understanding). The distinction is such that it reduces the accuracy of an integration of sciences into legal practice⁶⁹.

D. Nelken’s is underlying the possible ways to understand how “law-making” and sciences can interact. His point is to show that scientific discourses conflicts with the legal perception and categorization of the world. An argument designed to support the internal point of view may be formulated as follows: the conflicts between scientific discourses and legal practical discourses reveals a specificity in legal perspective which could only be understood by adopting an internal point of view. Thus, only legal internal approaches are able to give an account of law, partly excluding other social sciences. The specificities of the law could not be grasped in the terms used by social sciences⁷⁰. Nevertheless, if some scientific discourses are present in legal practice (as shows the place devoted to expertise in trials), legal actors keep a degree of latitude in adopting or rejecting them (for instance in qualifying material facts under “legal fictions”)⁷¹. The conflict is only between the legal (prescriptive) discourses and the scientific discourses, and not between legal scientific (descriptive) discourse and other scientific discourses. Taking into account the internal point of view of legal actors can be made without confusing the scientific point of view of the researcher and the point of view of the participants (even if law may influence social and scientific categories⁷²): to consider the internal point of view does not necessarily

⁶¹ B. Latour, op. cit., 2004, B. Dupret, op. cit., 2010

⁶² R. Cotterrell, op. cit., 1998, p.173

⁶³ D. Nelken, “Can Law Learn from Social Science?”, *Israel Law Review*, 2001, p. 206-207

⁶⁴ *Ibid.*, p. 207

⁶⁵ D. Nelken, op. cit., 2001, p. 215

⁶⁶ *Ibid.*, p. 218

⁶⁷ *Ibid.*, p. 216-218

⁶⁸ *Ibid.*, p. 218-221

⁶⁹ *Ibid.*, p. 220

⁷⁰ R. Cotterrell, op. cit., 2006, p. 48

⁷¹ O. Cayla, « La qualification ou la vérité du droit », *Droits, Revue française de théorie juridique*, 1993

⁷² R. Cotterrell, op. cit., 2006, p. 49

requires to share the values of the participants, to presuppose an ontological nature of law, or to prescribe obedience to law⁷³. Even if some indicators show that professional lawyers have a specific (and probably varying) way of seeing the world, it does not disqualify the accuracy of social sciences approaches to law⁷⁴.

In order to resolve the opposition between internal and external approaches, a “middle ground” approach can also be promoted: an articulation of the internal point of view and the external point of view. It is a “moderate external point of view” (or a “moderate internal point of view”⁷⁵), defined as an approach that adopts external point of view but takes into account the internal point of view of legal actors⁷⁶. These points of view are not adopted together at the same time, but successively. Furthermore, the dichotomy would never be an absolute one, notably because the observer always participates in some manners to its object⁷⁷.

One can also see this debate as putted in a wrong way. R. Cotterell rejects the dichotomy: “It is replaced by a conception of partial, relatively narrow or specialized participant perspectives on (and in) law, confronting and being confronted by, penetrating, illuminating and being penetrated and illuminated by, broader, more inclusive perspectives on (and in) law as a social phenomenon”⁷⁸. According to J.-L. Halpérin, there is a subjectivity of points of view as researchers write with their own questions from their own context of research (however, a certain objectivity of discourses is maintained due to mutual evaluations between researchers)⁷⁹. The debate about internal point of view is not seen as decisive: researchers must know the specificity of their field of research and are free to define and use the tools that they consider the most accurate⁸⁰. And the renewal comes from diversity of point of views, comparing spaces and times; and with the possibility to move from one point of to another⁸¹.

Interdisciplinarity may be considered as a way to articulate internal and external points of view or even to go beyond the opposition, in adopting renewed points of view, and by crossing disciplines and methodologies. Because the term methodology is polysemous, we can stipulate the meaning hereafter to talk about interdisciplinary methodologies (combining elements that could be distinguished): a practical attitude in addressing the object, determining the steps for the process of research, associated to the elaboration of conceptual frameworks of analysis, and specific know-how, sources and data, with a pretention to be attached to more than one disciplinary methodology⁸². Methodologies described or prescribed for cross-disciplinary researches are heterogeneous. In the one hand, they are *sui generis*, but in the other hand they borrow from existing methodological standards in order to be reliable and evaluated by researchers⁸³. Some researchers also make their investigations with no explicit specification of their methods (which can only be reconstructed with a retrospection). Moreover, methodologies can be modulated during the research.

Typologies for distinguishing the methodologies could be elaborated using similar criteria as the ones used for interdisciplinary approaches. For instance: the degree of integration of the different methodologies, the context, the questions of research, the delimitation of the object, the objectives, the duration, the human and financial resources of the research. Another possibility is to look at the disciplinary methodological standards to which researches are attached. To simplify, the following disciplinary methodologies are often associated to legal science methodology (in many ways, and with a diversity of methodologies inside a given discipline) referring to the following disciplines: history; sociology; ethnology; anthropology; cognitive sciences;

⁷³ M. Troper, op. cit., 1987, p. 200

⁷⁴ R. Cotterrell, “Why Must Legal Ideas Be Interpreted Sociologically?”, in., Law, Culture and Society, Ashgate, 2006, p. 51-54

⁷⁵ H. Dumont and A. Bailleux, op. cit., 2010, p. 286

⁷⁶ F. Ost and M. Van de Kerchove, op. cit., 1991, p. 73.

⁷⁷ F. Ost et M. Van de Kerchove, op. cit., 1991, p. 74-75

⁷⁸ R. Cotterrell, “Why Must Legal Ideas Be Interpreted Sociologically?”, in., Law, Culture and Society, Ashgate, 2006, p. 60

⁷⁹ J.-L. Halpérin, « Le droit et ses histoires », Droit et Société 75/2010, p. 308

⁸⁰ Ibid., p. 311

⁸¹ Ibid., p. 312

⁸² We take those elements from the analytical distinctions made by V. Champeil-Desplats to distinguish various concepts of method. V. Champeil-Desplats, op. cit., 2014, p. 4

⁸³ W. Schrama, “How to carry out interdisciplinary legal research. Some experiences with an interdisciplinary research method”, Utrecht Law Review, 2011, 150

economy; philosophy; linguistic; political science; logic; literature *etc.*⁸⁴. The forms of investigations can vary; it may be quantitative or qualitative, at a macro or a micro level. For instance: empirical or experimental observations, text analysis, archives analysis, statistics analysis, interviews, surveys, psychological protocols of experiences, workshops *etc.*

One possibility to synthesize cross-disciplinary approaches and methodologies is to encompass them in a broad conception of sociological perspective to law⁸⁵. R. Cotterell brings together under the label “sociological perspective” any approach that interprets law “systematically and empirically as a social phenomenon” with no consideration about a specific method or theory from the sociological academic discipline⁸⁶. The sociological perspective he suggest is sociological and transdisciplinary; it admits any discipline and method that takes law as an empirical phenomenon in order to give an empirical and systematic understanding⁸⁷.

3. The challenges of cross-disciplinary perspectives

The challenges faced by researchers may be due to epistemological issues (a) as well as institutional and individual ones (b).

a) *Epistemological difficulties*

A strict conception of the link between a scientific discipline and its objects seems to render cross-disciplinary approaches nearly unachievable. If one science constitutes its own object, it is conceptually exclusive from other sciences, even if the empirical reality can also be describe by other sciences. For instance, when H. Kelsen defines the object for legal science as legal norms, or positive law, it excludes other science to also give an accurate description or explication on them⁸⁸. If identifying and specify a proper-called object “law”, and the modalities in which norms are produces, is only possible through legal science, it excludes other disciplines⁸⁹. Possibly, legal science is the only one that can explain the link (the imputation) between a prescriptive meaning and the text to which legal authorities attached it. The only solution here is to specify a particular object for a cross-disciplinary science, and this object would conceptually not be shared with other disciplines. The plurality of definitions given to law by cross-disciplinary approaches would create mutually exclusive concepts incompatible with a unified vision of one pluridisciplinary science of law with a common object. The difficulties emerging from the conceptual definition of the object also underline a broader one concerning the possibilities of circulation of concepts used from different disciplines.

The diversity of interdisciplinary objects, methodologies and discourses is also a heuristic problem. With such differences it seems very difficult to elaborate a unified theory of scientific interdisciplinarity, and to specify the criteria to be used in order to evaluate their scientific accuracy. A scientific discourse is usually evaluated from one field of knowledge, with more or less shared criteria. Interdisciplinary researches do not fit in one pre-existing category, and the researches can only be partly evaluated from the point of view of one discipline. In the United States, some criticisms are formulated against interdisciplinarity made by legal researchers. They would not be able to observe the methodological requirements from the disciplines used⁹⁰. In this critical perspective, interdisciplinary approaches couldn't overcome methodological problems and, as a

⁸⁴ V. Champeil-Desplats, *op. cit.*, 2014, M.-C. Ponthoreau, *op. cit.*, 2010, p. 237-249, K. Ervasti, “Sociology of Law as a Multidisciplinary Field of Research”, *Scandinavian Studies in Law*, 2008, p. 138, and more specifically about history and legal science, see: J.-L. Halpérin, *op. cit.*, 2010.

⁸⁵ In this perspective, sociology pursues interdisciplinarity and transdisciplinarity. J. Carvajal « La sociología jurídica y el derecho », *Revista Prolegómenos - Derechos y Valores*, 2011, p. 115

⁸⁶ R. Cotterell, *op. cit.*, p. 54-55

⁸⁷ *Ibid.*, p. 54-55

⁸⁸ H. Kelsen, *op. cit.*, 2010, p. 83-84, M. Troper, *op. cit.*, 1987 Volume 11, p. 195-196

⁸⁹ P. Brunet, *op. cit.*, 2014, p. 271

⁹⁰ V. Champeil-Desplats, *op. cit.*, 2014, p. 345

result, would stay at a superficial level⁹¹. Interdisciplinary researches may finally appear as incompatible with disciplinary approaches that tend to define rigorous methods and concepts. Thus, the only admissible level would be pluridisciplinarity while inter and transdisciplinarity risk to fall into a syncretism⁹². Another potential pitfall is the selection from other disciplines of some insights that correspond (and legitimate) to a dogmatic vision of law, letting apart others elements.

The conception of the role and function of researchers in their respective disciplines can also be too strictly delimited to allow interdisciplinarity. N. Bobbio considers that interdisciplinarity always presupposes a distinction between approaches⁹³. Comparing the work of sociologists to the one of lawyers, he underlines differences: in their materials and the ways to use it, the point of view they adopt, their approaches (sociologists start from behaviors to identify a rule, and lawyers operates in the opposite way; one being descriptive and the other normative), one is mainly oriented on description of behaviors, the other on interpretation of legal rules⁹⁴.

b) *Institutional (and individual) limitations*

The institutional division of knowledge in various entities, which are relatively autonomous, can be a condition for scientific specialization and enhancement, but it can also be a limit to any attempt in order to build a cross-disciplinary research⁹⁵. In addition, legal research is relatively isolated from other social sciences (as a result of a historical process of elaboration and affirmation of the discipline⁹⁶), and legal discourses are rarely considered as “scientific” notably because of their proximity to the legal practice⁹⁷. Academic divisions of disciplines may also be an issue for interdisciplinarity, which is limited by economical and institutional constraints, and conflicts between disciplines⁹⁸. Furthermore, career advancements are mostly organized around disciplinary divisions.

A researcher who wants to engage in a cross-disciplinary approach may not have the required competences in doing so. Legal education (depending where) is sometimes not providing a sufficient formation in social sciences⁹⁹. The researchers are also situated in cultural contexts, and may have internalized disciplinary divisions¹⁰⁰. Moreover, the differences in approaches and methodologies may lead to miscomprehensions between researchers. Interdisciplinary approaches can also be viewed suspiciously, as an illegitimate “intrusion” in a field¹⁰¹ or as a way for legal science to lose its superiority on its object¹⁰².

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⁹¹ Ibid., p. 345

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⁹⁵ F. Darbellay, op. cit., 2011, p. 68

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⁹⁸ Ibid., p. 13-14

⁹⁹ H. Dumont and A. Bailleux, op. cit., 2010, p. 275

¹⁰⁰ F. Darbellay, op. cit., 2011, p. 69

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THE ECONOMIC CRISIS AND ITS CHECKMATE TO OUR TRADITIONAL INHERITANCE SYSTEM: SHOULD WE NOT RESTART THE GAME?

Mónica García Goldar¹

Abstract

This paper aims to criticize the outdated Spanish regulation that gives heirs unlimited responsibility for the debts of the deceased in case of inheritance acceptance. Only through the benefit of inventory, which has some difficult requirements and limited time, can the heir limit his liability up to the value of the estate. The economic crisis has increased the number of inheritances with unaffordable debts and, due to that, the number of inheritance repudiations has increased fourfold. But there is another problem: sometimes it is difficult to get to know the existence of debts, and our regulation does not provide any solution for this situation. That is why we consider it is time to promote a new regulation.

Keywords: economic crisis, effects, socioeconomic reality, succession law, reform.

Introduction

The financial crisis sweeping the world, and especially the southern European countries, has had a devastating effect on the socio-economic reality. In Spain, we have undertaken a long and hard struggle against recession, making our economy and society stagger before the astonished eyes of our European partners. The decline was not easy. It was long and difficult, and reached the lowest depths imaginable.

It is true that the macroeconomic rates have begun to give small droplets of optimism, but if you look back it is still easy to feel thirsty, the immediate past is really bleak. Everything that the economic recession has already destroyed seems difficult to restore. And what is worse, it has become difficult to continue with some of our archaic legal institutions, which do not go well with the current times. That is why the main objective of this communication is to show the need to renew our regulatory framework in many sectors, and especially where inheritance is concerned. This demand for change, actually responding to a social demand, is the basis of this study.

1. Impact of the economic crisis in Spain

As mentioned above, the impact of the financial crisis in Spain has been catastrophic. The statistics say so clearly. And the worst part is that this crisis has come to round to a kind of freefall chain reaction, as all economic sectors were affected. The financial crisis in Spain is not comparable to that suffered by other countries in the eurozone, as in our case, another economic condition has been brewing for some years: the housing bubble. When the crisis erupted, the economy contracted in a calamitous way.

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The effects of this combination of endemic problems were quickly seen, and those who suffered it most were the average citizen and small businesses. Thus we started to see mortgage defaults, closure of small businesses, and strong job losses. In recent years we have had to witness a shocking number of foreclosures. Reading the news was a real nightmare, as it was always the same: more families left without a roof over their heads. In fact, since the crisis began, in the 2007-2015 period², a whopping 672,624 foreclosures have been carried out. This gives us the sad average of 74,736 foreclosures a year, or 205 a day. To make things worse, and as the popular saying goes, it never rains but it pours, so the bad economic situation of some people led to a bad economic situation for other people. This malicious spiral led, as we say, to the viral spread of negative effects in all sectors of the economy.

These astronomical numbers led the Spanish legislator to propose many reforms in all sectors: labor, financial, legal, economic, etc. The Law 1/2013 of 14 May on measures to strengthen protection for mortgage holders, debt restructuring and social rent requires special mention. However, despite the timid improvement that could be seen with these reforms, the fact is that the Spanish economy is still deeply affected.

In the area of successions, which is what interests us here, the economic crisis also had a big impact. During the period 2007-2015, the number of repudiations of inheritances went from 11,047 in the year 2007 to 37,811 in 2015³. That is, they increased by 242%. This strong increase worried not only the legal field⁴, but also the press⁵, which continues to publish news about this unstoppable trend. People who write on this issue are clear: the cause of this increase in the repudiation of inheritance is the excessive presence of inherited debts. Not surprisingly, we can see this cause-consequence in the data about foreclosures, which are the direct cause of many of the repudiations that occur and to which we have referred.

2. The traditional continental system of succession

To understand the title of this communication, we should briefly explain how succession is regulated in the Spanish Civil Code⁶. The first point to note is that, unlike in common law systems –where the inheritance does not include debts, because the death of a person is considered to be the ideal timing for proceeding to pay debts- our system is traditionally Roman, so the inheritance includes all assets, rights and obligations of a person which are not extinguished by his death (Article 659 Civil Code). This implies, therefore, that the heirs acquire the estate of the deceased in its entirety, including all debts, and that they are going to be personally liable for those debts.

Another important issue to note is that, contrary to what happens in the Germanic systems -in which the heir acquires that status automatically at the moment of the deceased's death, with the option to repudiate-, our legal system is also traditionally Roman in this point. That is, a positive or negative act by the one who is called for the inheritances is needed, and if he does not do anything, he will not become an heir. This exigency of action gives the heir a double power: he can either accept the inheritance or repudiate it. Both acceptance and repudiation are characterized as being unilateral acts, not personal, indivisible, unconditional, irrevocable and not subject to term. However, although the repudiation always has to be expressed, acceptance may be expressed or tacit.

² Official statistics can be found here:

<http://www.poderjudicial.es/portal/site/cgpj/menuitem.65d2c4456b6ddb628e635fc1dc432ea0/?vgnextoid=311600fe2aa03410VgnVCM1000006f48ac0aRCD&vgnnextchannel=a64e3da6cbe0a210VgnVCM100000cb34e20aRCD&vgnnextfmt=default>

³ <http://www.notariado.org/liferay/web/cien/estadisticas-al-completo>

⁴ http://www.notariado.org/liferay/c/document_library/get_file?uuid=e3058c83-cab7-4302-ada4-85b17b1b915b&groupId=10218

⁵ http://www.lavozdegalicia.es/noticia/economia/2016/02/03/renuncia-herencias-bate-record-galicia-pese-mejora-economica/0003_201602G3P31991.htm; <http://www.andaluciaendatos.es/las-renuncias-a-herencias-se-cuadruplican-en-andalucia-durante-la-crisis/>; http://www.lavozdegalicia.es/noticia/galicia/2015/04/06/renuncia-herencias-multiplico-cuatro-inicio-crisis/0003_201504G6P4994.htm; <http://www.larazon.es/economia/cuando-una-herencia-es-una-ruina-GI6921019#.Ttt1nk7PsSdqj3L>

⁶ We must clarify that the Spanish Civil Code establishes a regulatory framework that is binding for a large part of the Spanish territory, but not all, since there are autonomous regions with legislative powers in civil matters in which their own regulation is sometimes not only different, but completely opposite.

If we connect these two themes - inheritance as a concept that includes all assets and debts of the deceased, and the requirement of a positive or negation action - we will be in position to define the main focus of this communication, which is to study the responsibility of the heirs for debts. In this regard, we can say that the Spanish law states, according to the specific action of heirs, what could be called a general rule and an exception.

The general rule, which we consider detrimental, is that the heir who accepts the inheritance is liable for all debts of the estate, even with their personal assets if the assets of the estate are not enough to cover the debt. This is what is known as *ultra vires hereditatis* responsibility. With this "strategic" regulation, a mixture is produced between the inheritance and the personal assets of the heir⁷. The estate and personal assets of the heir form a common mass so that the heir becomes debtor of his creditors and the creditors of the deceased. There is no priority among the creditors: all have the same right to demand the payment of their debts.

As it is clear to see, this regulation is quite harmful: it harms the right of creditors to see their credits paid, especially if the heir is in trouble or in a precarious situation. It also harms the rights of the heir creditors, especially if the inheritance has more debts than assets. Ultimately, in either case it is harmful for the heir, as this *ultra vires hereditatis* responsibility could affect his own personal patrimony.

Another major flaw in this regulation is that there is not any debt liquidation procedure. Debts can be paid before or after the partition, with the problems that this lack of regulation involves. If the debt is paid once the partition has been arranged, creditors can demand the entire payment of their debts from one of the heirs who have accepted the inheritance without the benefit. And although the heir who has paid has some legal remedies to demand the other heirs pay their proportional part, it is not difficult to see the possibility that the heir who has paid all the debt will end up assuming the possible insolvency of others.

Against this legal rigmarole, the Spanish Civil Code has included an action by which the heir can limit their liability for debts up to the limit of the value of the estate. This resource depends on the application for the benefit of inventory. If the heir uses this legal option, his liability for debts will be limited to the value of the assets of the estate. That is, the responsibility will become only *intra vires hereditatis*, so that his personal assets will always be safe. This does not mean that the heir will not become a debtor. The heir remains a debtor, but his responsibility will be limited.

It is possible to think, then, that this system is not advantageous for the deceased's creditors or that this system only benefits the heir and the heir's creditors. But this would be a fallacy. The real truth is that the benefit of inventory does not change the status of creditors. Before the death of the debtor, the creditors have the patrimonial guarantee of Article 1911 Spanish Civil Code that states that debtors respond to their debts with all their assets, present and future. Well, with this benefit, the guarantee remains unchanged. And indeed, this legal option offers more advantages than the limitation of liability, especially because a debt liquidation procedure is followed. The debt payment becomes the main priority, so if the heir wishes to benefit from this exception, he must ask the notary for the formation of a "true and correct" inventory of all assets of the estate, and the summons of creditors and legatees. This represents the first guarantee for creditors who may, on the one hand, ensure that their credits are taken into account in the inventory, and on the other hand, make sure that all the assets are correctly included in the inventory, so that they will be able to be paid with them.

We also must say that until all known creditors and legatees are paid, the Spanish Civil Code states that the inheritance is to remain in administration. The administrator, who may be the heir or a third party, will be responsible for making the payment of such debts and, in the case of remains, handing it over to the heirs, who will not have the full enjoyment of the assets of the estate so far. It is important to note, too, that the administrator must follow an order of priority established in the Spanish Civil Code: namely, the deceased's creditors have to be paid first, and then the legatees. In cases where there are preferential credits, the administrator must take measures to ensure the payment of these preferential credits.

In conclusion, this legal exception is triply advantageous: it is beneficial to the heir, who does not see his personal assets diminished, it is beneficial to the deceased's creditors as well, as long as they get to collect their credits preferentially and without the slightest option that the inheritance gets confused with the assets of

⁷ There is an author, PEÑA BERNALDO DE QUIROS, who argues that there is no such patrimony mixture.

the heir, and it is also beneficial for the heir's creditors, who will enjoy the certainty that the assets of the debtor will not be confused with the harmful inheritance.

If this system is so advantageous, we can only ask: where is the problem then? Well, we have identified two problems essentially. The first problem is the configuration of this benefit as a legal exception, which many people are aware of⁸. The second problem is the reduced deadline. In effect, this benefit can only be requested within 30 days of acceptance, if there has been acceptance, or 30 days from the end of the period for which the possible heir has been compelled to accept or reject the former inheritance ex Article 1005 Spanish Civil Code. This deadline is unacceptable, as most citizens do not know about this option, or when they find out about its existence, it is too late.

It is also important to note that our Civil Code admits, as we have said above, that there can be a tacit acceptance. The tacit acceptance takes place when the heir performs acts that imply a willingness to accept. In these situations, where there is a tacit acceptance without legal advice, the heirs are particularly at risk of seeing their patrimony affected, especially if they do not apply for the benefit in time.

3. The possible existence of unknown debts

One might think that the average citizen is the one who must seek to know the net worth of inheritance and to take protective measures and insurance in case there are more debts than assets. However, this legal burden on the citizen does not seem fair, especially if we take into account that there are situations where it is very difficult or almost impossible to predict or get to know the real status of the estate. For example, it can happen that the deceased is declared responsible for extra-contractual liability once he is already dead. In this regard, the recent decision of the Supreme Court, 7 May 2014⁹, stated that the liability of a doctor carrying out his duties was not a personal debt and therefore was transferable to his heirs, who were sentenced to pay that debt once the acceptance had taken place.

Another common paradigm, especially now in times of economic crisis, is the surety contract. And, indeed, sometimes it is not the direct debts of the deceased that generate a harmful inheritance, but those derived from the provision of guarantees in favor of third parties, usually children or other relatives. In this regard, and as we have already said, the debtor is responsible for the payment of his debts with all his assets, present and future. However, this universal responsibility often becomes insufficient, so that it is normal to demand additional guarantees to ensure the collection of a debt. The problem arises, however, for the sureties, who are unaware that the obligation guaranteed will remain as a debt, even after his death.

If we consider that the Civil Code does not require any special form for the surety, we can see the seriousness of the situation. Indeed, the Civil Code does not even require that the surety contract be written. This lack of formality involves major setbacks in the *mortis causa* succession, as can happen, and does happen in reality, when the heirs are unaware of the obligations that the deceased have had guaranteed and they accept the apparently acquitted inheritance without any possibility of foreseeing the guarantee that will affect the inheritance and, maybe, their own patrimony.

These are the main problems that can be seen regarding the difficulty and sometimes impossibility of knowing all the deceased's debts. What is really disturbing is that the Spanish Civil Code does not provide any solution to these situations, unlike other European countries. Thus, in 2006, a year which can be considered the start of the European crisis, France introduced an amendment to the Article 786 of the French Civil Code

⁸ In this regard, I have conducted an unofficial study to contrast this reality through Google Forms tool, in which 200 people from different backgrounds have participated. It is surprising that, while 76.2% of respondents admitted having a college education, 70.4% admitted that they had either never heard about the benefit of inventory (49%) or did not know what it was (21.4%).

⁹ Aranzadi, RJ 2014/2477

according to which the heir can be relieved wholly or partly of a debt if he can prove he had no way of knowing about this debt, and this debt is of such a value that it might affect his personal assets¹⁰.

In the Spanish Civil Code, as we say, there is no legal solution to these situations. The only feasible solution that comes to mind is to annul the acceptance because of mistaken consent. This is a quite controversial solution, as long as it has special requirements for its viability, namely, that the error falls on the object, is not attributable to the sufferer, and is excusable, that is, inevitably using an average diligence and the requirements of good faith.

Conclusions

The economic crisis, as we said at the beginning, has had important consequences in the field of succession. And, indeed, if the general system of succession is based on succession of debts, it is not surprising that the number of repudiations has increased. It is easy to see the large percentage of population that is now deeply in debt or bankrupt and to imagine the impact of all that on the field of successions.

At this point, the question we have to ask ourselves is whether the regulatory regime that exists today is adequate or not. That is, is it useful to have a system in which the general rule implies an acceptance that carries out the unlimited responsibility of the heir? Is it logical that the benefit of inventory, which is triply advantageous, as we said, is constituted as a legal exception? Besides that, it is an option that is largely unknown by the citizens.

In our opinion, the answer to these questions is clear: no, this general system is no longer useful. The crisis has highlighted its shortcomings and limitations, and it is necessary to promote a legislative reform as well as to establish the benefit of inventory as a general rule. Only then we will reduce the number of repudiations that presently occur. This question is not trivial at all, especially in economic terms, since an excessive period of time for an inheritance without an owner is not positive for the economy in the long run.

By promoting this new regulation we will also protect the heirs, who today seem to be constrained to be a kind of personal and atypical guarantee *post mortem*, which guarantees, with dubious legality, the debts of the deceased with their own personal assets.

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5. Navarro Castro, "La responsabilidad por las deudas hereditarias" (Madrid: Fundación Registral 2009)
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¹⁰ Article 786 du Code Civil, modifié par Loi n° 2006-728 du 23 juin 2006.- L'héritier acceptant purement et simplement ne peut plus renoncer à la succession ni l'accepter à concurrence de l'actif net. Toutefois, il peut demander à être déchargé en tout ou partie de son obligation à une dette successorale qu'il avait des motifs légitimes d'ignorer au moment de l'acceptation, lorsque l'acquittement de cette dette aurait pour effet d'obérer gravement son patrimoine personnel. L'héritier doit introduire l'action dans les cinq mois du jour où il a eu connaissance de l'existence et de l'importance de la dette.

THE IMPLICATIONS OF BIOETHICS ON DIFFERENT CONCEPTS OF LAW: HUMAN CLINICAL RESEARCH PERSPECTIVE

Justina Januševičienė¹

Abstract

The synthesis of the achievements of various sciences evokes greater expectations of society for a longer duration of healthy years. The possibility of conducting clinical research on humans is one of the most important factors, which impose direct influence upon the progress of biotechnologies. Theological, ethical and moral aspects of clinical trials for new medicines, methods and medical devices have been discussed by representatives of biomedical and social sciences several decades already, with no hint of autonomous action of law in this field. Standards of good medical practice and nonmaleficence, morality and professionalism have been developed in such convincing manner that society met them as an issue for numerous challenges and threats arising from massive technological offspring. And this does not mean that both the rule and the role of law in biotechnologies are blunt because of the domination of medical ethics. The opposite – detailed analysis of different legal concepts reveal consistent impact of biomedicine to the development of legal thought.

It is thrilling to observe the contribution of biomedicine and biotechnologies to law not only when we come to generally applicable legal virtues and essential principles, such as dignity, freedom or right to life, but as well as we find an undeniable impact on basic functions of law.

The core examples of research paper are collected and analysed through the perspective of clinical research on humans due to the uttermost importance of the topic today.

The article covers the insights of representatives of natural law – I. Kant, R. Dworkin, J. Finnis and J. Rawls, procedural natural law – L. L. Fuller, legal positivism – H. Kelsen, J. Austin, H. L. A. Hart, J. Raz, legal realism – J. Bjarup, A.N.C. Ross, economic concept of law – R. Coase, G. Calabresi.

Keywords: biotechnologies, clinical research, bioethics, ethical principles, legal concepts, natural virtues.

Introduction

The development of life sciences causes a never ending discussion on the interaction between law and biotechnologies. While representatives of various groups of legal thought argue on whether it is necessary to accompany every stage of biomedical treatment and research steps with clear legal provisions, or whether should law reduce its imperative regulations in order to facilitate innovations and let the self-rule mechanisms flourish, it is important to understand the influence of bioethics to law. Though theological, ethical and moral aspects of clinical trials for new medicines, methods and medical devices have been discussed by representatives of biomedical and social sciences several decades already, we can scarcely find explicit data on what could have been or what could be the possible impacts of pure law on the development of biotechnologies. A. R. Jonsen puts it clear - legal regulations in biotechnologies developed not as a result of autonomous legal thought and analytical jurisprudence, but as a normative reflection of the synthesis of

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paradigms of philosophy and theology². Standards of good medical practice and non-maleficence, morality and professionalism were incorporated into the main legal acts, which constitute the main principles and conditions of medical practice and clinical researches, as they were regarded as an ideal solution for all biomedical sciences related issues.

The opportunity to facilitate the progress of medical technologies, medical devices, medicines and methods is directly linked to the possibility of conducting clinical trials. Despite the importance of legality in clinical trials, nowadays, the main focus is put on the ethics of clinical trials rather than the law of clinical trials: the distinction between these two categories is nearly invisible. Modern requirements of clinical research have to constitute a balance between the priority of an individual and scientific or social needs and expectations³. The perspective of clinical trials, which was selected in order to reveal the interdisciplinary approach to law, is one of the most illustrative issues where law has to revise its basic functions as well as to make a shift in a definition of legal virtues and essential principles, such as dignity or freedom of will.

In order of sustaining logical consistence, bioethical implications to law are analysed through a prism of various legal concepts. There is no more fundamental legal concept than that of "law" itself. There have been a great many definitions of law, but probably the most wide spread definition of law is that of Blackstone. Blackstone's definition says that law, in its most general and comprehensive sense "is that rule of action which is prescribed by some superior and which the inferior is bound to obey."⁴ Deriving from this point, we must acknowledge that a specific legal concept, which is dominant in certain society at a certain period, is the most important tool to evaluate the legality of human behaviour including all its consequences. Though some authors argue, that society has gone too far and the discussion on the contradiction between legal positivism and natural law as modern legal order is virtually neutral⁵, practical evolution of law in biomedicine reveals a direct link between dominant legal concept and bioethical virtues. Therefore, the impact of bioethics to law cannot be generalised in terms of legal concept of law as "itself" and again - different legal concepts reveal different implications of bioethics. The ideas of this article are explicated through natural law, analytical and critical paradigms of law and economic concept of law.

The article gives a review on the findings of legal classicists: representatives of natural law – I. Kant, R. Dworkin, J. Finnis and J. Rawls, procedural natural law – L. L. Fuller, legal positivism – H. Kelsen, J. Austin, H. L. A. Hart, legal realism – C. Varga, economic concept of law – R. Coase, G. Calabresi and other authors.

1. Bioethics and the principle of dignity

The principle of dignity is one of the essential virtues of modern society. Its origins come from the ontology of human essence. The grounds for the general perception of human dignity were set by Voltaire, J.J. Rousseau, J. S. Mill, D. Hume, I. Kant, G. Hegel, T. G. Masaryk, C. Varga, which have dedicated great part of their work for identification of the definition and limits of dignity. General perception of dignity, which is embodied in Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, The *Charter of Fundamental Rights of the European Union*, is concerned on three main categories of the meaning: dignity as the synonym of honour, dignity as an obligation of one individual towards another one and dignity as a human right. Though the aforementioned aspects of dignity seem to cover all aspects of human nature, bioethics finds them insufficient and even provides arguments why dignity can be eliminated out of medical ethics without loss of content⁶. While some believe that dignity is just a blunt declaration, which is not suitable for bioethics, we would like to provide contrary arguments on how bioethics influenced the perception of dignity and adjusted the principle to its needs. M. Düwell adds the fourth category of dignity which derives from the principle of maleficence („primum non nocere“), which is set by

² A. R. Jonsen, 'A Short History of Medical Ethics' (New York: Oxford University Press 2000) 115

³ World Medical Association Declaration of Helsinki on Ethical Principles for Medical Research Involving Human Subjects, adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964; <http://www.wma.net/en/30publications/10policies/b3/>

⁴ W. Blackstone, 'Commentaries on the laws of England' (ABA Classics Press 2013) 38

⁵ C. Varga, 'Contemporary legal philosophising' (Budapest: Szent Istvan Tarsulat 2013) 12.

⁶ R. Macklin, 'Dignity is a useless concept. It means no more than respect for persons or their autonomy' [2003] 327 BMJ 1419–1420

Hippocratic Oath: dignity as an “antidote” for human vulnerability⁷. The obligation to cause no harm for a person comes from the professional duty to refrain from physically or mentally hazardous actions or negligence: superior individuals should not abuse their position and take care of those, who are in need. Consequently, if natural law considers dignity as the fundamental right among all human rights, the dignity of most vulnerable individuals (children, mentally disabled persons, addicts, refugees and etc.) should be additionally protected and respected by the individuals under whose care the former individuals appear. Practical operating under conditions of the principle of non-maleficence (as a bioethical duty to respect the most vulnerable groups) leads us to the question, whether law should dignify the vulnerability of such objects of clinical research as, for instance, human embryos. Bioethical teaching says – it should be very cautious and foresee the possible consequences. And here we come to an example on how biomedical and bioethical paradigms affect legal thought depending on legal concept: law has to revise a distinction between a person and a human being. And there is no general agreement on this point.

The core argument of natural law is based on an idea of universality of human rights and is grounded on the equality between human being (regardless the stage of its development) and a person (an individual, enjoying natural rights). Representatives of natural law concept believe that dignity should not be earned or conferred – it is a fundament of human society. I. Kant says that dignity is common for all human beings and they cannot be used as a mean for other purposes⁸. These arguments are supported by J. Rawls, who believes that equal rights are not just empty vessels of just society – they are filled with dignity, which is the basis of society⁹. This is quite straightforwardly focused on each person’s right to acquire dignity with his birth and not having dignity developed over time depending on a person’s behaviour, physical or mental health, morality, economic welfare, social standing, race, or religion. Bioethics challenges the understanding of inborn dignity and questions whether it is just to exclude vulnerable human beings from a right to be dignified. At the perspective of clinical trials it is important to discuss the possibility to conduct clinical research activities on human embryos or foetuses, which, independently of their development stage, fall into the category human beings of prenatal period and, following the concept of „acquiring rights with the birth of an individual“, are still formally not subject to be dignified. And here, bioethics offers a compromise between religious beliefs which consider human essence (as a whole: including soul and all the possible physical shapes) coming from God’s will, with which no human power should compete, and law, defining acquisition of human rights from the moment of birth. Bioethics offers law to protect and respect dignity of human beings at any stage of their development as an antidote for their vulnerability. And the concept of natural law absorbs this standpoint. J.Finnis argues that there is a matter of substance: human embryo is the same substance as fully developed individual and it is subject to the same natural rights¹⁰. Convention for the Protection of Human Rights and Dignity of the Human being with regard to the application of biology and medicine (hereinafter referred to as the Convention on Human rights and medicine) emphasizes the obligation to respect the human being both as an individual and as a member of the human species and recognises the importance of ensuring the dignity of the human being as the misuse of biology and medicine may threaten human dignity¹¹. Article 18 of the Convention on human rights and medicine says, that the adequate protection of the embryo should be ensured, where the law allows research on embryos *in vitro*. It is obvious that the obligation to ensure protection of an embryo comes from a principle to refrain from causing harm for the most vulnerable human beings. There is even no further discussion on how “human” this human being is: does he feel, see, hear or react. The concept of natural law accepts and adopts a definition of dignity, which comes from bioethical principle of non maleficence, and may apply this definition beyond the field of biomedicine. Dignity becomes more than a feeling of being respected. *Dignity, deriving from bioethical approach, is a protector from society’s self-destruction.*

⁷ M. Düwell, ‘Bioethics : methods, theories, domains’ (London : Routledge 2013) 49

⁸ I. Kant, ‘Grynojo proto kritika’ (Vilnius: Margi raštai 2013) 430

⁹ J. Rawls, ‘The Law of Peoples’ (Cambridge, Harvard University Press 1999) 121

¹⁰ J.Keown., P, Robert, ‘Reason, morality and law: the Philosophy of John Finnis’ (Oxford: Oxford University press 2013) 295

¹¹ Convention for the Protection of Human Rights and Dignity of the Human being with regard to the application of biology and medicine https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168_007cf98

Other concepts of law are less concerned on bioethical arguments related to vulnerability. The representatives of utilitarian and economic law theory believe that despite the universality of human rights, dignity has to be additionally enforced by law and, what is more, it has to be “earned”. Both utilitarianism and economic concept of law make a clear distinction between a human being and a person. According to P. Singer, the former one is capable of deserving dignity and other rights, belonging to a person through cognitive recognition¹². Utilitarian teaching says that a person, who is worth being dignified, must be capable of analyzing good and bad decisions and their aftermaths. The limits of personal dignity are adequate to person’s conscious and purposeful usefulness in society. Though the participation human embryo in clinical trial is also useful for the society as it may serve for the aim of setting its members free from illnesses and malfunctioning, but the absence of conscience does not earn a state of being dignified. G. Calabresi argues that fair compensation should be the essential precondition of every relation between or among individuals and if it is impossible to esteem the value of someone’s interests, the economic interests of the majority of society should be respected first.

The relation between bioethics and both analytical and critical jurisprudence is rather tensed because of legal positivism and legal realism being often criticized on its attempts to purify law from moral statements. According to R. A. Posner, the greatest defect of legal positivism is making no distinction between law and laws, which appears very convenient to oppressive regimes¹³. H. Kelsen and J. Austin liberate the perception of law from all moral speculations and virtues, which exist independently from the will of state, and put it as set of rules enforced by one group of individuals towards the other group. On the other hand, the positivistic thesis of the separation between law and morality, at its origin, is truly an attempt to separate the law and the state from the overwhelming claims of tradition and religion. According to H.L. A. Hart and J. Raz, the relation between law and morality is unnecessary or not essential in regulating the legal norms of society: certainly, it can happen that a legal system, or some of its norms, embodies moral values or a legal system adopts specific criteria of legal validity based on respect for some moral values, but these have to be conventional moral values, agreed upon by members of society, not universal or inborn. While some believe that clinical genetic, dermatological researches and experiments on young children or mentally disabled people, conducted by Nazi during the Second World War, were inspired by legal positivism with no hint of respect towards human dignity¹⁴, others argue that legal positivism has nothing to do with that, as the general laws, acting at that time were totally against inhumane clinical researches¹⁵. What is more, L.L. Fuller believes that the rule of law enhances human dignity as legal provisions do not allow people to appear in especially humiliating conditions. But certain procedural lawmaking conditions have to be fulfilled¹⁶. This means that positivistic legal doctrine requires individuals to be dignified by precise legal provisions. That is why analytical and critical jurisprudence framed discussion on dignity, which is a central principle of bioethics, faces a bit of inconsistency of law in itself. For instance, Scandinavian legal philosophers well known for their positivistic - realistic outlooks A.N.C. Ross¹⁷, J. Bjarup¹⁸ refuse to acknowledge the influence of medical ethics to law and consider it no more than a complimentary measure to make law more concrete, but in any means to shape it or replace it. The essence of positivism rejects the idea of universal rights and do not confer dignity to foetus or an embryo as it does not recognize its’ personhood. On the other hand, the evolution of bioethical institutions, supervisory bodies for clinical research, reproductive health and biobanking becomes so expansive that even rigid standpoint of

¹² P. Singer, ‘The expanding circle: ethics, evolution and moral progress’ (Princeton university press: 2011) 214

By the year 1993 P. Singer shocked the society of the USA by his statement that taking away the lives of disabled newborns can be morally justified, as a newborn should not be considered a human until it is 30 days old.

¹³ R., A. Posner, ‘The Problems of Jurisprudence’ (Cambridge and London: Harvard University Press:2000) 190

¹⁴ G. J. Annas, E. R. Utey, M., A. Grodin, “Nazi doctors and the Nuremberg code: human rights in human experimentation” (Oxford: Oxford university press: 1992)

¹⁵ G, K. Yang, The rise of legal positivism in Germany: a prelude to nazi arbitrariness? Murdoch university press: The Western Australian Jurist, vol 3, 2012. The directive adopted by the Prussian minister of Religiuos, educational and health affairs on the 29th of May, 1900, was against human testing on vulnerable groups.

¹⁶ D. Luban, ‘The rule of law and human dignity: reexamining Fuller’s cannons. Georgetown Pubic Law and Legal Theory research paper’ [2010] 10-29

¹⁷ E. Millard, ‘Alf Ross and Realist Conceptions of Legislation.’ [2013] The Theory and Practice of Legislation, Hart Publishing, 77-89.

¹⁸ J. Bjarup, ‘Scepticism and Scandinavian Legal Realists’,(Oxford: Oxford University Press 2006), 287

analytical and critical legal concepts cannot hold the pressure to reconsider the impact of bioethics. Though we may see Germany, Austria, Sweden and Denmark as cradles of legal positivism and legal realism, the most recent debates on genomic sequencing and stem cells research involving human embryos show that bioethics is being considered as a valuable source of law or even a value index, measuring the legitimacy of law¹⁹.

2. Bioethics and freedom

Freedom in terms of relation between law and bioethics ought to be discussed as a freedom of will. Unrestricted will in clinical trials is materialised through informed consent of a participant. In terms of natural law concept, informed consent means clear expression of personal autonomy. According to legal philosopher J. Christman, the core elements of autonomy are *self-rule and self-government*²⁰. *Self rule* means independency from views and choices, caused by external manipulations. In this sense, the definition is equal to Kantian practical reason, which refers to the inner logics of autonomy. The other element – *self-government* is the ability to act upon individual values and conditions of competence and authenticity. *Self-government* is a synonym to S. Mill's frames of external autonomy, meaning that only free, rational and reasonable individual may recognize his own desires, values through the values of the coexisting individuals. Transforming the meaning of autonomy into the objectives of the informed consent gives us the authenticity of individual's desires, the capability to adapt personal reason based decisions and the capability to implement these decisions. Of course, previous deliberations are not applicable to vulnerable groups (children, mentally disabled persons, addicts, refugees, human embryos and fetuses), whose protection is embodied in the principle of dignity and discussed in the first part of this article. Freedom is equal to autonomy only in case of acquiring an informed consent of mentally capable adult persons. At this point, bioethics accepts the perception of autonomy, which is provided by natural law. Thus the main function of law at the initial stage of clinical trial is to protect a fundamental right to freedom. But there are some other views, consequence by the scope, volume and expansion of biotechnologies.

Firstly, even those, who are in favour of natural law concept-inspired universality of human rights, say that we should not overestimate the idea of individual autonomy²¹. The core argument against the equality of autonomy and freedom in clinical research is that only few individuals may act as self-rulers and self-governors, because of social environment and certain rules, which individual is inclined to obey: C. Varga says that human commitment to coexist in a society is incongruous with the idea of absolute autonomy, because a person is incapable of dissociating from his surroundings and rules of preferable behaviour²². Cultural context, upbringing, education, social status, religious beliefs are that influential, that some societies or communities accept "collective autonomy", which is bound by strict behavioural rules (i.e. unequal position of women and men in some African and Middle- East countries). Though term "collective autonomy" is being discussed by legal philosophers in several areas of social relations, human clinical research ethics is the strongest agent driving "collective autonomy" to legal recognition. And the explanation lays in general principles of bioethics. Bioethical teaching commits to respect human autonomy in complex with commitment to act upon interests of the individual and benefit him as well as the obligation refrain from harm and ensure justice. As the harm, benefit and individual interests are estimated through the glass of certain society or community, the informed consent (materialised form of autonomy) is based on fundamental consent of a group of individuals. In this case an informed consent becomes not less legitimate. At this point law has to recognize the presence of "collective autonomy", which, though falling into the term of "autonomy", is lacking two core elements, discussed above.

The other important aspect of the interaction of law and bioethics is revealed while searching for limits of freedom in utilitarian concepts of law. Comparing to other legal concepts, utilitarianism is the most convenient

¹⁹ S. Sperling, 'Reasons of conscience. The bioethics debate in Germany', (The University of Chicago Press 2013) 221-223

²⁰ J. Christman, 'Autonomy in moral and political philosophy', (<http://plato.stanford.edu/entries/autonomy-moral>)

²¹ M. Donnelly, 'Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism' (Cambridge University Press 2010) 11

²² C. Varga, 'Theory of Law' (Budapest: Szent Istvan Tarsulat 2012) 38

concept of law in clinical research. In utilitarian theory, however, autonomy appears to have its value only in its existence as a means to the greater aim of well-being and satisfaction. The aim of clinical research is maximizing the benefit of society. The participant of the research has his own intentions and desires of participation in the clinical research (societal benefits, better health, scientific interests, economical reasons and etc.). Ideological shift, inspired by modern bioethics, provides us new aspects of functions of law in regulating clinical research. Legal provisions are acting not only as a protective measure of fundamental rights (dignity, freedom, right to privacy, non-discrimination), but they also enhance economical rights of the individual, because the outcomes of clinical research may result in materialised gains and profit. Therefore, bioethical impact on law is obvious in the transformation of the informed consent as an agreement as the relation between the researcher and the participant shift from paternalism to purposeful interaction, based on: 1) common intention 2) agreed methods and conditions of procedures 3) discussed risks, outcomes and legal expectations²³. The outcomes of clinical research are no longer solely under the interest of scientists and industry as a participant of a clinical research considers his rights to enjoy the results as a property right. Property rights rise from the ownership of material valuables or valuables that can be turned into material shape or economic value. Normally, the participant has a right to benefit from the results of clinical research in that extent that he has consented (agreed) in an informed consent. And this makes an informed consent more a contract than a transfer of autonomy.

Conclusions

It is obvious that legal background of human clinical research evolved out of bioethical paradigms. Specific legal concept, which is dominant in certain society at a certain period, is the most important tool to evaluate the legality of human behaviour including all its consequences. The less virtue-orientated dominant legal concept is – the less influential religious, ethical and bioethical speculations are.

Obligation to ensure protection of the most vulnerable groups in human clinical research is undividable from a definition of a human being and universality of human rights. Legal regulations come from a principle to refrain from causing harm for the most vulnerable human beings. The concept of natural law accepts and adopts a definition of dignity, which comes from bioethical principle of non malfeasance, and may apply this definition beyond the field of biomedicine. Dignity is a fundamental principle in human clinical research, which, in bioethical sense acts as an antidote for vulnerability and protects society from self-destruction.

Despite long historical debates on bioethics being a source of law and denying its influence on the evolution of bio law, modern legal positivism and legal realism shift to bioethics as an instrument of measuring legitimacy of certain actions, because the deep-rooted contradiction of natural law and analytical-critical paradigms of all is no longer that evident in modern relations. Bioethics, combined with utilitarian legal thought became a fundament of modern standpoint of clinical research shifting the concept of freedom from consented paternalism to contractual relations.

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²³ J.L. Dolgin, 'The Evolution of the 'Patient': Shifts in Attitudes about Consent, Genetic Information, and Commercialization in Health Care' [2015] Hofstra Law Review

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CYBERSECURITY IN BRAVE NEW WORLD

Karolis Jonuška¹

Abstract

The rapid expansion of internet following its implementation in modern society has not been without security concerns and issues. Nowadays states, non-state actors, business and individuals have become interconnected to the point where almost every single operation is performed electronically. Although the internet was developed as a closed system, it was never meant to be secure; therefore, cyber threats are inherent in the features of the internet. The article serves to explain and uncover the underlying social and legal issues that are closely connected with cyber security. From the legal point of view applying pre-existing legal rules and concepts to cyber security entails difficulties in view of new technologies observed. It is not only difficult to determine appropriate response to cyber threats but it is difficult to entail who should exercise response too. The difficulty lies in the identification, whereas it is burdensome to identify the identity of the person behind the act. Other issues arise trying to apply the same methodology, terminology and tools to uphold common Cyber security standard. Another major challenge to governments lies in ensuring that its citizens are protected from crimes on the internet. Majority of the attacks are performed by individuals, therefore it would be wrong to characterize cyber security solely as a fifth dimension to war. However, keeping this in mind, the legality of cyber war is yet not sufficient. Finally, cyber security raises social and economic issues. Cyber security industry is gaining new heights since cyber-attacks are capable of incurring huge losses on state and industrial level. The social dimension of Cyber security serves as a great indicator, explaining the general international policy towards cyber security. The "internet of things" – explains the idea and issues discussed in the paper. Internet has brought new tools that shaped the economy and made a social impact in the society. However, the means to offer and uphold Cyber Security are not there yet, since it requires universal approach to be effective. The paper offers a view to the problems discussed, projecting an insight into possible solutions, combating cyber threats and ensuring net neutrality.

Keywords: cyber-security, cyber-warfar.

It is no surprise that national security paradigm is changing and evolving over time. Most of that change is influenced by technical innovation in the fields ranging from medicine to engineering. Some would even argue that innovation *per se* is a result of competition between different military industries or national security doctrines. However, the invention of computer technology and World Wide Web brought national security advisers to brand new, undiscovered fields of neutrality where everyone can be anyone at any time in anywhere and do everything pretty much unrestricted.

The famous Shakespearean line², which is referred to in the title, portrays the isolation as a worst hindrance to advancement in any civilization. According to the play, the character Miranda was set afloat and landed on an island where she observed beautiful creatures, which in true were savages. To her amazement, she took them as beautiful and godly creatures, because she was brought up in an isolated island, where only other living creatures were her family and her servants. A modern interpretation of this phrase set in Huxley's book highlights naivety and enthusiasm for modern technology and world of perceived control. Most importantly, this leads me to the first part of this paper. To grasp policy and legal ideas upon which cyber security operates, one must understand the basic philosophical and technical concepts behind it. To begin with, the internet was created to accommodate different needs; hence, the purpose stays the same. Around

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² „O wonder! How many godly creatures are there here! How beauteous mankind is! O brave new world, That has such people in't“ William Shakespeare, The Tempest;

1960s computers and network was created to exchange scientific data between different researchers and data centers working in the universities. Only some time later, when military saw the purpose in it, the packet switching concept – was developed. It is important to underline, that the early stage prototype, which we proudly call the internet nowadays was never meant to be safe or sterile space, nor to be limited by laws or regulations. The people behind the workings of this invention had a different idea in mind. Since it was invented as a thought and research sharing platform, internet was supposed to be neutral, unregulated and free to access to everyone, who had the necessary credentials, time and technical knowledge to access it (during the early stages it required sophisticated equipment as well as knowledge to operate it).

Therefore, one might say, that regulating something that was never supposed to be regulated brings a Shakespearean fallacy, obstructing advancement of civilization. From my point of view, such criticism lacks any ground argumentation from technical as well as legal / policy view. Firstly, the cyber technologies had went a long road ahead and had become an inclusive part of modern lifestyle. Our social realities as well as our own social identities are partly formed and dependent on our cyber identities and relations with the technology. This portrayed reality, which some refer to as “Internet of things”³ is only limited by interconnectivity. Even more, most of the time all that needs to be done is to download an app (abbreviation for application). Could an app be a solution to everything?

This leads me to the first issue of cyber technology and cyber security. Everyone has an access to the web but not everyone has the best intentions while using it. Secondly, the further advancement into the internet ages leaves most of state functions and its apparatus in cyber space, while allowing (sometimes intentionally) breaches to personal data and other sensitive information. We are too dependent on cyber space.

Technology is already there but our minds are not.

So is there are a one definition of cyber security? As some authors have described⁴ cyber security does not fit easily into well-established categories therefore the interdisciplinary approach so far has been the most successful. Although highly technical, this topic has long breached the traditional borders of research and nowadays is being approached from different scientific disciplines and points of view. In addition, the technicality of the issue keeps it in line with ongoing internet and technological revolution in general. In short, cyber-security deals with security issues that came together with the internet and emerging new technologies as well possible solutions to make it secure.

Cyber-security and internet of things, are they related? Yes, because they refer to similar processes in popular usage. While cyber-security could be attributed to broader range of means to regulate and improve inter-connecting means and measures both technical and non-technical, physical and non-physical in their substance, internet of things is a theory (or vision) to have all electronic and non-electronic equipment digitalized and connected to worldwide interconnected network of devices (hence the name internet of things). Going to more specific details, internet is only one part of the cyber space. And while internet security is important, it deals almost exclusively with digital threats and risks. Moreover, possible damages following the breach of internet security rarely fall outside digital matter. However, cyber-security is a broader concept, which absorbs cybernetic, internet and other bio electronical environment threats. The result of breach of cyber-security could take form of physical damage, which is often targeted at critical state infrastructure.

One of the most recent examples of such breach of cyber-security targeted at critical infrastructure could be December 23, 2015 attack on “Prykarpattyaoblenergo”, an energy company in the Ivano-Frankivsk region of western Ukraine. The attack was first ever recorded cyber-attack on a power grid⁵, leaving from 80`000 to 225`000 Ukrainian households without electricity⁶ in the middle of winter season.

³ J. Rifkins, “The zero marginal cost society: the internet of things, the Collaborative Commons and the eclipse of the capitalism”, New York: St. Martin’s Press, 2014;

⁴ A. Collins, „Contemporary Security Studies“, Oxford: Oxford University press, 2012, page 2;

⁵ 2016 February 12 Reuters article „Ukraine sees Russian hand in cyber attacks on power grid <http://www.reuters.com/article/us-ukraine-cybersecurity-idUSKCN0VL18E>

⁶ 2016 March 9 Defence one article „The Ukrainian Blackout na dthe Future of War <http://www.defenseone.com/technology/2016/03/ukrainian-blackout-and-future-war/126561/>

Authors describe different terminology to differentiate attacks from other computer threats. Attacks are the main focus of cyber-security and will be the main focus of this article. Passive or active attacks are orchestrated (or led) by humans, in popular culture known as hackers. The term hacker is a complicated term, which may refer to positive actions and attributed skills, or in popular usage – negative activity. Hackers employ various type of software to reach their goals. This software may take different forms or functions, ranging from hacked software that replicates official one, email attachments working as backdoor to gain access to computer, or ones, that destroy physical data, such as hard drives, amongst others.

Cyber-security is divided into multiple areas focusing on specific objects of cyber-security, which are operated by different actors. To no surprise, private enterprises are taking the lead in terms of innovation and regulation of cyber security. Because cyber-espionage and cyber-crime is aimed at stealing sensitive commercial, financial, industrial or other business data, majority of private cyber-security effort is being poured in this field in order to stop those activities. Sometimes those areas or discourses interact with each other, whereas it is difficult to differentiate one from another. However, this paper will focus primarily on military and defense layer of cyber-security, also known as cyber-warfare.

To put it simply, cyber-warfare means warfare conducted in cyberspace through cyber means and methods⁷. Cyber domain differentiates it from other means of warfare, thus covering all digitally interconnected networks, computer systems and all data resident therein. Although cyber-warfare may produce kinetic or non-kinetic results, they are achieved through the usage of electronic and informational technology means. The previously given example of grid power lines blackout was caused by cyber-attack, which could be attributed to an act of cyber-warfare. However, if same grid power lines blackout was caused by kinetic means such as bombardment, manned infiltration or other manual method, which depends on direct physical interaction with the object, such blackout would not be attributed to an act of cyber-warfare.

How cyber-warfare is regulated by international law? Opinions on legality of cyber war could be distinguished into two main blocks. First one says that international law is not applicable at all therefore it should be dismissed from the discussion altogether. Other scholars are more moderate, however result remains the same – international law effect is limited or effectively excluded. Finally, there is a second block to which this paper could be attributed, one that says that international law principles as well as humanitarian law principles apply in cyber space as well as in cyber-warfare. The former stance on cyber space rules is supported and reinforced by US scholars and government officials⁸. This is to effect that US is leading the cyber warfare and cyber security debate, by introducing new regulating and supervisory bodies. One example could be the US Department of Defense and its recently established Cyber Command. To keep it effective, it was given a wide array of tools to engage possible adversaries, such as to conduct full spectrum of military cyberspace operations in order to ensure that all US and its allies military domains enjoy freedom of action in cyberspace and the same freedom is denied to possible adversaries.

It should be said that some scholars are highly critical on the notion of ongoing cyber-warfare too. Firstly, as it was explained, there is no unilateral explanation of the term cyber-warfare, and if there was one, there is an ongoing debate on whether a cyber-attack could constitute an act of war in classical international law sense. So are we inventing an artificial cyber-war problem? As O'Connell puts it "there is appropriate international law relevant to supporting commerce and communication on the internet, but that law is not the law of international armed conflict"⁹. Due to the limitations of this paper I will not go into discussion on whether cyber-security belongs to military or private industry, or to put it in other words, whether it should be subject to international humanitarian law or civil law. Therefore the second part of the paper will explain two distinct understandings of the term attack secondly, it will analyze what international law says on cyber-warfare with a particular focus on international humanitarian law, and finally, it will draw conclusions on how the brave new world is adapting to this new security paradigm.

As it was indicated above, the application of international law in cyber-warfare context is complicated for many reasons. The most obvious one is closely related to the technicality or, rather, instrument-based

⁷ N. Melzer, „Cyberwarfare and International Law“ in United Nations Institute for Disarmament Research Resources, 2011, page 4

⁸ Harold Hongju Koh remarks on International Law in Cyberspace <http://www.state.gov/s//releases/remarks/197924.htm>

⁹ M. E. O'Connell, 2012 may 29, International law meeting summary „Cyber Security and International Law“;

approach. The basic international treaties, upon which both international law and international humanitarian law rely on, were signed around the end of the first and second world wars. For this reason, it is difficult to attribute law governing conventional military attacks to conducts of cyber-attack.

The analysis of international law governing the cyber-attacks shall begin with Article 51 of the Charter of the United Nations. Article grants the state, who is a member of the United Nations, a right to individual or collective self-defense. However, no state has reported to the UN Security Council to respond to cyber-attack against that state. As the evidence shows, the number and scope of cyber-attacks is increasing rapidly however the regulation is left at the sidelines. There is a legal distinction between the armed attack and use of force, which makes a significant difference on how the other party shall legally respond. As Hathaway puts it, "in the absence of agreement, the increase in attacks heightens the possibility that states might respond to a cyber-attack with conventional military means"¹⁰.

However, one must grasp the terminology and its implications behind the term "attack". Presently, there are different meanings of the term attack which are attributed to two distinct categories of law. Anyhow, in both cases term "attack" acts as a threshold to distinguish legal and lawful response and conduct of cyber-attacks (operations) from the ones that are illegal. Traditionally, the law governing conflict is distributed into two categories: *jus ad bellum* and *jus in bello*. *Jus ad bellum* norms define the legitimate reasons a state may engage in war. The principle legal source of *jus ad bellum* is Charter of the United Nations which limits states by requiring them to refrain from the threat or the use of force. Under *jus ad bellum* states are very limited in their capacity to move beyond measures described in Article 41 such as economic measures and counter-measures. Articles 2, 42 and 51 prohibit the use of force and sets out strict limitations under which state may resort to individual or collective self-defense. The second category – *jus in bello* puts down the rules when the armed conflict has already started. This category regulates how the wars shall be fought and relies on customary international laws and requirements set out in specific treaties, regulating the conduct of war. Term "International Humanitarian law" is synonymous with "*jus in bello*", and is favored by international organizations such as International Committee of the Red Cross. The purpose of International Humanitarian law is to minimize the possible harm during armed conflict to military objectives and aims. In this category, term "attack" means specific military operation, conducted within the framework limits set out by International Humanitarian law. On the contrary, in *jus ad bellum*, term "armed attack" serves as a threshold upon which measures, described in Articles 42 and 51 of the Charter of the United Nations could be employed.

From what has been said it is evident that two distinct categories of law define terms "attack" and "armed attack" differently, thus establishing different thresholds for legality of the conduct of such actions. Article 2, paragraph 4 of the Charter of the United Nations sets out a general rule that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state <...>". Moreover, Article 51 of the Charter of the United Nations establishes special rule that "nothing <...> shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security <...>". Therefore special rule set out in Article 51 allows a State to "use force" when it is the victim of an "armed attack". According to the Article 51, there is no requirement of prior authorization from the Security Council to engage in individual or collective self-defense.

Analyzing cyber-attack threshold under *jus ad bellum* it is evident that there are no unique restrictions on the defensive cyber operations in response to kinetic ones. As it will be explained further in the article, comparing cyber-attacks with conventional kinetic ones is difficult on many levels. However under *jus ad bellum* cyber-attacks fall under same requirements and qualifications as kinetic attacks. Cyber-attacks have to comply with the same principles, namely, necessity, proportionality, immanency and immediacy. However the question is when does cyber-attack qualify as an armed attack? The most common explanation could be drawn from Nicaragua case¹¹ where International Court of Justice filled a gap whereas support to a rebel group in another state did not amount an armed attack against that state. Therefore it is safe to say that all

¹⁰ O. A. Hathaway, „The law of cyber-attack“, California law review, vol. 100, no. 4, 2012 page 840;

¹¹ Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, ICJ;

armed attacks are uses of force but not all uses of force are armed attacks¹². The same analogy could be used to measure cyber-attacks – all cyber-attacks are uses of force, however not all of them amount to an armed attack.

From my point of view, the instrument based approach taken in Article 51 of the Charter of the United Nations covers the use of cyber-attacks. Although the Charter was drafted with conventional military operations in mind, the International Court of Justice¹³ has explained that the type of weapon used is immaterial to the application of Article 2 and 51 of the Charter of the United Nations. One of the solutions to this issue – of bringing the Charter closer to current realities of warfare and conduct of war, scholars suggest employing the consequence-based approach¹⁴. On this concrete issue I side with Koh¹⁵ who says that it is not the first time that “technology has changed and international law was asked to deal with those changes”. The question is - how the existing law could be re-interpreted to adopt to these changes in order to stay relevant and effective?

To better grasp the issue of terminology as well as the competing theories and policies on cyber-security it is important to start out with the analysis of *jus ad bellum* application on cyber-attacks. As it was set out earlier, in this context states are limited by the Article 2 of the Charter of the United Nations as well as principle of nonintervention, to refrain from use of armed force while conducting their international affairs. Scholars argue that the introduction of cyber-warfare in international affairs shifts the balance of power, proving cyber-attacks a weapon of the weak¹⁶. One of the main concerns regarding cyber-attacks is the fact that they are not conducted openly, usually in disguise or even from the third country using zombie-computers. The limitation of nonintervention and use of force is not without exception. There are two exceptions – actions taken as part of collective security operations and actions taken as self-defense. First one is set out in Article 39 of the Charter of the United Nations and grants the Security Council right to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and decide on measures herein. Collective security operations are difficult not only on technical, but on political level as well, since permanent members have the right to veto, which they are more than comfortable in exercising. Second exception lies in Article 51, providing a right to individual or collective self-defense. In order for a state to respond to a cyber-attack under Article 51, it must first rise to the level of armed attack. It must be noted that term armed attack is distinct from other forms of attack both technically and linguistically. In order to be considered sufficient to respond under Article 51, armed attacks must constitute “most grave forms of the use of force”¹⁷. To sum up, there are three tests on how to constitute whether an armed attack has sufficed and whether such attack grants the right to self-defense – the instrument, the target and the effect based approach. According to first one, the cyber-attack does not have the means to be considered an armed attack, because it does not rely on conventional means of warfare. This approach is inherently flawed, because cyber-attacks or cyber-warfare in general does not rely on conventional means of warfare. Following this line of thinking, theoretical cyber-attack could happen without any repercussions, sanctions and most importantly – outside the general limitations of *jus ad bellum*. The second approach is aimed at protecting the state’s critical infrastructure. However the broad framework of cyber-attack leaves the possibility of response by conventional means more likely. For these reasons, the second approach is highly flawed as well, since it fails to deliver on its purpose – international peace and security implemented by the means of regulating the cyber-attacks and having adequate and sufficient methods to respond to it. The third approach draws a focus on the effects of attack, leaving it somewhere in between the previous two. This approach, however, requires the end list of the effects that justify self-defense, otherwise the approach is ineffective.

Moreover, the response to cyber-attack must follow the requirements for necessity and proportionality. The first principle requires the force to be used as a last resort. Second one prohibits the force if it is excessive

¹² M. N. Schmitt „Attack“ as a Tern if Art in International Law: The Cyber Operations Context“, 2012, 4th International Conference on Cyber Conflict, page 286;

¹³ Legality of the Threat or Use of Nuclear weapons, advisory opinion, 8 July 1996, ICJ;

¹⁴ Supra note 11, page 288;

¹⁵ Supra note 7;

¹⁶ Supra note 9, page 842;

¹⁷ Supra note 10, paragraph 191;

in terms of the danger to the state. These basic principles of *jus ad bellum* are difficult to comprehend in the context of cyber-warfare. As it was proven with the case of Stuxnet worm¹⁸, the proportionality is difficult to account, since the cyber-attack could spread uncontrollably and thus proving unproportioned. The same logic follows the same requirement – it is difficult to assess whether the cyber-attack could potentially destroy critical infrastructure or even the intended target or goals behind the attack. All these issues arise out of novelty and technicality of cyber-warfare.

Shifting the analysis to *jus in bello* and its understanding of the term “attack” raises a brand new set of questions. In this category, only when cyber-attack is qualified as an attack other problems arise. Once it is qualified as an attack, Article 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and the criteria set out therein, insofar as military objective, come into play. If an object of attack is not constituted as a military objective, possibility of legality of such attack is limited. One might say that although cyber-attacks have never instigated an armed conflict, cyber-warfare and cyber-attacks have been employed in previous wars¹⁹ as a tool to achieve military objectives. *Jus in bello* operates following three basic principles of necessity, proportionality, distinction and neutrality. As to the necessity, this requirement is not unique to cyber-warfare, although it poses a few technical challenges while accounting for possible military advantage gained by employing cyber-attack. The requirement of proportionality limits the possibility of attack to the excess of concrete and direct military advantage, thus forbidding injuries and damages to civilians and civilian objects. As it was iterated earlier, the nature of cyber-attack poses difficulties in calculating these losses. Since the cyber-attack is usually aimed at a full range of technical disruptions to which some are aimed at inducing physical damage, there must be a test or formula, to calculate the losses or the importance of each component in infrastructure. Moreover, calculating even theoretical consequences of a cyber-attack is complicated, since it is not always clear on how specific system will react to ongoing attack. So far as proportionality goes, it establishes ambiguity among military planners, since these actions could easily question the legality of the actions or the whole attack (considering that cyber-attack is a part of conventional attack). Requirement of distinction poses another great challenge. This principle requires military planners to employ weapons that can target accurately and distinguish between civilian and military objects and objectives. The problem with cyber-attack is the fact that majority of infrastructure (the possible targets) is employed by the full range of different actors – from civil to military ones. Take for example electricity grids – the attack on electricity supply operator could harm both military and civil object, even as much as hospitals and other critical civil infrastructure. Since majority of infrastructure as well as cyber space itself is of dual use – the possibility to harm civil objects remains indistinguishable, therefore leaving the possibility of the legality of such attack insufficient.

Finally, the question arises on who may be targeted by the cyber-attack and who may carry out a cyber-attack. Under the law, only three categories could be targeted, namely combatants, civilians directly participating in hostilities and civilians acting in a continuous combat function. However, since the majority of cyber-attacks due to their technicality, complexity, as well as the fact that states employ civilians to hide the direct involvement, cyber-attacks may blur the line between these three distinctions. As to the second question, states that employ civilians to conduct cyber-attacks theoretically may hinder the principle of distinction. Finally there is an issue of neutrality, whereas combatants employ the neutral state’s infrastructure to gain military advantage or to pursue military goals, but due to the limitations of this article this issue will not be further addressed.

¹⁸ Stuxnet worm was a computer virus that slowed down Iranian nuclear research programme. It effectively infiltrated computer networks and postponed the development by destroying the technical equipment such as centrifuges. Although the virus was targeted at Iran, it spread to other countries such as India, Azerbaijan and even US.

¹⁹ Overview by the U.S. Cyber Consequences Unit of the Cyber Campaign Against Georgia in August of 2008, page 4;

Conclusions

The brave new world has brought new means of warfare as well as a brand new understanding of how this warfare shall be conducted. The question remains on how the current international law will adapt to these changes. As it was evident from the article, although not without limitations, public international law as well international humanitarian law is applicable and has means to both deter, restrict and set out the rules of cyber-warfare. One must remember that cyber-space was brought up without security concerns in mind as an open, free to use and unrestricted platform, therefore militarization of the cyber-space poses danger to the future development of technology both from legal and policy perspectives.

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SOCIAL PARTNERSHIP INFRASTRUCTURE FOR EMPLOYEMENT MAINTENANCE: ECONOMIC, LEGAL AND INSTITUTIONAL INSTRUMENTS

Muslim Khassenov¹

Abstract

It is obviously that employment constitutes as a core socio-economic problem of each country. In the context of a serious reduction of consumers' demand and unstable dynamics of the main markets of goods and services it will be experienced an inevitable increase in the number of actual unemployed persons. Moreover, there existing a high degree of non-productive self-employment in labor market.

In this regard, the key objective of the governments defines creation of favorable conditions for the painless absorption of released human resources in the sector of small business and self-employment category.

Establishment of an infrastructure of social partnership is determined as breathing of a fresh air into mentioned objective through new forms of participation in employment policy.

In this policy paper author considers social partnership as a conceptual fundament of corporate organization of society, proposes detailed measures in order to maintain employment within current economic and social obstacles observed globally.

Keywords: employment, corporate organization, society, social partnership, microfinance, infrastructure, policy, employers' participation, professional standards, trainings and qualifications.

Introduction

According to the OECD, 42 million people now in the OECD countries are unemployed and more than 1/3 jobseekers have been out of work for 12 months or more (15.7 million). 20 million young people are unemployed, with education or their education are not sequent with labor market requirements².

According to the OECD³, the unemployment rates in the late 2015 are estimated as follows: 3.5% in Korea and Japan (the minimum), 4.2% in Switzerland, 4.6% in Germany, 11.7% in Italy, 23.7% in Spain, 25.8% in Greece (the maximum). The average rate for 28 countries of the European Union is 9.2%. Totally for OECD countries is 7.1%.

According to the OECD⁴, there is a variety of self-employment rates among the member-states in 2014. For example, 6.5% in the United States (the minimum), 8.8% in Canada, 10% in Switzerland, 11% in Germany, 15.4% in the United Kingdom, 24.9% in Italy, 35.4 in Greece (the maximum). The average rate for 28 countries of the European Union is 16.5%.

It is obviously that employment constitutes as a core socio-economic problem of each country. In the context of a serious reduction of consumers' demand and unstable dynamics of the main markets of goods

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² OECD Employment outlook 2015: <http://www.oecd.org/employment/oecd-employment-outlook-19991266.htm>

³ OECD (2016), Unemployment rate (indicator). Accessed on 20 March 2016.

⁴ OECD (2016), Self-employment rate (indicator). Accessed on 20 March 2016.

and services it will be experienced an inevitable increase in the number of actual unemployed persons. Moreover, there existing a high degree of non-productive self-employment in labor market.

In this regard, the key objective of the governments defines creation of favorable conditions for the painless absorption of released human resources in the sector of small business and self-employment category.

Establishment of an infrastructure of social partnership is determined as breathing of a fresh air into mentioned objective through new forms of participation in employment policy.

1. Situation in Kazakhstan

According to the information from statistics department, the key indices on the labor market by January 1, 2016 are as follows⁵:

- economically active population (at the age of 15 years old and older) - 9.0 million people;
- employed⁶ - 8.5 million people (or 67.6% from economically active population);
- hired employees⁷ - 6.2 million people (73% from employed people);
- self-employed⁸ - 2.3 million people (27%).
- unemployed⁹ (people at the age of 15 years old and older who didn't have paid job and who were actively looking for it and were ready to start) - 451.1 thousand people. Unemployment rate is 5.0%.

Considerable part of self-employed people worked in agriculture (45.2%), trade sector (25.0%), construction (9.0%), and transport services (10.4%).

Totally according to the informal evaluation the concealed unemployment on labor market is – 1.5 million people: unproductively employed (1.1%) + unemployed (0.4%). The real unemployment rate is estimated as 6.5%.

Thus, there are more than 2.3 million people, or 27% of the working population, employed in SME. It determines large reserves for growth.

The statistics shows a noticeable growth of people employed in small- and medium-scale business. Employment in the sector of small and medium entrepreneurship is 3 214 937 people, compared to the similar period of 2014 the employment has grown and is now 10.9% (316 651 people). Within 10 years the rate of people employed in small- and medium business has increased at 71% (1 339 300 people).

2. Conceptual fundament of social partnership as a corporate organization of society

Social partnership conceptually became a result of emerging in XIX-XX centuries of various socio-economic theories and political ideologies. Particularly, the most significant influence have made by “corporatism” ideas.

One of the founders of corporatism P.C. Schmitter defines corporatism as “a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory,

⁵ Official site of the Committee of statistics of the Republic of Kazakhstan: <http://stat.gov.kz>

⁶ According to the OECD data methodology, the employed people are those of a specified age, checked during a specified period, and who were in paid employment or self-employment (<https://data.oecd.org/emp/self-employment-rate.htm>).

⁷ People in paid employment during the reference period performed some work for a wage or salary, in cash or in kind, or they may have been temporarily not at work during the reference period, but did have a formal job.

⁸ Those who were self-employed during the reference period performed some work for profit or family gain, in cash or in kind, in an enterprise such as a business, farm or service undertaking, or they may have been temporarily not at work during the in paid employment or self-employment (<https://data.oecd.org/emp/self-employment-rate.htm>).

⁸ People in paid employment during the reference period performed some work for a wage or salary, in cash or in kind, or they may have been temporarily reference period, but did have an enterprise.

⁹ Those in unemployment are people aged 15 and over who were without work during the reference week, available for work and actively seeking work during the previous four weeks, including the reference week. Unemployed people refer to those not in paid employment or self-employment during the reference week. People available for work refer to those who were available for paid employment or self-employment during the reference week or four weeks after the reference week. People seeking work refer to those who took specific steps to actively find paid employment or self-employment during a specified recent period, previous four weeks, including the survey reference week.

noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports"¹⁰.

Cawson A. understands corporatism as "specific socio-political process in which organizations representing monopolistic functional interests engage in political exchange with state agencies over public policy outputs which involves those organizations in a role that combines interest representation and policy implementation through delegated self-enforcement"¹¹.

Some corporatist elements is inevitable features of contemporary economic organization of societies.

In 70-th of XX century the term «corporatism» was revived in Germany, as «neo-corporatism» (or liberal corporatism), indicating "the inclusion (incorporation) of organized interests in politics and their equity participation in the formation and political decision-making"¹².

One of the main advantages of neo-corporatism is considered its ability to reduce the differences in income between members of single society¹³. Neo-corporate structures in some cases are able to achieve the goals that the parliamentary system is not able to realize themselves, it is an example of the possibility to support non-inflationary employment¹⁴.

As part of the corporate model of social relations it is steadily entrenched the term "corporate capitalism", which, according to L.V. Smorgunov, means the situation of the state transition from the rigid functions of pressure on business to the principle of cooperation between the state and business, that is, forms of cooperation with a certain relationship centering on state¹⁵.

Lobachyova E.A. defines corporate capitalism as a political and social system of relations based on private property, free enterprise and competition, with the institutionalized cooperation of state representatives, apical organizations of capital and labor, based on the tripartite principle-oriented parties on pragmatism, consensus and common interest to achieve the long-term socio-economic development goals of society¹⁶.

Obviously, the features of corporate capitalism are inherent only in states with developed market economies as the highest form of organization of interest groups.

Corporate capitalism is considered as a qualitative implementation of neo-corporatism species on the basis of the value system of social partnership and consensus between the major parties to the relationship (government, business and trade unions) through negotiation and consultation in the framework of a social market economic model¹⁷.

In this sense, this theory has the greatest proximity to the model of social partnership in the modern understanding. The corporative theory eventually led to the formation of modern tripartism system of social and labor relations.

Peregudov S.P. differentiates tripartism system as a typical manifestation of the relationship of liberal corporatism, based on consultation and institutional representation of the interests of business, trade unions and the state. According to him, through these mechanisms there is achieved an agreement between the main social partners¹⁸.

¹⁰ Schmitter Ph. 'Still the Century of Corporatism' // Review of Politics, [1974], №36 (1). P.93-94

¹¹ Cawson A. 'Varieties of corporatism: the importance of the meso-level of interest intermediation / Organized Interests and the State. Studies in Maso-Corporatism. Eds. Cawson A. - London: Sage Publications. [1985]. – p.8

¹² Temizheva Z.E. 'Corporatism as a form of interaction between the state and the interests of business groups in modern Russia' // Dissertation of Candidate of Political Sciences. Moscow. [2003]. – P.40

¹³ Potapova E.B. 'Neo-corporatism in the context of globalization: experience of Western Europe' // Dissertation of Candidate of Political Sciences. Saint Petersburg. [2011]. – P.87

¹⁴ Ibid. P.99

¹⁵ Smorgunov L.V. 'Knowledge and coordinating functions of the state' // World and policy, №10 (37). [October 2009]. P.32

¹⁶ Lobachyova E.A. 'Corporate capitalism and evolution of tripartism' // Dissertation of Candidate of Political Sciences. Saint Petersburg. [2011]. P.30

¹⁷ Ibid. P.18

¹⁸ Peregudov S.P. 'Political representation of interests: the experience of the West and the Russian problems' // Polis [1993], №4. Pages.115-124

Gourevitch P. noted that capital and labour что capital and labor are able to find institutionalized compromise, the results of which are tripartism agreement in the crisis period¹⁹.

We believe it is possible to agree with the position of the Japanese scientists (H.Okumura, T.Nisiyama, Ts.Outi, K.Sibagaki et al.) that the corporate community is some new stage in social development. British scientist J.Winkler after Japanese scientists identified corporatism as a new political and economic system, having come to replace capitalism and socialism²⁰.

Philosopher L.Gumplovich writes about the role of the groups as a driving force in all of the social world. Proceeding from the importance of this role, it can be considered a wise legislation based on ineradicability of informal and formal links between the groups within the state. These relations should not be ignored like "constitutionalists", and should not expect to change the nature of this relationship is like trying to make a "collectivist" (socialists and communists). In the harmonic interaction of social groups is the only possible solution of social problems, as far as possible²¹.

Thus, conceptually social partnership is evolutionary the result of the convergence of the social theories of democracy (in the framework of socialist ideology) and the liberal-conservatism (in the framework of capitalist ideology), as a natural result of cooperation and mutual accommodation of two major groups - employers and employees under the mediation of the state in order to ensure their effective interaction.

3. Social partnership instruments in employment policy

Employment policy of each country is traditionally constructed around entrepreneurship communities.

"The arena of entrepreneurship involves many fascinating and important problems that have come to the attention of mainstream scholars. Entrepreneurship, properly conceived, is an intellectual domain of hard and important problems that can be attacked with the best possible scholarship. The progress of the field has been substantially enhanced as it attaches its problems to discipline tested tools²².

Indeed, we believe that core element of social partnership's employment mechanism is entrepreneurship.

The following economic, legal and institutional instruments defined as measures promoting employment (*note: the most of them are implementing in Kazakhstan*):

In Kazakhstan within the program "Employment roadmap – 2020"²³ infrastructure development is a key parameter which provides employment in the long term. At this the compulsory condition for getting program participants employed is 30% in construction, not less than 50% during the ongoing and capital repairs and improvement of the region where infrastructure project takes place.

Employment shall be provided in realization of projects related to:

- capital, medium, and ongoing repairs of the objects of housing and communal services, socio-cultural objects, and engineering-transport infrastructure;
- construction of feldsher-midwife stations and medical clinics in rural areas. Priority shall be given to the projects that would solve problems of rural medical objects which are under the threat of collapse, maladjusted, and made of adobe;
- improvement of rural communities.

¹⁹ Gourevitch P. 'Politics in hard times: comparative responses to international economic crises'. – NY: Lthaca Cornell University Press, 1986.

²⁰ Temizheva Z.E. 'Corporatism as a form of interaction between the state and the interests of business groups in modern Russia' // Dissertation of Candidate of Political Sciences. Moscow. [2003]. – P.46

²¹ L.Gumplovich. 'Foundations of sociology' / The texts on the history of sociology of XIX-XX centuries. Chrestomathy. – Moscow: Science. [1994]. – P.387

²² Stevenson, H.H. (2000). 'Why the Entrepreneurship has won'. 14 Coleman White Paper USASBE Plenary Address, February, 16-19. P.5

²³ "Employment roadmap – 2020" program. Promulgated by the Decree of the Government of the Republic of Kazakhstan of 31 March 2015 № 162

3.1. Promoting entrepreneurial initiatives including microfinance, trainings and service infrastructure

As international experts proclaimed, it is important for policy to engender a culture and attitudes that are conducive to business creation. For example, the education system, the media and business support organizations can help foster entrepreneurial motivations. Similarly, adequate entrepreneurship skills – which include small business management skills, strategic skills and entrepreneurial traits – can help new entrepreneurs to succeed. This implies the need for a change in the curriculum, pedagogies, structures and strategies in education and training systems to better import these skills²⁴.

In Kazakhstan in this regard within the “Business roadmap – 2020” program²⁵ every citizen of the country may take part in in one of these directions: have a training course, find a job according to the specialty, or open or expand their business. The following supportive measures are set in practice:

1) free training on fundamentals of entrepreneurship with providing of financial aid for travel and accommodation, assistance in business-plan development.

In Kazakhstan there are has launched free business schools along the country by the National chamber of entrepreneurs.

2) microfinance arrangement;

The one of the most perspective tools for promoting entrepreneurial initiatives is microfinance instruments, creating a unified system of microcredit related to business schools.

Significance of microfinance could be expressed in the following ways. “Microfinance has proven its value in many countries, as a weapon against poverty and hunger. It really can change people’s lives for the better, especially the lives of those who need it most²⁶” (Kofi Annan, former UN Secretary-General). “Microfinance is one of the most important economic phenomena in the world in the last 50 years²⁷” (Vinod Khosla, co-founder of Sun Microsystems and partner, Keiner Perkins Caulfield & Byers).

The Global Development Research Center estimates that 500 million people own small or micro businesses and only 10 million of these entrepreneurs and producers have access to credit and other financial services. Indeed estimates suggest fewer than 2 per cent of the poor have access to financial services, other than traditional moneylenders, whose triple or quadruple interest rates force perpetual dependency for some. Demand for currently unserved financial services products — credit, deposit-taking or savings and insurance — is estimated to exceed 100 million persons needing nearly \$22bn in funds²⁸.

In order to reveal practical issues of microfinance it’s need to discuss the experience of the Grameen Bank, founded by Nobel Prize winner, Muhammad Yunus in 2006.

The Grameen Bank (GB) is a well-known institutional framework that has achieved considerable success in improving the socioeconomic conditions of the rural poor, particularly women, in Bangladesh²⁹. Dr. Muhammad Yunus has observed that commercial banks had inbuilt constraints and are aimed only at those

²⁴ Marco Marchese, Stuart Thompson. ‘Benchmarking Innovation and Entrepreneurship in Selected OECD and BRICS Countries’ http://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/Benchmarking_Innovation_and_Entrepreneurship_in_Selected_OECD_and_BRICS_Countries.pdf. Accessed on 20 March 2016

²⁵ “Business roadmap – 2020” Single program of support and development of business. Promulgated by the Decree of the Government of the Republic of Kazakhstan of 31 March 2015 № 168

²⁶ Antal Szabó, ‘Microcredit institutions in the European Union’ Final workshop report on “Microfinance for SMEs in the Black Sea Economic Cooperation Region”, [12-15 November 2014], Bucharest, Romania

²⁷ Rai, S. ‘Tiny Loans Have Big Impact on Poor’, New York Times, [12 April, 2004], p. C3.

²⁸ Arch, Gail, ‘Microfinance and Development: Risk and Return from a Policy Outcome Perspective’, Journal of Banking Regulation, Volume 6 Number 3, [2005]

²⁹ Sarker, A.E., ‘The Secrets of Success: the Grameen Bank Experience in Bangladesh’, Labour and Management in Development Journal, 2(1), [2001], p. 1-17

who are already well off. He contemplated an alternative institutional framework that could be used to raise the wellbeing of impoverished sections of society³⁰.

The GB of Bangladesh holds an iconic position in the world of microfinance. It is credited with proving that the poor are bankable, the GB model has been copied in more than 60 countries; it is the most widely cited development success story in the world³¹. Thus, accomplishment of GB as poverty alleviation program and has been internationally accepted by different countries of the world.

Successes and potential benefits of the GB micro credit system are as follows³²:

- it exhibits an average of 97% repayment rates,
- the members of GB enjoy an average household income at least 25% higher than nonmembers,
- the number of GB members living below the poverty line has rapidly decreased,
- the landless benefit most, followed by marginal landowners,
- there has been a shift from agricultural wage labor to self-employment and petty trading a shift which results in an indirect positive effect on the employment and wages of other agricultural wage laborers, and which has impacted poverty alleviation and economic improvement at a national level, and
- group savings have proven as successful as group lending.

Conditions of microcredit arrangement in Kazakhstan:

Upon completion and passing of the course on business or new skills attendees receive a certificate which allows them to have a microcredit up to 10 million KZT (25 thousand Euro). Credit is given only with strict conditions. Microcredit may be loaned for goods warranty or equipment purchase. Budget credit from the Republican budget is given to a local executive agency for 5 years based on recurrency principles, urgency and availability at a price with annual rate of remuneration at 0,01 %.

Designated purpose of a microcredit – arrangement and expansion of own business.

Microcredit for expansion of own business is issued under condition of creating new steady jobs and compulsory employment through job centers.

Period of microcredit amounts up to 500 thousand KZT – is no longer than 3 years, over 500 thousand KZT – no longer than 5 years.

Microcredit amounts are:

- up to 3 million KZT – for arrangement and expansion of own business;
- up to 5 million KZT – for oralmans³³ and migrants who came to the regions and who are specified by the Government of the Republic of Kazakhstan, who are included into the regional quota of oralmans and migrants reception;
- up to 6 million KZT – for arrangement of small commodity production based on personal subsidiary plot (shall be tested in 2016 as a pilot project).

Maximum annual remuneration rate by microcredits up to 500 thousand KZT for a final borrower is no more than 5 %.

Repeated crediting is allowed at the expense of funds returned by final borrowers by the credit resources issued earlier.

3) granting services for project support (marketing, legal, accounting, and other types) for the period up to one year.

³⁰ Islam, Jamal and Mohajan, Haradhan and Datta, Rajib, 'Aspects of microfinance system of Grameen Bank of Bangladesh', International Journal of Economics and Research, Vol. 3, No. 4 [31. August 2012]: p. 77.

³¹ Hulme, D., 'The Story of the Grameen Bank: From Subsidised Microcredit to Market-based Microfinance', Brooks World Poverty Institute Working Paper-60, University of Manchester, UK [2008].

³² Islam, Jamal and Mohajan, Haradhan and Datta, Rajib, 'Aspects of microfinance system of Grameen Bank of Bangladesh', International Journal of Economics and Research, Vol. 3, No. 4 [31. August 2012]: p. 90.

³³ Oralman is ethnic Kazakh, who has resided at the time of acquisition of the sovereignty of the Republic of Kazakhstan abroad, and his/her children with Kazakh ethnicity who were born and reside permanently after the acquisition of sovereignty by the Republic of Kazakhstan abroad, arrived in the Republic of Kazakhstan for permanent residence as the historic homeland and received the corresponding status. See the Law of the Republic of Kazakhstan of 22 July 2011 № 477-IV "On migration of population" (article 1 clause 3)

These services are available free of charge in 188 regions of the country in the Centers for entrepreneurship services.

4) development and/or construction of missing objects of engineering-communication infrastructure and/or purchase of equipment for the projects realized by the Program participants, including those for development of distant pasture cattle rearing except persons who got microcredits for the amount up to 500 thousand KZT.

3.2. Assistance in finding job through training and resettlement within employer's requirements

A. Training and assistance in finding job

There are provided following types of state support:

1) occupational guidance, assistance in choosing profession, consulting on training and job finding, psychological adjustment services;

2) assignment for free extension courses, professional training and retraining (hereinafter referred to as professional training);

Additionally following measures shall be taken:

- determination of need in staff;

- determination of the list of training organizations which provide professional training services;

- social contract conclusion (job center, employer, Program participant and training organization);

3) assignment for free short-time courses (further referred to as – training master-classes) for training staff for sector of services, including those for EXPO-2017 and “green economy” field;

4) providing financial aid for professional training, with the exception of short-time courses for acquiring practical skills;

5) searching suitable vacancies and assistance during employment process, including social jobs and youth practice;

6) partial financing of salaries of natural persons placed in social jobs;

7) labor remuneration of natural persons assigned for youth practice;

8) temporary financing of two thirds of the lost income of qualified employees for the shortened work time;

Basic conditions:

- only for employees of the enterprises with the staff number not less than 250 people, under the condition of decline of production volume or prices due to the world pricing situation and the enterprise compliance to one of the following conditions:

a) it is an economic base in mono-towns and cities;

b) share of exported goods (services) is not less than 30% in total quantity of the goods (services) made by a specified enterprise;

c) share of goods (services) supplied within domestic market is not less than 30 % of the regional quantity or not less than 10% of the republican quantity of the same goods (services).

9) assignment for extension courses or retraining at the expense of state grants to employers.

Grants are given at the amount of 80% of employer's expenses from the extension courses or retraining cost per one person, but no more than 100 monthly settlement indicators.

B. Increase of territorial mobility

Following supportive measures are provided:

- assistance in job finding in a new place of residence;

- providing of office housing;

- providing room in dormitory for youth

- professional training with the following employment to vacant positions;

- receipt of microcredit;
- assignment to: social jobs and youth practice.

Along with the current measures it is necessary to mark out the following trends as additional measures for employment assistance in order to *develop various forms of employment*:

1) *Realization of a pilot project for development (providing) of temporary personnel market within one of the active special economic areas.*

Temporary personnel market (leasing, outstaffing, outsourcing) – providing specialists in various fields: seasonal business, retail trade, filling in demand in qualified staff in short-time and medium-term projects, during reporting period of an enterprise (for example, temporary accountants). One operator provides year-round employment for a high number of free specialists.

World market analysis and demand in temporary personnel services show that this advance practice has good prospects. Leasing services industry is well developed in the western countries: annual market volume in Germany is 7 billion, England — 37.5 billion, and the USA — 80 billion dollars.

2) *Development of social entrepreneurship through increase of state social demand, including issues of special social services, also through state-private partnership or concession (handing over objects of social infrastructure: kindergartens, hospitals, etc.) and testing models of state-private partnership.*

In this direction tight restrictions are not needed, considering that social entrepreneurship is based on attraction of business, non-standard approaches, creativity, and initiative of people aimed at effective solution of social problems.

For the development it is necessary to have affordable special training, as well as organizing and consulting assistance (management of projects, finances, development of business-plans, accounting, etc.), spread of the best world practices.

It seems logical that it is necessary to create special consulting centers or to make functional expansion of the active Services Center for entrepreneurs.

3) *Construction of housing (dorms) around big enterprises within infrastructural projects, providing conditions for creating and keeping steady jobs.*

4) *Incentive state financial aid to involve unemployed, disabled and other target groups of population into labor activity (based on German experience).*

With the help of such financial aid (Eingliederungszuschuss, EGZ) there are covered various types of organizational-financial assistance to involve unemployed people into labor activity. Size and duration of giving the financial aid to newly employed person is basically determined depending on results of his labor and requirements to the relevant job. Size of financial aid may be up to 50% of his salary and is provided for the period up to 12 months. For senior citizens and people with various disability degrees there are also other resources for their work incentives.

5) *Extension of network of business-incubators and industrial parks with providing infrastructure and free working areas.*

3.3. Improving of national qualification, development of professional and educational standards

Professional standards – are technical requirements of employers to their employees, i.e. what kind of employees they would like to have. Educational standard – is a system of abilities and skills that is developed in accordance with these professional standards and requirements of employers. Acceptance of standards would allow introduction of an independent system of qualification evaluation.

Unemployment rate is caused by not only the economic crisis, but by the fact that skills, experience, and education level of unemployed people does not always correspond to the requirements of today's market.

According to the OECD standards, labour productivity³⁴ level for one employee is 46.7\$ USD per hour worked³⁵ while in Kazakhstan indicator is just 25.6\$ USD³⁶.

Obviously, that in order to increase labour productivity it is need to improve qualification and the quality of skills of labour resources. That's why such measure would be not only the factor of employment but has an economic impact too.

3.4. Economic incentive for employers participating in the above mentioned activity

Of course, realization of the measures mentioned above shall be incomplete and of short-term action if there are no relevant economic incentives for employers involved in construction and organization of proper infrastructure and institutional environment.

The most appropriate measure is tax incentives for employers, optimizing its manufacturing process in order to preserve jobs. As we know, there are four options in order to save during crisis conditions: to cut employed personal of enterprise, to increase prices on production and services, to increase productivity or reduce losses. If the first two measures have negative social impact, the last two options could be the reasons for promotion from the government.

For example, employer developed program for increasing the productivity or reducing the losses is a subject to tax incentives in the end of each tax period with confirmation of implementation such optimization policy. The key requirements are saving staff and stable economic situation in applying of the program for optimizing its manufacturing process.

Conclusions

Conceptually social partnership is evolutionary the result of the convergence of the social theories of democracy (in the framework of socialist ideology) and the liberal-conservatism (in the framework of capitalist ideology), as a natural result of cooperation and mutual accommodation of two major groups - employers and employees under the mediation of the state in order to ensure their effective interaction.

Practically social partnership presents the infrastructure of economic, legal and institutional instruments. Considering that supplying of all the mentioned measures will be undertaken by both employers and state in favor of employees and self-employment persons, we may observe absolutely new form and relations between social partners: state, employers and self-employment persons:

1. Promoting entrepreneurial initiatives including microfinance, trainings and service infrastructure:
 - 1) free training on fundamentals of entrepreneurship;
 - 2) microfinance arrangement;
 - 3) granting services;
 - 4) development and/or construction of missing objects of engineering-communication infrastructure.
2. Assistance in finding job through training and resettlement within employer's requirements:
 - 1) Training and assistance in finding job;
 - 2) Increase of territorial mobility.
3. Improving of national qualification, development of professional and educational standards.
4. Economic incentive for employers participating in the above mentioned activity.

Fostering such kind of partnership the state will achieve both the objectives of employment maintenance and entrepreneurship activity's growth with respective revenues for state budget.

³⁴ Labour productivity is defined as GDP (Gross Value Added in market prices, based on PPPs) per hour worked. Hours worked reflect regular hours worked by full-time and part-time workers, paid and unpaid overtime, hours worked in additional jobs, and time not worked because of public holidays, annual paid leaves, strikes and labour disputes, bad weather, economic conditions and other reasons. See OECD (2015), OECD Compendium of Productivity Indicators 2015, OECD Publishing, Paris. <http://dx.doi.org/10.1787/pdty-2015-en>

³⁵ OECD (2012), Labour productivity levels in the total economy (indicator). Accessed on 20 March 2016.

³⁶ National Report on the condition of entrepreneurial activity in the Republic of Kazakhstan. Astana [2016], National chamber of entrepreneurs of the Republic of Kazakhstan. P.15

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THE RECONCILIATION OF PROFESSIONAL, PRIVATE AND FAMILY LIFE — THE KEY MEASURES

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Abstract

Over the years the reconciliation of professional, private and family life has become a central concern for the European Union (“EU”). This was addressed in the Lisbon strategy² and was renewed in the EU 2020 strategy³. The reconciliation of work and family life policy is seen as an important means of achieving one of the major policy objectives of the EU: to reduce gender wage inequalities, and is a key element for sustainable employment and income-led recovery, as well as having a positive impact on demography and enabling carers to fulfil their care responsibilities. Furthermore, reconciliation is acknowledged as one of the key factors of the fundamental values of the EU – the ability of gender equality to succeed.

Reconciliation is a multi-layered concept and involves a sophisticated framework. EU policymakers see reconciliation in three contexts: (1) pregnancy, birth, maternity and paternity, (2) flexible working arrangements, (3) the care of adults, elderly and other dependents. Nevertheless, it should be acknowledged that it encompasses an eclectic mix of provisions.

This article will attempt to reveal the concept of reconciliation, the key legal measures that compose it and adjustments that assist to reconcile a person’s professional, private and family life and the main issues they are faced with.

Keywords: reconciliation, work-life balance, reconciliation measures.

Introduction

In this article, firstly, the concept of reconciliation based on legislation and case law will be explored. Then the key measures of reconciliation, providing legislative acts and judicial practice by interpreting and applying them will be explored. Finally, the paper ends with a conclusion in which the correct approach is suggested.

1. The concept of *reconciliation*

The issue of reconciliation of work and family (reconciliation) was first officially placed on the EU agenda in the 1974 Social Action Program⁴. The document recognized the need to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations. The Charter of Fundamental Rights of the European Union⁵ (“Charter”), which after the Treaty of Lisbon⁶ entered into force (on 1 December 2009) and became legally binding, sets (Art. 33(2)):

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² European Parliament. Lisbon European Council 23 and 24 March 2000. Presidency Conclusions. Available at <http://www.europarl.europa.eu/summits/lis1_en.htm> (accessed on 10 February, 2015). The Lisbon strategy was an action and development plan devised in 2000, for the economy of the European Union between 2000 and 2010.

³ COM (2010) 2020. OJ, 2011 C 88.

⁴ OJ, 1974 C 103, p. 0001-0004.

⁵ OJ, 2010 C 83, p. 389-403.

⁶ OJ, 2007 C 306, p. 01-271.

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

This provision grants the right of reconciliation to 'everyone', meaning the Charter intends to make reconciliation a universal right. This explanation correlates with EU concern placed on the Social Action Plan in early 1974 to ensure the need of all concerned to reconcile family responsibilities with work commitments. Furthermore, reconciliation as a right for everybody was clearly recognized by The Court of Justice of the European Union ("ECJ") in *Gerster*⁷ in 1997. The Court emphasized that "The protection of women – and men – both in family life and in the workplace is a principle broadly accepted in the legal systems of the Member States as a natural corollary of the fact that men and women are equal, and is upheld by Community law." One year later the Court reiterated it in *Hill*⁸. The position on reconciliation as a fundamental right was considerably strengthened by the ECJ in *Chatz*⁹, where the Court pointed out that "observance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognized as fundamental by Article 33(2) of the Charter of Fundamental Rights"¹⁰.

Foregoing the ECJ's rulings, in terms of reconciliation, leads to two significant conclusions. First, considering that reconciliation derives from the equality principle (indeed, is still interpreted along these lines), the above-mentioned decisions allow one to conclude that the ECJ has yet to recognize reconciliation as a self-standing principle. Secondly, in terms of the ECJ, the reconciliation concept, in view of EU law, has been defined as a fundamental right.

The aforementioned provision of reconciliation of the Charter, however, is not without critique. Firstly, it creates ambiguity as to what structure of 'family' the provision is addressed at. The legislator does not set clear paths to find an answer. However, under the European Court of Human Rights' ("ECtHR") case law grounds the 'family' in the reconciliation right stipulated in the Charter is to be interpreted as encompassing all significant relatives in a person's personal life, irrespective of formal relationships¹¹. Furthermore, Article 33(2) of the Charter granting the right of reconciliation has been attacked for its limits as it directly relates to certain forms of leave, i.e. maternity and parental leave. These types of leave necessarily only include infants and very young children. This is in contrast with the idea that reconciliation includes wider responsibilities, which were envisaged in the 2000 Council Resolution.¹² In addition, strategies to ensure stronger support for reconciling professional, private and family life build on a range of components, including but not limited to, childcare facilities, leave entitlement and flexible working time arrangements. Moreover, Article 33 (2) stipulates reconciliation; however, it omits the broader regulation in as much as it does not involve either flexible working arrangements or care provisions. Thus consist the measures of the reconciliation¹³ and it is to the key reconciliation measures that we now turn.

⁷ *Hellen Gerster v Freistaat Bayern*, Case C-1/95 [1997] ECR I-05253, para 38.

⁸ *Kathleen Hill and Ann Stapleton v the Revenue Commissioners and the Department of Finance*, Case C-243/95 [1998] ECR I-03739, para 42.

⁹ *Zoi Chatzi v Ipourgos Ikonomikon*, Case C-149/10 [2010] ECR I-08489, para 40.

¹⁰ *Ibid.*, para 63.

¹¹ See, e.g., *Elsholz v Germany*, application no. 25735/94, ECtHR, para 43 (in this case ECtHR interprets that the notion of family is not confined to marriage-based relationships and may encompass other de facto 'family' ties, where the parties are living together out of wedlock); *Keegan v Ireland*, application no. 16969/90, ECtHR, para 44 (the notion of 'family' encompass even if the parents are no longer co-habiting or if their relationship has then ended); *Marckx v Belgium*, application no. 6833/74, ECtHR, para 45 ('family life' includes at least the ties between near relatives, for instance those between grandparents and grandchildren); *El Boujaïdi v France*, application no. 25613/94, ECtHR (brothers and sisters).

¹² CARRACIOLO di TORELLA, E., MASSELOT, A. *Reconciling Work and Family Life in EU Law and Policy*. London: Palgrave Macmillan, 2010, p. 42.

¹³ See, e.g., The Commission of the European Communities. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A better work-life balance: stronger support for reconciling professional, private and family life. COM(2008) 635 final. Brussels, 3.10.2008. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0635&from=EN>> (accessed on 9 February, 2015).

2. The key measures of reconciliation

Leave provisions

The leave provisions helping to reconcile work and family life generally relate to pregnancy, birth, maternity and paternity. They are regulated mostly by secondary EU law. The leave provisions lie in the three principal directives: Directive 76/207 on Equal Treatment¹⁴, now Directive 2006/54 on Sex Equality¹⁵, which prohibits discrimination on grounds of gender in terms of access to employment, vocational training and promotion, and working conditions, Directive 92/85 on Pregnant Workers¹⁶, which provides the minimum requirements for encouraging improvements to protect the health and safety of pregnant workers, Directive 96/34 on Parental Leave¹⁷, repealed and replaced by Directive 2010/18/EU¹⁸, designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

The ECJ has been progressive in developing the reconciliation concept by interpreting Directive 76/207 on equal treatment. In the early case of *Hofmann*¹⁹ in 1984 the Court responded to a complaint by a father that he was not allowed maternity leave payment and held that the equal treatment directive is not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents²⁰. Fourteen years later in *Hill*²¹, in the implementation of the principle of equal treatment of men and women, the Court, nevertheless, moved away from this stance and underpinned community policy on equality in order to help workers to combine work and family responsibilities. This shows clear recognition by the ECJ of the Equal Treatment Directive as a measure helping men and women to reconcile their professional and family obligations.²² Furthermore, the ECJ extends application of the Equal Treatment Directive to women who is not still pregnant but are trying to start a family. In *Mayr*²³, where the issue of wrongful dismissal of a Ms Mayr was touched upon, the ECJ has not seen a way to apply the Directive 92/85 on pregnant workers. Ms Mayr was not still pregnant, i.e. her ova had already been fertilised by her partner's sperm cells, so that *in vitro* fertilised (IVF) ova existed, but they had not yet been transferred into her uterus. However, the Court found a path to protect Ms Mayr's interests based on the Equal Treatment Directive. This decision illustrates the ECJ has attempted to interpret reconciliation measures (in this case covered by leave provisions) in a broad manner.

Parental leave offers both men and women an opportunity to reconcile their work responsibilities with family obligations, i.e. it applies to all workers²⁴. Parental leave, as a measure allowing parents to reconcile family needs with employment, has been consistently held by the ECJ in its case law, e.g. in *Meerts*²⁵,

¹⁴ OJ L 39, 14.2.1976, p. 40–42.

¹⁵ OJ L 204, 26.7.2006, p. 23–36.

¹⁶ OJ L 348, 28.11.1992, p. 1–7.

¹⁷ OJ L 145, 19.6.1996, p. 4–9.

¹⁸ OJ L 68, 18.3.2010, p. 13–20.

¹⁹ *Hofmann v Barmer Ersatzkasse*, Case C-184/83 [1984] ECR 1984 03047.

²⁰ *Ibid.* para 24.

²¹ *Kathleen Hill and Ann Stapleton v the Revenue Commissioners and the Department of Finance*, Case C-243/95 [1998] ECR I-03739.

²² A proactive interpretation of Equal Treatment Directive by ECJ in dealing with reconciliation issues can be seen in the following ECJ's case law: *Oumar Dabo Abdoulaye and Others v Régie Nationale des Usines Renault SA*, Case C-218/98 [1999] EC I-05723; *Land Brandenburg v Ursula Sass*, Case C-284/02 [2004] ECR I-11143, para 32, 33; *Bianca Küçük v Land Nordrhein-Westfalen*, Case C-586/10 [2012], ECR (not yet published), para. 33.

²³ *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*, Case-506/06 [2008] ECR 2008 I-01017.

²⁴ See, e.g., *Christel Meerts v Proost NV*, Case C-116/08 [2009] ECR I-10063; *Zoi Chatzi v Ipourgos Ikonomikon*, Case C-149/10 [2010] ECR I-08489; *Nadežda Riežniece v Zemkopības ministrija and Lauku atbalsta dienests*, Case C-7/12 [2013] ECR (not yet published); *Lyreco Belgium NV v Sophie Rogiers*, Case-588/12 [2014] ECR (not yet published); *Christel Meerts v Proost NV*, Case C-116/08 [2009] ECR I-10063; *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*, Case C-486/08 [2010] ECR I-03527; *Lyreco Belgium NV v Sophie Rogiers*, Case-588/12 [2014] ECR (not yet published).

²⁵ *Christel Meerts v Proost NV*, Case C-116/08 [2009] ECR I-10063, para 35.

*Chatzi*²⁶, *Riežniece*²⁷, *Lyreco Belgium*²⁸. Furthermore, the right to parental leave is not merely a right but, the ECJ observes, a particularly important principle of Union social law²⁹. Nevertheless, parental leave is usually unpaid and inflexible, therefore not very attractive to parents in trying to reconcile a work-family life.

Parental leave, however, must not be confused with paternity leave, which is granted to fathers on the birth of their child; this is down to State Members law regulation, as EU law still makes no uniform provisions on this. Paternity leave is still unused by most male employees as it is usually unpaid. Furthermore, parental leave is very short on terms of duration, therefore it cannot be considered as a significantly attractive measure for the reconciliation of professional and family commitments.

The leave provisions are a key dimension of reconciliation. However, these provisions alone are not sufficient assistance in helping to reconcile professional, private and family life. Other measures, however, shall be invoked.

Time provisions

Forms of 'flexible work' or 'atypical work' constitute the second – time – field of reconciliation³⁰. These forms usually cover part-time work, a short fixed-term contract, telework, or as an agency worker (temp).³¹ Atypical work arrangements fall under the following main directives: Directive 97/81 on Part-time Work³², Directive 99/70 on Fixed-term Work³³, and Directive 2008/104 on agency work³⁴. Telework is regulated by the Framework Agreement on Telework, signed between the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe / the European Union of Crafts and Small and Medium-Sized Enterprises (UNICE/UEAPME), and the Centre of Enterprises with Public Participation (ECPE) on 16 July 2002³⁵. The above-mentioned Directives are designed in gender neutral terms and use the types of contract relating to *any* worker, even those not tied to 'family' relations (e.g. biological parents looking after their child, or workers who need to take care of other dependents). The same can be said for telework. Flexibility of working time is thus increasingly important for both employers and workers³⁶. In terms of reconciliation, the discussed provisions are more favourable to employers than employees because, firstly, the findings show that for the majority of workers it is the employers that decide on their working schedules³⁷, not the employee. Secondly, the statutory right to *request* flexible working arrangements does not grant the right to obtain it. Thirdly, once an employee is granted a flexible working arrangement he or she is not secure that they can transfer from one flexible arrangement form to another, e.g. from part-time to full-time work. Taking into consideration that a need to reconcile work and family commitments is commonly of a temporary nature, time

²⁶ *Zoi Chatzi v Ipourgios Ikononikon*, Case C-149/10 [2010] ECR I-08489, para 56.

²⁷ *Nadežda Riežniece v Zemkopības ministrija and Lauku atbalsta dienests*, Case C-7/12 [2013] ECR (not yet published), para 31.

²⁸ *Lyreco Belgium NV v Sophie Rogiers*, Case-588/12 [2014] ECR (not yet published), para 30.

²⁹ *Christel Meerts v Proost NV*, Case C-116/08 [2009] ECR I-10063, para 42; *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*, Case C-486/08 [2010] ECR I-03527 para 54; *Lyreco Belgium NV v Sophie Rogiers*, Case-588/12 [2014] ECR (not yet published), para 36.

³⁰ Flexicurity, including typical employment contracts, as one of the pathways which should support the possibilities to reconcile work and family life mentioned, e.g. in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards Common Principles of Flexicurity: More and better jobs through flexibility and security. 27 June, 2007 COM(2007) 359 final.

³¹ See, e.g., BARNARD, C. EU Employment Law. Fourth Edition. Oxford: University Press, 2012, p. 426.

³² OJ L14, 20.1.1998, p. 9-14.

³³ OJ L 175, 10.7.1999, p. 43–48.

³⁴ OJ L 327, 5.12.2008, p. 9–14.

³⁵ ETUC, UNICE-UEAPME and CEEP, Framework Agreement on Telework, Brussels, 16 July 2002. More about telework, e.g. MENDEZ, L.M, SERRANI, L. Work-Life Balance and the Economic Crisis: Some insights from the Perspective of Comparative Law (Volume II: International Scenario). Cambridge Scholars Publishing, 2015. p. 188-295.

³⁶ ARROWSMITH, J. Working Time in Europe. in MENDEZ, L.M, SERRANI, L. Work-Life Balance and the Economic Crisis: Some insights from the Perspective of Comparative Law (Volume II: International Scenario). Cambridge Scholars Publishing, 2015, p. 172.

³⁷ Eurofound. *First findings: Sixth European Working Conditions Survey – Résumé*, 23 November 2015, p. 5. Available at <<http://www.eurofound.europa.eu/publications/resume/2015/working-conditions/first-findings-sixth-european-working-conditions-survey-resume>> (accessed on 20 March, 2016).

provisions granting employees to change the form of flexible working arrangements to another, namely based on the need to reconcile professional, private and family life, need to be improved.

Care provisions

The concept of care, in the context of reconciliation, is multifaceted. It involves child care, adult care, the rights and duties of both caregivers and those who require care, facilities, financial support for care, etc. And in this area, compared to the other elements of reconciliation, namely leave and time provisions, no coherent policy or legislation at both domestic or EU level exists. Partly, care is covered by maternity protection provisions. Mostly, however, care falls within the scope of soft law and policy initiatives, which are non-binding, e.g. the Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies³⁸, the Council's recommendation of 31 March 1992 on child care³⁹, Communication on Work-Life Balance⁴⁰ and others. The absence of binding provisions at EU level can be explained by the limits of EU competence in this policy. However, it does not mean that EU regulation in this field is non-existent. Indirect EU intervention is significant and, in contrast to leave or time provisions, unpredictably wide.

Furthermore, care provisions focus on parents, and especially while their children are very young. However, the working age population (15–64) in the EU has started to decrease while the population aged 65 years or more is projected to increase from 87 million in 2010 to 152 million in 2060 (European Commission, 2012). Thus the issue of providing care is becoming increasingly prominent on the policymakers' agendas⁴¹. Moreover, a gap can be seen in the protection rights of caregivers of disabled relatives. While the legislation for the protection rights of disabled persons exists, in implementing the reconciliation right comprehensively and efficiently, provisions need be clearly extended to carers of disabled persons. Spring lights of this can be found in *Coleman*⁴², where the ECJ addressed discrimination by association and applied Employment Equality Directive's provisions (reasonable accommodation⁴³) to non-disabled persons. The case concerned Ms S. Coleman, who was the mother of a disabled child, in which she alleged that on returning to work after having given births to her child, she was treated less favourably than other employees, namely, because she was primary carer of a disabled child. Turning to the matter of discrimination by association, the Court pointed out that the Employment Equality Directive is not limited to the people who are themselves disabled, but also applies when an employee is discriminated or harassed by an employer because of the disability of the employee's child, whose care is provided primarily by the employee. The aforementioned decision is important in terms of the protection rights of the caregivers of disabled persons, however is not sufficient itself to grant efficient protection for caregivers. Thus, reconciliation for all caregivers needs to be based on a strong legal framework, supplemented by other measures, which leads them not to be disadvantaged as a 'care penalty'.

Conclusions

The right of reconciliation set currently in primary law (the Article 33(2) of the Charter) is vaguely tailored and leaves the role of interpretation to the ECJ. Notwithstanding, the legal status and effect of the Charter, including the provision of reconciliation, is most significant when read alongside the wider policy and legal provisions of EU law. Reconciliation is a multilayered concept and involves a sophisticated framework. The key measures to what is usually referred to reconciliation of professional, private and family life have three

³⁸ OJ L 245, 26.8.1992, p. 49–52.

³⁹ OJ L 123, 8.5.1992, p. 16–18.

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A better work-life balance: stronger support for reconciling professional, private and family life. COM(2008) 635 final. (CELEX no. 52008DC0635).

⁴¹ The European Foundation for the Improvement of Living and Working Conditions (Eurofound). *Working and caring: Reconciliation measures in times of demographic change*. Luxembourg: Publications Office of the European Union, 2015, p. 5. Available at <<http://www.eurofound.europa.eu/publications/report/2015/working-conditions-social-policies/working-and-caring-reconciliation-measures-in-times-of-demographic-change>> (accessed on 20 March, 2016).

⁴² *S. Coleman v Attridge Law and Steve Law*, Case C-303/06 [2008] ECR I-05603.

⁴³ Article 5 of Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OL L 03, p. 0016 – 0022.

strands: leave, time and care provisions. Those provisions grants strong protection for women during pregnancy and maternity leave, notwithstanding the protection for men and women after maternity leave is slowly increasing, but still weak. The flexible working arrangements allow working parents to facilitate the reconciliation of professional, private and family life. Nevertheless, they are designed to achieve economic interests rather than to help employees balance work and family commitments. The third strand on care is least developed in the EU. Regulation regarding healthy young children is partly covered by leave provisions, therefore, jointly with care provisions they assist parents to combine work and family life. Notwithstanding this, the care of disabled children, other dependents or the elderly is essentially out of the realm of the EU legislator, while a truly effective reconciliation requires it.

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LIMITED LIABILITY COMPANY WITHOUT SHARE CAPITAL AS THE EXAMPLE OF ECONOMIC, POLITICAL AND INTERNATIONAL LEGAL APPROACH TO TRADE LAW IN POLAND

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Abstract

It is obvious that interdisciplinary approach to law is exceptionally noticeable as far as the European or international law are concerned. Nevertheless aforementioned approach cannot be omitted when it comes to domestic law. As a matter of fact, it should be underlined that international law's influences, as much as the economic and political changes in Poland, are the great example of interdisciplinary approach to Polish trade law. Since analyzing the Polish trade law, it should be noted that economic and political changes, having their source also in international law, have got a big impact on domestic commercial regulations, including the Polish Commercial Companies Code. That is why, under the pressure of Polish economy and politics, as well as by comparing the Polish and international law, the Polish legislator has started the process of introducing a limited liability company without share capital to the Polish law. Considering the economic approach, the reasons to do so were clear: to facilitate conducting an economic activity, to improve economic development, to entourage entrepreneurs to set up a limited liability company and, as a result of all of that, to increase budget revenues. What is more, according to the economic statistics, the „typical” limited liability company is not as much popular, as it was anticipated, which slowed down the Polish economy. Moreover, there were some political influences, closely related to the economic and international law approach. The most important political argument was the fact that Germany, the most powerful European country, has got a similar regulation and it works good. According to some politicians and representatives of the doctrine, Poland as the developing country, can and should draw from well-functioning West European regulations. All these economic and political issues have convinced the Polish legislator that changes considering the limited liability company are necessary and justified. However because of long-lasting and well-established regulations of Polish limited liability company, regardless of the character of the influences, all these aforementioned changes do not have the characteristics of evolution. Instead of that they should be presented as revolution of Polish trade law that began with the political and economic approach. That is why, the economic and political approach to domestic law is even more visible and important than interdisciplinary approach to international law. Last but not least it should be mentioned that changes of limited liability company are very important and widely discussed hot topic among lawyers, economists and politicians in Poland.

Keywords: limited liability company, share capital economic and political approach.

Introduction

It is obvious that interdisciplinary approach to law is exceptionally noticeable as far as the European or international law are concerned. Nevertheless aforementioned approach cannot be omitted when it comes to domestic law. As a matter of fact, it should be underlined that international law's influences, as much as the economic and political changes in Poland, are the great example of interdisciplinary approach to Polish trade law. Since analyzing the Polish trade law, it should be noted that economic and political changes, having their source also in international law, have got a big impact on domestic commercial regulations, including the Polish Commercial Companies Code. That is why, under the pressure of Polish economy and politics, as well as by comparing the Polish and international law, the Polish legislator has started the process of introducing a limited liability company without share capital to the Polish law. Considering the economic approach, the

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reasons to do so were clear: to facilitate conducting an economic activity, to improve economic development, to encourage entrepreneurs to set up a limited liability company and, as a result of all of that, to increase budget revenues. Moreover, there were some political influences, closely related to the economic and international law approach. The most important political argument was the fact that Germany, the most powerful European country, has got a similar regulation and it works good.. However because of long-lasting and well-established regulations of Polish limited liability company, regardless of the character of the influences, all these aforementioned changes do not have the characteristics of evolution. Instead of that they should be presented as revolution of Polish trade law that began with the political and economic approach. That is why, the economic and political approach to domestic law is even more visible and important than interdisciplinary approach to international law.

1. The character of the share capital in limited liability company in Poland

A limited liability company, in Polish trade law, should be presented as “classical” capital company. According to A. Kidyba² it is connected with:

- duty to make assets;
- lack of shareholders' liability for the company's obligations;
 - the company's liability with all its assets for its obligations;
- acting by the authorities and not by the shareholders;
- rule that change of shareholders has no impact on the company itself;

As the aforementioned author underlines, contributed capital is decisive when it comes to the company's relationships and position of an each shareholder. As a consequence, the capital decides on „the power of voice”, which is crucial when it comes to making decisions, influence on the company's activity, participation in profits and losses³.

What is more, the limited liability company is liable with all its assets, whereas shareholder bear the risk to the value of contributions.

The company's capital should be described as the original contribution of the owners of the company, the sum of all contributions entered in the assets of the company or as the total share capital, entered in the liabilities of the company. However, as marks A. Kidyba, both aforementioned meaning of this term are related to each other, but should be treated separately, because both of those terms play a different role in practice. The company's capital defined as the sum of assets means that those tangible assets form the basis of asset liability of the company, whereas the total share capital refers to the company's credibility towards third parties⁴. It is also crucial to mention that the company's capital corresponds, on the assets side, to the value of the assets acquired property for the contributions of partners.

The doctrine⁵ indicates the three functions of the company's capital: legal function, economic function and guarantee function. The first one refers to the definition of the company's capital described as the specific numerical size corresponding to the total nominal value of the share allocated to all shareholders in exchange for contributions. The economic function means that the company's capital is a set of measures, enabling the company to take up an economic activity. The most important, from this paper's point of view, is the guarantee function of the company's capital according to which the company's capital is a minimum, constant fund of the potential satisfaction of the creditors. In other words, thanks to the size of the share capital, potential creditors and contractors of the company derive knowledge about the company's financial condition.

² A. Kidyba, 'Trade law' (Warsaw 2010) 339 and next.

³ Ibidem, 339.

⁴ S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, 'Commercial Companies Code. Commentary' (Warsaw 2002) 854.

⁵ i.a. S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja 'Commercial Companies Code. Commentary' (Warsaw 2002).

2. The assumptions of amendment of the Polish Commercial Companies Code

According to the art. 154 of the Polish Commercial Companies Code⁶, the share capital of the company should be at least 5.000,00 zlotys, whereas the nominal value of the share should be not less than 50,00 zlotys. In other words, to start conducting an economic activity in form of limited liability company, shareholders should have the amount of 5.000,00 zlotys. It is important to mention that current amount of share capital is the result of the amendment from 2008⁷. Previous amount of share capital was 50.000,00 zlotys. It should be noted that the amendment mentioned before, according to the representatives of the doctrine⁸, does not seem to be the right solution, especially against the current phase of discussions in the doctrine on the functions of the share capital. It is obvious that reduction of the total share capital affected the credibility of the company, which now has to be really careful to stay solvent.

That is why, to the representatives of the doctrine it was rather strange and disturbing that the Polish legislator has started the process of introducing a limited liability company without share capital to the Polish law. The amendment of the Polish Commercial Companies Code considers introducing a limited liability company without share capital and changing current limited liability company.

I. Limited liability company without share capital

The project of the amendment dated 11.08.2014 introduces the limited liability company without share capital. The essential elements of the company are:

- the lack of share capital;
- the occurrence of the so-called "equity capital" – a capital of shares, without its nominal value;
- the lack of shares of nominal value;
- share without its nominal value does not constitute a fraction of the share capital or equity capital;
- share in the share capital, in the case of the share without its nominal value, is the ratio of the number of shares entitled the shareholder to the total number of shares in the company;
- maintaining the obligation to make contributions to the company, but the value of contributions is in no way referred to the value of no-nominal shares;
- the list of shareholders, when it comes to the shares without its nominal value, articles of association, determine the value of the contributions made by shareholders including the shares of no par value and indicate the amount of shares subscribed for the contribution;
- in the book of shares there are indicated shareholders with shares without its nominal value and number of their shares;
- the possibility of free transfer the company's assets by the company to the shareholders which also considers assets derived from contributions as the dividend;
- so called 'solvency test', according to which any payments to shareholders under the heading corporate will require the submission of a statement by the management of that performance to the company does not lead to the loss of its ability to perform its obligations in the normal course of business, the space of one year.;
- so called 'balance-sheet test', consisting in determining whether the company a surplus of liabilities over assets;
- the possibility of establishing the share capital by granting to shares without its nominal value such a value⁹;

⁶ Act of 15.09.2000 Commercial Companies Code, Dz.U.2013.1030.

⁷ Act of 23.10.2008, Dz.U.217.1381.

⁸ i.a. A.Kidyba, 'The comentary to the art. 1-300 of the Commercial Companies Code', Lex/EI 2016, A. Kidyba, 'The worst amendment of the Commercial Companies Code and its consequences', [in] edited by J.Fraçkowiak, 'the Commercial Companies Code after 10 years' (Wroclaw 2013) 11 and next.

⁹ A.Kappes, 'The amendment of the Commercial Companies Code – Project 11.08.2014' (http://www.lodz.adwokatura.pl/pliki_strony/pobieranie_pliku.php?plik=file-konspekt-nowelizacjakodeksuspolekhandlowych1501-1708.docx) 2 and next.

II. The amendment of current limited liability company

According to the aforementioned project of the amendment, changes include:

- setting aside the art. No 14 § 3 of the Polish Commercial Companies Code (receivable of partner / shareholder's loan granted to the company are considered as his/her contribution in the event of bankruptcy of the company within 2 years of the conclusion of the loan agreement);
- reducing the minimum share capital to 1 zloty;
- reducing a minimum value if the share to 1 zloty;
- obligation of establishing a supervisory board of a company of min. 25 shareholders;
- exclusion of shareholder's deprivation - in the event of the establishment of the supervisory board - the right to demand explanations from management of the company;
- setting aside the art. No 230 of the Polish Commercial Companies Code;
- obligatory establishment of the capital of the storage - devoting every year min. 10% of the profit for the year until this capital reaches at least 5% of total liabilities at the end of the previous financial year;
- so called 'balance-sheet test', consisting in determining whether the company a surplus of liabilities over assets;
- for each share carries one vote, regardless of whether it is a share with or without its nominal value;
- possibility of depriving a shareholder priority right to subscribe for new shares in a resolution adopted by a majority of 3/4 votes;
- possibility of lifting the share capital (in addition to the existing possibility of a reduction of share capital);
- share capital increase has been completed with the possibility of establishing new shares without its nominal value;

In conclusion, on the basis of the amendment, there are three types of limited liability companies:

- 1) current limited liability company;
- 2) limited liability company without share capital and without shares with a nominal value;
- 3) mixed limited liability company: both with share capital and shares with nominal value, as well as with equity capital and shares without nominal value¹⁰;

3. The economic and political approach of the amendment

The reasons to introducing aforementioned amendment were both political and economical. First of all, the legislator applied economical and political approach to the subject, according to which conducting an economic activity has been facilitated by eliminating the need to cover the share capital and in particular by the introduction of "release" of the company through a relatively free distribution to the shareholders¹¹. The legislator refers to the claim that legal minimum of share capital is not only arbitral, but also is not a sum sufficient to conduct an economic activity¹². According to the draft of assumptions of the bill of changing the Commercial Companies Code and some other bills, subject to the statutory minimum, amount of share capital is the result of an autonomous decision of the shareholders and there is no obligation that it should be in any relation to the size and type of business pursued by the company. At the same time there is an inability to construct a legal rule addressed to all companies whose content would be requirement to hold the share capital at an "appropriate" level. There is no objectively ascertainable "due" the value of the share capital. Any industry in which companies operate, has a different risk of loss, other equipment needs for the company's

¹⁰ A.Kappes, 'The amendement of the Commercial Companies Code – Project 11.08.2014', (http://www.lodz.adwokatura.pl/pliki_strony/pobieranie_pliku.php?plik=file-konspekt-nowelizacjakodeksuspolekhandlowych1501-1708.docx) 2 and next.

¹¹ Ibidem, 1 and next.

¹² The draft of assumptions of the bill of changing the Commercial Companies Code and some other bills, version 15.07.2013, ms.gov.pl/pl/informacje/download,5174,0.html, 6.

equity and make investments¹³. That is why, the legislator propose a solution in which the share capital is becoming an optional institution, and the statutory minimum will be reduced to the amount of 1 zloty, which is dictated by the need to determine the minimum nominal value of the share in the light of the requirements of accounting¹⁴. What is more, the legislator convinces that introduction of the limited liability company without share capital help to facilitate conducting an economic activity, because it will be easier to run it, improves economic development by encouraging entrepreneurs to set up a limited liability company and, as a result of all of that, to increase budget revenues.

All in all, considering the economical and political approach the legislator came to the conclusion that a share capital does not fulfill its guarantee function, because the minimum amount of it is so low that potential contractors cannot never be sure if the company is solvent. However, the legislator seems not to notice that current minimum amount of the share capital was changed by the act of 23.10.2008¹⁵, whereas previous amount of share capital was 50.000,00 zlotys which could fully protect the company's contractors. It should be noticed that even justified reservations about the guarantee function of the share capital does not justify the abandonment because this category also has other functions (legal, funding), and is the basis of the political system company¹⁶. Moreover, the lack of share capital will permit circumvention of, or even is contrary to the article No 3 of the Polish Commercial Companies Code, according to which the partners have an absolute obligation to make contributions¹⁷. Last but not least, it should be underlined that, contrary to the legislator, there is no proof of the fact that the share capital limits entrepreneurship and especially that Polish economy is threatened by the risk of a flood of companies registered in the UK and elsewhere - companies without share capital¹⁸.

4. The legal and international approach of the amendment

According to the legal approach, the legislator expressed an opinion¹⁹ according to which implementation of aforementioned plans are designed to suggestions based on the experiences of legislative several EU Member States that have implemented similar solutions in the first decade of this century, for example Finland (2006-2007), France (2006), Germany (2008) and the Netherlands (2010). These solutions rely mostly on lowering the minimum share capital to the amount of EURO 1, dependence dividend payment on the fulfillment of the solvency test or introduce shares without nominal value. Nevertheless in the greatest the Finnish experience has been used, according to which shareholders have choice between shares with and without nominal value. The legislator convinces that if those legal solutions work in other West-European countries, then it must work in Poland. This is the reason why the Polish legislator wants to learn and derive from the experiences of other countries. On the other hand, the legislator forgets that, for example, according to German Commercial Companies Code²⁰, the German company UG (Haftungsbeschränkt) is required to assembly capital in the amount of minimum share capital of "classical" LLC, that is the amount of Euro 25.000,00 and then the company has the right to turn into a "typical" limited liability company. What is more, limited liability company without share capital is in no way distinguishable from the "classical" company, especially not called differently, as it is in German law. Last but not least, it should be noticed that countries

¹³ Ibidem, 6.

¹⁴ The draft of assumptions of the bill of changing the Commercial Companies Code and some other bills, version 15.07.2013, ms.gov.pl/pl/informacje/download,5174,0.html, 6.

¹⁵ Act of 23.10.2008, Dz.U.217.1381.

¹⁶ A.Kappes, 'The amendment of the Commercial Companies Code – Project 11.08.2014' (http://www.lodz.adwokatura.pl/pliki_strony/pobieranie_pliku.php?plik=file-konspekt-nowelizacjakodeksuspolekhandlowych1501-1708.docx) 6.

¹⁷ A.Kappes, 'The amendment of the Commercial Companies Code – Project 11.08.2014' (http://www.lodz.adwokatura.pl/pliki_strony/pobieranie_pliku.php?plik=file-konspekt-nowelizacjakodeksuspolekhandlowych1501-1708.docx) 4.

¹⁸ Ibidem, 4.

¹⁹ The draft of assumptions of the bill of changing the Commercial Companies Code and some other bills, version 15.07.2013 (ms.gov.pl/pl/informacje/download,5174,0.html) 2 and next.

²⁰ Act of Commercial Code, 10.05.1897, 'Handelsgesetzbuch' (federal Law Gazette No 4100-1).

such as Germany, France or Finland are far more developed than Poland and that in those countries there is a request for such types of commercial companies, whereas in Poland the most popular of conducting an economic activity is still a civil partnership which is not a partnership *sensu stricto*, but only a civil agreement.

Conclusions

To sum up, it should be mentioned that the amendment of limited liability company in Poland is nowadays a crucial and widely-discussed topic. According to the legislator's grounds of aforementioned amendment, the reasons of proposed changes were clear: to facilitate conducting an economic activity, to improve economic development, to encourage entrepreneurs to set up a limited liability company and, as a result of all of that, to increase budget revenues. In the project of amendment, the legislator presented a number of reasons considering economic, political, legal and international approach. The most important of them are: the fact that the share capital does not fulfill its guarantee function and therefore does not provide protection for contractors. Moreover, the legislator claims that implementation of aforementioned plans are designed to suggestions based on the experiences of legislative several EU Member States that have implemented similar solutions. That is why, the Polish legislator propose to introduce limited liability company without share capital and without shares with nominal value and mixed limited liability company: both with share capital and shares with nominal value, as well as with equity capital and shares without nominal value next to the current limited liability company. However, the interdisciplinary approach to the limited liability company in Polish commercial and trade law is obvious, there is many doubts if those amendments are necessary. First of all it is because of the fact that the share capital has got many roles, not only the guarantee one. Conducting an economic activity in the form of limited liability company without share capital is very risky, especially for the contractors. Moreover, there are no proof that the share capital creates a barrier for the entrepreneurship, because its current amount is so low, that there is no problem in starting and running a business in this legal form. What is more, according to the article No 3 of Polish Commercial Companies Code, shareholder are obliged to make assets, whereas the asset of 1 zloty cannot be compared to the asset of 50 zlotys or more and it cannot be understood as the share.

That is why, the project of amendment is widely criticized among the representatives of the doctrine. So remains the question whether interdisciplinary approach to law is always reasonable and right.

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BASIS AND EXPLANATION OF A LEGAL NORM: SOME PROBLEMS WITHIN THE CONTEXT OF CRIMINAL AND CRIMINAL PROCEDURE LAW

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Abstract

The article is an attempt to give basis for several complicated discussion issues related to the provision of rationale for the existence of norms of law. Some issues of the theory of law related to interconnection of morality and law are reviewed using Russian criminal and criminal procedure law statutes. The author believes that the current practice of passing laws in the field of criminal punishment and criminal procedure needs to be improved.

Keywords: morality and criminal law, fairness of the punishment, validation of the norms of law, explanation of the criminal procedure law.

Introduction

Development of public relations and legislation requires more precise analysis of the validations for the current norms of criminal procedures and criminal law, which comprise criminal law policy of countries. The public must understand the meaning of the existing norms of law, and its rationale: logic, moral, criminologic, and other basis. This could be called foundation of the legal norm. From the author's point of view, norms of law especially in the field of criminal justice must possess maximum substantiation due to the high public significance of their application.

The present publication desires to cover several interconnected aspects of the issue based on the examples from criminal and criminal procedure laws:

Moral justification of criminal and criminal procedure laws;

Explanation of the norms of law as an attempt at external description of their foundation (on examples of current laws as well as bills);

Raising the issue of law-making process adjustment as an important formal procedure of legislative basis.

As examples the author selected more available norms of Russian law and materials of law-making process; however these examples illustrate some common challenges.

1. The most important basis of the law is its moral justification.

Every textbook on the theory of state and law says that morality is one of the foundations of the law², that the law is based on foundational ideas based on humanistic values³. Moral and legal norms regulate, coordinate and manage public relations⁴.

Some immersion in the publications on this issue brings the following picture.

Traditional Soviet theory of law proceeded from the premise that social norms are made of two elements of interconnected norms: moral and legal⁵. Positivistic norm approach usually equals with the current

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² 'Theory of State and Law: textbook for law schools and law departments'. Joint authors under the editorship of S.S. Alekseyev (Moscow, Norma 1998) 202.

³ Matuzov N.I. 'Theory of State of Law: textbook' (Moscow, Yurist' 2004) Chapter 7

⁴ Ref.: Ikonnikova G.I. 'Philosophy of Law: textbook for master degree students' (Moscow 2015) 223

⁵ Ref.: Haikin Y.Z. 'Structure and Interaction of Moral and Law Systems' (Moscow 1972) 31

legislation, for libertarian theory it is typical to differentiate notions of justice and law, where some authors paradoxically downplay morality compared to legal categories: “Moral interpretation brings confusion ... and does not contribute to formation of legal consciousness”⁶. One could hardly agree with such a statement; the more common approach seems more convincing where justice is an important and the most formalized mechanism of manifestation of moral categories into real life, and examples of some developed countries show convergence and interweaving of legal and moral norms⁷.

It is important to note that positive (written) law may gradually lose connection with morality, more and more conjugating with politics⁸.

Despite the discussions, such short review of sources is sufficient to state that in the theory of law in general the approach that dominates is the one which connects morality and law as two most important social regulators.

2. The most important unsolved issue is exact understanding of what is to be understood as morality, with which we must correlate current norms of law, and law ideas, as well as initiatives to amend current law.

The very notion of “morality” presents significant complexity, which is confirmed by a significant number of varying definitions. In the context of this publication, we will take one of the classical definitions: “Morality is one of the main ways of regulating a person’s actions in society with the assistance of norms. Apart from a simple custom or tradition, moral norms receive idealistic basis in the form of ideals of good and evil, tribute, justice, etc.”⁹ In this definition let us note the indication of difference between morality and law. Morality is sanctioned only by ways of spiritual pressure (public assessment, approval or disapproval). Also the important part of the traditional approach to understanding morality is understanding that next to universal elements morality includes historically transient norms, principles, and ideals.

A major Russian law scholar S.S. Alekseyev noted that not every moral “can be assessed positively” for two reasons: there are archaic, “reactionary” postulates and norms, and besides, the predominance of morality over a person should not be unlimited¹⁰.

The review of journal publications devoted to interconnection of law (first of all criminal one) and morality reveals that there are some opinions that the moral substance for example for Russian criminal law must be Christian morality¹¹, others separate moral, religious, and criminal law regulators, without opposing them (however they do not clarify which particular religion is meant)¹², many speak about the necessity for moral measurement of the law (E.A.Lukashova) based on “universal humane values and ideals”¹³.

Making no claims as to the complete survey of opinions and depth of analysis, however, one can summarize that the majority acknowledge such social regulator as morality to be the foundation for legal norm. This in particular means the legal norm must not contradict moral norm, and the key question here is which specific moral norms form the basis for the norm of law expressed in the law and are mandatory for enforcement. On what should they be grounded and where should they be formulated? Responses to these questions will make a discussion of a number of the most important trends in criminal and criminal procedure laws more clear.

One of the answers could be a position that the most important norms of morality which are significant for legal relation of various kind are secured in the Constitution, a number of most significant international legal

⁶ Ref.: Chetvernin V.A. ‘Introduction to the Course of General Theory of Law and State’ (Moscow 2003) 39

⁷ Ref.: Obolonsky A.V. ‘Morality and Law in Politics and Management’ (Moscow:State University Higher School of Economics 2006) 70-71

⁸ Ref.: Ikonnikova G.I. ‘Philisophy of Law: text book for master degree students’ (Moscow 2015) 224

⁹ ‘Politics.Thesaurus’ (Moscow,INFRA-M 2001)

¹⁰Ref.: Alekseyev S.S. ‘Theory of Law’ (Moscow, Publishing House BEK 1995) 138

¹¹ Ref.: Levakin I.V. ‘Law and Religious and Moral Norms of Russian Society’ [2012] 6 Journal of Russian Law 97-106

¹² Ref.: Kozachenko I.A. ‘Moral and Religious Components of Russian Criminal Law’ [2012] 5 Russian Law Journal 77

¹³ International Scholarly Conference “Interaction Between Law and Morality” at the Law Department of Moscow State University [2014] 5 International Public and Private Law 46-48

acts. The Constitution of Russia, defining the state as secular, guarantees as the most important legal norm such moral value as "Person, his rights and freedoms are of the highest value" (Art.2), which obviously determines open humanistic foundation of secular morality and moral substance for the law.

As far as religious norms as moral norms, this is a very complicated issue. The very understanding of Christian values as a foundation of public morality is related to a great number of discussions. For example, following a number of Christian norms can challenge the very criminal law and court procedures or at least criminal punishment.

3. Let us refer to the field of criminal justice and remind everyone who studied criminology of the well-known notion of "criminologic basis of criminal law norm".

Hereunder one usually understands (based on rational methods of cognition) a grounded approach to introduction, evaluation, or cancelling a criminal legal norm.

Sometimes legislators apply criminological information (primarily statistics on some type of crime) to justify amendment of some norm of Criminal code. However, such basis does have obligatory and systematic character.

In this context there is a very interesting and very important issue of basis of criminal legal sanctions. The very system of punishment in criminal law is stipulated by numerous contradictory phenomena of public development (for instance, political regime¹⁴, legal culture of a society, etc.).

The author did not manage to find significant works devoted to scholarly basis of the type, and most importantly, amount of criminal punishment, even though such punishment as deprivation of freedom obviously has enormous importance for the people involved in criminal procedure, as well as for the society in general. This is apparently one of the symptoms of so called "crisis of punishment", which existence is noted by some scholars. The survey of explanations for the necessity to increase criminal punishment for certain types of crime allows one to state that even scholars-lawyers often do not give any ground for the suggested increase of the sanction, as if imagining that this would lead to the decrease of crime level.

Going back to the issue of moral basis, there are problems with the norms in criminal punishment in general, including within the context of humanistic values as a foundation of morality and law.

What is the purpose of criminal punishment in general? Art. 43 of the Criminal Code of the Russian Federation says that "Punishment is applied for the purpose of restoring social justice, as well as for correction of the convicted and prevention of new crimes".

In British criminal law the purposes of punishment have not been stated for a long time, they are revealed in the legal doctrine which has several approaches: public recompense ("vengeance with the purpose to satisfy indignation" J.F.Stephen) and due retribution, isolation of those who committed a crime, correction of the person, prevention of crimes¹⁵.

French criminal law does not state purposes of punishment; it is done by criminal law theory as a neoclassical concept (retribution and deterrence, duty to expiate guilt) and a theory of new social protection (correction and resocialization of a criminal, allows suffering from deprivation of one thing, like freedom, money, rights). French criminal law in general reflects this approach; a similar situation is observed in the criminal law of Germany¹⁶.

So how in theory is justice and its variety social justice being explained? In the philosophy of law there is a notion of legal justice, i.e. interconnection of the action and retribution¹⁷. With that the main measure of justice is freedom, with which the majority of authors agree¹⁸.

This means that social justice lies in the foundation of the most common criminal punishment – deprivation of freedom. It is its moral foundation, being in essence a retribution for the crime. Some authors

¹⁴ Ref.: Ghilinsky Y.I. 'Criminology: Theory, History, Empiric Basis, Social Control' (St.Pete. 2009) 395

¹⁵ Ref.: Yesakov G.A. and others. 'Criminal Law of Foreign Counties: Textbook' (Moscow 2014) 260-261

¹⁶ Ref.: Yesakov G.A. and others. Ibid. 279-280,300.

¹⁷ Ref.: Ikonnikova G.I. Ibid. 264.

¹⁸ 'Current Problems in Criminal Law: textbook for graduate students' (Moscow 2015) 279

directly equate social justice and vengeance¹⁹. And it allows us to raise a question: what kind of morality is this: progressive or archaic (according to S.S.Alekseyev)? How is it correlated to the declared humanistic foundation of the law?

Some authors believe that social justice of the punishment is commensuration of the punishment with severity of the crime, personality of the perpetrator, etc.²⁰

However, how does one assess this commensuration? What is commensuration of the punishment under P.6 Art.264 of the Russian Federation Criminal Code (violation of driving rules which caused death of several people) as deprivation of freedom for the term of four to nine years? Or for theft from an apartment to be deprivation of freedom up to six years?

Or must we analyze the length of the incarceration from the point of view of other purpose of the punishment – correction of the convicted? But, firstly, the logic of criminal law does not allow this, secondly, how could one justify the time of incarceration by the time of correction? And how does one explain such punishment as a many-fold fine (for example, 90-fold one)? Where is social justice and possibility for correction in this case?

Thus, we can state that:

Available theoretical explanations of punishment are based on the idea of retribution or correction²¹;

The lack of acceptable theoretical ground of punishment in the criminal law is primarily explained by moral issues and discussions between legalism and didacticism;

Ideas of making punishments for a crime harsher, expressed by scholars and politicians, commonly have no ground at all; law-making process reflects mass understanding of so called “increasing fight against crime”, which is usually understood as enhancement of punishment for violating criminal code prohibitions.

Thus the idea of complicating the law-making process in the field of criminal law the way it is done in Finland²² could be supported. The criminal law bills, especially those related to punishment, should be passed from our point of view following a more complicated procedure, which can include a mandatory mechanism of scientific, rational explanation of the length and type of punishment. Scientific basis for such explanation could be criminology with its statistic data, social psychology, and psychology of personality.

Regulation making and regulation-making process are a part of law activity, where all these theoretical aspects can be quite specifically expressed. One believes that such aspect of law writing as basis of a law bill is not sufficiently represented in scholarly works and textbooks. For example, an interesting textbook by T.N. Moskalkova contains much valuable practical information on the setup of regulation-making process (first of all at the Russian Federation Federal Assembly);, however it does not pay sufficient attention to the requirements of basis of law regulations. The book describes in detail procedures through which a law bill and the necessary documents go: explanatory notes and financial feasibility study²³.

4. Let us refer to criminal procedure law and based on the examples of its regulations let us review the issue of basis and explanation of the necessity of legal norms: a long-existing institute, a recently passed law, and a law bill in the sphere of criminal-procedure law.

Available empiric material here is the content of legislative process, materials of the legislative power agencies (explanatory notes, various reviews to the bill, shorthand report of the discussion in the parliament, protocols of the amendments, resolutions, etc.)²⁴.

A) Initial stage of a criminal process in Russia is a stage of initiating a criminal case. It is a mandatory element, through which a majority of criminal cases passes. It is a certain “filter”, a preliminary evaluation

¹⁹ Ref.:Ghilinsky Y.I.Ibid.315.

²⁰ ‘Current Problems of Criminal Law...’ 291.

²¹ It is interesting to note that I. Kant criticized the idea of correction, as one contradicting to morality

²² Ref.:Kozachenko I.Y. ‘Lack of Innovative Will of Criminal Law’ [2011] Criminal Law: Sources, Realities, Transfer to Stable Development: materials of the VI Russian Congress on Criminal Law 441

²³Ref.: Moskalkova. T.N., Chernikov V.V. ‘Norm-making: research and practice aid’ (Moscow, Prospect 2011) 230

²⁴ There were used materials from a specialized official website on law-making activities. Law bill No. 173958-6 // <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=173958-6&02> (date of plea February 10, 2016)

without which the investigation cannot start. The very existence of the stage of initiating a criminal case has been criticized lately in scholarly research papers. There is a traditional explanation for the existing stage of instigation of a criminal case as a guarantee of legitimacy of the investigation (Ms.Lupinskaya). Among notable critical arguments it is important to specify that this whole common process institute appeared after publication of the bylaw – Circular Note of the USSR Prosecutor’s Office as of June 5, 1937 without democratic legislative procedure and does not have any serious ground,; however it influences significantly the current practice and criminal policy of the country.

B) A second example is the status of the victim in the criminal process of Russia. One of the main changes of the year 2013 was the insertion of a possibility in the procedure for a victim to take part in the court hearing on early parole for the convicted for the relevant case.

The authors of the bill explained the amendment by the need to reinforce safety of the victims and ensure collection of the damages. However, a more detailed analysis of this amendment and court practice revealed that courts started to deny early parole in cases when the victim did not show up for the court hearing or objected to early parole of the convicted.

Thus the victims of crimes were given an opportunity for revenge on criminals, one way or the other preventing their early parole. Later this practice and the regulation itself were adjusted and amended; Russian Federation Constitutional Court had to make a decision initiated by a Kurgan region court. Having reviewed the plea, the Constitutional Court determined in particular that “the duty of the state to protect rights of the victims of a crime does not presuppose vesting them with the right to determine the necessity for public criminal prosecution in respect of this or that person, as well as the range of criminal liability and punishment – such right due to public nature of criminal law relations belongs only to the state represented by its legislative and law enforcement agencies; liability is a means of public-law reaction to the law violating behavior due to which the type and amount of liability of a perpetrator must be determined according to public-law interests, and not private interests of a victim

Early parole implemented during serving the sentence as well as determination of the limits of criminal liability and punishment, implemented at the earlier stages cannot be stipulated by the will of a victim – otherwise it would contradict nature of law and purposes of the punishment” (Decree of the Russian Federation Constitutional Court as of March 18, 2014 . N 5-П "Regarding the case of constitutionality of Part 2 Art. 399 of the Russian Federation Criminal Procedure Code based on the plea from Ketovsk district court of Kurgan region").

This example reveals interconnection of the criminal process, criminal law, and morality. Russian Federation Constitutional Court clearly explained that vengeance or revenge cannot serve as a foundation of criminal law and criminal process regulation. The state sets limitations for people to display such wishes, taking functions of prosecution and punishment on itself, thus making revenge unacceptable moral norm for law. The problem is that rather evident things were not taken into account upon making amendments in the criminal procedure law.

C) A third example is a sufficiently well-known debate on the need to establish the legal definition of truth in criminal court proceedings and the duty of the court to establish the truth in a criminal case. The issue has many aspects, for instance a philosophical one: what is the correlation between truth and the sentence of the court which came into legal effect?

The authors of the bill explain its necessity the following way²⁵:

“Implementation of this purpose (criminal procedure – author’s note) is impossible without clarifying the circumstances of the criminal case as they were in reality, i.e. establishing objective truth for the case.

“There is a plan to introduce a term “objective truth” into the list of notions of Russian Federation Criminal Procedure Code and there will be its definition in Article 5 as compliance to reality of the circumstances established in a criminal case which are relevant for its resolution ...

“Public-law subjects which are to prove within their competency must take all measures to provide comprehensive, complete, and objective fact-finding of the circumstances which are to be proved.

²⁵Law bill No. 440058-6 <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=440058-6> (date of plea 24.02.2016)

“The legal fiction of presumption of innocence established in Art.14 of the Russian Federation Criminal Procedure Code which is stipulated to construct insurmountable doubts in favor of the defendant, could only be applied if it is impossible to obtain objective truth for the case, and only after exhaustive measures were taken for its search”.

The bill’s authors offer to formalize law definition of truth. Without getting to philosophical, scholarly explanations of the impossibility to accomplish it, let us note that this bill is related to proof only in the sense that it offers to formulate truth as “correspondence to reality of circumstances of the criminal case which are relevant for its resolution”.

Let us note that the very absence of the word “truth” in the text of the current law was significantly justified during the development and discussion of the bill of the present Criminal Code of Russia and the discussion about it must include the analysis of very serious arguments. The bill’s authors do not reflect argumentativeness of the issue in their explanatory notes.

Analysis of numerous publications on the subject (for example, Bulletin of the International Union of Assistance to Justice, its issue No.1, 2015 is completely devoted to publication of the roundtable discussion “Truth in jurisdiction proceedings”²⁶) allows one to summarize a plethora of sufficiently contradictory opinions on this issue. Allow me to express the following thoughts:

A) category of “objective truth” refers to fundamental problems of academic world, it is valid for numerous fields of people’s activities, and without taking into account the achievements of other research in this issue it is not worth debating within the realm of criminal procedure science the application of this category in criminal procedure research and administering justice;

B) proponents of the introduction of the notion of “objective truth” into legislation as a rule do not deny that the meaning of key norms of Russian Criminal Procedure Code allows one to state that it possesses numerous guarantees of basis and correspondence to reality of the decisions on criminal cases (it will be sufficient to note regulatory requirements to the subject of proof, to most important procedure decisions, etc.);

C) the very introduction of this category into the text of Russian Criminal Procedure Code will not solve a singular practical problem and will not enhance the quality of made decisions. Acuteness of the debate does not speak in favor of a univocal answer from a legislator.

Present norms of the RF Criminal Procedure Code sufficiently lead the law enforcer –subject of the proof, to complete and objective collection of evidence in the criminal case through a list of circumstances which are to be proved, through the requirements of the procedure decisions, etc. Introduction of the notion “objective truth” will not solve practical issues of legal regulation of proof and law enforcement practice.

Both last examples show that official explanation of the offered amendment to the law does not take into account a significant academic debate on the issue and the most important moral and legal sources which lie in the basis of law. The legislation hardly wins because of that.

Conclusions

1. The issue of legal norm basis belongs to most complicated issues of law theory. Nevertheless, the principle meaning and content of current international and constitutional law allows one to state that humanistic morality based on human person’s priorities should form foundation for legislation. Humanistic morality is connected in many ways with some major religious ideas, however, it differs from them in most of the countries.

2. Any legal norm can be evaluated from a moral point of view. In addition to moral foundation, a legal norm must also have other rational ground and explanation of its existence. One of the key problems of criminal law is basis of sanctions (punishment) norms. One can state lack of sufficient rational theory explaining current system of criminal punishment.

3. Law-making process is one of the most important displays of law norm substantiation. We believe it necessary to formalize passing of some amendments in the field of criminal law and criminal procedure. The author suggests introduction of a rationalization mechanism for passing these amendments based on

²⁶ [2015] 1 Bulletin of International Union of Assistance to Justice

contemporary level of law development and other sciences. In particular, this could be introduction of mandatory expertise of a law bill by several independent research centers with mandatory consideration of their position by the legislator.

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FOREIGN POLICY ANALYSIS AND COMMON FOREIGN AND SECURITY POLICY

Luigi Lonardo¹

Abstract

Foreign Policy Analysis (FPA) is a sub-field of International Relations which seeks to explain decision making in foreign policy. FPA bridges the gap between the internal and the external factors which are thought to shape the foreign policy decisions of an actor. External factors include physical ones (such as geography, or the demography of neighbouring states) and historical conjunctures (international political environment, balance of powers etc). Internal factors are for example the public opinion, the personality of decision-makers, and the institutional organisation. Few contributions have concentrated on the role of the law as an internal factor.

This paper aims at contributing to the literature of foreign policy analysis by exploring the role of law in the Common Foreign and Security Policy (CFSP) of the European Union. The interest of this analysis lies in the fact that CFSP is a legally distinct area of EU policy making, and is subject to “specific rules and procedures” (Art 24 TEU). Three aspects of distinctiveness are identifiable. The first aspect is the uncertainty on the scope and nature of the CFSP competence. Contrary to other Union’s acts, CFSP instruments lack direct effect and supremacy. Moreover, the principle of pre-emption does not apply. This implies that EU action does not prevent MSs from taking acting in the same area. The second aspect concerns the procedure and the instruments. Even though the institutions are the same as with other EU competences, the ordinary legislative procedure does not apply; also, soft law plays a major role in CFSP given that the adoption of legislative acts is excluded. The third aspect is the lack of jurisdiction of the Court of Justice. Two major exceptions are the control over the delimitation of competences and the review of economic sanctions.

It is the main contention of this paper that this legal “particularity” accounts for EU foreign policy outcomes and shortcomings.

Keywords: foreign Policy Analysis, European Union, International Relations, Common Foreign and Security Policy, EU Law.

Introduction

Foreign policy (FP) is studied by various disciplines and with different approaches. Comparative politics developed a set of analytical tools to study “domestic” politics of nations. Those tools can be applied to understand foreign policy, considered as a continuation of domestic politics².

Scholars of International Relations or historians as well study foreign policy. For example, authors such as Pollack³, Zakaria⁴, and Porter⁵ have developed narratives accounting for the emergence of the US as global power. In that case, foreign policy has been analysed in its historical development.

Foreign Policy Analysis (FPA) is a sub-field of IR. It seeks to understand decision-making in foreign policy. FPA greatest theoretical contribution is that it bridges the gap between the internal and the external factors which are thought to shape the foreign policy decisions of an actor. For example, in the case of the European Union, internal factors which shape foreign policy are the preferences of individual Member States

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² Kissinger said that “foreign policy begins where domestic policy ends”. H Kissinger, “Domestic Structure and Foreign Policy” (1966) 95 *Daedalus* 503

³ SD Pollack, *War, Revenue, and State Building: Financing the Development of the American State* (Ithaca: Cornell University Press 2009).

⁴ F Zakaria, *From Wealth to Power: The Unusual Origins of America’s World Role* (Princeton, NJ: Princeton University Press 1999).

⁵ BD Porter, *War and the Rise of the State: The Military Foundations of Modern Politics* (Kindle Edition: The Free Press 2008).

(MSs), the bureaucratic organisation of the EU, public opinion, or even the personality of the leaders. Law as well is an internal factor that shapes the foreign policy outcome of the European Union.

EU Foreign Policy has been harshly criticised in several instances in the last decades. In particular the Union is attacked as being too weak and for not expressing a sufficiently strong position on themes that the public opinion perceives as fundamental – and in which it is felt that the EU should give a strong answer. Areas of “foreign policy” in which the EU is criticised are for example the handling of the “migrant crisis”, the threat of terrorism, and the Islamic State. A legal analysis may help explaining the decisions taken by the European Union. Since inference is asymmetric⁶, it is easier to concentrate on what the power of the EU are, and how they are constrained, rather than asking the negative question “why does the EU punch below its weight in international affairs?”. As a first example, the lack of competence of the Union of most of the three key above-mentioned subjects is already a quite convincing explanation for the EU not taking “sufficient” steps.

After recalling the main literature on FPA, I will describe the aspects of distinctiveness of the legal dimension of EU FP. Three aspects of distinctiveness are identifiable. The first aspect is the uncertainty on the scope and nature of the CFSP competence. Contrary to other Union’s acts, CFSP instruments lack direct effect and supremacy. Moreover, the principle of pre-emption does not apply. This implies that EU action does not prevent MSs from taking acting in the same area. The second aspect concerns the procedure and the instruments. Even though the institutions are the same as with other EU competences, the ordinary legislative procedure does not apply; also, soft law plays a major role in CFSP given that the adoption of legislative acts is excluded. The third aspect is the lack of jurisdiction of the Court of Justice. Two major exceptions are the control over the delimitation of competences and the review of economic sanctions.

The paper suggests that the legal distinctiveness of the CFSP plays a role in hampering the EU from exercising a foreign policy worthy of a major economic power. It argues that, taken collectively, the three aspects of distinctiveness result in a difficulty in creating efficient, effective and coherent instruments for the conduct of a foreign policy. Moreover, they do not allow for a military power of the Union. Finally, they do not offer an easy access to resources to finance foreign policy operations.

1. Foreign policy analysis

May law account for the perceived weakness of EU Foreign Policy? Foreign Policy Analysis (FPA) bridges the gap between the internal and the external factors which are thought to shape the foreign policy decisions of an actor.

It is not a discipline in itself, but a subfield of International Relations. Probably because of this origins, its focus has been on humans as decision-makers⁷. This has led FPA to overlook the contribution of the law. Law can and should account for decision making in foreign policy.

This is not to say that law is the only explanation of EU foreign policy behaviour, of course. However, in the case of the EU, law does contribute to explaining the role of the Union on the international scene. It is a co-factor.

FPA studies and tries to explain (a) the conduct (b) of actors (c) in the international system. This statement needs a lot of specifications, especially since the FPA’s definition and the understanding of FP that derives from a legal perspective are only partially overlapping. By way of example, FPA’s definition is much broader than the Common Foreign and Security Policy as understood by the EU Fundamental Treaties.

(a) By “conduct” it is meant, very broadly, not only the action but in general the “system of activities”⁸ of a subject. Typically, for example, the conduct of foreign policy includes decisions *not to act*. Non-action is arguably as important as action. “Non-action” is the first interplay between foreign policy analysis and law. All the more so since FP decisions to act or not to act may need to be immediate, eg in response of a crisis. For example, in the case of the European Union, it would be hardly conceivable to institute a system of

⁶ “We require more data to assert that there are no black swans than to assert that there are black swans” N Taleb, *The Black Swan: The Impact of the Highly Improbable* (Penguin 2007).

⁷ V Hudson, “Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations” (2005) *Foreign Policy Analysis* 1, 1

⁸ G Modelski, *A Theory of Foreign Policy* (London: Pall Mall 1962)

pre-emption of EU Law in CFSP. Would non-action pre-empt MSs? Conduct includes not only activities, but also ideas⁹.

(b) By “actor” it is meant primarily States. The exclusive focus on States is a theoretical shortcoming of FPA. It is not necessary to be a State in the traditional sense in order to have a foreign policy. Traditionally, the conduct of external relations is the other side to the coin of being the highest authority within its own border. Thus, the conduct of foreign policy is an attribute of sovereignty¹⁰. But this is only true if one equates sovereignty with states, as realists do. International organisation may have a foreign policy, non-recognised states may have a foreign policy as well. This is another interplay between law and FPA, which shows that lawyers may see “foreign policy” even when traditional FPA accounts would not.

(c) By “conduct on the international scene”, FPA’s broad definition encompasses everything that has an “external impact”. This include anything from intelligence operations to trade. Traditional foreign policy instruments are diplomacy and the continuation thereof by other means, that is, war. Traditional, top down diplomacy includes summits, “conferences” which result in Treaties or memoranda of understanding. FPA is also interested in the conduct of FP via economic sanctions, or the subversions.

Foreign Policy analysts have concentrated on “internal” explanations, including analysis of organizational processes and bureaucratic politics¹¹, but not on the law per se. The foundations of the idea that internal organisation influences foreign policy decision making, apart from being highly logical, was also in Weber¹². The most influential pieces of work in this field are Allison’s “Essence of Decision” (1971) and Halperin’s “Bureaucratic Politics and Foreign Policy” (1974). This stream of work was continued by many authors in the 80s, eg Hilsman¹³ or Kozak and Keagle¹⁴.

These authors concentrate on institutions, and on how they interpret their role. But not on legal constraints. This is what I set out to do.

2. CFSP peculiarity

2.1 Uncertainty on the scope and nature of CFSP competence

2.1.1 Scope is uncertain as there is no definition

CFSP has a legally “flexible” definition in art 21(2) and 24 TEU (“The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence”).

The legal definition is narrower than what scholars of IR would normally define as “foreign policy”. In EU law, “foreign policy” is distinct from, for example, trade, development aid, or economic action.

The flexibility of the definition means that there is uncertainty on the scope of CFSP competence. Indeed, the issue is contentious and there is case law of the Court trying to define the boundaries of this policy¹⁵.

⁹ K Holsti, *International Politics: A framework for Analysis*, (Prentice Hall, 7th ed, 1994)

¹⁰ D Grimm, *Sovereignty* (New York: Columbia UP 2015).

¹¹ V Hudson (n 7) 7.

¹² Weber, *The Theory of Social and Economic Organizations* (London: Martino Fine Books 2012, 1st ed 1921).

¹³ R Hilsman, *The politics of policy- making in defense and foreign policy: conceptual models and bureaucratic policy* (Prentice Hall, 1987)

¹⁴ DC Kozak and JM Keagle (eds), *Bureaucratic policy and national security: Theory and Practice* (Lynne Rienner Pub 1988).

¹⁵ See eg cases C-658/11 *Parliament v Council* and 263/14 (pending) on the delimitations of CFSP.

2.1.2 Direct effect and supremacy do not apply

As it was suggested by some authors already before 2009¹⁶, in my opinion direct effect do not apply to CFSP. Ever since seminal judgments such as *Van Gend en Loos*¹⁷ and *Costa v. Enel*¹⁸, the Court of Justice defined the Community as an organism that has created a new legal system. A hallmark of this system is the direct effect and the supremacy of EU law in national laws. The MSs have referred to it in the Declaration on the primacy of EU law, “in accordance with well settled case law of the Court of Justice”¹⁹ and Art 4(3) TEU regulates the relationship between MSs and EU law.

Ever since those landmark rulings, process of EU integration has been “essentially one of legalisation”²⁰ because the Court decided that it was through law that individuals would benefit from the constraints to political power, in the aim to bring peace in a united Europe²¹.

The Lisbon Treaty doesn't include any reference to the principle of supremacy. It is, however, constant in the Court's case law to uphold such a constitutional principle²². Still, there is no express legal provision stating that CFSP decisions have direct effect or are supreme over national laws.

Moreover, the TEU forbids the adoption of legislative acts in CFSP. But it is legislative acts who have direct effect and supremacy- not simply common decision of CFSP, which as per Art 24 are by definition non-legislative acts. Article 24 TEU therefore may be a technical way of excluding that the two principles in question apply to CFSP. The obligations to comply with secondary law (Art 28(2), 29 and 34(1) TEU) are read by Eeckhout as excluding that these decisions have effect in the national legal system as they only commit MSs as regard their actions and positions. They are therefore merely political statements²³.

Finally, art 4(2) TEU states clearly that “national security remains the sole responsibility of each Member State”. Since Security and Defence Policy and CFSP are so interconnected, as made clear by art 42(2). This dissertation follows Dashwood in interpreting this article as meaning that there is no EU law primacy in CFSP in general²⁴.

2.1.3 No pre-emption in FP

The so called “pre-emption”, or “supervening exclusivity” is a principle that excludes MSs' actions in favour of EU action, in some particular instances. It is codified in Art 3(2) TFEU.

There are three cases.

First case. The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union. Therefore the express conferral of power to conclude international agreements means that the power is exclusive. However this seems to be in contradiction with art 2(2) TFEU, where it is written that MSs can act to the extent that the Union has not. If, however, the Union has been conferred express power, art 3(2) says, the MSs are pre-empted from acting. Therefore this cannot apply to FP.

¹⁶ De Baere 'EU Integration and the Rule of Law' in J Dickson and P Eleftheriadis, *The Philosophical Foundations of European Union Law* (OUP 2012), 365

¹⁷ Case C-26/62 *Van Gend en Loos* [1963] ECR 1

¹⁸ Case C-409/06 *Flaminio Costa v Enel* [1964] ECR 585 paras 53 ff.

¹⁹ Declaration 17 of the final act of the intergovernmental conference OJ 2008 C 115/344

²⁰ De Baere (n 16) 363.

²¹ See eg M Cappelletti, M Seccombe, JHH Weiler, *Integration Through Law* (vol 1, De Gruyter 1986).

²² See also case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 par 3; C-106/77 *Simmenthal* [1978] ECR 629 par 21; C-149/79 *Commission v Belgium* [1980] ECR 3881 par 19; C-46-48/93 *Brasserie du Pecheur and Factortame II* [1996] ECR I-1029 par 33; C-473/93, *Commission v Luxemburg* [1996] ECR I-3207 par 37; joined cases C-1022/97 *IN.CO.GE.'90 et al* [1998] ECR I-6307 par 11; C-285/98 *Kreil* [2000] ECR I-95 par 25; C-213/07 *Michaniki* [2008] ECR I-9999.

²³ Eeckhout *EU External Relations Law* (OUP 2012) 472.

²⁴ Dashwood A, 'The Continuing Bipolarity of EU External Action' in I Govaere et al (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Nijhoff 2013) 9.

Second case. When it is necessary to enable the Union to exercise its internal competence. In op 1/76²⁵ the Court enounced a principle that varies from the one codified in this second case. The Court stated that the Union enjoys exclusive competence when internal and external action are so “inextricably linked” that it does not make sense to have one without the other- it was not necessary for the Union to have actually exercised its powers. The main issue with the current formulation of art 3(2) is that the word “necessary” is less imperative a requirement than “inextricably linked”. In other words, it broadens the Union’s competence. But there is more: the article only refers to “internal” competence, without specifying what category. Taken literally, the article means that even in an area of shared or just supportive competence the Union gains *exclusive* external competence if it is necessary to achieve the policy. Such a reading is critically brought forward by Craig and de Burca and cannot be accepted. The argument is that bringing the formulation to its extremes leads to a *reductio ad absurdum* which goes against the case law, which the article was meant to codify. In this respect, the view of AG Kokott in case C-137/12 that the article codifies previous case law of the Court is to be preferred. Be it as it may, however, it is unconceivable to have “internal competence” for which foreign policy would be necessary. What internal competence can only be completed by foreign affairs? What area of domestic politics is “inextricably linked” to the conduct of political international relations? Either one recognises that all areas of a community’s life are indeed a mixture of internal and external activities, or this second principle of pre-emption does not make sense as applied to FP.

Third case. In so far as its conclusion may affect common rules or alter their scope. In its seminal judgment *ERTA*, the Court found that when the Community laid down common rules to implement a common policy Member States were prevented from acting if they could jeopardise the rules or distort their scope. Subsequently, the Court seemed to build on a broad interpretation of the *ERTA* principle: in *Kramer*²⁶ it was held that if the Union had not yet exercised its powers, the MSs retained competence to act. In op. 1/94²⁷ the Court rectified: the exercise of internal power, and not their mere existence, is what triggers EU exclusive competence. Moreover, there were cases in which the *ERTA* doctrine would not apply, such as when the Union rules and the international agreements imposed minimum standards (see op 2/91 par 18²⁸; *MAFF* paras 58-59²⁹; *Max Planck*³⁰). The test was broadened again in the *Open Skies* case (par 82)³¹: it was sufficient for the rules to cover the field to a large extent for exclusivity to supervene. Finally, in the *Lugano* judgment³² the Court held that to assess when an area is “largely covered” by Union’s rules, regard must be held to the rules’ nature and content, and the future development of the law. Again, this provision is at odds with Art 2(2). Such a nuanced case law was recalled, even though not too precisely, by the opinion of the AG in Case C-137/12 *Commission v Council*³³. The case was about services, such as pay-tv, that can, however, be fooled by certain devices so that the customer doesn’t pay the fees and gets a “free ride”. The Union, who already had internal rules against the phenomenon, wanted to conclude a convention. At issue was the correct legal basis. The council and some Member States were of the opinion that Art114, harmonisation to protect the internal market, was to be used, while the Commission took the view that it fell within the common commercial policy, therefore art 207 was the correct legal basis. As is derived from Art 3(1)(e) of the TFEU, the common commercial policy is an area of *a priori* exclusive competence. In case Art 114 had to be adopted as legal basis, it is to be established whether or not the Union enjoys exclusive competence.

In the opinion of Kokott AG, Art 3(2) is relevant to the exclusivity question³⁴. Contrary to what the council and some interveners had objected, in fact, she held that the article in question codifies previous case law. It is her opinion that there is no difference between the case law prior to Lisbon and art 3(2), and she bases it on

²⁵ Op. 1/76 [1977] ECR 741.

²⁶ Case C-6/76 *Kramer and Others* [1976] ECR 1279.

²⁷ Op. 1/94 [1994] ECR I-5267.

²⁸ Op. 2/91 [1993] ECR I-1061.

²⁹ Case C-5/94 *The Queen v MAFF ex parte Hedley Lomas* [1996] ECR I-2553.

³⁰ Case C 94/07 *Andrea Raccanelli v Max-Planck Gesellschaft (MPG)* [2008] ECR I-5939.

³¹ C-468/98 *Commission v Sweden (Open Skies)* [2002] ECR I-9575.

³² *Opinion 1/03, re Lugano Convention* [2006] ECR I-1145.

³³ C-137/12 *Commission v Council (European Convention on conditional access services)*, nyr.

³⁴ C-137/12 *Commission v Council (European Convention on conditional access services)*, nyr, AG opinion par 111.

the preparatory works of the Constitutional Treaty and the TFEU. Moreover, she argues that “the third variant of Article 3(2) TFEU constitutes a codification of the Court’s previous case-law on the Union’s exclusive competence for the conclusion of agreements according to the ‘ERTA doctrine’”³⁵. And therefore her logical conclusion is that the article has to be treated as if it perfectly reflected case law and the ERTA doctrine as codified in it. Hence, the Union has exclusive competence for the conclusion of an international agreement within the meaning of the third variant of Article 3(2) TFEU, if it concerns an area which is already covered to a large extent by Union rules. Such a reading embraces the reading given in the *Opens Skies*, even though not the subsequent developments of the *Lugano* judgment. The Court nonetheless found that the correct legal basis is Art 207 on the CCP. In this case, therefore, there has been no scope for further needed clarification of Art 3(2)³⁶.

When it comes to whether Art 3(2) is applicable to the CFSP some authors exclude it³⁷. Craig, instead, does not seem to exclude that the CFSP may be a shared competence and therefore Art 3(2) may apply to this field.

I find however reasonable grounds to exclude that the CFSP be subject to cases of supervening exclusivity: in fact, the constitutional differences between the TFEU and the CFSP competence are so vast as to exclude the application. In other words, given the current state of the law, and since CFSP is not an area of “normative action” (in Eeckhout’s formulation) as per art 24(1) it does not make sense to “protect” the Union competence in the way Art 3(2) does. As the article in question does not apply to the cases of Art 4(3) and 4(4) TFEU, for similar teleological reasons it should not apply to the CFSP.

2.2 Ordinary legislative procedure does not apply and there is soft law

2.2.1 Special procedure

In the field of CFSP the rules relating to the decision-making process are different from what is called “ordinary legislative procedure” (art 289 TFEU) which involves three elements: (i) the adoption of an act, (ii) jointly by the Council and the Parliament, (iii) on a proposal put forward by the Commission.

Every time there is a variation on one of the aforementioned elements, it is outside the ordinary legislative procedure. In CFSP the initiative belongs to the high representative. The rule for the other Union actions, including other external actions, instead, is that the monopoly of the initiative belongs to the Commission.

It is apparent that different levels of integration and consistency in the Union’s actions correspond to different levels of institutional involvement, which influence the policy output³⁸. Given the intrinsically political nature of CFSP, the European Council (EC) plays a prominent role in it³⁹. This institution, which “shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof” (Art 15(1) TEU) identifies the strategic interests and objectives for the EU’s external action in general (art 22(1) TEU) and in particular defines the guidelines in CFSP (Art 26(1) TEU). This is usually done through “conclusions”, which are acts adopted at the end of each meeting, and which may trigger further actions⁴⁰. These are often merely political statements. Among the CFSP guidelines there are those for matters with defence implications (26(1) TEU). The Foreign Affairs Council is a key actor in CFSP, in so far as it “shall

³⁵ *Ibid* par 112.

³⁶ *Incidenter tantum*, it is interesting to point out how Kokott AG opinion in case C-431/11 (*United Kingdom v. Council (EEA)*, nyr) also holds that Art 216(1) embraces all previous case law. In the view of the advocate general it would be possible to use Art 3(2) and 216(1) basically as articles that need not be further specified because they are the codification of previous case law.

³⁷ Dashwood (n 24); Eeckhout (n 23)171; J Schmidt, “Common Foreign and Security Policy and European Security and Defence Policy after Lisbon: Old Problems Solved?” (2009) 5 *Croatian Yearbook of European Law and Policy* 240, 255; A Sari, ‘Between legalisation and organisational development: Explaining the evolution of EU competence in the field of foreign policy’, in PJ Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Asser Press 2012) 85

³⁸ S Vanhoonacker, ‘The Institutional Framework’ in C Hill and M Smith (eds), *International Relations and the European Union* (OUP, 2nd ed, 2011) 79.

³⁹ Devuyt ‘The *European Council* and the CFSP after the Lisbon Treaty’ (2012) 17 *EFA Rev* 327.

⁴⁰ Van Vooren and Wessel, *EU External Relations Law* (OUP 2015)

elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent" (Art 16(6) TEU). The Council statutes with the rule of unanimity by express provision of primary law (Art 31 TFEU). Unanimity is the rule in CFSP, where it is up to Member States to find an accord. According to the ordinary procedure, the voting rule in the Council is QMV (as defined in Art 16(3),(4),(5) TEU). There was debate over whether or not QMV should be introduced in the CFSP⁴¹, but the Lisbon Treaty has decided to maintain the intergovernmental method, thus not abolishing, de facto, the "second pillar". This aspect has not changed since 1992. There is a caveat: Keukeleire and Delreux argue that there are "grey areas" which blurry the clear-cut separation between the intergovernmental and "ordinary" methods (for example, there are instances in which the Commission plays a prominent role in CFSP)⁴². The only partial mitigation to unanimity is the existence of the principle of "constructive abstention". A Member State may abstain from voting a measure without *eo ipso* vetoing its adoption, and at the same time obtaining the right not to be bound by such a measure (Art 31(1) TEU). And see by way of derogation arts 22(1) and 31(2) TEU.

2.2.2 Soft Law

The Lisbon Treaty forbids the adoption of legislative acts⁴³ (art 24 TEU) and authorises the adoption of only one instrument (Art 25 TEU): decisions defining (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii). A decision is a legal instrument typical of EU law, which "shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them" (Art 288 TFEU). The addressee can be individuals, categories of individuals or States⁴⁴.

Decisions on actions. These are adopted by the Council where the international situation so requires (Art 28(1) TEU). Their legal nature is unclear and their effect is a matter of debate as there is no clear mention.

Decisions on positions. These are adopted by the Council to define the approach of the Union to a particular matter of a geographical or thematic nature (Art 29). The same problem as regards their legal effect subsists.

According to some authors there is no difference between the two kinds of decisions adopted by the Council⁴⁵, whereas Schmidt argues the two are different in substance⁴⁶.

Decisions on strategic interests and objectives. Adopted by the European Council (Art 22(1) TEU) in order to establish a general policy framework, should lead to a coherent CFSP. Pursuant to Art 31(2), when adopting a decision based on one by the European Council, the Council may deliberate by Qualified Majority.

Finally, statements and declarations, despite being merely communication and not binding, are a tool for the Union to express its reaction to a particular event and express the "acquis politique"⁴⁷, that is a common position. They may also be considered the "single voice" of the EU foreign policy⁴⁸. Van Vooren and Wessel argue that soft law is the most important tool of CFSP.

⁴¹ Deyvust (n 39) 88.

⁴² S Keukeleire and T Delreux, *The Foreign Policy of the European Union* (Palgrave Macmillan, 2nd ed, 2014) 63.

⁴³ That is: regulations, directives or decisions adopted under the procedure of art 289 TFEU.

⁴⁴ Paul Craig and Grainne de Burca, *EU Law. Texts, Cases and Materials* (OUP 2011) 86.

⁴⁵ Eeckhout (n 23) 473; Dashwood (n 24) 5.

⁴⁶ Schmidt (n 37) 252.

⁴⁷ E Regelsberger and W Wessel, 'The Evolution of the Common Foreign and Security Policy. A case of an Imperfect Ratchet Fusion' in A Verdun, O Croci (eds), *Institutional and Policy-Making challenges to the EU in the Wake of Enlargement* (Manchester University Press 2004).

⁴⁸ T Voncina, 'Speaking with one voice: Statements and Declarations as an Instrument of the EU Common Foreign and Security Policy' (2011) 16 EFA Rev 169

2.3 No Court Jurisdiction

As a general rule, there is no Court of Justice jurisdiction in the field of CFSP⁴⁹. Art 24(1) TEU provides that the CJEU shall not have jurisdiction with respect to CFSP provisions and Art. 275 (1) TFEU states that the Court does not have jurisdiction “with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions”.

The exclusion of the Court in CFSP is not a peculiarity of the European Union⁵⁰ as States usually do not allow a judicial review of the executive decisions in foreign policy.

However, there are three ways through which the ECJ may still give rulings relating to CFSP. Two of them are express exceptions provided for in art 24(1).

The first is the decision on the delimitation between CFSP and non-CFSP competences- “monitor compliance with Article 40 of this Treaty”.

The second is through judicial control within the EU regime of economic sanctions.

A third way through which the Court may expand its jurisdiction is by judging on provisions of general application, Art 218(11) TFEU, even though these provisions fall within the CFSP⁵¹. This opportunity was first recognised by Craig⁵² and seems now to find a judicial confirmation in case C-658/11, where at paragraph 70 the Court declares that its own exclusion from CFSP is a derogation from the general rule of art 19 TEU, and as an exception it has to be interpreted narrowly. It yet unclear what is the Court’s opinion on how narrow is the CFSP exception. This opportunity to rule on CFSP-related matters is excluded by De Baere⁵³. This is topical for preliminary rulings on CFSP⁵⁴.

3. The EU does not have enough power

The interim conclusions are that the legal distinctiveness of CFSP accounts for little power of the EU. In particular, the legal “distinctiveness” accounts for the following difficulties. The EU instruments are not binding, and therefore Union’s action is less effective because its decision cannot be enforced.

3.1. Action is not effective because instruments are not binding

EU decisions in CFSP are not as binding as EU law normally is. For example, a parameter of “legal weakness” of CFSP is the wording of Art 24(2), which states: “Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States’ actions”. Such article is phrased in a similar way to the old article dealing with free movement of capitals (the old art 67 TEC) which provided that “Member States shall progressively abolish between themselves all restrictions on the movement of capital (...)”. Such an article is more a programme than a norm- a view that

⁴⁹ In the CCP instead the Court has acted *ab origine* as an engine for integration, giving important judgments to clarify and ultimately broaden the scope of this policy (see Eeckhout (n 23) 14).

⁵⁰ Franck, ‘Courts and Foreign Policy’ (1991) 83 Foreign Policy 66; A Lavinbuk ‘Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket’ (2005) 114 Yale LJ 855; Koutrakos, Koutrakos P, EU International Relations Law (Hart 2006); De Burca ‘EU International Relations: The Governance Mode of Foreign Policy’ Institute for International Law and Justice colloquium, 7th April 2010.

⁵¹ S Peers, ‘The CJEU Ensures Basic Democratic and Judicial Accountability for the EU’s Foreign Policy’ (*EU Law Analysis*, 24th June 2014) <http://eulawanalysis.blogspot.co.uk/2014/06/the-cjeu-ensures-basic-democratic-and.html>.

⁵² Craig, *Lisbon Treaty* (Oxford: OUP 2009) 415.

⁵³ De Baere (n 16)369.

⁵⁴ Case C-72/15, *Rosneft*. Reference for a preliminary ruling from High Court of Justice (England & Wales), Queen’s Bench Division (Divisional Court) (United Kingdom) made on 18 February 2015 – OJSC Rosneft Oil Company v Her Majesty’s Treasury, Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority

was held by the court in *Casati*: “the wording of that provision departs noticeably from the more imperative forms of wording employed in other similar provisions [...]. It is apparent from that wording that, in any event, the first paragraph of article [67 TEC] does not impose on the Member States an unconditional obligation capable of being relied upon by individuals”⁵⁵.

Equally weak is the principle of loyal cooperation found in Art 24(3) TEU. It uses the word shall and emphasises it with strong adverbs⁵⁶. It imposes two obligations. A positive one: working together; and a negative one: refraining from actions against the interest of effectiveness of the EU.

The principle of systematic cooperation (Art 32 TEU) is another reason why CFSP decisions are not effective. The article enshrines a duty of consultation, but is phrased with the word “shall”, which may be read as not unconditionally binding⁵⁷. Art 32 means that in theory MSs cannot take a position on matters of CFSP “of general interest” before discussing them with their allied- that is, with the other MSs⁵⁸. Always in theory, this means that MSs have to discuss in the European Council before making their own position public. The duty of art 32 is, according to Schmidt, a field of great significance for the application of the duty of close cooperation spelled out in art 4(3)⁵⁹. The scope of the matters of general interest, the presence of which determines the emergence of such a duty, however, is to be determined by the MSs themselves⁶⁰. In practice, therefore, this article does not bind the MSs as it is easy for them to not to bring issues of foreign policy into discussion in the European Council; and it is then up to the MSs to decide when the duty of systematic cooperation arises.

The lack of judicial control in CFSP is a major account for the lack of effectiveness of the provisions and hence of the EU actions. The absence of the CJEU jurisdiction or a procedure similar to that of art 258 or 259 TFEU makes it hard to make MSs compliant. Even those authors who argue that the Treaty language is not weak in itself recognise so⁶¹.

These general principles of CFSP are those who allow the creation of a united and long-term strategy. Through the principle of consultation and cooperation is the EU able to affirm a single position in the European Council and then translate it into CFSP instruments of secondary law. If the principles of primary law are not effective because they are not binding, they constitute a challenge for the European foreign policy.

3.2. Timeliness of measures

Measures adopted need to come at the right time. Negotiating and agreeing to a common position is intrinsically more complicated if the Council must decide by consensus. It is easier to reach a decision if not all 28 MSs have to agree.

However, it seems that, despite the inevitable difficulties in reaching a common position between all the MSs, the EU has been able to make its –although vague- position clear on recent major international issues with the necessary timing.

For example, military support to Kurds in northern Iraq⁶² was certainly proposed on time, even though it is not yet effective- not least because the EU does not have military power on its own.

3.3. It is complicated to pursue a consistent policy

⁵⁵ Case 203/80 *Casati* [1981] ECR 2595, par 19.

⁵⁶ Schmidt (n 37) 250.

⁵⁷ I agree with Schmidt (n 37) 249.

⁵⁸ C Hillion and R Wessel, ‘Restraining External Competences of EU Member States’ in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008) 82

⁵⁹ Case C-266/03 *Commission v Luxemburg* [2005] ECR I-4805 paras 57 to 66

⁶⁰ Schmidt (n 37) 250.

⁶¹ Dashwood (n 24) 7; Eeckhout (n 23) 172; R Wessel, ‘The Legal Dimension of European Foreign Policy’ in A Aarstad et als (eds), *Handbook of European Foreign Policy* (Sage 2014).

⁶² See the Council press release of 15th August 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144311.pdf; D Jolly, ‘EU Foreign Ministers Back Military Support for Kurds in Northern Irak’ *New York Times* (New York, 15th Aug 2014) http://www.nytimes.com/2014/08/16/world/europe/european-union-iraq.html?_r=0.

Consistency is a concept particularly emphasised in the Lisbon Treaty in three generic provisions: art 21(3) TEU and 7 TFEU. There are also other more specific provisions calling for coherence scattered in the Treaties⁶³. The relevance of this concept is peculiar to EU law as States do not usually rise this principle to a constitutional level⁶⁴. The legal meaning, scope and standards of consistency, however, are object of debate⁶⁵ as there is no binding definition.

Consistency could assume two meanings. In the narrow sense, it means absence of contradictions⁶⁶. This interpretation has been endorsed by the EU Parliament⁶⁷.

In the broad sense, it means a coherent whole in which parts fit together⁶⁸. If consistency is read in the latter sense, it means that it is a flexible notion as there are various degrees to which something can be deemed coherent. Therefore it would be up to the Court to determine how to apply the test and what legal requirement impose on MSs. So far, consistency has not been object of a clear jurisprudence. The court, however, has held repeatedly that the principle of sincere cooperation enshrined in art 4(3) TEU imposes a duty of close cooperation⁶⁹ in case C-266/03⁷⁰, C-433/03⁷¹ and C-246/07⁷².

To these problems, a linguistic difficulty is added as not all languages know the difference between “consistency” and “coherence”⁷³.

Article 7 TFEU provides for horizontal coherence⁷⁴, since it refers to consistency in policies and actions. The word “actions” has been added to the previous versions. It means that the article is not only intended for policy-makers⁷⁵ but also concerns any act adopted in the implementation of a Union’s policy- where “policy” should be interpreted in the technical sense. From this article two legal issues arise.

First, whether or not the word “actions” include acts adopted for implementing a policy, if the act is challenged as incoherent with previous ones. There are grounds to believe that the jurisdiction of the Court shall be excluded when the acts are CFSP ones. To begin with, the CJEU jurisdiction is expressly excluded from CFSP from the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. Thus, even though art 7 TFEU falls within the direct jurisdiction of the Court, reviewing a CFSP measure on the ground that it is incoherent would be an indirect way to affirm jurisdiction on CFSP. An opposite view maybe has been taken by the Court in case C- 658/11⁷⁶ as it has affirmed its jurisdiction in a similar matter. Moreover coherence should be only a political decision, and it is not easily amenable to judicial review⁷⁷. The restriction of judicial control could be read as implicitly confirming the huge reluctance to provide for a possibility of a supranational spillover within the CFSP.

⁶³ Art 3, 13(1), 13(6), 17, 18 TEU; 181, 212(1) TFEU.

⁶⁴ Eeckhout (n 23) 186.

⁶⁵ C Hillion, ‘*Tous pour un, Un pour tous!* Coherence in the External relations of the European Union’ in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press 2008); L Den Hertog and S Strob, ‘Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term’ (2013) 18 EFA Rev 373, 375; C Franklin, ‘The Burgeoning Principle of Consistency in EU Law’ (2011) 30 YEL 42; C Gebhard, ‘Coherence’ in C Hill and M Smith (eds), *International Relations and the European Union* (OUP, 2nd ed, 2011); N Koenig, ‘The Union and the Libyan Crisis’ (2011) 46 International Spectator 4; M Cremona, ‘Coherence through law’ (2008) 3 Hamburg Review of Social Science 1, 14-16.

⁶⁶ C Hillion (n 65) 17; Den Hertog and Strob (n 65) 375; Franklin (n 65) 46.

⁶⁷ European Parliament, Report on the EU Policy Coherence for Development and the “Official Development Assistance plus” concept, A7-0140/2010, Art A (2010).

⁶⁸ Franklin (n 65) 47.

⁶⁹ C Hillion, ‘*Mixity and coherence* in EU external relations: The significance of the ‘duty of cooperation’” CLEER Working Paper 2009/2, 2.

⁷⁰ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, par 60.

⁷¹ Case C-433/03 *Commission v Germany* [2005] ECR I-6985, par 66.

⁷² Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-3317 par 75.

⁷³ Franklin (n 65) 51.

⁷⁴ Den Hertog and Strob (n 65) 377; P Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In search of a New Balance between Delimitation and Consistency’ (2010) 47 *Common Market Law Review* 987.

⁷⁵ Franklin (n 65) 60.

⁷⁶ Par 70.

⁷⁷ Franklin (n 65) 85.

Second, whether or not consistency mean “avoiding contradictions” or something more; and if more, what should exactly be the standard of cohesion. In the current state of EU law it seems difficult to find a legal standard that would impose constraints to MSs action, thus ensuring vertical coherence⁷⁸. Even though the High Representative and the EEAS are meant to ensure consistency of the action, Declaration 14 on CFSP attached to the Lisbon Final Act is a major obstacle in as far as the MSs “underline that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations”.

Moreover, the decisions on Art 40 are extremely delicate from a consistency standpoint. It is increasingly difficult to adopt instruments on only one legal basis, as the Union pursues an array of objectives through ever more interconnected policies⁷⁹. In a security mission or a police mission⁸⁰, for example, the interplay of factors is so broad and transversal that it is hardly possible to base the action on a single legal basis as it may present profiles of development, CFSP, judicial cooperation etc. A rigid compartmentalisation of the policies under art 40 TEU may thus be detrimental to the Union’s external action⁸¹. As evidence for this statement militates the increasing inter-institutional litigation before the Court on matters related to Art 40 (or 47 before Lisbon)⁸².

3.4. EU has no military capacity

The lack of EU military force is a hinder to an effective foreign policy⁸³, as demonstrated in the years following the adoption of the Lisbon Treaty. It has been so in the reaction to the Libyan civil war⁸⁴, the Ukrainian crisis⁸⁵, the arming of Kurdish combatants⁸⁶ and the answer to ISIS threat.

The hard power is the idea of the CSDP⁸⁷, now in Art 42(1) TEU. The text is clear in as much as it states that the “[t]he performance of [peace-keeping, conflict prevention and strengthening international security] tasks shall be undertaken using capabilities provided by the Member States”. And so Art 42(3) TEU. Since the military assets are in a very small number of MSs’ hands, which have a long history of alliances, it is at the moment unrealistic that the inequalities and difference of views between the Union’s members allow for a deployment of military assets⁸⁸.

3.5. It is hard to finance CFSP operations

Financing EU actions that fall within the CFSP is a hard task as there is no EU budget for them. Operations with military implications or in the field of military defence led under the Common Foreign and Security Policy

⁷⁸ Den Hertog and Strob (n 65) 379.

⁷⁹ Koutrakos 484; “None of the new threats is purely military; nor can any be tackled by purely military means. Each requires a mixture of instruments.” ‘A secure Europe in a Better World – European Security Strategy’ (Brussels, 12 December 2003) 34, Available at: http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC7809568ENC.pdf; Report on the Implementation of the European Security Strategy (Brussels, 11 December 2008).

⁸⁰ Schmidt (n 37) 239.

⁸¹ Blockmans and Spornbauer 22.

⁸² European Consensus on Development [2006] C 46/01; ECOWAS; Case C-403/05, *European Parliament V. Commission (Philippines Border Management Project)* ECR I-9045 ; C-658/11; C-263/14.

⁸³ Hill Hill C, ‘The Capability-Expectations Gap, or Conceptualising Europe’s International Role’ (1993) 31 JCMS 316.

⁸⁴ J Wouters and S Duquet, ‘The Arab Uprising and the European Union: in Search of a Comprehensive Strategy’ (2013) 32 YEL 230, 241.

⁸⁵ K Volker ‘Where is NATO Strong Response to Russia’s Invasion of Crimea?’ Foreign Policy (18th March 2014) arguing that the EU and the US have preferred travel, economic and financial sanctions over a long-term strategic military action.

⁸⁶ D Jolly ‘EU Foreign Ministers Back Military Support for Kurds in Northern Iraq’ *New York Times* (New York, 15th Aug 2014) http://www.nytimes.com/2014/08/16/world/europe/european-union-iraq.html?_r=0..

⁸⁷ Schmidt (n 37) 239.

⁸⁸ Dashwood (n 24) 8.

(CFSP) cannot be covered by the EU budget pursuant to article 41(2) of the TEU. These operations are funded by contributing Member States. Council Decision 2011/871/CFSP of 14 May 2007 established a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena).

Thus, financial support for the missions undertaken as a response to the Arab Uprisings was found through a variety of sources⁸⁹.

CFSP budget does not include military missions. It means in practice that even in case the MSs wanted to place military assets and other operational capacities at the EU's disposal, eg under Article 42 TEU, they would also need to provide further financial assistance⁹⁰.

Conclusions

Can law help understanding decision making in foreign policy? This paper maintains that the answer is yes. In particular, this paper showed that CFSP legal distinctiveness accounts for EU action (or lack thereof) on the international scene.

Given the specificity of CFSP within EU Law, it follows that EU action in FP is not effective because instruments are not binding. Arguably, EU measures in other areas (eg CCP, monetary policy) are effective because they can be enforced. Lack of enforceability derives also by the exclusion of the Court's jurisdiction on CFSP. The requirements of coherence or consistency in CFSP are not sufficiently precise, nor sufficiently enforceable. This makes it difficult to conduct a consistent action, which is another aspect of an effective action (as arguably foreign policy is more effective when it is consistent than when it is not).

Finally, the EU has no military capacity and it is hard to finance CFSP operations. Arguably, these two are elements of weakness. It is suggested that centralising the diplomatic efforts – that is, shifting the competence from MSs toward the EU- may have beneficial effect for the Foreign Policy of both the EU as a whole and individual MSs.

Further research should explore how this theoretical framework applies to concrete cases. That is, it should explore decision making of the EU in FP with regards to either a specific time-frame, a subject-area, or a geographical reason to see if the parameters of weakness identified in this paper apply. Another area of future research is a comparison with between the law of foreign policy of other great power.

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⁸⁹ Wouters and Duquet (n 84) 262.

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SOCIOLOGICAL APPROACH TO LEGAL PROVISION FOR NATIONAL TAX SECURITY

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Abstract

The study considers the interaction of sociology and law in ensuring national tax security. The objective of this study is to clarify how sociological approach to legal regulation may reduce threats to national tax security. The study describes the definitions of the terms "taxation process", "tax avoidance", "tax conflict", "tax threat to national security", "security indicators" in the scope of sociological theory. Consideration of the mechanisms of social interactions in the legal regulation of interaction between taxpayers and tax authorities promotes improvement the quality of such interaction and, consequently, increases tax compliance and reduces threats to the national tax security. We suppose that the application of sociological methods in the study of law enforcement activity of tax authorities helps to identify the ways to improve the legal basis of taxation and minimize the illegal and inefficient practices of tax administration. The questionnaire survey which was carried out among officials of tax authorities in Omsk region by author have shown that the majority of officials misunderstand the content of a number of tax regulations, make the wrong choice of punishment among variety of penalties. An important conclusion is the fact that sociological approach to legal regulation helps to identify incorrect rules in the tax codes to change them and promote their uniform application.

Keywords: tax security, national security, tax law, sociology

Introduction

The effectiveness of legal regulation depends on the understanding of the development of his subject. Subjects of the regulation by all branches of the law are social relations in variety of their manifestations. Therefore actual and high-quality law-making is impossible without application of achievements of sociology, because sociology studies the development of society and its various groups. This is especially true for legal provision for national tax security. Conflict between the individuals' interests in minimization the costs of taxes and the state's interest in maximizing tax revenues to implement public tasks underlies the nature of taxation. This conflict is the point of intersection between sociology, Economics and law. Fiscal sociology (or sociology of tax) is widespread within the sociological knowledge. Fiscal sociology studies how taxation and public finances affect a wide range of political, cultural, historical and institutional factors, as well as the reverse influence of these factors on taxation and public finance²; how national revenues and expenditures are determined by social sphere and affect it³.

The subject area of fiscal sociology is institutional causes and consequences of national fiscal policy, principles of public finance management and redistribution of tax burden among various economic classes; fiscal sociology studies how the social sector affects the state budget as well as tax culture.

Breakthroughs of fiscal sociology have significant potential for use in the study of the legal regulation of taxation and in the improvement of the legal provision for national tax security.

The study of legal aspects of national tax security must start with understanding the categories: "social processes", "social conflict," "deviant behavior", "threats to security", "security indicators" - developed by the sociological science.

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² Campbell J.L. "The state and Fiscal Sociology". *Annual Review of Sociology*. [1993]. Vol. 19. P. 163.

³ Padgett J.F. "Hierarchy and Ecological Control in Federal Budgetary Decision Making". *American Journal of Sociology*. [1981]. Vol. 87. P. 76.

Threats of national tax security and its indicators: concept and types in the scope of sociological approach

Taxation in the state can be described as the process aimed at achieving a status of national tax security by eliminating its threats and ensure compliance between such process and indicators of the national tax security.

The identification of threats and indicators of the national tax security allows us to specify the orientation of legal regulation, to prevent the development of negative trends of taxation as a social process by legal methods, as well as to assess the effectiveness of legal means adequately.

The threat is explained in sociological theory as the presence of a certain external objective and subjective factor, which can cause negative and dangerous consequences regardless of the will and behavior of the recipient. "The threat is a real possibility of destructive changes caused by external factors in respect of objects, subjects, statuses important and valuable to society and the individual"⁴.

Key words in this definition are "external factors" and "negative effects". Meanwhile not only external factors, but internal and inherent properties of the object also may become threats to the object of security. Thus, the process of taxation in the state can be influenced destructively by the actions of other states, by the defects of legal technique of the national tax bills; and by the tax evasion by taxpayers due to their subjective feeling of heaviness of the tax burden.

National tax security can be described as a situation of the state when the amount of collecting taxes corresponds to the number of planned tax revenues taking into account the need for full funding of all functions and tasks of the state and municipalities both in the current period and in the future.

Thus, the threats to national tax security can be defined as the external objective and subjective factors, as well as specific manifestations of the properties of the process of taxation, leading to a lack of tax revenues of the state in comparison with the amount necessary for full funding of all functions and tasks of the state and municipalities both in the current period and in the future.

The correspondence between taxes planned and collected while the country's GDP grows and the expenditure obligations of the state and municipalities are executed is indicator of national tax security.

Legal regulation of tax relations should be aimed at eradication the identified threats to the fiscal security and achievement of its indicators, by the usage of regulating impact of legal tools on the process of taxation.

Taxation as a social process and goals of legal regulation

Taxation is the activities of state bodies and taxpayers in interaction with each other. Each stage of this activity causes changes in the behavior of social groups. Taxation itself is a social process in the sphere of economic relations, due to objective and subjective social factors, the tax behavior and tax culture are particularly important among them. Taxation is a managed socio-economic macroprocess, it is lengthy in time, continuous, sustainable and strictly sequential.

Taxation is a controlled social process, hence law as a regulator of social relations is able to control its development by influencing the objective and subjective factors contributing to the genesis of taxation.

Taxation and tax behaviour of taxpayers depend on various social factors (value orientation and attitudes of taxpayers, tax culture of the population, the needs of the state in tax revenues, the condition of the state, etc.).

Tax behaviour of the population, on the one hand, reflects the level of legal consciousness of taxpayers and the effectiveness of the adopted legislation, and on the other, the level of tax culture of the population. The identity of the population as taxpayers, formation of their motivations, values and attitudes, determining the attitude to taxes and defaulters, and to evaluation of the fairness of the tax system, the willingness to pay taxes and faithfully discharge the tax liabilities – all of it originate under the influence of the tax system of the state (including it's legal elements).

⁴ [http:// do.gendocs.ru/docs/index-37536.html?page=2](http://do.gendocs.ru/docs/index-37536.html?page=2) [last viewed 2016-03-20].

According to the results of sociological polls in Russia, only 39% of the population condemn tax frauds; 28% – understand or approve it, 22% – remain indifferent. According to the responses, almost 50% of respondents said that the tax evasion does not affect the taxpayer's reputation in society.

The extent of imposing the tax burden on society by state is largely determined by its ability: 1) to negotiate with taxpayers; 2) to calculate taxable economic activity; 3) to monitor those who have to pay taxes.

Taxation as a social process affects various aspects of social relations, and this fact is also should be taken into account in legal regulation. F. Mann after functional analysis of taxation concludes that the tax function morphs to a function of social control. Three forms of social control are exercised through taxation: correction of socially undesirable human behavior, the readjustment of economic power and the suppression of social abuses of capitalism⁵.

Thus, legal regulation of tax relations should influence the process of taxation with respect to its functions, as well as social factors contributing the genesis of taxation as a social process.

Taxpayers as a set of social groups

The perception of the taxpayers as a set of social groups may be useful for identifying threats to the national tax security.

According to R. Merton, social group is an aggregate of individuals who interact each other a certain way, self-aware as a part of the group and are recognized as the members of this group from the point of view of other people⁶. Social group is a group of people selected on socially significant characteristics – characteristics that have a significant impact on the social behavior of the individual and shape his system of values. T. Zaslavskaya, who bases on socio-economic approach, understands social structure of society as the people themselves, organized in various groups and performs defined social roles in the system of economic relations.

The significant social characteristics that underlie the stratification of the taxpayers, are the means of obtaining and amount of income and assets. T. Zaslavskaya develops the indicators of socio-economic status of the population, developed by (the ownership of capital that produces income; involvement in the processes of allocation, transfer, and exchange of social product; the level of personal income and consumption). If we use these indicators we can distinguish the following social groups of taxpayers:

- large and average business,
- small businesses;
- employees with high incomes,
- employees with average and low income;
- recipients of social benefits as their only source of income.

We should also take into account the large proportion of state and municipal employees in the structure of Russian society and the urgent need to control their economic activity, because of it we believe they should be differentiated in a separate group.

Each of these social groups acts as a collective subject of social action. All of the groups have its own interests in the field of taxation and ways of their protection that should be considered in the development of legal models of taxation as well as in the assessment of threats to the national tax security associated with the self-organization of social groups given in the tax conflict.

Tax conflicts as a kind of social conflicts and possibilities of law for their prevention and resolution

Extreme forms of manifestation of tax evasion – tax frauds- are the most significant and dangerous among internal threats to fiscal security. The consideration of this phenomenon from the standpoint of the theory of social conflict help us to understand its nature and to improve the legal methods of their neutralization.

⁵ Mann F.K. "The Sociology of Taxation". Review of Politics, [1943]. Vol. 5. P. 225–235.

⁶ Merton R.K. "Introduction to Social Theory and Social Structure". The Classical Tradition in Sociology. The American Tradition / Ed. J. Alexander, R. Boudon, M. Cherkaoui, Cambridge: Cambridge University Press, [1997]. Vol. II. P.335-349.

There are two approaches to the content of social conflict in sociology.

A number of sociologists believes that all of the social interactions are mainly conflict. The main cause of conflict is the incompatibility of the needs of the opposing sides, or, according to the terminology of K. Boulding, "scarcity" – limited resources, which are seek to posses by individuals⁷.

According to other scientists, social conflict is an open confrontation, the collision of two or more subjects and participants of social interaction, caused by incompatible needs, interests and values. That is, only a social dispute, which is transparent and has a high degree of intensity, acquires the properties of social conflict. L. Coser suggested the definition of the conflict as a struggle over values and claims to a certain status, power and resources; the struggle, objecting to neutralize, harm or destruct the opponent⁸.

The tax evasion can be considered as a social conflict in the first of these meanings, because the social interaction occurs in taxation on the basis of conflicting interests, but the parties are unable to neutralize, harm or destroy each other and do not pursue such goals.

One of the reasons for social conflicts is the deviant behavior of its parties.

Deviant form of tax behavior became widespread in Russia. As sociologists note, there are various reasons for such behavior: economic (low level of incomes), moral (unbelief in government help and in the honesty of tax collection, decreased level of social optimism) and legal (the devaluation of law), the lack of public intolerance to tax evasion, low level of legal consciousness. The low level of tax culture is determined by poor awareness in the field of tax law, injustice of the tax system, the distrust to the taxes and the lack of interest in tax policy.

Tax culture, being a subsystem of economic and legal culture of people differs by multidimensional and multilevel structure. So one of the obvious areas of tax conflict management, positively changing the society is improvement the tax culture of the population through economic, legal and educational measures and methods.

The tax conflict is not always related to tax offences, even though it may lead to such offences. Thus, there can be illegal or erroneous actions of state authorities, or conflict can be caused by incorrect actions of the taxpayer, or inspired by third parties interested in the tax conflict , So social deviations of individual taxpayers or groups shouldn't be considered as exclusive reasons for the tax evasion.

Any social conflicts have a positive aspect, because the parties of conflict become to realize their confrontation and their relationship to conflict during the process of conflict as a form of social interaction. They organize consciously, elaborate the strategy and tactics of struggle. The main social role conflict is the stabilization of the economic and social processes⁹. So the most important condition for successful conflict management is a voluntary cooperation between the parties, who should decide for themselves what is best for them.

Conflicts do not disappear by management; they do not necessarily become at once less intense, but they are controlled, and their creativity put to the service of the progressive development of social structures.

The resolution of tax disputes by force (coercion) only is the most inefficient. This method is accompanied by explicit or implicit neglect to legal regulations by officials, breeds corruption and tyranny, and as a consequence the large scale of tax evasion.

The main ways of resolving social conflicts, allocated by sociologists, are negotiation, mediation and arbitration.

Conflict resolution (management) through interaction of the parties is more efficient. It is possible to improve cooperation between the parties by means of such a principle of behaviorism, as a principle of learning. Social conflicts can be modeled and rational ways of behavior may be developed by creating a plan or strategy of behavior in conflict situations.

Thus, it is possible to allocate following directions of improvement of legal support of tax security, if take into account the sociological laws of resolving conflicts based on their causes and interests of social groups.

⁷ Boulding K. Conflict and Defence: A General Theory. (NY.: Harper and Broth. Publ., 1963).

⁸ Coser L.A. The functions of Social Conflict. (N.Y., 1956). 250 p.

⁹ Dahrendorf R. Class and Class Conflict in Industrial Society. (L., 1959).

1) To provide for the mandatory regulatory impact assessment of draft regulatory acts on taxes. Despite the clear negative attitude of taxpayers to the tightening of the tax burden in any form, this assessment will help to eliminate excessive regulation, as well as cases of infringement of the rights of taxpayers in tax non-property relations.

2) To give the Russian Union of Industrialists and entrepreneurs (as a representative of the interests of large business), Mainstay of Russia (as representative of small and medium business), the Russian Union of taxpayers (as representative of the interests of employees and socially unprotected layers of the population) the right to introduce proposals on elimination of excessive administration. Such proposals should be mandatory reviewed by the Federal Tax Service of Russia and the Ministry of Finance. According to the research of Public Opinion Foundation in 2004 79% of respondents noted the need for public organization that would protect the rights and interests of taxpayers and only 8% of respondents believe that such an organization is not needed. The Russian Union of Taxpayers was created in 2003, but it did not become recognizable, it's work is difficult to admit effective. An independent civic organization should represent the interests of each social group of taxpayers in relations with authorities if consider above given the social structure of taxpayers.

3) Taking into account the increased activity of the population in the Internet, it is necessary to oblige the Russian Federal Tax Service to support accounts in most popular social networks by determining the responsible persons among the employees of the Federal Tax Service responsible for cooperating with the media or taxpayers. The content of such accounts should include an explanation of the legal amendments and the answers for the matters of tax law application, most relevant for citizens. They should create information occasions for inclusion in the broadcasting network news television programming, with emphasis on efficient use of collected taxes for the needs of the population. It is appropriate to include objectives to promote fair payment of taxes, clarification of directions of tax revenues utilization in budgets in the constituent documents of the Russian Union of Taxpayers as associations applying for the expression of the interests of all taxpayers.

4) Legislative innovations of tax administration and tax credits should be tested in the pilot regions to determine their effectiveness and degree of community response before the entry into force on the entire territory of the Russian Federation.

Sociological methods in studying the text of tax bills and their enforcement

The use of sociological methods in the study of law enforcement activity of tax bodies contributes to the improvement of mechanisms to ensure tax security by identifying ways to improve the tax framework and minimize the illegal and inefficient practices of tax administration.

So, the sociological survey among employees of tax authorities in Omsk region conducted by the author have shown that the majority of officials in tax authorities misunderstand the content of certain tax regulations, choose wrong sentence from the penalties for taxpayers for the failure to provide necessary information.

The survey was conducted among employees of Department of Federal Tax Service of Russia in the Omsk region and among employees of Inspections of Federal Tax Service of Russia in Omsk region. A survey conducted with the participation of 184 people (the sample set is formed based on a confidence level 95%, confidence interval 7%, and sampling totally is 7% from the total number of employees of tax authorities on the territory of Omsk region (general totality). The majority of respondents (88%) were employees of management of Department of Federal tax service of Russia in the Omsk region because they have long and versatile work experience. The opinion of employees of inspections of Federal tax service of Russia is also taken into account. The views of the staff of the various divisions of the territorial tax authorities (departments of registration of taxpayers, debt settlement and bankruptcy procedures, desk and field tax audits, accounting, income tax analysis and reporting, controlling and legal departments) are adequately represented.

The questionnaire included questions concerning: 1) the overall level of information support of tax administration and legal regulation of this sphere; 2) the quality of data submission to the tax authorities by the public authorities; 3) the quality of information exchange between multiple tax authorities; 4) the quality of obtaining information from private entities by tax authorities and interpretation of key legal norms regulating

this activity; 5) proposals for improvement of legal regulation in this sphere, including those based on the experience of foreign countries; 6) control questions.

The survey gave the following results.

About 60% of the responded tax officials pointed out the necessity to improve standards on information support of their activities. More than a third of respondents have indicated that there is regulatory uncertainty in the length of the submission of most of the necessary information to the tax authorities by authorities of subjects of Federation and local self-government.

About a third of respondents faced with the performance of false information by public authorities (34,8%) and even with the refusal to provide available information (25%).

The Russian Tax Code specifically sets out the obligations of the tax authorities in article 32. It determines the existence mandatory information for tax authorities (which includes explanations of the Ministry of Finance on the application of tax legislation). So any explanations of the Russian Ministry of Finance (including addressed to specific taxpayers) should be mandatory for service tax. More than half (58.7%) respondents had agree with this proposal.

Tax officers had a better qualification compared to financial bodies of subjects of Federation, and especially of municipalities, so it would be prudent to set the obligation to reconcile projects of clarifications of tax legislative acts they provide with the offices of the Federal Tax Service. The proposal is particularly relevant because of the law quality of the explanation given by the financial bodies of subjects of Federation and municipalities. 55.5% of tax officials responded are faced with explanations of these bodies, which are contrary to the law, while 33.3% of respondents estimate the number of such contrary explanations as much.

The survey found that almost 60% of respondents consider low-quality information exchange between different divisions of a single tax authority. There are cases where similar acts of a taxpayer qualified by tax officials in different ways, depending on, for example, the Department of officials: desk or field tax audits .

These results indicate the need to refine legal procedures of information exchange between tax authorities and other public authorities, as well as in the system of tax authorities.

Sociological research has also revealed defects in the rules governing relations between taxpayers and the powerless subjects of tax relations.

Nearly half (49.5%) tax officials interviewed by the author believe that they are not allowed to request documents concerning a specific transaction outside the framework of a tax audit, despite the fact that the norms of the Tax Code provide it.

Almost a third of respondents (27.7%) believe that the witness may refuse to testify only if the matter concerns himself, his spouse, parents, children, brothers and sisters, grandparents, grandchildren. However more than a third of respondents (36.4%) also supplement this list of half brothers and sisters, adoptive parents and adopted children, the Commissioner for human rights and MPs. These results indicate that legal uncertainty in the characteristics of testimonial immunity.

In Russia, unlike in some foreign countries, advising of taxpayers expressly prohibited, except for the situation of drawing up preliminary ruling in the process of tax monitoring. This idea of advising taxpayers is rejected by the majority (72.3%) of respondents. However the provision of taxpayer rights to know clear opinion of the tax authority about the application of tax laws to specific potential business transactions could play a role in the prevention of tax evasion, become the way to manage a tax conflict (if use the terminology of R. Dahrendorf).

Participation in field tax audits of professionals (who are familiar with industry specific activity of the taxpayer in order to explain it to the inspectors) is able to significantly improve the efficiency of tax control. A proposal for the involvement of such specialists to tax audit finds support among the respondents (70.7% of respondents agree with it).

The proposal to stimulate citizens reporting about tax violations (because money is the best social stimulant), is supported by the 45.1% of the respondents.

Conclusions

An important conclusion is the fact that sociological approach to legal regulation helps to identify incorrect rules in the Tax Code to change them and promote their uniform application. Consideration of the mechanisms of social interactions in the legal regulation of interaction between taxpayers and tax authorities may improve the quality of such interaction and, consequently, increase tax compliance. This leads to a reduction of threats to the national tax security that are associated with arbitrary punishment of taxpayers, reduced economic activity and decreased tax revenues to the Federal budget.

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SHARIA COUNCILS IN WESTERN SOCIETY – COMPROMISE OR SURRENDER (WITH PARTICULAR REFERENCE TO THE UNITED KINGDOM)

Karolina Mendecka¹

Abstract

With growing number of refugees from Muslim-majority countries being welcomed to the European Union and a great amount of Islamic population already present in most Western countries, it is crucial to face inevitable issues in the best possible manner. Muslims are usually deeply devoted to their religion and their beliefs and actual ways of conduct should not be ignored. Sharia (Islamic) law is something that is not manifestly recognised anywhere in Europe, however in most parts of Europe migration has made it a pressing issue.

A form of alternative dispute resolution is available in the United Kingdom – Muslim Arbitration Tribunal and other Islamic sharia councils are available for Muslims who wish to resolve their disputes without recourse to the civil courts. It was made possible under the Arbitration Act 1996 and means that Islamic councils can act as arbitration panels and their decisions are legally binding. Despite the fact that English law does not constitute separate Islamic legal system, the parties are allowed to resolve some disputes under condition that it has to be in the public interest and in accordance with the UK law. Sharia councils cover issues such as Islamic divorce, inheritance law and arbitration, provided that the parties agree and that its procedures are fair, Islamic tribunals may make decisions that will be accepted by civil courts.

Opponents raise many essential counter-arguments to this regulation. Those concern especially women and child related matters as under sharia law there is no equality in such cases. All those arguments cannot be omitted but have to be properly addressed, because despite the desire of states and non-Muslims to consensually coexist with Muslim communities, it may not always be easy and the outcome might not be satisfying. Religious approach to the law may pose a threat for Western values and norms.

Keywords: Islamic law, Muslim community, sharia councils, state sovereignty, multiculturalism.

Introduction

A significant proportion of immigrants in Western Europe are Muslim. The precise number is unknown, especially in recent months when many crossed European borders from Syria, and is also dependent on the definition of “Muslim”². Islamic law is unquestionably penetrating into the West through official and unofficial means, contributing to the evolvement of law and jurisprudence³. Islamic law has many methods of adapting itself to the social reality. With the growing presence of Muslims in Western countries more and more legal measures are taken by Muslim activists in order to preserve and legally transmit their worldview⁴. Despite that to this day no Western country fully accepts sharia as a personal law system in the manner found in some Afro-Asian countries (where Muslims are also non-dominant group). However Islamic law is getting more visible with each year in the West in a variety of ways. Especially, what is particularly interesting, Islamic law is institutionalised in the common law countries – the United Kingdom and Canada. Perhaps it is due to the fact that those countries have a long history of toleration and multiculturalism. Both countries allow so-called

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² D. Westerlund, I. Svanberg, ‘Islam in the West. Critical Concepts in Islamic Studies’, (London and New York: Routledge), 333

³ E. Giunchi, ‘Muslim family law and legal practice in the West. An introduction’. In: ‘Muslim Family Law in Western Courts’ (New York: Routledge 2014), 1-14

⁴ P. Fournier, ‘Sharia in the West. Colonial consciousness in a context of a normative competition’. In E. Giunchi, ‘Muslim Family Law in Western Courts’ (New York: Routledge 2014), 14-32

“sharia councils” to exist. Among Muslim diaspora the state law of the country of origin and of the new country, different customs and ideas of sharia all coexist creating a complex arena of expectations and references⁵.

The United Kingdom is known to be a home to many Muslim immigrants (mainly from present-day India, Pakistan, Bangladesh, who came to Britain many years ago) and the number is increasing each year. Despite the fact that the UK offers no constitutional protections for one’s religious freedom, common law tradition is in strong support of religious pluralism, and thus of pluralistic religious expressions. Maybe this is why many immigrants strive to settle there (the second possible reason being social benefits). The British idea of society implies that foreigners are welcome, provided that they respect the rules of British society.

The United Kingdom has been a multicultural society for many years. It has been a colonial power once and as a result of the collapse of colonialism – welcomed many migrants from all over the world. Those persons were of different religious, culture and tradition background, which were sometimes not compliant with British worldview. The UK had to face new reality – Christian values were substituted with secular and by the end of 20th Century religion for most Brits became (if anything at all) “a hobby”, not an indicator of behaviour and especially – not present in public and political arena. However, another, almost alien religion became visible in almost every sphere of life – Islam. It became a great challenge to accommodate and balance between liberal values and oriental, strict and conservative ideas preached by Muslims. In spite all this, the UK has been a firm advocate for freedom, tolerance and multiculturalism, proving that although different, all humans deserve equal rights and are free to express not only their faith but also ways of conduct. Britain seems to follow the idea that state has to serve people and meet their needs, not the other way round.

A particularly interesting example of the UK’s approach to multiculturalism can be found in the existence of courts that rule on matters of personal law. Although British common law applies to all residents of the country, some Muslim groups have pleaded for the introduction and recognition of at least certain provisions of personal status in sharia law to be applicable to Muslims in Britain. A kind of compromise solution has been found that encourages Muslim litigants to arrive at their own solution through Muslim arbitration, taking sharia provisions into consideration, provided it does not violate British law⁶.

Taking advantage of a clause in the UK Arbitration Act of 1996⁷, the Muslim Arbitration Tribunal and other sharia courts exist in cities like London, Bradford, Birmingham, Manchester and Nuneaton. This network rules on cases ranging from divorce and financial disputes to ones involving domestic violence. The MAT is considered an Alternative Dispute Resolution programme and being classified this way allows it to operate in a manner that is not perceived as supplanting British common law⁸. It will be considered how and if this conception is just and fair, what in fact sharia means and what does this reconciliation with Muslim community (*umma*) may result in.

It will be discussed how does the religious approach to the law operates within legal framework of the UK. It will be shown briefly what sharia in fact stands for and what risks cause the inclination to the religion rather to the nation values. The subject of fundamentalism, terrorism and Muslim identity crisis will be touched. Additionally, it will be elaborated if Islam should have a place in democratic societies. Moreover, the attempt will be made to answer the question if transmitting Islamic values into international regulations is a direction that the Western society should follow in this new, multicultural world.

1. Sharia as the only law

To fully understand the reasoning behind the idea of establishing sharia councils, the concept of Islamic law has to be briefly addressed. Sharia, as stated in the holy book of Islam – Quran – is understood as god’s will known through revelation. Therefore, as a law given by god (Allah) himself, Muslims believe it to be superior to

⁵ E. Giunchi, op. cit., 1-14

⁶ J. Waardenburg, ‘Muslims and Others. Relations in Context’ (Berlin: De Gruyter 2003), 315

⁷ The Arbitration Act 1996 (c. 23) Act of Parliament which regulates arbitration proceedings within the jurisdiction of the United Kingdom [1996] <http://www.legislation.gov.uk/ukpga/1996/23/contents>

⁸ A. B. McCloud, ‘Muslim Minorities in the West’. In: McCloud, S. W. Hibbard, L. Saud, ‘An Introduction to Islam in the 21st century’ (Singapore: Wiley-Blackwell 2013), 163

any other law established by human initiative – it is immutable and divine, given by god through the agency of prophet Muhammad. The word sharia is rendered into English as the “Islamic law”, but Arabic terminology means “path” or “method”. In the Islamic tradition this path consists of three basic aspects: worship, ethical code and social intercourse⁹. Besides Quran the second source of law is Sunna – a collection of stories (*hadith*) that relate to the prophet’s life and acts¹⁰. For Muslims, there is only one source of true power – Allah. It is believed that *entertaining fear of awe toward anything less than god is a result of intellectual dishonesty*¹¹.

There are five pillars of Islam – basic requirements to be met by every practising believer. These practices are *designed to preserve the spiritual integrity of human beings*¹² and they constitute the life of a Muslim. Those mandatory acts include: *shahada* (Islamic confession of faith), *zakar* (charity), *sawm* (fasting in the month of Ramadan), *hajj* (pilgrimage to Mecca, at least once in a lifetime, if one is capable and financially stable) and *salat* (Islamic prayers performed 5 times a day).

Unlike for the Western law order, under sharia not all human beings are equal. Differences in legal personality are related to religion, gender and slavery¹³. Sharia is founded on a threefold inequality: the inequality between man and woman, the inequality between Muslim and non-Muslim, and the inequality between freeman and slave¹⁴. However, truth be told, beyond these, the law does not recognise other forms of collective legal inequality. Descent, ethnicity, social status do not affect a person’s legal capacity. Social reality often prevails over doctrine¹⁵. Islam considers non-Muslims from the ontological and juridical point of view, even with regard to those that it defines as *dimmi* (protected people), a term that refers to Jews and Christians, however tolerance does not imply equality with Muslims. Polytheists and atheists (“infidels”, *kafir*) enjoy absolutely no protection. Moreover, between the Islamic world and that of the “unbelievers” there is theoretically (?) a state of perpetual war with countries, which are not under Islamic rule – *dal al-harb* (House of War)¹⁶.

2. Sharia councils in the United Kingdom

Alternative Muslim legal institutional structures had operated across Britain at least since the early 1980s. Such institutions concentrate on the issuance of Islamic divorces for Muslim women, inheritance and will issues and even contractual disputes. Established according to the various segments of Islam, Muslim legal institutions are often linked to mosques. Not all institutions refer to themselves as “sharia councils” or “Islamic courts”. Some have more formalised structures, procedures, websites and a panel of *ulama* (the learned ones). They tend to run on voluntarily and charge small fees, especially when compared to the costs involved in official court proceeding. Some argue, that for clients lawyers and official courts are too expensive and not capable of understanding or responding to their problems, which often touch the religious issues. This may be particularly so if a marriage is not registered under British law or it is a case of enforcing the terms of a *nikah* (Islamic marriage contract), which English courts do not regard as binding¹⁷.

⁹ M. Said Al-Ashmawi, ‘Sharia in the discussion on secularism and democracy’. In: C. Toll, J. Hjarpe, J. Skovgaard-Petersen and D. Tamm, ‘Law and the Islamic World Past and Present. Papers presented to the joint seminar at the Universities of Copenhagen and Lund March 26-27 1993’, (Copenhagen: Munksgaard 1995), 35

¹⁰ I. Edge, ‘Recent trends in Islamic Law’. In: C. Toll, J. Hjarpe, J. Skovgaard-Petersen and D. Tamm, ‘Law and the Islamic World Past and Present. Papers presented to the joint seminar at the Universities of Copenhagen and Lund March 26-27 1993’, (Copenhagen: Munksgaard 1995) 15-23

¹¹ T. L. Saud, ‘Religious structures’. In: A. B. McCloud, S. W. Hibbard, L. Saud, ‘An Introduction to Islam in the 21st century’ (Singapore: Wiley-Blackwell 2013), 47

¹² *Ibid.*

¹³ R. Peters, ‘Introduction’. In: C. Toll, J. Hjarpe, J. Skovgaard-Petersen and D. Tamm, ‘Law and the Islamic World Past and Present. Papers presented to the joint seminar at the Universities of Copenhagen and Lund March 26-27 1993’, (Copenhagen: Munksgaard 1995) 7-15

¹⁴ K. Samir, ‘111 Question on Islam’ (San Francisco: Ignatius Press 2006), 90-91

¹⁵ R. Peters, *op. cit.*, 7-15

¹⁶ S. K. Samir, *op. cit.*, 90-91

¹⁷ <http://www.matribunal.com> [access date: 24.03.2016]

There are two main notorious institutions that function in the UK. First one being the London-based Islamic Sharia Council (ISC), which adapts Islamic principles to the context of family disputes, imams refer to *fiqh* (Islamic jurisprudence), usually sticking to one *madhhab* (doctrine) and *fatwas* (legal opinions)¹⁸. However it was the establishment of a network known as the Muslim Arbitration Tribunal (MAT) that excited additional interest. Press reports have referred to MAT as capable of delivering sharia-compliant decisions enforceable in English law, such as the arbitrations of MAT are enforceable in court, unlike the decisions of the informal sharia councils, which conduct mediations on Islamic marriage contracts or settle family disputes¹⁹. Moreover, some legal scholars are of the same impression²⁰. Addressing this controversies, MAT's own website announces that As MAT is operating within the remit of the Arbitration Act 1996, the decision of the Tribunal will be binding on the parties in the same way that a High Court judgment would be and if need be, can be enforced (...) MAT operates within the legal framework of England and Wales thereby ensuring that any decision reached by MAT can be enforced through existing means of enforcement. Operating within the legal framework of England and Wales does not prevent MAT from ensuring that all decisions reached are in accordance with one of the recognised Schools of Islamic Sacred Law.²¹ According to English law, if the parties to a dispute agree to a binding arbitration the outcome may be enforceable under the Arbitration Act 1996. Binding arbitration is already well established among the Jewish Battei Din²².

Naturally, there are many opponents and supporters of those regulations. Advocates point out to the biggest advantage – costs and ruling in accordance with religious believes, that are crucial for many. Also, it is believed that it is easier to reach satisfying conclusion for both counterparts, which would not be possible in the court. Also, undeniably the atmosphere of the tribunal is welcoming for Muslims and awareness that one is heard and possibly better understood by someone of the same kin, might be a big advantage. Adherents point out that the MTA rulings comply with British law and its principle of the best interest of a child²³. Ahmad Hajj Thomson, a barrister (and in fact a convert to Islam) who often speaks publicly on Islamic issues, is quoted as saying: *in fact the various UK sharia councils are the precursors of what will eventually become sharia courts, insh'Allah – but they need to be improved and unified*²⁴.

However, there are also many drawbacks that have to be duly considered. Firstly, there is a gender issue. Research has confirmed these fears and points to the fact that arbitration services offered to Muslim women in Britain may reflect patriarchal assumptions and asymmetric power relations²⁵. The main fear expressed by the opponents is that the equality rights entrenched in the Act could be infringed upon through the course of private law to the detriment of the rights of women, children and other vulnerable people. Moreover, the MAT also deals with commercial and civil matters, and it naturally raises a question of what would happen if a non-Muslim would become involved in such proceedings, especially when remembering what is the attitude towards “infidels” in Islam. Due to the fact that the High Court may ratify, vary or reverse or send it back to the arbitrator for reconsideration, it is not as much of an issue. Additionally, the MAT also can be involved in inheritance disputes and Islamic wills. Knowing that the position of a woman is less than a man (for example, daughters are bound to inherit half of what a brother would get), it poses a threat that such issues as gender equality would be omitted. Then again, women often agree to such treatment and are happy to receive what is set in a holy book for them. Exact same agreement of a less favourable treatment exists in divorce cases. Man in Islam may divorce a wife simply stating three times *talaq* (“I divorce you”). A woman has to perform *khula* to divorce a husband, who also has to give permission. The MAT may be a mediator or seek

¹⁸ E. Giunchi, op. cit., 1-14

¹⁹ K. Gelinsky, 'Deutsche Gerichte wenden die Scharia an' [2010] Frankfurter Allgemeine Zeitung, 29 Dec. 2010

²⁰ J. Witte and J.A. Nichols, 'Faith-based family laws in Western democracies?' [2010], Fides et Libertas: The Journal of the International Religious Liberty Association, 122-135

²¹ <http://www.matribunal.com> [access date: 24.03.2016]

²² P. Fournier, op. cit., 14-32

²³ S. Bano, 'In pursuit of religious and legal diversity: a response to archbishop of Canterbury and the „sharia debate“ in Britain, Ecclesiastical Law Journal [2008] 10(3) 283-309

²⁴ S.R. Ameli, B. Faridi, K. Lindahl, A. Merali, 'Law & British Muslims domination of the majority or proces of balance?', (London: Islamic Human Rights Comission 2006) 81

²⁵ S. Bano, op. cit., 283-309

for grounds to annul the marriage – *faskh*. A 2001 report noted that women applying to Islamic council, reported that the organization met their demands by helping them dissolve their marriages²⁶. In cases of forced marriages or marriages with minors, in English law, the Forced Marriage (Civil Protection) Act enables English courts to make orders to prevent forced marriages or to remove persons from a situation of forced marriage²⁷.

Additionally an Islamic divorce may be necessary if a divorced woman wishes to remarry in an religiously “proper” way. A remarriage outside the acceptable religious limits would probably be perceived by the community as adulterous and children would be considered illegitimate. Warriach and Balchin argue that gender implications of faith based councils are not clear cut and that despite the bias of the imams these councils may indeed provide psychological relief to some women as well as socially acceptable solutions to their marital problems²⁸.

Media reports have also indicated that informal Muslim faith-based councils tend to rule in favour of abusive husbands and enforce female obedience. One other concern is that children, according to Islamic law, after a divorce should remain under custody of the father, which may question the real compliance to the best interest of a child principle. From a liberal-secular perspective, the main concern with this initiative is its break with the monopoly and universality of state law, which is seen as a better protector of women’s and children rights than any potential competitor, especially faith-based ADR mechanism²⁹.

Lastly, the problem with sharia councils is the issue of various schools of Islamic legal interpretation, with considerable differences – there are four major Sunni not to mention also Shi’a schools. Moreover, predominant percentage of faith-based bodies are dominated by male conservatives. Some Muslim women’s associations like “Women Living Under Muslim Laws” believe that the formal recognition of sharia councils and the like work to the disadvantage of women, threatening the rights they enjoy under the “hosting” system³⁰.

3. Multiculturalism, identity crisis and legal research

Multiculturalism is a result of social and ideological changes. In Western culture, it leads to a confrontation of ethnic and cultural minorities, as well as marginalized social groups with a dominant Western culture, which is based on particular standards and principles. For this reason, it is essential to look at law from a different perspective³¹. The UK approach, as it was previously discussed, is innovative, however as one can imagine, probably is at the cutting edge of the new approach to dealing with claims and needs of Muslim *umma*. I would like to argue that although, as it was explained in previous section, proposed regulations in the UK may have many advantages, they may also pose danger to the Western world.

The urban landscape of London and many cities in the UK has changed dramatically. Many see a great threat for the UK created by the flow of immigrants from Muslim countries. Usually immigrants keep their own culture and values while adopting also the culture and values of the host country, so they become a part of two cultures³². Second-generation Muslims born in Europe often swing between the two cultures, one – preserved mostly by parents at home, and the Western culture, with their friends and at workplaces or universities. Some authors argue, that members of the younger Muslim generation easily navigate cross-culturally and have multiple senses of belonging, facilitated by their access to the new media and thus to wider discourses³³.

²⁶ S.N. Shah-Kazemi, ‘Unyting the Knot. Muslim Women, divorce and the shariah’, [2001], London: Nuffield Foundation

²⁷ The Forced Marriage (Civil Protection) Act 2007 (c 20) is an Act of the Parliament of the UK which seeks to assist victims of forced marriage [2007], <http://www.legislation.gov.uk/ukpga/2007/20/contents>

²⁸ S.A. Warriach, C. Balchin, ‘Recognizing the Un-Recognized: inter-country cases and Muslim marriages and divorces in Britain’, [2006], London:WLUML

²⁹ A. Shachar, ‘Feminism and multiculturalism’. In: A. S. Laden, D. Owen. ‘Multiculturalism and Political Theory’ (Cambridge University Press 2007) 136-146

³⁰ <http://www.wluml.org> [access date: 24.03.2016]

³¹ B. Wojciechowski, ‘Justifying Punishment in Multicultural Societies’. In: B. Wojciechowski, M. Zirk-Sadowski, M. Golecki. ‘Between complexity of law and lack of order. Philosophy of Law in the Era of Globalization’, (Toruń: Marszałek 2009), 180

³² J. Balicki, A. Wells, ‘The Pendulum Culture? Integration of Young Muslim Immigrants in East London’, (Bloomington: Trafford 2010), 7-40

³³ E. Giunchi, op. cit., 1-14

In a book “The Pendulum Culture” researchers interviewed over 200 students from Newham College in London, all of who were Muslims. Main question of the research was if the young Muslims do have problems with finding themselves between those two cultures. Majority of the students felt they were British, even though some of them also referred to their religion (Muslim British), or to the country of origin (British Pakistani). Second generation immigrants expressed the feeling of belonging to the UK. However, some issues showed that there is still a significant gap between Western society and Muslims, especially regarding the position of women. In Muslim countries generally there is no coeducation, in the UK men and women usually study together and parents allow limited friendship between two sexes. Also the parent-child relationship is different; children are expected to remain submissive (the example of arranged marriages)³⁴. Majority of respondents stated that they wouldn’t marry a person outside their own ethnic group and they usually would follow their parent’s wishes. The main conclusion was however generally positive: *being a Muslim in Britain is not a matter of choosing one over the other; instead, it involves a profound negotiation of the different sets of ideas and values that swirl around them in their everyday lives. (...) their journeys into and through Islam actually means to them, are all part of an effort to reconcile both ‘sameness’ and ‘difference’*³⁵.

Nonetheless, there is another side to the problem. Other authors point out that many young Muslims living in the West are split between the traditional Islamic culture of their parents and the secular multicultural society in the host country and consequently one of the cultures may prevail. In their search for identity, some individuals are turning to religion³⁶. The question is, if in the secular Western world, with its admiration for human rights and liberal values, there should be a place, at least in legal measures, for a religion that is everything but the West stands for (women, LGBT community, freedom etc.). It has to be highlighted that under certain circumstances, this identity crisis may lead to an Islamic counter culture among young Muslims who embrace radical interpretations of Islam. The general problem of “belonging” is illustrated by surveys of Muslim opinions in the UK where up to 1/3 of respondents would argue that they have more in common with Muslims in other countries than with non-Muslims in Britain³⁷.

It is often the children who accuse their parents of betraying their original Muslim heritage and of having moved away from true Islam. This conflict within the Muslim community is sometimes fuelled by the radical organizations that try to push young people toward positions that are far from integration and toward everything that tends to be in opposition to the West³⁸. The identity crisis that may touch some Muslims raises a question if the creation and increased number of Muslim tribunals and councils can lead to even bigger crash between religious and national identities.

Recent events all over the Europe naturally lead to fear and anxiety of many. Despite what some may say, there is a threat of Islamist radicalisation. “Home grown” terrorism in Europe has been increasing tremendously over the last two decades. Terrorists target trains, airplanes, buses, football fields and airports. Interesting answers is given by criminological studies in recent years. “Home grown” terrorism can be viewed as a sociological phenomenon where issues as belonging, identity, group dynamics and values are important elements. A common denominator seems to be that the involved persons are at a cross road in their life and wanting a cause³⁹.

T. Precht had come up with a typical pattern of radicalisation. It consists of four overlapping phases:

- I. pre-radicalisation
- II. conversion and identification with radical Islam
- III. indoctrination and increased group bonding
- IV. actual acts of terrorism

³⁴ J. Balicki, op. cit., 7-40

³⁵ Ibid.

³⁶ T. Precht, ‘Home grown terrorism and Islamist radicalisation in Europe. From conversion to terrorism’, (Copenhagen: Danish Ministry of Justice 2007), 5

³⁷ Ibid.

³⁸ S. K. Samir, op. cit., 90-91

³⁹ T. Precht, op. cit., 43

T. Precht indicates that the background factors are often a Muslim identity crisis, and the trigger factor (among other) is often presence of a charismatic person or spiritual advisor⁴⁰. Usually those preachers are connected to mosques, possibly then also present in sharia councils where people turn for help.

It is a fact, that Islam is one of the most rapidly growing religions in the world and Islamic fundamentalism is one of its more forceful manifestations. Many Westerners fascinated by the religion, which is shown in media as peaceful and worthy of respect and even admiration (unlike our “own” Christianity) turn to Islam for answers. It is probably to the fact that states still fiercely stand for tolerance and open-mindedness and encourage the society to believe that Islam has nothing to do with terrorist acts. Many of the converts get lost in their new beliefs and do not stand out for their commitment toward a real integration of Muslims with Westerners. On the contrary, they tend to underline the irreconcilable differences between Islam and the host country. Many converts assume radical positions, possibly to justify to themselves for their change of direction. Converts often make the socio-political arena their battlefield and fight in order to obtain a particular statue or some exceptions to general rules and in the process they become the spokespersons of the whole Muslim community⁴¹. The West suddenly is posed as an imperialist and aggressive enemy that represents not only a threat, but also a source of cultural decay. Islamic fundamentalists have come to the conclusion that it is because Muslims have abandoned or forgotten the divine aspect of their history – god’s instructions to live a good and god-fearing life – that they have suffered such a fate⁴².

In spite all of that, some authors remain optimistic: *the fact that the religious, political, and cultural outlooks of secular Westerners and Islamic fundamentalists are very different does not result in the “clash of civilizations” that has been predicted by some of the more extreme Western observers (...) There may well be future periods of tension between the democratic, secular West and some Islamic fundamentalist movements and states, but, given the convergence of economic and strategic interests, in the long run, the two different societies might just as likely find ways to accommodate each other*⁴³.

The majority of mosques and Muslims are not radical though, however sometimes religious leaders are open with their beliefs and willingly show their true colours. Imam Abu Baseer, one of the leading supporters of the religious Al-Qaeda says *one of the objectives of immigration is the resurrection of the duty of jihad and enforcement powers infidel. Immigration and jihad go hand in hand. One is consequence of the other, and is dependent on it.*

Political correctness often stops from posing a question if submission to Muslim claims – first (but surely not the last one) being the Islamic tribunals in the UK – can lead to the domination of Islam in Europe. Every, although big and beautiful civilisation, with well-established laws and norms that once flourished – had crashed, as it may seem unreasonable and exaggerated, is true and should be taken into consideration. After 2nd World War human rights movement, tolerance and antiracism are deservedly proclaimed but have grown to tremendous size and nowadays any critique towards Islam seem to be unwelcomed. The fact is however, that new and highly conservative norms and values set by Islam are now legally introduced to the Western democracies, despite the fact that they do not stand for such values as freedom or equality.

4. Internationalization of law and sharia

Democratic Western countries struggle with the demands of ethnic minorities for cultural recognition. They not only have set the law concerning such claims for themselves but also have made a serious commitment to internationalizing minority rights, embedded not only in formal declarations but also in European institutions. I would like to argue that Western countries and international institutions should take a moment to reconsider their policy towards the biggest minority group – Muslims and imposing such norms at other countries. Sharia councils are just an example of a direction we are all heading as Western society and possibly are indicators the big change that may come.

⁴⁰ Ibid.

⁴¹ S. K. Samir, op. cit., 90-91

⁴² L. Davidson, 'Islamic fundamentalism. An introduction', (London: Greenwood 2003) 1

⁴³ Ibid.

It has to be pointed out that some of the existing attempts to developing international norms regarding national minorities have been too strong, because they are based on norms of self-determination⁴⁴. However, J. Habermas makes an interesting point that *the dispute between Kantian Idealists and Carl Schmittian Realists over the limits to the juridification of international relations is today overlaid by another controversy (...). The new controversy is concerned with the issue whether law remains an appropriate medium for realizing the declared goals of achieving peace and international security and of promoting democracy and human rights worldwide*⁴⁵. I believe that international regulations concerning minorities should not be imposed on those countries that wish to set different, less “welcoming” boundaries to certain legal cultures, especially Muslim one. The discussion of the legal framework of multiculturalism forces to a deeper level of analysis, namely to a consideration of the nature of sovereignty in the modern world. State sovereignty has become an issue and political theorists argue that state sovereignty is in decline and national boundaries have become uncertain⁴⁶. The assertion of the primacy of the state justice stems from the idea of an integral link between the state and the law⁴⁷. M. Weber’s notion of power politics is closely related to C. Schmitt’s development of a theory of the politic. In Weberian model law is command, the political is the struggle between friend and foe, and sovereignty is the capacity to decide that a state of emergency exists⁴⁸. J. Habermas justly pointed out that *the citizens of one political community cannot anticipate the outcome of the interpretation and application of supposedly universal values and principles accomplished by the citizens of another political community from their local perspective and their own cultural context*⁴⁹. Therefore, I believe that the new trend, set by the UK and international law, which acknowledges minority rights (that propagate anti-liberal worldview, as in Quran) should not be applied by other countries. States should determine their limits and set exceptions to the rule (by determining who is a “foe”), especially in such crucial matter as transmission of Islam to legal order, rightfully claiming sovereignty. Sometimes, the majority, be it international organisations or even European Union – might be wrong. Legal pluralism stretches liberalism to its limits. Why does Western society recognise cultural differences of Islam, when it entails gender inequality, breach of human rights and basic legal standards?

Conclusions

In the article I tried to show the UK’s approach to Islamic claims through legal measures. The creation and functioning of sharia councils were shortly discussed, pointing out the most common opponents and supporters arguments. The problem of Islamic fundamentalism and terrorism was elaborated. I have made an attempt to point out that due to identity crisis that might touch Muslims, trigger factors (especially legally established measures and welcoming an alien religion that does not share Western values and legal tradition), may lead to inclination towards radicalism and choosing the religion and *umma* over the state and the nation. Therefore, I believe that countries and international institutions should reconsider their policy towards allowing any religion, especially this one in particular, interfere with law. Islam with its sharia law and culture is irreconcilable with values outworked by Western society, law and with democracy in general. It is always Allah’s laws alone that are acceptable to most of Muslims and no other sovereign or temporal authority can command their obedience. This is the essence of social contract within a Muslim community⁵⁰. A principle of Islamic law is that the lawgiver (god) has left out nothing and Islam is a “complete code of life”. Any other state

⁴⁴ W. Kymlicka, ‘Rights to Culture, Autonomy and Participation: The Evolving Basis of Minority Rights in Europe’. In: O. A. P. Shabani, ‘Multiculturalism and Law. A Critical Debate’ (Cardiff: University of Wales Press 2007) 235

⁴⁵ J. Habermas. ‘Kant and Constitutionalization of International Law: Does it Still have a Chance?’, In: O. A. P. Shabani, ‘Multiculturalism and Law. A Critical Debate’ (Cardiff: University of Wales Press 2007), 206

⁴⁶ B. S. Turner, ‘New and Old Xenophobia. The crisis of liberal multiculturalism’. In: S. Akbarzadeh, F. Mansouri, ‘Islam and political violence. Muslim diaspora and radicalism in the West’, (London: Tauris 2010) 82

⁴⁷ A. Moosa, D. Helly, ‘An analysis of British judicial treatment of Islamic divorces’. In: E. Giunchi, ‘Muslim Family Law in Western Courts’ (New York: Routledge 2014), 131

⁴⁸ B. S. Turner, op. cit., 82

⁴⁹ J. Habermas. op. cit., 218

⁵⁰ I. A. K. Nyazee, ‘Law as the Hukm of Allah’. In: B. S. Turner, ‘Islam. Critical concepts in Sociology’, (London: Routledge 2003), 120-130

legal system or international regulations are alien for some Muslims and are not likely to succeed in the solution of their problems; *it would be doomed from the start*⁵¹. Therefore, it is safe to say that Islamic jurisprudence always will lead not towards democracy, but theocracy. Fundamentally the problem facing Muslim jurisprudence today is the same problem it has always faced and which is inherent in its nature – the need to define the relationship between the standards imposed by the religious faith and the secular society. It cannot be denied that certain provisions of the Quran, such as the amputation of the hand for theft, stoning for adultery or homosexual relationship, pose problems in the context of contemporary life for which the solution is not readily apparent⁵². I am not convinced that *citizenship and human rights will be our best defence against civil unrest and the erosion of civil liberties in the name of our security*⁵³. I would rather argue that our best chance is to set boundaries and limits to what is accepted by international law. It cannot be stressed enough that some Muslims not only despise Western secular values as decadent, materialistic, corrupt and immoral. They also do not accept the distinction between what should be left for the spirit and what is the role of law and state. Generally speaking, for Muslims the whole of human life must represent a submission to god. This means nothing less that they feel a duty to “Islamicise” the values of the surrounding culture⁵⁴.

In a speech given in New York City in November 2005, Oriana Fallaci described European society based on tolerance and respect for cultural diversity as a *spent force – the end of a cigarette* and explained how *today's Islamic expansionism does not need armies and fleets with which the Ottoman Empire once terrorized Europe. It only needs the immigrants, whom short-sighted politicians and befuddles multi-culturalists continue to welcome. If such trends continue, Fallaci claimed, Europeans would ultimately become minorities on their own continent, confined to the “reservations” allotted to them by their Muslim overlords*⁵⁵.

I strongly concur with this statement which best describes the situation we live in. R. Dworkin once stated that *we inherited a cultural structure and we have some duty, out of simple justice, to leave that structure at least as rich as we found it*⁵⁶. I believe that Western society should rather stress the importance and simply cherish democracy, law, liberal and secular morals, than constantly giving in and forgetting what freedom means. And although measures like sharia councils may seem justifiable on paper, but easily can lead to one concession after another. It may end in unimaginable disaster and a slow collapse of the beautiful Western culture.

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⁵⁴ Melanie Philips, How the West was lost, Spectator, 11 May 2002

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UNDERSTANDING HUMANITY IN REMOTE WARFARE

Neringa Mickevičiūtė¹

Abstract

Advancement of certain (military) technologies enabled trends in battlefield that arguably dissociate conventional warfare from what can be termed as remote warfare. For further analysis this paper will encompass unmanned aerial vehicles (or drones), autonomous weapon systems² and cyber warfare. This article addresses one of the great concerns related to legality and morality of remote warfare, i.e. its compatibility with the principle of humanity.

The author discusses the principle of humanity in light of remote warfare, trying to cover essentially non-legal questions that have important legal implications: is humane treatment something that can be understood only by humans? Can remote warriors and, even more so, machines act humanely, understand suffering of others and ensure adequate respect for human beings? Is humanity part of human nature? Is there an inherent requirement in IHL for a minimum human involvement in lethal decision-making? Answers to these questions will draw on ethics, (legal) philosophy and computer science (artificial intelligence). This analysis is an effort to contribute to the discussion on the future of legal rules applicable to armed conflicts.

Keywords: remote warfare, principle of humanity, humanity, humane treatment, autonomous weapons, responsible command

Introduction

Throughout the history of wars military innovations and technological inventions changed the course of battles and, ultimately, the course of history itself. Now we are witnessing a technological progress that is transforming the way we fight and perceive wars in a very meaningful manner. In turn, it also challenges existing rules applicable to armed conflicts – international humanitarian law (IHL) – and their current interpretation. Even the meaning of fundamental rules of IHL, like the principle of humanity, needs to be revisited in light of current changes in waging wars.

1. Remote warfare: differences from conventional warfare

What is so game changing about the 21st century military engagements? Prominent scientists and practitioners in the field have already acknowledged the profound changes in warfare related to technological development. In 2014 the International Committee of the Red Cross (ICRC), following the cycle of expert discussions, established³ the concept of 'remote warfare', and new trends associated with it. According to ICRC, those trends are: (1) automation of weapon systems and delegation of increasing number of tasks to machines; (2)

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² Autonomous weapon systems or autonomous weapons will be understood in the following manner: "[...] any automated system that can initiate lethal force without the specific, conscious, and deliberate decision of a human operator, controller, or supervisor." P. Asaro 'On banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making' [2012] International Review of the Red Cross, Vol. 94, No. 886, P. 694.

³ 'Remote warfare' or similar terms, like 'remote attack', 'remote control warfare', etc. have been sporadically used for the past few years. See, for example, W. Boothby 'Some legal challenges posed by remote attack' [2012] International Review of the Red Cross, Vol. 94, No. 886, P. 579 – 595; or Remote Control project, a project of the Network for Social Change hosted by Oxford Research Group, available at: <<http://remoteproject.org>>.

increased, even extreme remoteness from the battlefield; (3) increased precision, persistence and reach of weapon systems; and (4) potential to use less physical force to achieve same or even greater military goals.⁴ This paper will further analyze cyber warfare, unmanned vehicles (drones), and autonomous weapons as prominent examples⁵ of what new technology is (potentially) bringing to war zones and, also, what new legal and moral challenges it raises.

The key characteristics of remote warfare listed above – remoteness, precision, reach and decreased (or no) human involvement – appeal with ever high potential to reduce military, as well as civilian casualties. In addition, as author and political scientist Peter W. Singer points out, new advanced technology “becomes cheaper and simpler to use.”⁶ Thus, at first glance, resorting to remote warfare might be commendable from both military and humanitarian perspectives⁷, as military goals might be achieved with a lower death toll.

Leading IHL expert Michael N. Schmitt points out: “[...] military necessity exists in equipoise with the principle of humanity, which seeks to limit the suffering and destruction incident to warfare”.⁸ Perhaps remote warfare can strike the perfect balance between military necessity, on one hand, and humanitarian considerations, on the other? In order for us to answer this question, we need to explore the meaning of the principle of humanity, and then discuss it in light of remote warfare.

2. Principle of humanity and humanitarian considerations in IHL

In 1899 the first Hague Conventions were adopted, and the Preamble to the Conventions contained the humanitarian standard, repeated and paraphrased throughout later years in a number of legal instruments, that is best known as the Martens clause. The original 1899 formulation of the clause is as follows.

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.⁹

It is articulated in strong language, both rhetorically and ethically, which goes a long way toward explaining its resonance and influence on the formation and interpretation of the law of war and international humanitarian law.¹⁰ This and later versions of the clause are also commonly referred to as “principles of humanity”, and permeate the entire body of IHL. Judge Theodor Meron also concludes that “[p]rinciples of humanity are not different from elementary considerations of humanity”,¹¹ thus can be explained together. Principle of humanity is also a fundamental principle of the Red Cross movement, proclaimed as such in 1965. It reads as follows:

⁴ International Committee of the Red Cross Law and Policy forum, e-briefing ‘New Technologies and The Modern Battlefield: Humanitarian Perspectives’ [2014]. Available: <https://app.icrc.org/e-briefing/new-tech-modern-battlefield/index.html?mc_cid=5a90fef39a&mc_eid=97be0a7dde> [Accessed 12 January 2016].

⁵ Cyber and drone attacks have been undertaken a number of times, whilst fully autonomous weapons systems are yet to be developed. Thus, a certain degree of hypothetical discussion and speculation will be inevitable.

⁶ ‘Interview with Peter W. Singer’ conducted by V. Bernard, M. Nikolova, and M. Silverman [2012] *International Review of the Red Cross*, Vol. 94, No. 886, P. 473.

⁷ The robotics blogger Evan Ackerman even goes as far as to ask: “<...> if autonomous armed robots really do have at least the potential reduce casualties, aren’t we then ethically obligated to develop them?” E. Ackerman ‘We Should Not Ban ‘Killer Robots,’ and Here’s Why’ [2015]. Available: <<http://spectrum.ieee.org/automaton/robotics/artificial-intelligence/we-should-not-ban-killer-robots>> [accessed 20 March 2016].

⁸ M. N. Schmitt ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ [2010] *Virginia Journal of International Law*, Vol. 50, No. 4, P. 796.

⁹ Convention (II) with Respect to the Laws and Customs of War on Land [1899] D.Schindler and J.Toman ‘The Laws of Armed Conflicts’ Martinus Nijhoff Publisher [1988] P.69-93.

¹⁰ T. Meron ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ [2000] *American Journal of International Law*, Vol. 94, No. 1, P. 79.

¹¹ *Ibid*, P. 82.

The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours - in its international and national capacity - to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.¹²

As one of the architects of modern IHL Jean Pictet wrote in a commentary of the fundamental principles of the movement: "If the Red Cross were to have only one principle, it would be this one."¹³ The importance of this principle is undeniable. It reflects both the essence of laws governing the conduct of hostilities, and the core that international community cannot deviate from in the future, despite, for example, technological developments.¹⁴

J. Pictet established that the goal of the principle was three-fold: (1) to prevent and alleviate suffering, (2) to protect life and health, and (3) to assure respect for the individual.¹⁵ The principle is a moral high ground, and, according to J. Pictet, rests on a philosophical foundation: the "golden rule" or, otherwise, the humanist maxim of "do unto others as you would have them do unto you".¹⁶

Let us now assume that technology, which enables remote warfare, is or can, at some point in the future, be most accurate at target identification, most precise in attacks, wait for the best moment to launch an attack, and use only the necessary amount of (lethal) force. No unnecessary suffering, no superfluous injury, reduced military, as well as civilian (collateral) casualties. Arguably, we would fully achieve first two goals entrenched in the principle of humanity. Then what about the last one of ensuring respect for the individual? We need to further analyze what is central to humanity as a legal and moral concept in IHL, and if remote warfare can by its nature be termed as humane, moral and dignifying.

3. Humanity without humans and moral responsibility for lethal decisions

Prominent IHL expert Marco Sassòli argues that "only human beings can be inhumane",¹⁷ thus suggesting that limiting role of humans in warfare by physically retracting them from the theater of war or even removing them from lethal decision-making (taking them out of the loop) might, actually, be a good thing for all. ICRC medical adviser Robin M. Coupland adds: "the fact that humans are capable of extraordinary acts of inhumanity makes it difficult to argue that all humans are equipped with humanity."¹⁸ Machines cannot fear, hate or seek revenge, thus, cannot act on negative emotions, which is undeniably good. On the other hand, machines cannot act on positive emotions, either, like grace, mercy, pardon, etc. The question remains if machines can decide on most humane methods and means of conducting military operations at a given moment. And, of course, we have to respond to a more philosophical concern: does moving humans very far from or completely out of the battlefield take humanity out of the battlefield, as well?¹⁹

First, we need to understand what 'humanity', 'acting humanely' and 'humane treatment' mean. The term humanity is most commonly understood in IHL as a morality or sentiment of good will toward fellow

¹² J. Pictet, 'Commentary on the Fundamental Principles of the Red Cross (I)' [1979] *International Review of the Red Cross*, Vol. 19, No. 210, P. 141.

¹³ *Ibid*, P. 145.

¹⁴ "[...The Martens clause] should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology." ICRC, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (Y. Sandoz, C. Swinarski, and B. Zimmermann eds.) [1987] P. 39.

¹⁵ J. Pictet, *supra* note 10, P. 145 & 147, and J. Pictet, 'Commentary on the Fundamental Principles of the Red Cross (II)' [1979] *International Review of the Red Cross*, Vol. 19, No. 211, P. 184.

¹⁶ However, such interpretation can be criticized, as it, in a way, suggests reciprocity, which is prohibited in IHL: it is a customary rule (Rule 140: "The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity." ICRC, Customary IHL, at: <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule140>).

¹⁷ M. Sassòli 'Autonomous Weapons – Potential advantages for the respect of international humanitarian law' [2013]. Available: <https://phap.org/system/files/article_pdf/Sassoli-AutonomousWeapons.pdf> [Accessed 5 March 2016].

¹⁸ R. M. Coupland 'The Humanity of Humans: Philosophy, Science, Health, or Rights?' [2003] *Health and Human Rights*, Vol. 7, No. 1, P. 159.

¹⁹ "Taking humans out of the loop also risks taking humanity out of the loop." C. Heyns, Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Execution A/HRC/23/47 [2013] United Nations Human Rights Council, para. 89.

humans.²⁰ This meaning is grounded in moral philosophy and, as such, guides planning and commission of military acts. Founded on the respect for human being, humanity also means being sensible of and sharing the suffering of others, preventing and alleviating it. Robin M. Coupland further argues that humanity is to a degree inherent to human nature, and to a degree shaped by and dependent on environment and experiences.²¹ Regarding humane treatment and behavior, J. Pictet argued: “[...] it would be useless and hazardous to enumerate all it constitutes, since it varies according to circumstances. To determine it is a question of common sense and good faith.”²²

If we now take an example of drone or cyber attacks, we have humans behind them, who can act according to common sense and in good faith. The question could be raised if, removed so far from the battlefield and the consequences of their attacks, humans behind such attacks can still be sensible of and share the suffering of others. This question attracted a lot of attention through analysis of mental state of drone pilots. It was concluded that they, like other soldiers in close combat, suffer from serious, at times specific to remote warfare, mental health deteriorations.²³ Thus, it appears that remote warriors can share the suffering of others as much as soldiers in conventional warfare.

If we, on the other hand, take fully autonomous weapons, we need to imagine more complicated scenarios. Scholars and practitioners are divided and uphold two opposite lines of thinking: one group supports the development and potential use of fully autonomous weapons, another one argues outright incompatibility of autonomous weapons with legal, geopolitical or ethical requirements, including principle of humanity.²⁴ However, it is not argued if robots can or cannot act humanely, as it is yet difficult to speculate on the potential of general artificial intelligence (AI). The opponents of autonomous weapons might focus on the fact that machines cannot share the suffering of others, while the proponents draw attention to the fact that machines might engage in defensive/offensive actions much later than humans and use much less force against a belligerent. Thus, despite the obvious lack of human nature, machines could hypothetically achieve the same humane outcomes.

Still, one of the strongest arguments against fully autonomous weapons is that their deployment implies “[...] a vacuum of moral responsibility”.²⁵ It is suggested that every decision to take someone’s life should be undertaken after internalizing its cost. UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, argues: “Machines lack morality and mortality, and should as a result not have life and death powers over humans.”²⁶ C. Heyns also adds: “[...] something may be lawful but be awful, and a human is needed in the loop to prevent that from happening.”²⁷ Thus, we are now fully submerged in moral, as well as philosophical arguments. The main issue is not whether machines can comply, act human-like or cause less suffering than humans. The main issue is if humans ought to retain the monopoly of decision to use lethal force against other humans. To put it in other words, is there an inherent requirement to have at least minimum human involvement in lethal decision-making?

²⁰ R. M. Coupland, *supra* note 16, P. 159.

²¹ R. M. Coupland, *supra* note 16, P. 161.

²² J. Pictet, ‘Commentary on the Fundamental Principles of the Red Cross (II)’, *supra* note 13, P. 185.

²³ For more see, for example, Medical Surveillance Monthly Report [2013] Vol. 20, No. 3, available: <https://www.afhsc.mil/documents/pubs/msmrs/2013/v20_n03.pdf>.

²⁴ Many artificial intelligence and robotics researchers called for “a ban on offensive autonomous weapons beyond meaningful human control”. ‘Autonomous weapons: an open letter from AI & robotics researchers’ [2015] International Joint Conference on Artificial Intelligence, available: <<http://futureoflife.org/open-letter-autonomous-weapons/>> [Accessed 17 January 2016].

²⁵ C. Heyns, *supra* note 17, para. 93.

²⁶ C. Heyns, *supra* note 17, para. 94.

²⁷ ‘Comments by Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions’ [2015] Informal Meeting of Experts on Lethal Autonomous Weapons: Convention on Conventional Weapons. Available: <[https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/1869331AFF45728BC1257E2D0050EFE0/\\$file/2015_LAWS_MX_Heyns_Transcript.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/1869331AFF45728BC1257E2D0050EFE0/$file/2015_LAWS_MX_Heyns_Transcript.pdf)> [Accessed 15 March 2016].

There's a hint of an answer to this question in written IHL: the requirement for combatants "to be commanded by a person responsible for his subordinates".²⁸ Thus, even if we could replace combatants with fully autonomous weapons, we should not, at least following existing laws of war, eliminate an element of responsible command.²⁹ Unless we create new specific rules, to address the technological progress, the human should be kept in the loop. Philosopher of technology Peter Asaro takes it even further: "The very nature of IHL, which was designed to govern the conduct of humans and human organizations in armed conflict, presupposes that combatants will be human agents. It is in this sense anthropocentric. Despite the best efforts of its authors to be clear and precise, applying IHL requires multiple levels of interpretation in order to be effective in a given situation. IHL [...] explicitly requires combatants to reflexively consider the implications of their actions, and to apply compassion and judgment in an explicit appeal to their humanity."³⁰ Thus, it is clear that "[u]ntil a more complete code of the laws of war is issued", the principle of humanity remains a moral yardstick that does not yet permit machines to wage wars without human control and responsibility of human operators.

Conclusions

Remote warfare is bringing unseen and unforeseen changes to war zones. Still, we must not forget that new military technologies need not only comply with written rules of IHL, but also with the spirit in which laws of war were drafted. The essence of IHL is basically captured by the principle of humanity. It requires not only humane conduct of military activities, but assumption of responsibility for every life lost at war. Every lethal decision in military engagements must entail not only legal, but also moral responsibility. It is true that humans are not superior to machines in terms of precision, accuracy, data analysis, etc. Human beings are also capable of committing inhumane acts. Yet only humans are equipped with moral responsibility and moral judgment. Thus, in an effort to keep humanity in a battlefield, and unless states adopt different laws, we need to ensure machines do not wage wars for us without us.

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²⁸ Art. 1, Convention (IV) respecting the Laws and Customs of War on Land [1907]. This rule was later repeated in Art. 4, Geneva Convention (III) relative to the Treatment of Prisoners of War [1949], Art. 43, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [1977], and Art. 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [1977].

²⁹ "[...] the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training. A "responsible" command cannot be conceived of without the persons who make up the command structure being familiar with the law applicable in armed conflict." ICRC, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (Y. Sandoz, C. Swinarski, and B. Zimmermann eds.) [1987] P. 512.

³⁰ P. Asaro, *supra* note 2, P. 700.

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THE APPLICATION OF THE WORK-LIFE BALANCE CONCEPTION AS AN EXAMPLE OF AN INTERDISCIPLINARY APPROACH TO LABOUR LAW

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Abstract

Labour law is a great example of the branch of law, in which an interdisciplinary approach is inevitable. The influences of such disciplines as sociology and economics are especially noticeable. The work-life balance (WLB) conception is present in legislators' intentions for some time. The aim of this idea is to find a balance between work and private life, including family, health and entertainment. It has been noticed that the efficiency of the employees is not necessarily proportional to the hours spent at work but is connected also with factors relating to their private lives. The WLB conception helps to prevent such negative social syndromes as workaholism or occupational burnout. Nowadays, its application is an advantage that allows to attract the best employees in the market but most likely, in a few years, the introduction of this conception to the companies strategies will be a necessity.

The aim of this article is to show versatility of the WLB conception and advantages of its introduction to labour law. This conception is one of the best examples of how an interdisciplinary approach to law should be properly applied in modern society. The author will present the examples of its usage that can be noticed in Polish labour law, such as diverse working time systems, newly modified provisions on fixed-term employment contracts or parental benefits. There will be also references to European tendencies in promoting and introducing this idea into modern society.

Keywords: work-life balance conception, labour law, employment, family life, working time systems, parental benefits

Introduction

Interdisciplinary approach to law is nowadays, on the one hand, a trend and, on the other, a necessity. It is a synonym of what is modern and "in fashion" for creating and applying law but most of all, it allows to go beyond the limits of particular scientific disciplines and thus describe the reality from various perspectives. Other scientific branches can be very helpful in searching the right legal solutions to contemporary problems, such as economic and social crisis. As a result of interdisciplinary actions, new and specific knowledge is created, which presents the approach different from the approach represented by the areas on which it is based.

Labour law is a great example of the branch of law, in which an interdisciplinary approach is inevitable. It regulates not only employment itself, but also social relations connected with employment. The model of labour law applied in particular country affects its economic and demographic development. This is why it is especially important to benefit from the latest achievements of such scientific disciplines as sociology (the study of social behavior or society, including human resource management), psychology (the study of behavior and mind, embracing all aspects of human experience) and economics (understood as the social science that describes the factors that determine the production, distribution and consumption of goods and services). Only this kind of open and broad approach enables labour law to cope with present challenges and dynamic development of societies. Otherwise, it would be just a "law on the paper", which application would not conform reality.

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The introduction of the work-life balance conception (hereinafter also WLB) is, in my opinion, one of the best examples of how interdisciplinary approach to labour law should be applied. The aim of this idea is to find a balance between work and private life, including family, health and entertainment. Further in the article I will present some general information concerning WLB conception and its practical application to labour law in Poland and other selected European countries.

1. The work-life balance conception – general issues

As it has been already mentioned, the work-life balance conception helps to reconcile professional duties and private life of employees. Generally, it is an idea including proper prioritizing between career and lifestyle in a broad sense, meaning health, pleasure, entertainment, family and spiritual development. It has been noticed that the efficiency of the employees is not necessarily proportional to the hours spent at work but is connected also with factors relating to their private lives. The WLB conception is a combination of various initiatives that help to prevent such negative social syndromes as workaholism or occupational burnout. It was proven that lack of balance between work and private life can lead to a significant deterioration of the mental health and higher level of stress among employees². In Japan there is a phenomenon called “*karōshi*”, which can be translated as "death from overwork" – this is not a pure medical term but a sociomedical term that refers to fatalities or associated work disability due to heart attack, stroke, stress and starvation diet. “*Karōjisatsu*” (suicide from overwork and stressful working conditions) has also become a social issue in Japan since the latter half of the 1980s. In 14 years, from 1997 to 2011, compensated cases of *karoshi* and *karōjisatsu* have risen respectively from 47 to 121 and from 2 to 66³. Moreover, surveys’ results suggest that the lack of balance between work and private life can reduce commitment to professional tasks and satisfaction derived therefrom. This leads also to decreased productivity and efficiency of employees and, in some cases, can result in quitting job⁴. On the other hand, well-balanced relation between work and family helps to function properly in marriage and family and is connected with greater happiness and equal division of responsibilities between spouses⁵.

It is easy to notice that maintaining a proper balance among employees is a win-win solution. Particular spheres of human life should complement each other. Relaxed, happy employees, fulfilled in their private lives, are high value for employers and perform their tasks properly. This also works the other way around. Nowadays, the application of WLB is usually an advantage that allows to attract the best employees in the market but most likely, in a few years, the introduction of this conception to the companies strategies will be a necessity. Due to this fact, it is important to present in the first place the evolution of described conception.

The work–leisure dichotomy was already perceived in the mid-1800s.⁶ The term "work–life balance" was whereas first used in 1970s – 1980s to describe the balance between an individual's work and personal life. Expansion of this idea was caused by socio-cultural changes, such as entry of women into the labour market and their need for professional development and division of household duties, rapid progress of economy, technology and numerous career opportunities.

² Inter alia: A.G. Bedeian, B.G. Burke, R.G. Moffett, R. G., “Outcomes of work-family conflict among married male and female professionals” *Journal of Management* [1988] 14, 475-492; M.R. Frone, J.K. Yardley, K.S. Mrkel, “Developing and testing an integrative model of the work-family interface” *Journal of Vocational Behavior* [1997] 50, 145-167; E.J. Grant-Vallone, S.I. Donaldson, “Consequences of work-family conflict on employee well-being over time” *Work and Stress* [2001] 15, 214-226.

³ International Labour Organization, “Case Study: Karoshi: Death from overwork” [2013], http://www.ilo.org/safework/info/publications/WCMS_211571/lang--en/index.htm, online access 23 March, 2016.

⁴ Inter alia: E.E. Kossek, C. Ozeki „Work-family conflict, policies, and job-life satisfaction relationship: A review and directions of organizational behavior human resources research” *Journal of Applied Psychology* [1998] 83, 139-149; R.G. Netemeyer, J.S. Boles, R. McMurrian, R. “Development and validation of work-family conflict and work-family conflict scales” *Journal of Applied Psychology* [1996] 81, 400-410; Frone and others, “Developing...”.

⁵ Inter alia: Frone and others, “Developing...”; M.A. Milkie, P. Peltola, P “Playing all the roles: Gender and the work-family balancing act” *Journal of Marriage and the Family* [1999] 61, 476-490; T.D. Allen, D.E.L. Herst, C.S. Bruck, M. Sutton “Consequences associated with work-to-family conflict: A review and agenda for future research” *Journal of Occupational Health Psychology* [2000] 5, 278-308.

⁶ P. Burke, "The Invention of Leisure in Early Modern Europe" *Past & Present* [1995] 146, 136–140.

Initially, the balance between work and life was identified by researchers with the lack of conflict between work and the demands of family life. It was first defined by Kahn and others, who found that it occurs when the demands of work and family are to some extent incompatible with each other. Quoting the authors, it is a “simultaneous occurrence of two (or more) sets of pressure such that compliance with one would make more difficult compliance with the other”⁷. On the other hand, Greenhaus and Beutell recognized that the conflict takes place when the requirements imposed on a person in one of these areas adversely affect his ability to meet the requirements of the second area⁸. Given the sources, one can distinguish three major forms of work-family conflict:

- time-based conflict – this type of conflict may take two forms: time pressures associated with membership in one role can make it physically impossible to comply with expectations arising from another role (e.g. a parent cannot take care of or a sick child, because he/she has to be present at a business meeting) or pressures can produce a preoccupation with one role even when one is physically attempting to meet demands of another role (e.g. a parent is present at a parent-teacher conference, but thinks about problems at work)⁹;

- strain-based conflict – it arises when strain and stress occurring in one role affects one’s performance in another role¹⁰ (e.g. due to marital problem one cannot perform properly its professional duties);

- behavior-based conflict – it occurs when specific patterns of in-role behavior may be incompatible with expectations regarding behavior in another role (e.g. a manager needs to be objective, even-tempered and stable, but his family expects him to be warm and emotional)¹¹.

Netemeyer and others also observed, that the work-family conflict is a two-way conflict: it may arise when requirements connected with work affects one’s ability to deal with family responsibilities and vice versa. These two types of conflicts do not exclude each other, which means that an individual can experience both of them at the same time¹².

Keeping abovementioned in mind, one has to notice that there can be also an advantageous impact between work and family life. These two spheres affect each other - professional practice can positively affect the quality of family life and family experiences may improve the quality of life in the professional sphere (for example by gaining some professional skills or features like patience, which occurs to be also useful in being a parent). Researchers called this positive relation “work-family enrichment”. Enrichment is an extent to which an experience gained from one role improves the quality of life in other role¹³.

Finally, researchers realized that family is not the only sphere of individual’s functioning that may affect the well-being and proper performing of professional duties. It has to be noticed that not everyone is engaged in family life, but still needs to have a space for self-fulfillment other than work. Entertainment, hobbies, education, social life or social activity – these are some of the examples of important elements of human privacy, which can remain in conflict or in balance with work. According to one of the latest surveys, there are three spheres of private lives of the employees, which especially collide with work: health, family and leisure activities¹⁴.

It has been already indicated that lack of balance between these areas may lead to serious consequences, this is why it is so important to counteract them. The WLB conception has a multi-faceted impact, not only on a particular employee and his employer, but also generally on society. Due to this fact,

⁷ R. L. Kahn, D.M. Wolfe, R. Quinn, J.D. Snoek, R.A. Rosenthal “Organizational stress: Studies in role conflict and ambiguity” (New York: Wiley 1964), 19.

⁸ J. H. Greenhaus, N.J. Beutell, “Sources of conflict between work and family roles” *Academy of Management Review* [1985] 10, 77.

⁹ *Ibid.*, 77-78.

¹⁰ *Ibid.*, 80-81.

¹¹ *Ibid.*, 81-82.

¹² R.G. Netemeyer and other “Development (...), 400-401.

¹³ J. H. Greenhaus, G.N. Powell, “When work and family are allies: A theory of work-family enrichment” *Academy of Management Review* [2006] 31, 73.

¹⁴ The survey was conducted among 5000 graduates of Michigan State University, A. Henion, A.M. Ryan, “Wanted: A life outsider the workplace” [2013], <http://msutoday.msu.edu/news/2013/wanted-a-life-outside-the-workplace/>, online access: 23 March, 2016.

described conception consists of several elements, such as legal regulations, programs implemented by employers concerning personal and organisational policy of companies and developing personal skills that help to combine various life roles.

2. The work-life balance conception in Polish labour law

In this article I would like to focus on the first of abovementioned elements, namely existing legal regulations that may indicate that WLB conception has been adopted in Poland. I will mention only the most important instruments, which are explicitly regulated by law. This happens for several reasons. First of all, I am a lawyer by profession and this subject matter is closest to me. Secondly, in my opinion, law has the greatest potential and the widest scope of impact, because it regulates social issues in general. However, this does not mean that legal regulations are needed and desired in all aspects concerning the WLB conception, which is also worth mentioning. Last but not least, the variety of measures taken to apply this idea is so wide, it is not possible to list and describe them in one article.

In literature, there are four main instruments distinguished, which support WLB application. Each of them includes a wide range of initiatives that allow to combine individual's needs with requirements of employer and society. These are:

- forms of organization of work and working time, including some customized forms of employment,
- various types of leaves, financial supports or benefits and exemptions from work, which may be used when an employee has to fulfill family obligations,
- benefits in various forms for employees, who use alternative forms of care of dependent family members,
- benefits (financial and non-financial) granted to employees, who have to reconcile work with caring responsibilities¹⁵.

Flexible working schedules and organization of working time help to adjust working time to needs of employees and employers. In Polish Labour Code¹⁶ there are a few solutions that may be useful in this area. One of them is a part time job – it is a job performed by employees, whose standard working time per week or average working time in an accounting period is lower than the standard working time. It means that these employees work for example three days per week instead of five or 4 hour per day instead of 8. Thanks to that, they can adjust time spent at work to their individual preferences and reconcile professional duties with family life. Moreover, it increases the chance of finding a job, returning to work or maintaining it after leave¹⁷. Secondly, there is a possibility to conclude an employment agreement for a fixed period, for example for two years. Due to the fact that this kind of contracts were very often misused by employers, there were some significant changes in PLC, which entered into force on February 2016¹⁸. Currently, temporary employment contracts cannot last longer than 33 months (with some exception, for example, when an employee replaces another employee, who is absent at work for justified reasons) and its notice periods are equated with notice periods of contracts for indefinite period. Next, PLC in Articles 129, 135 - 150 provides various types of working time systems, which may be used to reconcile work with private life – these are: basic working time, equivalent working time, task-based working time, discontinued working time, compressed working week and weekend work. Unfortunately, it is not possible to describe all of them in this article. However, from employee's point of view, task-based working time may be beneficial. It means specifying employee's tasks to be

¹⁵ A. Adamczyk, M. Kubasiak „Work-Life Balance – idealna koncepcja zarządzania równowagą między życiem prywatnym a zawodowym”/”The Work-Life Balance as a perfect conception of managing balance between private and professional life” in: J. P. Lendzion, A. Stankiewicz-Mróz (ed.) „Koncepcja Work-Life Balance a kierunki rozwoju funkcji personalnej”/”The Work-Life Balance conception and the development directions of personal function” (Łódź 2009).

¹⁶ The Act of 26 June 1974 Polish Labour Code (Dz.U.2014.1502), hereinafter PLC.

¹⁷ Z. Hajn, „Elastyczność popytu na pracę w Polsce. Aspekty prawne”/”Flexibility of demand for labour in Poland. Legal aspects” in: E. Kryńska (ed.) „Elastyczne formy zatrudnienia i organizacji pracy a popyt na pracę w Polsce”/”Flexible forms of employment as a way to get efficiency for companies” (Warsaw 2003) 81.

¹⁸ The Act of 25 June 2015 changing the Polish Labour Code and other acts (Dz.U.2015.1220). This kind of contracts were very often concluded for a long periods, e.g. 5 or more years with no justification. This situation was disadvantageous for employees, because in principle these contracts couldn't have been terminated, and if they could have, the notice period was only 2 weeks.

accomplished in a specified period (time necessary to accomplish tasks is determined by the employer in consultation with the employee). Moreover, according to Art. 142 of PLC, at the written request of the employee, the employer may determine an individual schedule of his working time under the applied working time system (individual working time schedule). Finally, PLC in Art. 67⁵- 67¹⁷ regulates telework - work regularly performed outside the workplace by using electronic ways of communication to provide the employer with results of work. Telework is beneficial for both employers and employees. First, it helps employers to significantly reduce costs and develop their business. On the other hand, employees could save time and costs associated with daily commuting to the workplace. Telework also allows to motivate workers living in rural areas and people with disabilities. From the employee's perspective, this form of employment makes it easier to reconcile the employee's duties with personal and family life, while allowing employers to optimize the work needed to run the company. Instead of all abovementioned advantages, telework is not a popular form of employment in Poland¹⁹. Polish labour law provides numerous solutions designed to facilitate working parents reconciling professional and family duties. One of them is protecting continued employment, which means that the employer may not dismiss or terminate employment during pregnancy and maternal leave²⁰. There are also various leaves related to maternity and paternity regulated in Division Eight of PLC. Polish system of parental leaves is very complex and complicated, which is why it is not possible to go into detail about it in this article. However, it needs to be emphasised that current legal situation and legislator's tendencies aim for equating mothers and fathers possibility to take parental leaves, splitting the leaves in time and between parents and other members of family and combining leaves with work²¹. All these actions are intended to help parents to reconcile their professional duties with childcare and to come back smoothly to work after taking a parental leave.

In PLC one can also find regulations concerning rest periods and holiday leave. They are very important, because they guarantee employees right to rest and regenerate and cannot be changed unfavorably for them. It is sign of respect for employees' private lives. Any infringement has consequences for employers, e.g. if the employee works longer than he should, the employer is obliged to pay overtime allowance. According to Art. 152 of PLC, the employee is entitled to an annual, continuous, paid holiday leave and he cannot waive this leave. These regulations are undoubtedly an instrument to counteract time spent at work and time needed for rest and private life.

Last but not least, the anti-discrimination clauses should be mentioned. The Art. 11³ of PLC states that any discrimination in employment, direct or indirect, in particular in the area of gender, age, disability, race, religion, nationality, political opinion, trade union membership, ethnic origin, sexual orientation, as well as due to employment for a definite period or an indefinite period or full or part-time work – is forbidden. According to the Art. 18^{3a} par. 1 of PLC, employees should be treated equally in the area of establishment and termination of employment, conditions of employment, promotion and access to training in order to raise qualifications, particularly regardless of sex, age, disability, race, religion, nationality, political opinion, trade union membership, ethnic origin, sexual orientation and regardless of employment for a definite or indefinite period or full or part-time work. Without these regulations, it would not be possible to make a proper use from the abovementioned solutions.

To sum up, in my opinion, described solutions, which were introduced to PLC, are needed. This refers especially to rest periods and holiday leaves – without these provisions, employees would not have a possibility to require from employers to respect their right to privacy. However, regulations relating to leaves for parents are too intricate and very often cause interpretative problems for lawyers, not mentioning employees. What is more, parents frequently indicate that leaves are not the only solutions, because they eliminate employees from labour market. It would be of greater help to provide them with nurseries and other

¹⁹ I. Miernicka „Elastyczne formy zatrudnienia jako element gospodarowania kapitałem ludzkim”/”Flexible forms of employment as an element of HRM” in: A. Rogozińska-Pawelczyk (ed.) „Gospodarowanie kapitałem ludzkim. Wyzwania organizacyjne i prawne”/”Human Resources Management. Organisational and legal challenges (Łódź 2015) 170-171.

²⁰ C. Sadowska-Snarska “Work-life balance. Comparative study Finland-Poland-Spain” (Białystok 2007) 36.

²¹ In January and March 2016 there were some significant changes in PLC concerning leaves for parents – The Act of 24 July 2015 changing the Polish Labour Code and other acts (Dz.U.2015.1268).

institutions taking care of children. As it was already mentioned, telework, despite its obvious advantages, is used rarely.

3. The work-life balance tendencies in EU countries

The reconciliation of work, family and private life has been an important issue for European employment policy for a long time. The aim has been to increase the participation of both men and women in the labour market and to support initiatives beneficial for health and well-being of employees. The improvement of work-life balance has been a main driver for legislative changes or social partners' agreements. One of the most common ways to do so, adopted by EU countries, is flexibility of working time, organization of work and place of work. These arrangements enable staff to align their work and private life more effectively and enable organisations to react more flexibly to fluctuations in demand for their products or services. This includes for example part-time work, reduced hours, term-time contracts, compressed working week (weekly hours are compressed into fewer days, giving an employee longer weekends), flexitime (allowing an employee to vary working hours within specified limits), shift swapping (allowing employees to rearrange shifts among themselves), staggered hours (employees have different start, finish and break times) and telework²². According to the Labour Force Survey Ad Hoc Module on reconciliation between work and family life from 2010, flexible working arrangements are most popular in Nordic countries, Germany and Austria. Employees in countries such as Latvia, Croatia, Bulgaria or Hungary do not work under employee-friendly flexible working time very often²³.

Parental entitlements and childcare institutions also play a significant role. Member States have national regulations, which give employees possibility to take parental leave. Additionally, legal provisions permit employees to work part-time during parental leave. This prevents knowledge and skills from being lost or becoming outdated. There are also great emphases on dividing family responsibilities between both parents and encouraging men to take parental leaves. The abovementioned leaves may differ considerably in areas such as the duration or level of pay (in some countries, e.g. Austria and Slovakia, parental leaves can last even up to three years)²⁴, however, they have to implement recommendations of Council Directive 2010/18/EU of 8 March 2010²⁵. The provision of facilities for caring for children is another significant element of applying work-life balance conception. Some big companies offer company-specified childcare places, but most common is supporting employees in finding, organising or financing childcare and providing them with special leaves in case of a sick child²⁶.

Conclusions

The aim of this article was to show versatility of the WLB conception and advantages of its introduction to labour law. This conception is one of the best examples of how an interdisciplinary approach to law should be properly applied in modern society. Without deriving from other sciences, like sociology, economy or

²² A. Broughton "EU Level: Reconciliation of work, private and family life in the European Union" Eurofound website <http://www.eurofound.europa.eu/observatories/eurwork/articles/quality-of-life/eu-level-reconciliation-of-work-private-and-family-life-in-the-european-union> online access 23 March, 2016;

O. Vargas, S. Boehmer "Policies to improve work-life balance" Eurofund website <http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-industrial-relations/policies-to-improve-work-life-balance>, online access 23 March, 2016.

²³ O. Vargas, S. Boehmer "Policies...".

²⁴ A. Broughton "EU Level: EU employers take family-friendly working seriously" Eurofound website <http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-quality-of-life/eu-level-eu-employers-take-family-friendly-working-seriously> online access 23 March, 2016.

²⁵ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, Official Journal of European Union L 68/13.

²⁶ A. Broughton „EU Level: EU employers...“

psychology and surveys conducted in these areas, it would not be possible to introduce proper legal solutions, which can help to find balance between time spent at work and private lives of employees.

Although advantages of applying WLB conception seem to be obvious, it is necessary to assess solutions which have been already entered into force, described in this article. In my opinion, legal regulations are very needed in such areas as working time, parental benefits or antidiscrimination. On the one hand, they enable employers to protect their right to privacy and family life, on the other they set boundaries and avoid abuses. However, they are not sufficient – there are other factors, which help to properly introduce WLB conception. There are many provisions in Polish labour law, which indicate legislator's intentions to reconcile work with private life, but still Poland has one of the lowest Work-Life Balance Subindex. According to the survey conducted by The Organisation for Economic Co-operation and Development (OECD) in 2014, Poland was at 28. out of 36 positions (the last were Mexico and Turkey). The OECD's survey base on such data as the amount of time a person spends at work and the level of employment of women, who have children aged 6-14. Denmark had the highest Subindex – according to the survey, in Denmark, 2% of employees work very long hours (average is 13%), full-time workers devote 16.1 hours to personal care and leisure (average is 15 hours). Moreover, policy in Denmark provides extensive financial support to families with young children²⁷. This shows that as important as legal regulations are also programs implemented by employers concerning personal and organisational policy of companies, developing personal skills and mindful approach of both employers and employees. Only a combination of all these factors can be a guaranty of success.

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²⁷ <http://www.oecdbetterlifeindex.org/> online access 23 March, 2016.

12. A. Henion, A.M. Ryan, "Wanted: A life outsider the workplace" [2013], <http://msutoday.msu.edu/news/2013/wanted-a-life-outside-the-workplace/>;
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EFFICIENCY OF LAW IN INNOVATION ENVIRONMENT

Yuliya Milto¹

Abstract

Law should be efficient. But is it really possible to guarantee law efficiency within the rapidly changing scientific, social and economic environment. The dynamic development of new technologies has led to challenges in law as far as myriad of new phenomena are falling into the scope of legal regulation. Among them are nanotechnologies, renewable energy, bioinformatics, etc.

Historically research and technology development was identified with innovations. Nowadays innovation embraces not only emerging technologies, but also economic, legal, political, environmental and social issues and policies. Such a transition from pure technology policy to innovation one has made it an umbrella policy linking together governance, law and society.

One of the most sensitive issues is whether it is possible to connect law with technology and how it can be done in order to provide technology progress and commercialization of its results, reveal gaps between technologies and the market, and to grant adequate level of human and environmental protection. Making law design more flexible and efficient requires an interdisciplinary approach and cooperation between relative disciplines that would take into account a big variety of elements such as extensive scientific and technological information; risk governance in the view of uncertainty of future technology progress and its benefits; involvement of different stakeholders in decision – making process.

Keywords: technology, innovation, risks, regulation.

Introduction

“Technology ultimately depends only on itself; it maps its own route”². Is it possible to provide an effective legal regulation of new technologies, a phenomenon the existence of which is grounded by its own rules and norms?

The article discovers the issues of efficiency of law in innovation environment.

Usually innovations are regarded as a synonym to emerging technologies. But nowadays the concept of innovation has received a new content, wider than before, and embraces not only new technologies but also new regulatory models, financial mechanisms, and social issues. That is why there are two main lines in the article: the first one describes the transition from technology to innovation and development of new innovation paradigm; and the second one, deals with innovations in regulation.

New technologies such as biotechnology, bioinformatics, surveillance technologies, robotics, nanotechnology, renewable energy and myriad of other technologies are progressively developing. Some of them are cherishing our hopes to solve the problems of climate change, resource scarcity, diseases and other challenges of the modern world. Being diverse by their technical characteristics and nature the emerging technologies have some traits in common such as uncertainties about their future, their benefits and risks to health, human rights and freedoms, environment, and security. As far as innovation process is always accompanied by risks the article starts with the revealing of areas that can be damaged by new technologies.

Promotion of innovations is impossible without granting the freedom to conduct research but this freedom can lead to unknown risks and to undercut public trust to science and government. On the other hand,

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² Robert, C. Scharff, V. Dusek, ‘Philosophy of Technology. The Technological Condition An Anthology’ (The United Kingdom: Blackwell Publishing 2003) 386

strict control and excessive regulation can slow down economic and social progress. Development of innovations and their regulation is interdependent: law has the influence on innovations and innovations have the influence on the law as well. Searching for a better regulation of innovation there is no guarantee that such a regulation would be created: innovations are developing more rapidly than the law and the most sensitive issue of legal regulation of innovations is whether the law can be in time with them.

One of the peculiarities of the emerging technologies is that they are not simply falling under the scope of legal regulation but themselves may be regarded as regulatory tools. Sometimes their role might be supportive to traditional legal regulation using CCTV surveillance and possibly brain imaging³.

At the beginning of the description of innovations is logical to provide the reasons giving the impetus to their emergence. There are different theories.

The first one attributes innovation with a scientific motivation or sees it as being pushed by the technological opportunities that appear; it derives that the new products and processes are generated by progress in scientific knowledge ("Technology Push" theory). The second theory of view regards innovation as a consequence of demand (the "Demand Pull" theory)⁴.

These theories in fact reveal the trajectories of regulation of innovations: when technologies are emerging *per se* and regulation should be adapted to their needs and nature (like in cases of genetic science, robotics technology), and when the regulator is initiator of new technologies and set legal and financial framework for their development (renewable energy).

1. Risks: an integral component of innovation

The other side of the coin of new technologies is their potential risks. It is complicated not only to calculate the level of possible risks but to determine what fields and who can be damaged (humans, environment) by technologies. If new technologies are safe at the present moment are there are guarantees that there will be no jeopardy in the future. Many of new technologies are closely connected with each other and it is extremely difficult to calculate all possible risks and benefits taking into account a big amount of unknown components. Risk and benefit calculation is not an easy task not only because there can be not enough information or knowledge about them but also because the expert conclusions can vary significantly.

Society is scared of technology uncertainty because the concept of risk has become ubiquitous embracing not only health, security and environmental issues but also fundamental rights and freedoms, ethical and societal values.

For example, bioinformatics being connected with biology, computer science, information technology raises the questions of security of bioinformatics databases containing personal health information, ethical and legal issues of the usage of informatics technologies in public-health surveillance⁵.

Risks of technologies define limits of their existence. Human life and health, fundamental rights and freedoms, environmental safety can be regarded as a "lighthouse" for the regulation of new technologies and their legitimacy. One of the ways to decrease the risks of new technologies is the creation of an effective legal mechanism that is able to maximize their benefits and minimize the risks and to provide a balance between social and ethical values and freedom to scientific research and innovation.

Sometimes it is not clear how to determine not only what areas can be affected by new technologies but also who can cause damage and should be responsible for it. The example is robotics technology.

Ugo Pagallo discovers the issues of robotic liberation, the full-fledged personality of robots, restricted personhood of robots for the reasons of civil and criminal law; and investigates whether robots should be or

³ R. Brownsword, M. Goodwin, 'Law and the Technologies of the Twenty – First Century: Text and Materials' (UK: Cambridge University Press 2012) 5

⁴ G. Barbiroli, 'The Dynamics of Technology. A Methodological Framework for Techno-Economic Analyses' (The Netherlands: Kluwer Academics Publishers 1997) 47

⁵ Jorge, L. Contreras, J. Cuticchia, 'Bioinformatics Law. Legal Issues for Computational Biology in the Post-Genome Era' (USA: ABA section of Science & Technology Law 2013) 157-176, 191-208

should not be deployed in accordance with the aim of moral, political and economic fields, legal challenges facing the “laws of robots”⁶.

Usually technologies are not emerging totally mature; on the one hand, it complicates the assessment of risks and benefits, on the other hand, the time of their “immaturity” gives to the law the possibility to discover new technology and to adapt to its needs if necessary. Thus, the technology assessment should be prepared as early as possible. Further is provided the description of the investigation of electricity risks and a time period that was necessary for conducting it.

When electricity was first introduced in the 1880s the public was apprehensive. By the 1930s transmission lines became symbols of industrialization and modernization. By the late 1960s and early 1970s individuals, governments, scientific and public health communities, the electric utility industry began to express increasing concern about the effects of electric and magnetic fields. In the mid-1960s scientists conducted laboratory experiments dealing with the effects of electricity on humans and animals. Until the late 1970s researches focused on the effects of electric fields around transmission lines. By the early 1980s an increasing number of epidemiological studies reported about connection between cancer and residential and occupational environment. By 1979 concern among the public, regulatory and technical representatives about possible health effects from electric and magnetic fields increased, precipitating additional research efforts and regulatory activity in the 1980s. Mounting fear and public activism caused delays in licensing and construction of major transmission facilities and as a result by December 1988 several states set limits on power line electric field intensity. New York was the first state to consider restricting distribution line⁷.

Even taken into account not the period of introducing the electricity in 1880s but the period when its transmission capacity increased in 1930s this brief historical review shows that it took around sixty years to realize and to estimate possible risks of electricity. Nowadays together with creating sophisticated technologies it is necessary to create techniques and tools to calculate their risks using the achievements of modern sciences more quickly. Technology assessment issue is regarded is the third paragraph of the article.

2. Transition from technology to innovation policy

The paragraph starts with the description of energy policy in the European states and of the energy crisis of 1973-1974 inasmuch as high dependence on energy and damage caused by conventional energy promoted a range of innovations in different fields and stimulated technology development.

It was energy that held one of the key positions in the European states after the Second World War. Because of the great need for energy European policy-makers focused in this sector as an area for urgent development of common policies and coordinated actions. This is reflected in the fact that two of the three treaties dating from the 1950s were directed at the energy sector (the Treaty establishing the European Coal and Steel Community in 1951 and the Treaty establishing a European Atomic Energy Community in 1957)⁸.

After overcoming the circumstances of the Second World War the European states could reach the new frontiers of economic and energy development that were put in jeopardy when the energy crisis of 1973 – 1974 struck down.

The oil crisis played a key role in producing the crash of 1974, which marked the end of a golden era of world trade and the beginning of a decade of stagnation and mass unemployment⁹.

There was another consequence of energy crisis for Europe. The energy crisis revealed the vital necessity of searching alternative to conventional energy and diversification of supply in order to provide energy security and independence. First come recognition of necessity to reduce dependence on oil-producer countries including by means of development of indigenous sources of energy and renewable energy.

⁶ U. Pagallo, 'The Laws of Robots. Crimes, Contracts, and Torts' (Dordrecht: Springer 2013) 6-7, 45-73, 147-179

⁷ W. Leiss, C. Chociolko, 'Risk and Responsibility' (Canada: McGill-Queen's University Press 1994) 88-99

⁸ Martha, M. Roggenkamp, A. Rønne, C. Redgwell, I. Del Guayop, 'Energy Law in Europe. National, EU and International Law and Institutions' (Oxford: Oxford University Press 2001) 214

⁹ G. Paul, 'A History of Contemporary Italy. Society and Politics. 1943 – 1988' (London: Penguin Group Penguin Books Ltd. 1990) 352

One of the ways for solving the consequences of the oil crisis and economic depression was seen in technological development.

According to the abovementioned "Demand Pull" theory necessity is the mother of invention: the impetus to development of new renewable energy technology was given by the necessity to solve the consequences of the energy crisis. Another factor promoting the development of renewable energy was the necessity of the environmental protection because together with expectations that new technologies could lead to economic recovery appeared recognition that they can lead to depletion of natural resources and can cause damage to environment. The concept of planet with unlimited nature resources was replaced by the concept of sustainable development and encouraged the development of innovations able to increase energy efficiency and to make energy technologies more safety to the environment.

Energy security and environmental protection are still one of the factors promoting innovations. The innovations in these areas are required also because the potential of global warming and climate change to stimulate conflict disasters has been realized. Climate change has become an important element of human and environmental security¹⁰.

Coming back to the technology policy development it should be stated that the role of the research and technological development policy changed in 1980 when the evolutionary and institutional economic theory reevaluated the understanding of the importance of technological innovation for economic development¹¹.

1990s was a very dynamic period of the European integration not just because of opening markets by also because of creating conditions for increasing competitiveness, stimulating growth and decreasing unemployment rates. The scope of the European integration has expanded considerably and encompassed directly or indirectly all spheres of policy-making including research and innovation policy¹².

By the mid-1990s the transition from a technology policy towards an innovation policy was regarded as a new innovation paradigm. This transition relies on a new theoretical conception of the innovation process. This conception presumes that innovation is not a linear process starting with a scientific discovery and ending in its industrial application, but is a more complex process involving social learning and organizational change. This new approach to the nature of the innovation process makes an emphasis not on the knowledge itself but the "success" that a new knowledge had in a social and organizational context. Innovations are so because they are socially relevant¹³.

Innovation is a complex phenomenon regarded as a source of social and economic prosperity and embracing not only technology and research aspects but governance challenges; legal issues including intellectual property rights, education and training, standards; the issues of human values and social trust in respect to science.

Innovation policy became one of the central elements of Lisbon Process and nowadays continues to play an important role in the European Union. The "Innovation Union" is one of the flagships provided by Europe 2020 Strategy for smart, sustainable and inclusive growth. It advocates a strategic and integrated approach to research and innovation that would lead to economic recovery and reduce of unemployment and development of the European approach to innovation able to face major economic, energy and societal challenges and to increase competitiveness. It is aimed at improving framework and access to finance and attraction investment for research and innovation.

A multifaceted character of the innovation policy causes certain difficulties in its development. The development of innovation policy is obstructed by absence of a system approach to policy and regulation, complexity and overflows of models and mechanisms of innovations, lack of transparency and clarity,

¹⁰ P. Katona, John, P. Sullivan, Michael, D. Intriligator, 'Global Biosecurity. Threats and responses' (USA: Routledge 2010) 116-117

¹¹ Peter, S. Biegelbauer, S. Borrás, 'Innovation Policies in Europe and the US. The new agenda' (Great Britain: ASHGATE 2003) 1-2

¹² D. De Bièvre, C. Reynolds, 'Dynamics and Obstacles of European Governance' (UK: Edward Elgar Publishing 2007) 3

¹³ S. Borrás, 'The Innovation Policy of the European Union. From government to Governance' (UK: Edward Elgar 2003) 15, 183 - 184

bureaucratic burden, unfavorable framework in promotion of ideas to the market because of low financing; costly patenting; market fragmentation; outdated regulations and procedures¹⁴.

As stated, the major challenges the European Union is facing today are climate changes and energy security and they require development of renewable energy technologies. But nowadays the renewable energy technologies have become so mature that their future prospective development requires innovations in their financial and regulatory spheres more than in technologies themselves.

Innovations are required in order to ensure the flexibility and security of the European energy system for decreasing costs of the energy infrastructure and preparing it for much larger amounts of renewable energy; to provide the continuity of electricity supply; rationalize demand for infrastructures through cost-effective balancing of renewable electricity, enable balance between multiple renewable energy source locations, for example, for linking offshore wind farms; development of market environment for consumers; ocean energy development¹⁵.

Future development of renewable energy technology requires creation of favorable market environment and revealing of gaps between technologies and the market. The difficulties when introducing renewable energy to the market and its commercialization are explained mainly by high cost of renewables. Innovations in financial and economic mechanisms are expected to provide competitiveness of renewable energy with conventional one in the market.

One of the most significant programs aimed to promote research and innovation including in energy field is Horizon 2020. One of its specific objectives is the transition to a reliable, affordable, publicly accepted, sustainable and competitive energy system, aiming at reducing fossil fuel dependency in the face of increasingly scarce resources, increasing energy needs and climate change. The activities in energy sphere under the Program are reducing energy consumption and carbon footprint by smart and sustainable use; low-cost, low-carbon electricity supply; a single, smart European electricity grid; building Intelligent Energy Europe, funding framework for energy research and innovation¹⁶.

3. Regulatory innovation

Previously was described the transition from technology to innovation policy. As an umbrella policy innovation embraces not only technology but also law, governance, and society.

In the times of innovation era do we need traditional legal regulation or new regulation should be adopted. How do the law and governance can be in time with new technologies and be connected with them? Numerous calls for new regulation, better regulation, and smart regulation are signals of inefficiency of traditional regulation not only when regulating emerging technologies but dealing with the challenges of the present. Innovation regulation is the result of the increasing necessity to correspond to global economic, social, energy and environmental issues and to adapt the regulation to changing reality.

Regulatory innovation is understood to be the use of new solutions to address old problems, or new solutions to address new problems. One of the dominant images of innovation regulation is that it is a matter of refining the technologies of regulation: the search of better tools of governance, the development of 'smart regulation'. Regulatory innovation is characterized by 'newism'. Regulatory innovation should involve analyzing not just the enactment of ideas, but their impact¹⁷.

¹⁴European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Europe 2020 Flagship initiative: Innovation Union' COM(2010) 546 final [2010] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0546&rid=241>

¹⁵European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Energy Technologies and Innovation' COM (2013) 253 final [2013] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0253&rid=226>

¹⁶ European Parliament and the Council, Regulation (EU) No 1291/2013 of the European Parliament and the Council of 11 December 2013 establishing Horizon 2020 – the Framework Program for Research and Innovation (2014 - 2020) and repealing Decision No 1982/2006/EC [2013] at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1291&rid=5>

¹⁷ J. Black, M. Lodge, M. Thatcher, 'Regulatory innovation. A comparative Analysis' (UK: Edward Elgar Publishing 2005) 3-7

Smart regulation focuses on searching the variants to combine various institutions and techniques, provides the combination of instruments that are the most appropriate in a given situation and designs strategies that mix instruments and institutional actors for achieving optimal effect. Smart regulation moves beyond state control and looks to mixes of control methods applied not merely by public bodies but by other actors including trade associations, pressure groups, corporations and individuals¹⁸.

Regarding innovation regulation as a system it is necessary to mention that as a system it is highly structured. And its efficiency at both local and national level depends on the type of institutions used to search for questions, collect data, apply creative effort, and distribute benefits¹⁹.

These concepts of regulation innovation demonstrates that the innovation regulation is a complex system that should be applicable to rapidly changing conditions; this applicability can be achieved by means of combinations of different forms of regulation such as centralized or decentralized, command-and-control, flexible, legislative or not. There is no single approach to regulation of innovations as well as there is no guarantee that regulation tools that used to be effective in regulation of one emerging technology would be effective when applying them to another one. The essence of innovation process is rather experimental and the essence of innovation regulation appeared to be very experimental as well.

Flexible innovation regulation mechanisms are aimed at achieving a wide array of goals: support of technology development, protection of human health and environment, increasing benefits, maintaining public trust. Flexible regulation is supposed to adapt better to changing environment.

Regulation of new technologies by means of soft law can be more preferable than applying hard law in situations when soft law in fact appears to be more effective, mainly in the fast changing and technology driven environment when it is necessary to reach agreement quickly. The flexibility of non-binding legal instruments can deal better with uncertainty and allows more active participation of non-state actors, promotes transparency, and facilitates the diffusion of knowledge and information²⁰.

When the technologies become more mature soft law can be “crystallized” into hard law²¹. Thus, innovation regulation has to combine continuity (in order to preserve the essence and value of law from making it too soft and flexible) and changeability to new circumstances.

Adapting legal mechanism to regulation of innovations means not only implementation of soft law techniques capable to deal with a great amount of uncertainties but to involve different stakeholders. Innovation regulation includes many actors: legislators, scientists, researches, governmental and non-governmental organizations, citizens and other stakeholders. Their wider interaction can maintain public confidence, diffuse information concerning different aspects of innovations. Nowadays participation of different stakeholders in debates about governing new technologies, freedom of information, and transparency in decision-making are regarded as an effective instrument of innovation regulation.

As far as one of the major problems of new technologies is uncertainty concerning their risks another way to increase the effectiveness of regulation of new technology is to create a mechanism able to prevent and minimize risks of technologies, for example by means of technology assessment.

Technology assessment was developed as an element of legislative policy making in the United States in the early 1970s with the creation of the Office of Technology Assessment. Technology assessment refers to the systematic assessment and evaluation of the positive and negative impacts of technology and is defined as an applied process that considers the societal implications of technological change in order to influence policy to improve technology governance. This admittedly broad definition captures the essence of the process, while leaving room for its forms and numerous methodologies. There are three types of technology assessment. Traditional technology assessment serves as an early warning function regarding the potential impacts of technologies for policy makers and relies primarily on analysis performed by technical experts. Initially focused upon economic and technological impacts, over time it expanded in some applications to

¹⁸ S. Weatherill, 'Better Regulation' (Portland: Hart Publishing 2007) 33

¹⁹ M. Considine, Jenny, M. Lewis, D. Alexander, 'Networks, Innovation and Public Policy. Politicians, Bureaucrats and the Pathways to Change inside Government' (UK: Palgrave Macmillan 2009) 4

²⁰ G. de Búrca, J. Scott, 'Law and New Governance in the EU and the US' (Oxford and Portland, Oregon: Hart Publishing 2006) 74

²¹ E. Kwakwa, 'Globalization and International Organization' (Great Britain: TJ International Ltd 2011) 382

include environmental, social and cultural impacts. Participatory technology assessment emphasizes the social nature of technology and involves citizens into the process, providing opportunities for them to learn and to share their opinions about technologies. Constructive technology assessment focuses on the earliest stages of technological change, involving scientists, regulators, workers, users and the broader public in the development and design of technology. Its variants are interactive and real-time technology assessment²².

Regulation can increase its effectiveness by means of anticipatory technology assessment on the earliest stages of technology development, dismissing information about it that can help the stakeholders to understand risks and benefits and to prepare the market to the introduction of new products if necessary.

Summing up, the most effective strategy for innovation regulation can be found taking into account the peculiarities of innovations, legal, social and political environment in which innovation is developing.

Regulatory intervention in the development of new technologies should be effective (it should have the intended effect), economical (there should be no resource that is surplus to regulatory requirement), and efficient (there should be an optimal gearing between regulatory input and output)²³.

Conclusions

Because of their autonomous character for a long period of time the development of technology was covered by its own rules but future stable development of technology in isolation from its comprehensive regulation is impossible. Nowadays the technologies have become so mature that their progressive development requires innovations not as much in technology itself but in its regulation. Technologies require new approaches to their regulation, though there could be no universal approach to regulation of new technologies.

Risk is an integral part of innovation. Further development of high-tech society is impossible without preventing risks and increasing benefits of innovations.

Looking for effective legal regulation it is necessary to underline that law is not a “panacea” for the challenges the world is facing today. Law should be regarded as only one element of innovation regulation together with governance, society, ethics, and science. It is possible to increase the efficiency of law involving it at the earliest stages of innovation process, including by legal assessment of emerging technologies. Wider participation of stakeholders in innovation regulation can share responsibility for decision-making and regulation between all the participants of innovation process. Thus, not only legislator and the government would be responsible for innovations, their risks and other outcomes.

In order to find out an effective correlation between innovations and law it is necessary to apply the achievements of various disciplines such as economics, political science, sociology, natural sciences. The law itself without cooperation with other disciplines and science is not able to create the efficient regulation environment.

Viewing law as an “empty shell”²⁴ we can fill it with any components that are able to provide development of law simultaneously with technologies.

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²² Gary, E. Marchant, Kenneth, W. Abbott, B. Allenby, ‘Innovative Governance Models for Emerging Technologies’ (USA: Edward Elgar Publishing 2013) 108-135

²³R. Brownsword, Morag Goodwin, ‘Law and the Technologies of the Twenty – First Century: Text and Materials’(UK: Cambridge University Press 2012) 61

²⁴ D. Patterson, ‘Blackwell Companions to Philosophy. A Companion to Philosophy of Law and Legal Theory’ (US: Blackwell Publishers 1996) 281

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CONVERGENCE OF MEASURES OF CRIMINAL LAW

Kateryna Novikova¹

Abstract

The report focuses on the improvement of the criminal legal means of responding to crime. They are studied from the angle of converging trends, which consist of the interpenetration and mutual enrichment of different independent criminal-law measures. In particular penalty of restriction of liberty under the Criminal Code of Ukraine is investigated as a result of convergence, as well as similar penalties to it and other measures of criminal law, provided foreign criminal laws.

In the course of their comparative study it was found that the current criminal laws of different countries of the world provide a total of three models of measures for restriction of freedom. The first of these is the isolation of the convict from society with the least possible amount of restriction of human rights. Second - it is the abandonment of the convict in society and charge with the best possible restriction of human rights. Finally, the third is the conjugation of the first two in certain proportions.

It is proved that as a result of converging trends of the measures of criminal law the most effective model of restraint of liberty ceases is the third of the above. On this basis, it is proposed to change the content of this form of punishment in the Criminal Code of Ukraine. In addition, the result of the convergence of individual measures of the criminal law ceases is the appearance in the criminal laws of a number of other measures of criminal law: safety measures, preventive measures, etc. Their content should consist of reasonable and non-punitive conjunction punitive measures, which is one of the priorities of science of criminal law.

Keywords: action of criminal law; convergence; comparative criminal law; the effectiveness of criminal law; purpose of criminal law measures; human rights; restriction of human rights.

Introduction

In modern criminal law the trend to convergence measures of legal influence becomes more and more distinct. It is that the laws of many European countries as for criminal offense effects, new measures appear, which include components that previously belonged to other measures. In the result of this trend there are no certain criminal activities in "pure" form left nowadays. They are characterized by mutual mixing, acquisitions, mergers and transformations. The same situation occurs with the main event of criminal law - punishment – as modern trends indicate that the majority of its types contain different combinations of punitive, corrective and preventive restraints. In this regard, the task of the science of criminal law is to give a proper assessment of this theoretical trend and on the basis of a systematic comprehensive study to develop proposals to improve existing measures and effective introduction of new ones. The art of the wise legislator is not the permanent law reform by "trial and error", but consistent movement toward legislative consolidation of reasonable

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proposals of the researchers. Criminal legal policy of the state as an activity against crime by means of criminal law should be based on a theoretically developed concept that finds support at the political level².

1. Comparative analysis of measures of legal influence

The inter alia appeal to the experience of foreign countries has proved to facilitate the process, especially when it comes to implementing the national law of new penalties that could become a good alternative to imprisonment. In this regard, the modern comparative trend has been developing in jurisprudence since the nineteenth century³, which makes it possible to study not only similar rules and institutions of different legal systems, but also suggests ways to improve them. Study of the legislative provisions of a number of foreign countries, primarily in Europe, shows that most clearly the trend towards convergence of criminal activities can be seen on the example of restriction of freedom. In many states, one way or another, measures are to limit freedom, there are various features of their adoption and use. It is found that under the restriction of freedom in the interpretation of the legislators from different countries refers to various activities. Moreover, investigating criminal codes, including those of the European countries which do not contain penalties entitled "restriction of freedom", one can find a similar set of measures under another name. It is necessary to pay attention only to the nature of the activities and not on the legal nature, because of the same convergence trend the line between punishment and other measures of criminal law, including security measures or educational measures for minors etc is difficult to be traced.

Exploring not only different legal systems, but also different legal families, one can find more common grounds than different ones including those as for the measures of legal influence⁴. This, in our opinion, indicates the possibility of a clear statement of the complete mismatch in the legal institutions of different legal systems and the inability to compare them. The situation is quite opposite due to the general trend to move away from so-called "single-track" Criminal Law, to the system of "multi-track" of legal effect on crime. Often "multi-track" appears in the presence of two types of criminal law activities, rarely three or four types⁵. This in turn affects the structure of the criminal laws of the respective countries, most codified criminal laws of foreign countries provide separate punishment and security measures⁶, in some cases, differentiating them into general and special security measures applied to a range of people⁷. Some laws in the system of criminal legal effect appear social protection measures and educational measures of legal influence⁸. Sometimes the legislator does not differentiate measures of legal influence groups, and provides various security measures, penalties etc. (for example, in Mexico the Criminal Code - 18 provide the list of the activities in a single section of the criminal code)⁹.

This rich experience and ambiguous criminal law in foreign countries constantly creates conditions for the legislators to borrow certain provisions for their domestic national legislation. Legislative mistakes should also be regarded as they do not always properly use the results of comparative studies. Most often they just paste certain provisions of international law into national law without evaluating them systematically, without

² For more details, see: Сучасна кримінально-правова система в Україні: реалії та перспективи: монографія / Ю. В. Баулін, М. В. Буроменський, В. В. Голина та інш., під загальною редакцією академіка НАПрН України Ю. В. Бауліна. – К.: ВАІТЕ, 2015.–С. 188

³ For more details, see: Давид Р., Жоффре-Спинози К. Основные правовые системы современности / Пер. с фр. В. А. Туманова. – М.: Междунар. отношения, 2009. – С.15.

⁴ Флетчер Дж., Наумов А. В. Основные концепции современного уголовного права / Пер. с англ. Л. А. Нежинской, Е. Непомнящей. – М.: Юрист, 1998. – 512 с. (С. 8)

⁵ Щедрин Н.В. О «многоколейности» российского уголовного права // Системность в уголовном праве. Материалы II Российского Конгресса уголовного права, состоявшего 31 мая – 1 июня 2007 г. М.: ТК Велби, Изд-во Проспект, 2007. – С.540.

⁶ E.g.: Criminal code of the Republic of Moldova // Режим доступу: <http://www.legislationline.org/documents/section/criminal-codes>

⁷ E.g.: Criminal code of the Republic of Romania // Режим доступу: <http://www.legislationline.org/documents/section/criminal-codes>

⁸ E.g.: Уголовный кодекс Литовской Республики / В. Павилонис, Н. И. Мацнев, А. Абрамовичюса, А. Дракшене, В. П. Казанскене. – СПб.: Юридический центр Пресс, 2003. – 470 с.

⁹ E.g.: Código penal federal los Estados Unidos Mexicanos // Режим доступу: http://www.oas.org/juridico/spanish/mesicic3_mex_anexo7.pdf

thinking whether those provisions are agreed with the general principles of the national law, their interaction with other rules of the legal system.

2. Convergence of measures of legal influence

In my view, convergence measures of legal influence, their mutual intersection and enrichment, which resulted in some actions of criminal law to obtain meaningful signs of other measures, is one of the most important trends of modern criminal law. It contributed to the emerge of such punishment as restriction of freedom, service restrictions for military personnel and others. The foregoing also applies to other criminal response to crime, safety measures, educational measures and others. These events in the early years and decades have shown relatively high efficiency, which in turn indicates a positive result of the convergence trend.

The convergence theory development seems to be continuous. For example, the restriction of freedom, being just kind of punishment, may be reformed in the direction of the convergence of the two types of execution, each of which by itself is inherent to other criminal-legal means. The first - a custody in the penal institutions with minimal restrictions aimed at isolating from society. Second - leaving convicted in society by applying to him the harshest restricting measures. In this model constraints will be an independent separate form of punishment with a specific set of restraints of rights different from those referring to imprisonment. This will bring it from the category of species in prison and turned into his real alternative.

Thus, the restriction of freedom in this model will be a drawn (combined) form of punishment that combines in itself two types of rights limitation. The first type would be holding a person in the institutions with minimal rights limitation while restricting their freedom. Whether holding people in these institutions is carried out with the assistance of a person for labor or not, the question is solved only by the court. This alternative attraction to work creates conditions for full implementation of the actual verdict. After all, today in Ukraine about 20 % of those sentenced to restriction of liberty, the sentence of a mandatory involvement of a person to work is never performed¹⁰. Due to economic problems solving the problem of unemployment in our country could not be found for a long time, and it can hardly be considered that appropriate penalties which require element of forced labor can be performed, because at this time tens and hundreds of thousands honest, experienced and highly skilled workers cannot provide themselves with work.

The second type can be employed in the rest of the period of time during which the person has an opportunity to maintain their social status, position and opportunities for personal development. A person is not removed from society, and continues activities (this can be education, work, social activities and voluntary and others). In addition, he is imposed restrictions on the maximum specific set of rights, restriction of freedom of choice of residence; kind of employment (career change, training, etc.) and the rest, including the organization of free time (not attending events, entertainment sites, etc.)¹¹. This combination in one form of punishment of two types of action (serving), with under one of them the sentenced is isolated from society, while the second has, in my view, a positive effect in achieving the objectives of punishment and will contribute fully to the task of re-socialization of the person.

Another area of convergence of criminal law development in Ukraine was the appearance of the institute of so-called "other measures criminal law." This institution is relatively new for our criminal law, although some of these measures (eg compulsory medical measures, etc.) has been known for a long time. In its present form

¹⁰ Шинальський О. Додержання вимог закону під час виконання кримінального покарання / О. Шинальський // Вісник прокуратури. – 2007. – № 6. – С. 9.

¹¹ For more details, see: Новикова Е. А. Сущность ограничения свободы по законодательству зарубежных стран // Юридическая наука и практика: Вестник Нижегородской Академии МВД России. – 2014. – Нижний Новгород. – № 2 (26). – С. 246-249.

this institution was formed in 2014 by four laws that introduced amendments to the Criminal Code¹². Thus, in the criminal law of Ukraine got the embodiment of one of the main trends of modern criminal law in many European countries is the emergence of other than criminal liability measures to persons who commit socially dangerous acts.

Some of the activities covered by this new category embodied the right combination of restrictive and other properties known to other independent criminal-law measures. For example, compulsory medical measures (Articles 93-95 of the Criminal Code of Ukraine) is essentially a combination of two components. The first - a person is isolation from society, which is inherent in all kinds of punishment, deprivation of personal freedom. The second - a person is forced to be provided medical care, which is not peculiar to penalties, aimed at improving the health of the person and safeguard society from the possibility of new attacks by such person. This measure by the court can be applied to persons who committed socially dangerous acts in state of insanity (part 2 of Article 19 of the Criminal Code of Ukraine), or a crime in a state of diminished responsibility (part 2 of article 20 of the Criminal Code of Ukraine) or sick with a mental illness before he was rendered a judgment (part 3 of Article 19 of the criminal Code of Ukraine) or while serving a sentence (part 1 of Article 84 of the criminal Code of Ukraine). It's absolutely clear that none of these components can be taken alone, in isolation from the others, not would ensure proper efficiency in criminal law response to attacks committed by such persons. Only their convergence in a single event of criminal law and capability of being an appropriate social response to the infringement committed by named persons.

However, convergence cannot be arbitrary, unreasonable and unlimited. Some measures of legal influence (e.g. penalty of a fine or life imprisonment) can barely cover other penalties or other measures of criminal law. Obviously, they are destined to a short term stay in a "classic" form.

Another level of criminal legal convergence is simultaneously applied to the same person who committed the crime, different in content of different measures of criminal law. In this case we are dealing not with a combination under the same different properties and applications of acts to the same person for different properties of criminal law. This level of convergence has long been known in criminal legislation of Ukraine. For example, it is still there in the possibility of simultaneous appointment of one or more additional penalties (Article 52 of the Criminal Code of Ukraine). Certainly, the simultaneous combination of different punitive and corrective properties of basic and additional penalties more effectively promotes the objectives of punishment, provides a lasting effect on their impact on the person who committed the crime¹³.

However, not only the traditional combination of basic and additional punishment appears at this level of convergence of criminal activities in Ukraine. At the present stage of development of domestic criminal law college impunity is widely used while using other measures of criminal law¹⁴. For example, institute of release on probation is widely used in Ukraine (Articles 75-79 of the Criminal Code of Ukraine), which is a kind of Ukrainian analogue of European probation (although the law on probation adopted in Ukraine exists independently). However, the person conditionally released from punishment, subject to (be subjected to) the whole complex variety of measures, some of which are covered by the content of criminal responsibility, others-are beyond. In particular, such a person is in the status of a criminal record, with all restrictions arising from this¹⁵. In addition, the court, in accordance with Article 76 of the Criminal Code of Ukraine has the right to

¹² For more details, see: Про внесення змін до Кримінального та Кримінального процесуального кодексів України стосовно виконання Плану дій щодо лібералізації Європейським Союзом візового режиму для України: Закон України від 18.04.2013 // ОВУ. – 2013. – № 46. – Ст. 1629; Про внесення змін до деяких законодавчих актів України щодо виконання Плану дій щодо лібералізації Європейським Союзом візового режиму для України стосовно відповідальності юридичних осіб: Закон України від 23.05.2013 // ОВУ. – 2013. – № 47. – Ст. 1686; Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України: Закон України від 15.04.2014 // ОВУ. – 2014. – № 36. – Ст. 957; Про внесення змін до деяких законодавчих актів України у сфері державної антикорупційної політики у зв'язку з виконанням Плану дій щодо лібералізації Європейським Союзом візового режиму для України: Закон України від 13.05.2014 // ОВУ. – 2014. – № 45. – Ст. 1182.

¹³ For more details, see: Тютюгин, В. И. Некоторые проблемы повышения эффективности применения дополнительных наказаний // Проблемы социалистической законности. Вып. 20. – Х. : Вища шк. / отв. ред. В. Я. Тацій, 1987. - С. 118-125

¹⁴ For more details, see: Письменський Є. О. Теоретико-прикладні проблеми звільнення від покарання та його відбування за кримінальним правом України / За наук. ред. О. О. Дудорова. – Луганськ: РВВ ЛДУВС ім. Е. О. Дідоренка, 2014. – 728 с.

¹⁵ For more details, see: Голина В. В. Судимість. – Х.: Харків юридичний, 2006. – 384 с.

put it on any combination of the following rights limitation measures as mandatory: 1) ask publicly or otherwise forgiveness from the victim; 2) do not leave the Ukraine for permanent residence without criminal executive inspection; 3) notify the criminal executive inspection of change of residence, work or study; 4) periodically appear to register in the penal inspection; 5) to undergo treatment for alcoholism, drug addiction or diseases that endanger the health of others. Finally, to such persons pursuant to Articles 96-1 and 96-2 of the Criminal Code of Ukraine may be applied such a measure criminal law as special confiscation of property.

Thus, at this level of criminal legal convergence manifests combined effect of different content on criminal measures applied to the same person to get the most out the objectives facing criminal law.

Conclusions

Thus, one of the most important tasks of science of criminal law at the present stage of theory development are reasonable conclusions and proposals on possibilities and limits of acceptable convergence measures of legal influence. Only then will the legislator have an opportunity not thoughtlessly adopt foreign role model, and develop domestic criminal law based on theoretically grounded concept that covers, including direction on convergence measures of legal influence. That is why we consider it possible to state once again that the legislative implementation of penal policy should be based solely on previous fundamental scientific research to be scientifically grounded, theoretically modeled, predicted, verified and tested¹⁶. That science is to produce and justify the strategy and tactics of criminal law, and it just worked out ideas and formulated proposals on this basis can become so a product that can get political support and of the law.

As modern criminal legislation is significantly and not always reasonably affected by political programs, aims and convictions and the difficulties arising today are often settled exclusively by criminal and legal measures of influence. Especially it can be traced in the attempts to resolve complex political, economic, social or even historical and conceptual issues by means of criminal legislation¹⁷. It's not always taken into account that the means of criminal law are connected with the most significant restrictions of rights and freedoms of the human person and citizen so they should be used solely as ultima ratio in countering the most socially dangerous acts which can cause significant damage to social relations safeguarded by the law¹⁸.

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¹⁶ Правова доктрина України : у 5 т. Т. 5 : Кримінально-правові науки в Україні: стан, проблеми та шляхи розвитку / В. Я. Тацій, В. І. Борисов, В. С. Батиргарєєва та ін. за заг. ред. В. Я. Тація, В. І. Борисова. – Х. : Право, 2013. – С. 56-71.

¹⁷ Баулін Ю., Пономаренко Ю. Наука. Політика. Закон // Юридичний вісник України. – 2009. – № 43. – С. 6.

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MINIMUM WAGE AND FREEDOM OF CONTRACT: AN INTERDISCIPLINARY PERSPECTIVE

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Abstract

Freedom of contract is one of the core principles of contract law. However, when it comes to employment contracts, several restrictions to this principle are legally imposed. One of them relates to the price of labour, since most of European national laws set forth a minimum wage. This paper analyses the case for implementing such a rule. The aim is to draw conclusions on whether or not a legally imposed minimum wage is justified and desirable and, if so, if its rate should be relatively high. Freedom of contract being a fundamental principle, limits on it must be necessary or, at least, beneficial for society as a whole.

The analysis is made from an interdisciplinary perspective. From a legal point of view, it is necessary to determine whether or not fixing a minimum wage is a justified restriction of freedom of contract that the legislature can set forth. In the event it were decided that the legislature is competent to limit freedom of contract on a core term such as the price of labour, it should be addressed the question of its desirability. In this paper, this is studied taking into account a historical perspective, the point of view of ethics and morals, economic grounds, and also political and sociological reasons.

Keywords: minimum wage, freedom of contract, human rights, law and economics, state policy

Introduction

Freedom of contract is one of the core principles of contract law. However, there are areas of law where this principle has been severely restrained, such as labour law. Employment contracts are not a paradigm of *laissez faire* philosophy. When it comes to this type of contracts, one of the restrictions imposed in most of European countries affects an aspect that falls under the subject matter of the agreement, as the price of labour. Most of European national laws set out a minimum wage, and this paper analyses the case for it. The aim is to draw conclusions on whether or not a legally imposed minimum wage is justified and desirable and, if so, if its rate should be relatively high. The analysis is done from several perspectives, taking into account a few of the many lines of reasoning and arguments that might be offered.

Part 1 takes a legal point of view. It is widely admitted that limitations on freedom of contract must be justified, but what are the situations where a limitation is justified depends on the ideological convictions of each person. Therefore, it is necessary to take a stand on what are the grounds on which a legislature can restrict freedom of contract. If the conclusion is that restraining freedom of contract by fixing a minimum price of labour would be justified and that it would not violate basic individual liberties, then the question to pose is whether or not introducing a minimum wage is desirable. Part 2 offers a historical view – the reasons argued in its origins to introduce a minimum wage in the United States. Part 3 deals with ethical and moral arguments. Part 4 addresses the effects of the minimum wage on the economy. And part 5 stresses a few ideas related to politics and sociology.

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1. Legal analysis

It is an obvious truth that minimum wage laws are a clear restriction to freedom of contract, which is one of the main principles of contract law, if not the most important one. The question is on what grounds freedom of contract can be limited, and that is mainly an ideological issue.

Nowadays, the democratic standard seems to be the majority position. The Swiss voted to reject what it would have been the world's highest national minimum wage², but had it been approved, probably not many voices would have risen to say that the restriction on freedom of contract would be unjustified or illegitimate. The debate on the minimum wage is set in terms of mere preferences. Some people think it is good, some people think it is not. Some think a given national minimum wage should be higher, others lower. Each political actor, lobby or group supports a position and tries to persuade the legislature to translate that position into a law. But a legal approach allows a debate that is currently missing – whether or not a legislature is competent to fix a minimum wage in the first place. In other words, if the legislature can restrict freedom of contract on the price of labour, or if it would be an unjustified interference with basic individual rights.

There may be many reasons why the competence of the legislature to fix a minimum wage is not put into question. From my perspective, an underlying idea is encompassed in two United States Supreme Court cases of 1937 and 1938. With all necessary nuances due to the fact that the philosophical foundations of American constitutionalism cannot be translated into other parts of the world, there are some similarities between the end of the forty years of the so-called 'Lochner Era' (1897-1937) and the aforementioned democratic standard.

To start, let us recall the 1923 decision *Adkins v. Children's Hospital*³. In this case, the challenged law allowed a three-member board to analyse occupations where women and minors were employed, and determine a minimum wage for them. The goal was, in the particular case of women, to set a living wage in order for them to be maintained 'in good health and protect their morals'. In *Adkins v. Children's Hospital*, the United States Supreme Court declared that the law was unconstitutional because it unduly interfered with freedom of contract, one of the aspects of economic liberty. Freedom of contract basically means the liberty to enter into contracts and to bargain over the terms, such as wages. And while the Court admitted that freedom of contract was not absolute, the majority did not find that the restriction at issue fell in one of the grounds on which it could be limited. The Court said that the challenged law did not concern a 'business charged with a public interest or with public work'. It had not been enacted to respond to an emergency, nor to protect people under legal disability, nor to prevent fraud. And there were not any issues regarding public order and safety. The challenged law was deemed to be merely a price-fixing act. And, since women were capable of contracting for themselves and bargaining over the price of the services to be rendered, the restriction was not justified⁴.

Adkins v. Children's Hospital was overruled in 1937 by *West Coast Hotel Co. v. Parrish*⁵. The Court's approach changed. It found a minimum wage was a means to avoid the abuses the workers might suffer as a consequence of the 'unequal position with respect to bargaining power', as well as to ensure a living wage. That was considered a matter of public interest, and the Court found that it was justified for the legislature to intervene and correct the outcome of the market process. The change that represented *West Coast Hotel Co. v. Parrish* was complemented in 1938 by *United States v. Carolene Products Co.*⁶, a case where the Supreme Court did mainly two things. First, it changed the presumption in favour of liberty for a presumption in favour of government intervention. Regulation restricting liberty of contract did not have to find a proper justification to be constitutional. It was sufficient to find 'some rational basis within the knowledge and experience of the

² <http://www.bloomberg.com/news/articles/2014-05-18/swiss-reject-world-s-highest-minimum-wage-srf-projection-shows>.

³ 261 U.S. 525 [1923].

⁴ D. N. MAYER, 'Liberty of Contract: Rediscovering a Lost Constitutional Right' (Washington, D.C.: Cato Institute 2011) 70-71, 77-82.

⁵ 300 U.S. 379 [1937].

⁶ 304 U.S. 144 [1938].

legislators'. Secondly, it set out a so-called 'double standard' – economic liberties and property rights would receive less protection than other personal or 'preferred' liberties⁷.

As MAYER has pointed out, some progressive scholars think that the Supreme Court was doing 'judicial activism' in favour of a *laissez-faire* ideology during the Lochner Era. This accusation can be traced back to Justice OLIVER WENDELL HOLMES' dissent in *Lochner v. New York*⁸. However, MAYER explains that this opinion is wrong, and that, on the contrary, judicial activism took place when the Court upheld New Deal legislation and adopted a less favourable approach to freedom of contract. The author stresses that, had the Court applied a hardcore classical liberal political and economic philosophy during the Lochner Era, there would have been many more laws struck down. What the United States Supreme Court did was, at most, to establish a presumption in favour of liberty. Even in decisions favourable to freedom of contract, the Court underlined that this freedom was not absolute, pointing out numerous grounds on which the legislature could intervene and limit it. There was a distinction between 'reasonable' restrictions of freedom of contract – where restrictions were a means to reach goals such as the protection of public health, safety, order and morality, and 'arbitrary' restrictions – where the goal was a different one, discretionarily decided by the legislature⁹.

As I see things, if we really want to claim that our economic system has liberty as its guide, and if we really want to claim that liberty of contract is a core principle of contract law, it is not enough to make it a mere general principle or a presumption. Any legal act can declare freedom of contract a main principle, but if then the mandatory rules are numerous, the initial declaration loses any relevance. In fact, among the several reasons that explain the change in the degree of protection that liberty of contract received within American constitutionalism, it is especially important the fact that it was a 'general rule riddled with exceptions'¹⁰.

Admitting that liberty cannot be absolute, it must nevertheless be a real 'value of values'. For that purpose, I think it is necessary to return to classical liberal principles, aiming at undoing the change into the interventionist philosophy that is identified both in *West Coast Hotel Co. v. Parrish* and *United States v. Carolene Products Co.* But, given the fact that during the Lochner Era freedom of contract was a 'rule riddled with exceptions', and thus had in itself the seeds for its own fall, it would be appropriate to go beyond and reinforce its foundations.

An exhaustive exposition of the foundations that should be reinforced would require to go well beyond the scope of this paper. But, to sum it up, I would start saying that, whereas only legal rules enacted within a democratic system are legitimate, not every democratic rule is legitimate. There are provisions a majority cannot enact because they would not respect basic individual economic liberties. At the same time, these individual liberties make irrelevant the amount of 'common good' that a given rule may bring. The greatest good of the greatest number is a good standard to decide which one among several sets of rules should be approved, but not to decide if something can be regulated in the first place. To really claim that liberty is the 'value of values', the first premise must be the idea of self-ownership¹¹. And the second premise, that any act which falls under the individual dimension of the person and that causes no harm to others must not be forbidden by the legislature¹². With this in mind, the main task of a government is to protect life, liberty and property, and not to alter the results produced after people have acted according to their free will, pursuing their own ends by their own means.

I conclude that individuals should be free to sell their labour at the price they see fit. I do not think the labour of a person is a social element, and selling it on a lower or higher price causes no harm to others. Therefore, in my view, the minimum wage is a restriction of freedom of contract that is not sufficiently justified.

⁷ D. N. MAYER, 'Liberty of Contract: Rediscovering a Lost Constitutional Right' (Washington, D.C.: Cato Institute 2011) 110-111.

⁸ 198 U.S. 45 [1905].

⁹ D. N. MAYER, 'Liberty of Contract: Rediscovering a Lost Constitutional Right' (Washington, D.C.: Cato Institute 2011) 57-67, 115, 117.

¹⁰ D. N. MAYER, 'Liberty of Contract: Rediscovering a Lost Constitutional Right' (Washington, D.C.: Cato Institute 2011) 99-103.

¹¹ J. LOCKE, 'The Second Treatise of Government. An Essay Concerning the True Original, Extent and End of Civil Government and A Letter Concerning Toleration' (3rd edition, Oxford: Basil Blackwell 1976) 15 ('every man has a property in his own person; this nobody has any right to but himself'), 24 ('[man is] master of himself and proprietor of his own person and the actions or labour of it').

¹² J. S. MILL, 'On Liberty' (Harmondsworth, Middlesex: Penguin Books 1974) 163 ('the individual is not accountable to society for his actions in so far as these concern the interests of no person but himself').

Taking into account that this conclusion is based on ideological grounds that many people will not share, in the next parts I will try to explain why, even if legally fixing a minimum wage is a legitimate action, it is not desirable to do so.

2. The origins of the minimum wage

A historical perspective can be useful because by knowing the reasons argued in its origins to implement a minimum wage, as well as the effects which were pursued, one can take a stand on the matter. If those arguments and consequences are not shared, we would have an argument against the minimum wage. Due to the length of the paper, this part will deal solely with the case of the United States.

One of the facts typically referred to is that some of the first laws regarding a minimum wage were applied exclusively to women. The basis for this was that women were a collective that needed special protection from the government. Gender was considered a factor that made more probable to be exploited by employers. Besides this purpose, there were other reasons which were projected onto society as a whole. For some of its advocates, a minimum wage was thought to be a necessary tool to give stability to labour markets. This stability would be reached because workers would earn a fair retribution for their work. Another point in favour of a minimum wage was that it could be a tool to build a consumer society. The minimum wage would play the role of a 'living wage', that is, any employed person would earn a salary high enough to allow him to obtain a certain amount of goods and services. At the same time, fixing the price of labour could be useful for the development of certain regions whose economy was weaker. And it could come to strengthen collective-bargaining units, too. The government would give some power to these units to balance their weaker initial position in front of businesses, and then the bargaining process would go on but on more just grounds¹³.

To make the marketplace more homogenous was another of the arguments provided within the debate in the United States. FINN has presented the positions of the representatives of the northern and southern states in the United States Congress, noting the big differences between the economy in both parts of the country 'in terms of the occupational and industrial distribution of workers, wages, the cost of living, and transportation costs, among many other things'. To homogenise the markets, a minimum wage varying from region to region seemed to be a possibility. But if a minimum wage could serve as a 'living wage', as it has been said before, wage differentials would leave some people with an inferior standard of living¹⁴.

So far, the arguments provided for implementing a minimum wage seem to be reasonable. Some of them may be more convincing than others, but overall they look fine. However, there is also a darker side of the origins of the minimum wage, and this darker side includes racism. The case for minimum wage laws also rested in an attempt to block the competition of low-wage workers. That is, some of the defenders of the minimum wage did so with the aim of preserving their position on the market and excluding others from it. Racism does not necessarily have to play a role within this line of reasoning, since one can say that fixing a minimum wage was supported on the basis on protecting certain groups of population from others regardless of race considerations. But it is obvious than, when social groups are trying to protect their position at the expense of others, a certain degree of racism is likely to be present sooner or later. And that is what happened with the minimum wage.

LEONARD has defined 'eugenics' as 'a movement to improve human heredity by the social control of human breeding, based on the assumption that differences in human intelligence, character and temperament are largely due to differences in heredity'. In this context, it is not a secret that there were opinions in favour of restricting the access to the labour market to those who were 'unfit workers', a notion that included 'low-wage races'. When we talk about racism, it must be understood in a very broad meaning. As the mentioned author explains, race 'meant ethnicity or nationality, especially when distinguishing among Europeans, so that the English, or those of Anglo-Saxon ethnicity, were presumed to be a race distinct from, say, the Irish race or the Italian race'. Some authors favourable to the minimum wage considered that the effect they expected by implementing the floor price of labour – job losses, if it affected certain groups of population, would result in

¹³ O. M. LEVIN-WALDMAN, 'The Case of the Minimum Wage' (Albany, New York: State University of New York Press 2001) 7-8.

¹⁴ C. J. FINN, 'The Minimum Wage and Labor Market Outcomes' (Cambridge, Massachusetts: The MIT Press 2010) 11-12.

social gains. It would be a disincentive for immigrants, and some 'more fit workers' would avoid competition from the unfit or undeserving people¹⁵.

Nowadays, those who support a minimum wage do not base their propositions on eugenics and racist grounds. But if some people wanted a minimum wage for these reasons and we implement the policies they pushed for, we will get the results they looked for¹⁶.

3. Ethical and moral grounds

Another point of view to consider is that of ethics and morals. The minimum wage can be linked to the dignity of the individual and to human rights – to work in just conditions and to a just remuneration. But ethics and morals actually support a position against the minimum wage.

Article 23.1 of the Universal Declaration of Human Rights declares that 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. Then, article 23.3 states that 'everyone who works has the right to *just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity*, and supplemented, if necessary, by other means of social protection'. The connection between the minimum wage as a 'living wage' and the dignity of the individual is quite obvious. Even if it cannot be compared to slavery, working hard to receive a very low salary can be said to be exploitation. It is not very difficult to sustain the claim that every worker should receive a decent compensation.

But if we take a closer look, some difficulties will appear concerning the ethic and moral grounds for establishing a minimum wage. A minimum wage is a prohibition to sell labour for a lower price. That could go against the dignity of an individual that for whatever reason is willing to work at a wage inferior to the one legally imposed. If a person owns labour-power, and this person wants to sell it, forbidding the transaction is forbidding a free decision regarding an individual thinking about himself. In addition to that, forbidding that transaction means leaving a person out of the labour market for who knows how long, and maybe forever if it is a low-skilled worker. Thus, as an author has stated, 'if it is inhumane to outlaw the profitable employment of those workers whose skills are the least valuable, then the minimum wage is deeply inhumane'¹⁷.

Ethics and morals oblige us to point out another idea. If minimum wage is a means to ensure a decent life, there should be wage differentials. Within the same country, the minimum wage should be higher in those regions where the cost of living is higher. And these differentials should take into consideration not only geographic factors, but also subjective ones. If the goal of the minimum wage is to ensure an existence worthy of human dignity for the worker *and his family*, as it is established in article 23.3 of the Universal Declaration of Human Rights, the minimum wage rate should vary according to the number of dependent family members the worker has.

4. The economic standpoint

The standpoint from which the case for a minimum wage has been analysed the most is probably that of economics. As it has been noted in the part on the origins of the minimum wage, some macroeconomic features have been at the centre of the debate. But in this part the focus will be placed on just three effects that a minimum wage produces, at least when the model taken into account is that of a competitive market. First, a minimum wage raises unemployment. Second, it reduces competition. And third, it raises prices. These three effects do not seem desirable, so they suggest the best thing to do is to abolish the minimum wage.

¹⁵ T. C. LEONARD, 'Eugenics and Economics in the Progressive Era' [2005] 19 Journal of Economic Perspectives 207-208, 212-215. See also J. A. TUCKER, 'The Eugenics Plot of the Minimum Wage' [2015] February 10, 2015. Available at: <https://fee.org/articles/the-eugenics-plot-of-the-minimum-wage/>.

¹⁶ J. A. TUCKER, 'The Eugenics Plot of the Minimum Wage' [2015] February 10, 2015. Available at: <https://fee.org/articles/the-eugenics-plot-of-the-minimum-wage/>.

¹⁷ D. J. BOUDREAU, 'How Minimum Wages Discourage Entrepreneurship' [2015] August 21, 2015. Available at <http://fee.org/articles/how-minimum-wages-distort-innovation-and-discourage-entrepreneurship/>.

The first effect, the raise of unemployment, is hardly questionable. In order for a person to be hired, the person must produce enough as to cover his own salary, the taxes, fees and other expenses imposed by law, and the profit the employer wants to obtain. For a contract to be signed, both parties must think they are better off with the agreement than without it. If the worker thinks it is better for him to look for another job than to be bound by the contract offered to him, the worker will not sign it. In the same way, if the employer thinks the production of the potential worker will not attain a certain threshold, the potential worker will not become an actual worker. The higher the costs (i. e., wages and taxes) the harder it will be to find workers productive enough to be hired. The higher the price (of labour), the lower the quantity (of workers) demanded, because while people are not commodities or articles of commerce, their labour certainly is¹⁸. The demand of labour is thus affected by the raise of its price just like many other commodities and goods.

Collecting 2014 data from the Organisation for Economic Co-operation and Development (OECD), PERRY points out that the jobless rate within the European Countries with a minimum wage reached 12.7%, comparing this rate to the 6.6% in the European Countries without one. When it comes to the youth jobless rate, it reached 29.5% in the first group of countries, standing at 15.8% in the second one. But not only we can conclude that minimum wage increases the unemployment rate. We can also stress that it will hurt especially the low skilled and low experienced workers, as they are the first who will not be able to attain the threshold of productivity the minimum wage implicitly imposes¹⁹.

It is true that a minimum wage set on a very low level will not mean a tremendous fall of the number of contracts signed. Parties have the opportunity of 'contracting around the rule', which means that the benefits for the worker in form of a higher salary can be compensated by setting worse conditions regarding other aspects of the contract. The equilibrium will be the same as before the introduction of the minimum wage, but it will be reached through other means, possibly less efficient. However, making the necessary adjustments to rebalance the contract may be costly, and in this case the employer may opt for firing workers, not renewing their contracts, or not hiring any new ones. All three situations might have been avoided had the minimum wage been not implemented²⁰.

Combining the legal and economic perspectives, the fact that the minimum wage harms the poorest and weakest members of society has important implications. Almost everybody will agree that a legal system cannot be an obstacle for the poorest and the weakest to improve their living conditions. Consequently, a minimum wage can be criticised because it is an artificial obstacle for the least well-off groups. In a case joined in the already mentioned United States Supreme Court decision *Adkins v. Children's Hospital*, a woman had lost her job after the board had determined that the salary for her occupation could not be inferior to \$71.50 per month, when she had been working for \$35 per month and two meals a day. The hotel where she worked hired a man to replace her, and the woman herself complained against the board, because her employment conditions were in her opinion the best she could obtain. A minimum wage harms those at the very bottom, because it protects the position of the people whose salary is over the legally minimum wage rate, but not at a

¹⁸ When Section 6 of the United States Clayton Antitrust Act of 1914 establishes that 'the labor of a human being is not a commodity or article of commerce', it must be clear that it does so with the aim of avoiding that the associations of employees could be deemed to be restraining trade and thus violating the act. EPSTEIN has correctly denied the accurateness of the Clayton Act ('most people both want and need to work. For them, if labor is not an article of commerce, then what is it?'). See R. A. EPSTEIN, 'Simple Rules for a Complex World' (Cambridge, Massachusetts: Harvard University Press 1995) 88-89.

¹⁹ M. J. PERRY, 'Some minimum wage updates' [2015] December 15, 2015. Available at <https://www.aei.org/publication/some-minimum-wage-updates/>. That is why some remarks made by the Bank of Spain in its 2012 Annual Report were not surprising at all. After some years of losing jobs, the report said, there was a high risk of the unemployment situation becoming 'chronic' for some people, mostly the youth and the low-skilled people. The report asked for 'facilitating the flexibility of salaries' and proposed to explore the possibility of adopting 'extraordinary measures to avoid that the minimum wage acts as a restriction for specific groups of workers with bigger difficulties regarding their employability'. See 2012 Annual Report of the Bank of Spain, page 34. Available at <http://www.bde.es/f/webbde/SES/Secciones/Publicaciones/PublicacionesAnuales/InformesAnuales/12/Fich/inf2012.pdf>.

²⁰ R. A. EPSTEIN, 'The Mistakes of 1937' [1988] 11 George Mason University Law Review 16-17.

great distance of it²¹. Therefore, the conclusion is that minimum wage harms precisely those groups of people it is deemed to protect²².

The second effect of the minimum wage is to reduce competition. As it has been already said, a person will be employed only if he produces enough to cover his salary, the expenses imposed by law and the profit expected by the employer. Other things equal, and if the employer does not terminate the contract with the worker, increasing the minimum wage means cutting the profit of the employer²³. If this cut is big enough, profitable economic activities will become unprofitable and many businesses will disappear. If the cut is not that big and the economic activity is still profitable, employers may find that the risk to be assumed is too high for the foreseeable returns. In any case, the minimum wage alters the structure of the market, and its effect is always to reduce the number of alternatives available to consumers in order for them to satisfy their needs and desires. It is utopian to think that the implementation of a legal rule will not have any response from the parties affected by it. And the consequences of that response may be worse than the problem the rule tried to solve in the first place.

Some authors may argue that the reduction of the competition can be a positive consequence. The reason is none other than a minimum wage is an incentive for higher-wages, higher-quality business models. That is, once the competition is reduced, the remaining firms would offer on average higher-quality goods and services²⁴. But from my perspective, we cannot forget that people do not always demand expensive, high-quality goods and services. There is no reason to exclude from the market cheaper, lower-quality options – if it is what people actually demand, an efficient marketplace must offer them.

It could be said that the rise of the unemployment rate and the reduction of competition are temporary effects. Minimum wage may be a means to reach a minimum demand and to make a consumer society possible. To satisfy the higher demand of goods and services, businesses would produce more or new businesses would enter the market. In both cases, more workers would be required²⁵. But this argument can be countered noting that its line of reasoning follows a sort of Keynesian multiplier, which consists on artificially increasing the demand as a means to get the economy moving. If this were good and had no risks, minimum wage advocates should push for a rise of it way higher than what they usually propose.

The third effect of the minimum wage is a general price rise, which means people will have less purchase power. When the demand of the products are services is inelastic, businesses will likely pass on to consumers the costs implied by the minimum wage. In this situation, it might be thought that these costs will be paid mostly by the richer people, because they consume more. But to assess the overall effect on the economy, the right thing to do is to calculate the increase in earnings of each group of population, and compare that number with how much more each one of those groups pay as a result of the then higher-priced goods and services. MACURDY's research suggests that 'when minimum wage increases are paid through higher prices, the induced rise in consumption costs mimics the imposition of a value-added or sales tax with a higher tax rate enacted on the goods and services purchased disproportionately by low-income families'²⁶. That is, a big part of what low-income families spend is targeted to products whose price will rise because of the minimum wage. And while some low-income families may experiment gains, there are many other low-income families that will suffer losses.

²¹ R. A. EPSTEIN, 'The Mistakes of 1937' [1988] 11 *George Mason University Law Review* 18 ('the [minimum wage] statute forces out of the market those workers who would have been hired for a figure less than the minimum wage but more than the market wage'); R. A. EPSTEIN, 'Simple Rules for a Complex World' (Cambridge, Massachusetts: Harvard University Press 1995) 144 ('a minimum wage law [...] redistributes from the poor below that level to those just above it').

²² D. N. MAYER, 'Liberty of Contract: Rediscovering a Lost Constitutional Right' (Washington, D.C.: Cato Institute 2011) 78, 161 (footnotes 33, 34), citing H. ARKES, 'The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights' (Princeton: Princeton University Press 1994) 13.

²³ R. A. EPSTEIN, 'The Mistakes of 1937' [1988] 11 *George Mason University Law Review* 18.

²⁴ C. J. FINN, 'The Minimum Wage and Labor Market Outcomes' (Cambridge, Massachusetts: The MIT Press 2010) 5.

²⁵ O. M. LEVIN-WALDMAN, 'The Case of the Minimum Wage' (Albany, New York: State University of New York Press 2001) 27.

²⁶ T. MACURDY, 'How Effective Is the Minimum Wage at Supporting the Poor?' [2015] 123 *Journal of Political Economy* 499, 503-505, 534-536.

The case for a minimum wage may be best defended when the market model taken into account is not a competitive one, but a monopsony – when only one firm is hiring labour. This situation allows the firm to behave in a different way from what it could if there were other competitors purchasing labour as well. The monopsonist will hire a lower number of workers and the output will be maintained lower as well. People selling labour will have to accept the terms imposed by the firm because it is their only choice, and among these terms it is almost certain that lower wages will be found. In this context, legally imposing a minimum wage incentivises the firm to hire more workers. At least, if the minimum wage is not higher than the equilibrium wage if the market were competitive. The artificially low levels of employment and output would then be corrected²⁷. However, this model requires barriers to entry. If other firms can easily enter the market and purchase labour, the monopsonist faces a high risk and thus loses its power. Since in most markets there are several firms a given worker can sell his labour to, the case for a minimum wage loses much of its appeal.

5. Political and sociological perspective

Finally, it is appropriate to include a political and sociological perspective. The legal, ethical and economic insights pointed out in this paper are taken together not as scientific considerations, but rather as aspects of state policy. It is evident that the macroeconomic reasons offered to support the case for a minimum wage in its origins are matters of politics. And the fight against poverty and the unemployment of the youth, which are two factors of the debate on minimum wage that have gained ground, are also political issues²⁸.

As it has been introduced in Part 1, the debate on the minimum wage is about preferences and how these preferences are imposed to others by way of legislation. And that means the political actors debating on the minimum wage may be founding their positions not on scientific grounds, but on their particular interests. Among these interests the most important one is winning the next elections. This makes the prospect not a good one, because even if a minimum wage is inefficient in economic terms, it could be efficient 'politically'²⁹.

From a sociological perspective, at first sight the minimum wage seems a factor that fosters social cohesion, allowing people to earn a living wage and creating the conditions for a consumer society. But a closer look shows that a minimum wage may actually hamper social cohesion. If minimum wage laws reduce the number of workers, and those who work earn more, there will be more differences between the two groups. Inequality in itself is not an evil, because if it comes from the fact that one person has been more productive or because he has made better economic decisions, the unequal position is justified. But inequality generated by way of a minimum wage is artificial, because it creates an obstacle to enter the market. People who otherwise could compete and improve their living conditions are thus trapped by the very same legislation that allegedly protects them. If it is harder to get a job, people will need assistance to make a living, and that results in a risk of dependency. To avoid this risk, it looks like the best thing to do is to erase barriers to entry, and to let people improve their living conditions with their own efforts³⁰. In my view, self-realisation will do a better job to spread social cohesion than depending on others.

Conclusions

The main conclusion is that we should get rid of minimum wage laws because they are a restriction of freedom of contract that limits individual rights without sufficient justification. But even if it is considered that a minimum wage law is legitimate, there are compelling reasons to abolish it – or for not adopting it in the first place. In general, I think the disadvantages outweigh the benefits.

Acknowledging that the minimum wage is a political issue, and that once a minimum wage is fixed it is really hard to derogate it, the future action should be led in two different but parallel ways. The first one is

²⁷ C. J. FINN, 'The Minimum Wage and Labor Market Outcomes' (Cambridge, Massachusetts: The MIT Press 2010) 4-5, 261; O. M. LEVIN-WALDMAN, 'The Case of the Minimum Wage' (Albany, New York: State University of New York Press 2001) 24-25.

²⁸ O. M. LEVIN-WALDMAN, 'The Case of the Minimum Wage' (Albany, New York: State University of New York Press 2001) 2-3, 10-11.

²⁹ O. M. LEVIN-WALDMAN, 'The Case of the Minimum Wage' (Albany, New York: State University of New York Press 2001) 16-17.

³⁰ D. BOAZ, 'The Libertarian Mind' (New York: Simon & Schuster 2015) 302-303.

explaining the classical liberal principles so they can recover the position they should have never lost. That way, people will realise why the minimum wage is an unjustified restriction of freedom of contract. The second one is pointing out the harmful effects of the minimum wage on the overall economy, so the political debate avoids special interest groups as much as possible, to become a scientific and constructive discussion.

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THE GENERAL ANTI-TAX AVOIDANCE MEASURE IN THE TIMES OF TAX PLANNING

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Abstract

According to *The Economist*, mergers and acquisitions boomed in 2015 – \$5.5 trillion-worth transactions were announced worldwide.

The operations of reorganizations and transfers were also in the centre of attention in Lithuania in 2015 as Vilniaus Prekyba – the biggest retailer in Lithuania – was stationed in a scandal of alleged tax avoidance, where the mentioned operations were said to be employed to avoid taxes in Lithuania.

Having no intent to provide any judgements, one has to admit that in the latter times of tax planning tax authorities may lack tools to distinguish when legitimate tax planning turns into illegal tax avoidance.

For example, the general tax anti avoidance measure stipulated in the Law on Tax Administration of the Republic of Lithuania defines tax avoidance as a transaction, an economic operation or any combination thereof concluded *to gain a tax benefit* [...].

According to the Council Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States the said operations are neutral for corporate income tax purposes (in the contrary to, for example, sale – purchase agreements).

A literal interpretation of the mentioned Substance over Form Principle might lead to a conclusion that reorganization or transfer gives itself a ground to apply anti avoidance measure. Or that there is a ground to apply anti-avoidance measure when the said operations are employed in order to shift business into a low-tax regime. Are such conclusions correct?

The paper addresses problematic aspects of the application of the Substance over Form Principle in the cases of international reorganizations and transfers. As well as provides an opinion whether specific measures, for example, the Article 15 of the said Directive – means against tax avoidance – should be implemented in Lithuania.

Keywords: Law and Economics, Taxation, Tax Avoidance

Introduction

Everybody wants to save these days: you and me looking for discounts in the super markets, buying used instead of brand new cars or using public transport instead. Corporate bodies are just the same – in the times of harsh competition they are looking for cheaper labour power, pushing their counterparts for discounts and cutting their expenses in the ways we could not even imagine.

Taxes, being one of the material expenses for corporates, are also something one would like to reduce.

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Some corporations minimize their taxes legally, others not, but in most cases drawing a line between legal and illegal is not so simple. It is especially true in the recent times of intelligent tax planning.

Corporations and their profit aspiration constitute only one part of the picture. Tax authorities and their aspiration for higher tax collection is another part. Provided corporates have different means to plan their taxes, tax authorities have different means to fight such planning in cases it turns into illegal one, i.e., tax avoidance or tax evasion². Everyone has probably heard of CFC (Controlled Foreign Companies) or Thin Cap (Thin Capitalization), or general tax anti-avoidance rules, for example, Substance over Form Principle.

The main problem is however that tax planning schemes (sometimes turning into tax avoidance, as mentioned), are being improved by lawyers and tax consultants on a day-to-day basis, whereas anti-tax avoidance measures remain unchanged for years. Ultimately one has to admit that in the times of tax planning tax authorities may lack tools to distinguish who is who in the international arena and when legitimate tax planning turns into illegal tax avoidance.

An illustrative example of operations of international reorganizations and transfers and possible application of a general anti-avoidance rule in the cases these operations are employed to avoid taxes in Lithuania are discussed in the paper below. The paper also provides a comprehensive analysis of a special tax anti-avoidance measure stipulated in Article 15 of the Council Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States³ (hereinafter – the Directive) and provides an answer whether this specific anti-avoidance rule should be implemented in Lithuania.

1. Anti-tax avoidance measures that may be applicable in the cases reorganizations and transfers are employed to avoid taxes

According to the provisions of the said Directive, the operations of reorganizations and transfers should be neutral for corporate income tax purposes (in the contrary to, for example, sale – purchase agreements). Provisions of this Directive were implemented in the Chapter IX of the Law on Corporate Income Tax⁴ in Lithuania.

Article 15 of the said Directive is aimed at fighting possible tax avoidance⁵. However this article was not directly implemented into Lithuanian legislation. Thus it is not clear whether Lithuanian tax administrator could fight cases of tax avoidance in international mergers or transfers and what means in such cases should be used. Is application of the general anti-tax avoidance rule – a Substance over Form Principle – appropriate?

Provided that according to the provisions of the Directive, EU member states were not obliged to directly implement the abovementioned anti-avoidance measure – Article 15 – into their national legal acts, it was unclear for the other EU member states whether their tax authorities may react to alleged tax avoidance, even though their national legislation has not enacted specific measures to implement Article 15 of Directive.

The said question was addressed to the European Court of Justice (hereinafter – ECJ) in the case Hans Markus Kofoed⁶. According to the decision adopted in this case, direct implementation of the Article 15 of the Directive into national laws was not necessary. A provision or general principle prohibiting abuse of rights or

² It should be noted that these two concepts have different meaning, but this question is not further discussed in the paper and generalized tax avoidance term is used instead.

³ Council Directive (EC) 2009/133 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States [2009] OJ L310/34 (Merger Directive)

⁴ Lietuvos Respublikos pelno mokesčio įstatymas IX-675 [2001] Žin. 110-3992

⁵ Discussed in detail in this paper hereinafter.

⁶ Court of Justice of the European Union. Judgement of 5 July 2007 Hans Markus Kofoed v Skatteministeriet C-321/05

other provisions on tax evasion or tax avoidance which might be interpreted in accordance with Article 15 [...] might suffice.

It should also be mentioned that according to the above mentioned decision of the ECJ, Article 15 reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.

Having performed a detailed analysis of the practice of the Supreme Administrative Court of Lithuania, it is also clear that Substance over Form Principle, stipulated in the Lithuanian Law of Tax Administration⁷, is a reflection of the already mentioned general Community law principle that abuse of rights is prohibited⁸.

Considering the abovementioned, it looks like application of the Substance over Form Principle in the cases tax is evaded in the operations of international reorganizations and transfers, is well grounded. However, application of this general anti-tax avoidance rule in the international cases of mergers and transfers is problematic, as indicated below.

2. Application of the Substance over Form Principle – problematic aspects

The general anti-tax avoidance measure, stipulated in the Law on Tax Administration – the Substance over Form Principle – defines tax avoidance as a transaction, an economic operation or any combination thereof concluded to gain a tax benefit [...].

Meanwhile, as already indicated, according the provisions of the Directive as well as the Law on Corporate Income Tax (which implements the Directive), the said operations of reorganizations and transfers are neutral for corporate income tax purposes. It might lead to a conclusion that reorganization or transfer gives itself a ground to apply anti-tax avoidance measure.

A literal interpretation of the mentioned Substance over Form Principle leads to a positive answer, but is such an answer well-grounded?

According to the conclusions presented in the scientific literature⁹, “since tax deferral is in the hearth of the Merger Directive, abuse must be distinguished from the mere application of the Directive’s benefits”. As far as there is no reason to disagree with the said opinion, a mere selection of a reorganization (transfer) procedure instead of, for example, sale – purchase agreement does not give a ground for the application of anti-tax avoidance measures.

There is a different case, however, when the operations of reorganizations and transfers are used as a part of business operations. For example, as a result of international share exchange operation a group of companies is structured in a way that dividends are paid to the entity, situated in the most favourable tax jurisdiction. Or such an operations leads to a company structure, where the shares, subject to the already planned share sale – purchase agreement, are finally held by an entity, situated in the jurisdiction, where taxation of capital gains is more favourable.

⁷ Lietuvos Respublikos mokesčių administravimo įstatymas IX-2112 [2004] Žin. 63-2243

⁸ A. Petkevičiūtė, ‘Reorganizavimo ir perdavimo metu kylančių klausimų sprendimas atsižvelgiant į Europos Sąjungos Teisingumo Teismo praktiką’ [2014] 91 Teisė 193

A. Petkevičiūtė, ‘Tarybos direktyvos 2009/133/EB nuostatų, nukreiptų prieš mokesčių vengimą, perkėlimas į Lietuvos teisę’ [2016] 98 Teisė

⁹ H. Van Den Broek, ‘Cross-Border Mergers Within the EU’ (Netherlands: Kluwer Law International 2012) 290

It is however also very important to mention that the above cases are just illustrative ones and, as it was indicated by the ECJ in *Leur-Bloem* case, one cannot confine himself to “applying predetermined general criteria but must subject each particular case to a general examination.”¹⁰

So the first aspect one has to draw his attention to while applying Substance over Form Principle in the cases of reorganizations and transfers is that a mere operation of reorganization or transfer does not give a ground for application of the anti-tax avoidance measures. In the cases of tax avoidance, reorganizations and transfers are used as a part of the group of operations. In order to determine a possible case of tax avoidance, all the group of operations should be subject to a detailed scrutiny.

Another problematic aspect of the application of the Substance over Form principle is obvious from its wording. As indicated in the Article 69 of Law on Tax Administration, this principle can be applied when a subjective intention of a tax payer to gain tax benefit is in place.

It is now very important to mention that, as indicated in this paper above, Substance over Form Principle, according to the practice of the Supreme Administrative Court of Lithuania is a reflection of the already mentioned general Community law principle that abuse of rights is prohibited.

Having analysed the case law of the ECJ outlining the *sine qua non conditions* for the application of the mentioned principle that abuse of rights is prohibited¹¹, it is clear that abuse of law (tax avoidance as well) is defined via two elements – subjective and objective. Subjective element being an intention of a tax payer to gain tax benefit, objective – the objective circumstances showing that, despite formal observance of the conditions laid down in the law, the objective pursued by this law, has not been achieved¹². Analysis of the wording of the Directive leads to the conclusion that the objective it pursues, is restructuring or rationalisation of the activities of the companies participating in the operation (valid commercial reasons).

Summarizing the above-mentioned, application of the general principle, which prohibits abuse of rights (and Lithuanian Substance over Form Principle as well) in the case of reorganizations and transfers is dependent on two conditions. First of all, there should be a subjective intention of a tax payer to avoid taxes (a mere option for a tax neutral operation does not constitute such an intention). And, second, there should exist objective circumstances showing the objective pursued by the Directive has not been achieved. And this is the second aspect one has to pay attention to while applying the Substance over Form Principle to the cases of international reorganizations and transfers.

What is also very important to stress is that existence of the objective criterion (valid commercial reasons), while judging international reorganization and transfer procedures, is vital. It must be recognized that part of such operations are carried out for tax planning purposes. As indicated in the practice of ECJ¹³, also acknowledged by the European Commission¹⁴, the tax payer cannot be prevented from structuring the operation so as to attract the least possible taxation. Tax planning aimed at using relative differences in tax burdens between Member States is not an abuse (specifics of the application of this rule in the cases of international reorganizations and transfers are discussed in the paper below).

Having considered the above-listed, one has to admit that due to the indicated uncertainties proper application of the Substance over Form Principles in the cases of international reorganizations and transfers is

¹⁰ Court of Justice of the European Union. Judgement of 17 July 1997 *A. Leur-Bloem v Inspecteur der Belastingdienst* C-28/95

¹¹ A. Petkevičiūtė, ‘Tarybos direktyvos 2009/133/EB nuostatų, nukreiptų prieš mokesčių vengimą, perkėlimas į Lietuvos teisę’ [2016] 98 *Teisė*

¹² Court of Justice of the European Union. Judgement of 12 September 2006 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* C-196/04

¹³ Court of Justice of the European Union. Judgement of 26 October 1999 *Eurowings Luftverkehrs v Finanzamt Dortmund-Unna* C-294/97

¹⁴ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries. Online access <<http://eur-lex.europa.eu/legal-content/LT/TXT/HTML/?uri=CELEX:52007DC0785&from=EN>> last accessed 2016-03-08

mostly dependant of the sophistication and *bona fide* of the tax authorities. Facing an increase in the volumes of international reorganizations and transfers it is obvious that special tax-anti avoidance measure, that could be applicable in the cases of international reorganizations and transfers, is necessary. The paper hereinafter focuses on the analysis of anti-tax avoidance measure stipulated in the Directive with an aim to provide a sound conclusion whether implementation of the Article 15 of the said Directive would be a proper solution.

3. Anti-Taxi avoidance measure implemented in the Article 15 of the Directive

Article 15 of the Directive embeds a complex anti-avoidance measure, which reads as follows: “A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions [...] (of the Directive) where it appears that one of the operations [...] has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives”.

In order to provide a comprehensive analysis of the said provision, the following aspects are being discussed in the paper below: 1) the basis for the application of the Article 15; 2) the presumption embedded in the said article and the burden of proof.

Starting with the basis for the application of the Article 15, according to its wording, anti-avoidance measure should be applied when there is tax evasion or tax avoidance. It should be noted that there is no definition of these two concepts in the Directive. Provided that both of them are treated the same in the Directive, the generalized term of tax evasion is used in this paper.

It should also be noted that in order to simplify the task for tax authorities to prove the fact of tax avoidance, the presumption is embedded in the said article. This presumption contains the notion of valid commercial reasons, however its definition is not presented in the Directive either.

Provided that the above listed notions of tax avoidance and valid commercial reasons are embedded in EU legislation, namely a directive, their conception should first of all be defined according to the practice of the ECJ. Unfortunately, practice of this court in the field of the application of the provisions of the Directive is not generous. And when it comes to the interpretation of the said concepts, there are only 3 relative cases.

According to the ECJ decision adopted in the *Leur-Bloem* case¹⁵, valid commercial reasons, within the meaning of Article 15 of Directive, must be interpreted as involving more than the attainment of a purely fiscal advantage such as horizontal off-setting of losses.

In the case *Foggia*¹⁶ the ECJ reiterated that purely fiscal motives are not valid commercial reasons, but fiscal motives are not necessary fatal as long as they are not “predominant”.

The *Kofoed*¹⁷ case, already discussed in this paper, did not provide any conclusions as to the meaning of the mentioned concepts, because it dealt with a different problem – possibility to apply anti-tax avoidance measures in cases a Member State does not implement Article 15 of the Directive to its national legislation.

To summarize everything, it should be admitted that there is no uniform definition of tax avoidance or valid commercial reasons in the practice of ECJ.

In accordance with the said jurisprudence, tax evasion **could** be regarded as operations of reorganisations and transfers concluded in order to take over the losses of the companies in the group, or to reduce the burden of the tax in the case of dividend payment. In the meantime, valid commercial reasons in the practice of ECJ are defined just as a wider concept than attainment of purely fiscal advantage such as horizontal off-setting of losses.

¹⁵ Court of Justice of the European Union. Judgement of 17 July 1997 *A.Leur-Bloem v Inspecteur der Belastingdienst* C-28/95

¹⁶ Court of Justice of the European Union. Judgement 10 November 2011 *Foggia v Secretário de Estado dos Assuntos* C-126/10

¹⁷ Court of Justice of the European Union. Judgement of 5 July 2007 *Hans Markus Kofoed v Skatteministeriet* C-321/05

To finish with, it is also very important to mention that according to the practice of ECJ, every single case of possible tax avoidance should be examined and proved separately. Which part of a tax dispute – a tax payer or a tax administrator – has the burden of proof according to the provisions of the Directive, is discussed below.

The first part of the Article 15, which is read as “A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions [...] (of the Directive) where it appears that one of the operations [...] has as its principal objective or as one of its principal objectives tax evasion or tax avoidance, suggests that the burden of proof is put on tax administrator.

It is also now worth mentioning that according to the Article 15 of the Directive, there is no requirement that taxes have actually been evaded and a subjective intention to avoid taxes is sufficient¹⁸.

Provided that it is hard to prove one’s subjective intentions, and in order to lighten the burden of proof to the tax administrator, a presumption of tax avoidance was embedded in the discussed Article 15. As already indicated in the paper above, the fact that the operation is not carried out for valid commercial reasons such as restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.

In order to provide a comprehensive analysis of the said presumption, one’s attention should especially be drawn to the ECJ’s decision in the *Leur-Bloem* case¹⁹. According to the said decision, this presumption cannot be considered unconditional. In order to determine whether the planned operation has an objective to avoid tax, the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination. According to the established case-law, such an examination must be open to judicial review. It is interesting to mention, that following the cited decision of the ECJ, the national court, hearing a *Leur-Bloem* case, decided that tax avoidance was not demonstrated.

It is now worth mentioning that the Law on Corporate Income Tax stipulates a requirement that shares, received during reorganization or transfer operation should be held for at least 3 years. In other case, reorganization or transfer would be treated as a sale-purchase agreement and capital gains would be taxed accordingly.

Having analysed the provisions of the Directive, one could draw a conclusion that the said provisions of Law on Corporate Income Tax is a distorted implementation of Article 15 into national legislation. Thus, in accordance with the position of the ECJ as well as opinion of legal scientists, it can be concluded that the said restrictions, implemented in the national legislation, are contrary to the Directive as well as fundamental principles of the Community law²⁰. Due to the said reasons they should be abolished.

Coming back to the burden of proof, it is important to mention that Article 15 allows denial of Directive’s benefits already if the transaction’s **one** of principle objectives is tax evasion or tax avoidance, which implies that even if valid commercial reason can be shown, tax administration may still prevail if it succeeds demonstrating that in addition to these possible business reasons, tax avoidance was a principal reason for the transaction as well²¹. The final decisions whether to apply an anti-tax avoidance measures will be up to tax authorities (according to the practice of the ECJ – with a right to appeal).

¹⁸ H. Van Den Broek, ‘Cross-Border Mergers Within the EU’ (Netherlands: Kluwer Law International 2012) 293

¹⁹ Court of Justice of the European Union. Judgement of 17 July 1997 *A.Leur-Bloem v Inspecteur der Belastingdienst* C-28/95

²⁰ A. Petkevičiūtė, ‘Reorganizavimo ir perleidimo metu kylančių klausimų sprendimas atsižvelgiant į Europos Sąjungos Teisingumo Teismo praktiką’ [2014] 91 *Teisė* 193

A. Petkevičiūtė, ‘Tarybos direktyvos 2009/133/EB nuostatų, nukreiptų prieš mokesčių vengimą, perkėlimas į Lietuvos teisę’ [2016] 98 *Teisė*

²¹ B. Terra, P. Walter, ‘European Tax Law’ (Netherlands: Kluwer Law International 2012) 693-694

It is also envisaged in the scientific literature²², that the wording of the Article 15 thus might make one wonder whether the Council wished to encroach upon the freedom of business to arrange the affairs in such a way as to attract as little taxation as possible: it is not enough that valid commercial reasons are present; principle tax avoidance reasons must be absent.

Summarizing the above, the burden of proof, stipulated in the Article 15 of the Directive, is not fully clear. According to the wording of the said article, as well as considering the practice of the ECJ, it could be concluded that it is a tax payer, who, in a case of a tax dispute, is obliged to demonstrate that valid commercial reasons predominate.

It might be interesting to mention that according Mr. K. Petrosovich²³, Article 15 of the Directive requires that there are absolutely no tax avoidance intentions in the business operations. According to this author, tax reorganization and transfer operations, which, in comparison to other transactions, are tax neutral, are tax avoidance *per se*. Thus, according to Mr. Petrosovich, Article 15 of the Directive is ill and contrary to the purpose of the Directive itself.

However systematic interpretation of the provisions of the Directive, as well as conclusions presented in scientific literature²⁴ that “tax deferral is in the hearth of the Merger Directive, and abuse must be distinguished from the mere application of the Directive’s benefits”, lead to a conclusion that the Article 15 does not contradict other provisions of the Directive.

Provided that the wording of the Article 15 of the Directive is so complicated, it is sometimes concluded²⁵ that probably, the best way for Member States to implement Article 15 of the Directive is to copy it more or less verbally into their national laws. On the other hand, provided that Article 15 simply reflects the general Community law principle that abuse of rights is prohibited, some “do not discern much value added in the Article 15”²⁶.

Generalizing everything that has been discussed in the paper, it should be concluded that due to the uncertainties left in the wording of the Article 15 of the Directive (obscure concepts of tax evasion, tax avoidance and valid commercial reasons; as well as unsettled burden of proof), its verbal copying into a national law would hardly be the right decision.

It should also be noted that, for example, Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States²⁷ has recently been amended for several times (in 2014 and in 2015). These amendments implemented special anti-tax avoidance rules, one of them being identical to the anti-tax avoidance rule stipulated in the Article 15 of the Directive and discussed in this paper: Member States shall not grant the benefits of this directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this directive, are not genuine having regard to all relevant facts and circumstances.

The said provisions of the directive on the taxation of dividends have not been implemented into the Lithuanian Law on Corporate Income Tax, although according to the provisions of the said directive, Member States should have brought into force the laws, regulations and administrative provisions necessary to comply with it by 31 December 2015 at the latest. Being aware of the harsh discussions, it is not likely that the said anti-tax avoidance provisions will be implemented into Lithuanian laws at all.

²² B. Terra, P. Walter, ‘European Tax Law’ (Netherlands: Kluwer Law International 2012) 693

²³ K. Petrosovitch, ‘Abuse under the Merger Directive’ [2010] European Taxation 562

²⁴ H. Van Den Broek, ‘Cross-Border Mergers Within the EU’ (Netherlands: Kluwer Law International 2012)

²⁵ H. Van Den Broek, ‘Cross-Border Mergers Within the EU’ (Netherlands: Kluwer Law International 2012) 695

²⁶ B. Terra, P. Walter, ‘European Tax Law’ (Netherlands: Kluwer Law International 2012) 698

²⁷ Council Directive (EC) 2011/96 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] OJ L21/1 (Parent-Subsidiary Directive)

The latter also supports the opinion already set forth in this paper, that verbal copying of the Article 15 of the Directive into a national law would hardly be the right decision.

On the other hand, as already been indicated in the paper above, application of the Substance over Form Principle in the cases of international reorganizations and transfers is mostly dependant on the *bona fide* of the tax authorities. Thus, it is obvious that special anti-tax avoidance measure, that could be applicable in the cases of international reorganizations and transfers, is necessary.

New anti-tax avoidance initiatives, for example, Anti-Tax Avoidance Directive, as discussed below, might provide a decision in the cases discussed.

4. BEPS and its anti-tax avoidance directive

OECD project on Base Erosion and Profit Shifting (BEPS)²⁸ and the BEPS-driven developments have recently been of the key interest to national governments, tax consultants, tax authorities and tax payers.

BEPS refers to tax planning strategies that exploit the gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.

BEPS is a global problem which requires global solutions. The final BEPS package gives countries the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time give business greater certainty by reducing disputes over the application of international tax rules, and standardising compliance requirements²⁹.

Following the global standards developed by the OECD, the European Commission has prepared the Anti-Tax Avoidance Package. Which, inter alia, includes the Anti-Tax Avoidance Directive. One of the key provisions of this draft directive, is a general anti-abuse rule (GAAR) allowing tax authorities to ignore non-genuine arrangements or a series thereof carried out for the essential purpose of obtaining a tax advantage that defeats the object or purpose of the otherwise applicable tax provisions. An arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

As stated in the EU – BEPS roadmap, released on 23 February 2016, Dutch presidency on EU Council will seek to reach a political agreement on the said directive by the end of June 2016.

It should also be noted that the mentioned Directive should be adopted upon the anonymous consent of all member states, and, what is more important, directives are binding only as to the result to be achieved. So it is hard to foresee if the general anti-tax avoidance rule in Lithuania – Substance over Form Principle – will be amended accordingly and whether these amendments would help tax authorities fight alleged tax avoidance in cases international reorganization and transfer operations are employed to avoid taxes.

Conclusions

Application of the Substance over Form Principle, stipulated in the Law on Tax Administration of the Republic of Lithuania in the cases of international reorganizations and transfers is problematic and mostly dependant of the sophistication and *bona fide* of the tax authorities. Facing an increase in the volumes of international reorganizations and transfers it is obvious that special anti-tax avoidance measure, that could be applicable in the cases of international reorganizations and transfers, is necessary.

However, due to the uncertainties left in the wording of the Article 15 of the Council Directive 2009/133/EC (obscure concepts of tax evasion, tax avoidance and valid commercial reasons; as well as

²⁸ Base Erosion and Profit Shifting. Online access < <http://www.oecd.org/ctp/beps.htm>> last accessed 2016-03-08

²⁹ Base Erosion and Profit Shifting. Online access < <http://www.oecd.org/ctp/beps.htm>> last accessed 2016-03-08

unsettled burden of proof), its verbal copying into a national law would hardly be the right decision. Therefore, the precise wording of the anti-tax avoidance measure is still subject to open discussions.

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12. Court of Justice of the European Union. Judgement of 26 October 1999 Eurowings Luftverkehrs v Finanzamt Dortmund-Unna C-294/97
13. Court of Justice of the European Union. Judgement of 12 September 2006 Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue C-196/04
14. Court of Justice of the European Union. Judgement of 5 July 2007 Hans Markus Kofoed v Skatteministeriet C-321/05
15. Court of Justice of the European Union. Judgement 10 November 2011 Foggia v Secretário de Estado dos Assuntos C-126/10
16. Base Erosion and Profit Shifting. Online access < <http://www.oecd.org/ctp/beps.htm>> last accessed 2016-03-08

HUMAN RIGHT PROTECTION AND RIGHT TO LIFE IN ARMED CONFLICT – ON THE CROSSROAD BETWEEN THE HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

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Abstract

Since the European Court of Human Rights (ECHR) McCann ruling the state and its agents are bound by the certain, detailed rules concerning the right of life. As it was underlined by the ECHR, those principles are also applicable in circumstances of terrorist activity. In the circumstances of the case, the IRA members killed by the British Special Air Forces soldiers in Gibraltar were protected from the arbitrary loss of life – the violation of article 2 of the European Convention on Human Rights and Fundamental Principles demand from the state agents to conduct military activity in accordance with the rules of necessity and proportionality. This model of article 2 ECHR interpretation (however not directly manifested) was maintained in the few cases concerning the Russian Federation activity in Chechnya. The Court for the first time countered the issue of the scope of protection of article 2 of Convention in the time of non – international armed conflict. Certain rulings were signaling that the human rights are not only protecting the right to life of civilian population, but were also corresponding to the members of military irregular forces. The ECHR point of view is coherent with the certain rulings of the International Court of Justice, especially the 'The Legality of the Use of Nuclear Weapons Advisory Opinion" and 'Palestinian Wall' judgments. ICJ proposed an supplementary approach of applicability of the humanitarian law and human rights regime described as *lex specialis – lex generali* relationship. However, on the other hand, the InterAmerican Commission of Human Rights (IACHR) made an interesting considerations concerning the limits of human rights protection. The Commission underlined that human right juridical bodies would both apply the *ius in bello* norm and customs (Geneva Convention and its Additional Protocols), and certain human protection standards. However, this approach would face an important legal issue – the question is whenever the right to life principle, as a most fundamental human rights norm, would be applied during the time of an armed conflict and would not be only limited to the civilian population..How does this consideration would affect and potentially reshape the modern battlefield? The aim of the article is to present the possible collision areas of interplay between human rights standards and international humanitarian law. This analyses would be centered on certain human rights courts rulings and decisions. Then the article will turn to the aspect of potential impact of the human rights regime in the modern battlefield. In this point, the paper would adhering any possible negative and positive consequences of ECHR, ICJ, and IACHR landmark judgments direct implementation, especially in the light of the modern warfare reality. Finally, the article would concern considerations of the state practice, especially in the framework of the global war of terror concept,

Keywords: International humanitarian law – right to life- human rights – armed conflict

Introduction

The framework of the international human rights regime and international humanitarian law had its origins in the principle of human dignity as a inseparable part of natural law. However, the scope of the protection and

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applicability of those regimes emerged separately. The laws of human rights protection had been considered as a element of restraining the legal powers of kings, princes and lords and merely as a matter of internal policy, very often as a result of consensus between groups of society e.g Magna Charta in United Kingdom, American Declaration of Independence and French *Declaration of the Rights of Man and Citizen*². On the other hand, the goal of international humanitarian law is to limit the negative consequences of warfare itself³. The philosophy of *ius in bello* had been influenced by the model of the Christian warrior based on chivalry and respect towards the enemy – much of this ideas originated from the basic principles of the law of nature and the influences from ancient philosophers combined with the Christian faith⁴. In the opinion of the author, the human rights protection system and international humanitarian law had the same core of legal, ethical, political, and philosophical concept of human however during the history the purposes and political desires changed the course of shaping the certain rules and customs. Both system again started to interfering in XXth Century, especially during the First Peace Conference in Hague 1899 where the axiological grounds of the first codification of the *ius in bello* had been seriously influenced by the human rights considerations⁵.

1. Law of armed conflicts and human rights standards – a common core

The rules and customs of warfare were a contradiction to the Roman phrase *inter arma silent leges*. Despite an certain attempts to control and restrain the unrestricted violence of armed conflicts, the isolated codifications and documents of certain legislatives around the world, in medieval and modern times *ius in bello* was mostly unrecognised by more than only a one party of the armed conflict. Such impartiality of belligerents was a source of overall ignorance of humanitarian law in his primal stage of development – none of the adversaries during the war would loose the tactical or strategic advantage of uncontrolled bloodshed. During the medieval and modern times the soldiers were promised of the bounty e.g private goods, slaves, etc as a reward for their service in king`s or prince army. The atrocities and violations of the basic law of nature conducted by the armed forces especially during the time of Thirty War (1618 – 1648) were a part of a greater war plan to declined the enemy capably of fighting and denied the social support of the adversary⁶. It is significant that the first modern approaches to the role of *ius in bello* had been established during the conflicts conducted in the XV – XVIIth Century (e.g Grotius⁷). However during the XVIII and XIXth Century the character of warfare had changed rapidly – as the military service became an mandatory duty, the quantity of the men in uniform raises significantly. The idea of total war was not longer a priority principle in future conflict. The aim of victory shifted from overall destruction of enemy property and society to global dominance of the battlefield by crushing the enemy armies with the increasing role of powder and artillery. War became shorter, but much more brutal, the casualties of the Napoleonic Wars were extraordinary high and the faith of the single soldier who were wounded, captured or missing would lead to certain loss of life, health or dignity⁸. It is vital to underline that both the laws of war and human rights provisions had been emerging as a form of protest: a

²U. N Chronicle, International Human Rights Law: A Short History <http://unchronicle.un.org/article/international-human-rights-law-short-history/> (access on 23.03.2016)

³ <<Humanitarian law aims to mitigate the human suffering caused by war, or, as it is sometimes put, to 'humanise' war. >> F. Kalshoven L. Zegveld, 'Constraints on the Waging of War, An Introduction to International Humanitarian Law (Geneva: International Committee of the Red Cross 2011) 12

⁴ G. Solis The Law of Armed Conflict: International Humanitarian Law in War (Cambridge: Cambridge University Press 2010) 5; T. Meron, ' International Humanitarian Law from Agincourt to Rome' [2000] 75 International Law Studies 302 - 304

⁵ Final Act Of the International Peace Conference. The Hague, 29 July 1899, available on <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xspaction=openDocument&documentId=8FCF14D950797012C12563CD00515C0A> (access on 4.04.2016)

⁶ D. J Bederman ' Globalization and International Law' (New York: Palgrave MacMillan 2008) 21

⁷ <<More civilized manners having abolished the barbarous practice of putting prisoners to death, for the same reason, the surrender of those, who stipulate for the preservation of their lives either in battle, or in a siege, is not to be rejected >> On the Law of War and Peace De Jure Belli ac Pacis by Hugo Grotius Translated by A. C. Campbell London, 1814

⁸ It is been estimated that around 3. 00 millions soldiers and civilians have died between 1792 – 1815 in Europe as a result of Napoleonic Wars K. Krause, War, Violence and the State (London: Palgrave Macmillan 2009) 188

voice of objection against the unrestricted warfare and unlimited executive power⁹. Both norms had been recognized on the domestic level far in the history but its international legitimacy in the meaning of *lex scripta* has been delayed until the XIXth and XXth Century.

Ius in bello is considered to be a balancing point between the realities of warfare (described in the principle of military necessity) and humanitarian requirements¹⁰. It limits the sphere of warfare to the objects and targets of military value, so *a contrario* the area of protection is limited by the norms and custom of international humanitarian law¹¹. It is been accepted that the military objectives could be targeted at any time, without further requirement of warning, and would be destroyed completely if it is desired by the condition of military necessity¹². In addition, the *ius in bello* sometimes accepted an civilian casualties under the principle of proportionality¹³. The principles of the necessity and proportionality are shaped differently than in human rights treaties and the principle of distinction is not recognized in the human rights protection system as it referring exclusively to the *ius in bello*¹⁴.

2. 'Laws of humanity' and the *ius in bello*

The cross interaction between the human rights regime and international humanitarian law would be recognized in the first modern *ius in bello* documents. The St. Petersburg Declaration of 1868 underlined for the first time that the adversaries are not allowed to use methods and means of warfare responsible for the unnecessary suffering¹⁵. For the first time the international humanitarian law stated that limitation concerning the waging of the armed conflict, and the origins of those boundaries are to be found in humanitarian consideration. The Second Hague Convention of 1898¹⁶ and the Forth Hague Convention of 1907 and its famous 'the Martens clause' had been directly adhering to the 'laws of humanity'¹⁷ T. Meron highlighted that the above mentioned preamble had been impacted by the humanitarian considerations emerged as a result of the international law framework development¹⁸. While it is argued whenever the clause was intended to

⁹ M. Happold, *International Humanitarian Law and Human Rights Law. Research Handbook on International Conflict and Security Law*, 2012 1 – 2

¹⁰ M. N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' [2010] 50 *Virginia Journal of International Law* 798; E. Crawford, *A. Pert 'International Humanitarian Law'* (Oxford: Oxford University Press 2015) 32

¹¹ << In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives>> Article 48 of 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.

¹² D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' [2005] 16 *The European Journal of International Law* 203; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press 2016) 42 G. D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press 2010) 188

¹³ Art. 57(2)(b) I Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁴ N. Lubell, 'Challenges in applying human rights law to armed conflict' [2005] 860, *International Review of the Red Cross*, 746

¹⁵ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles. Saint Petersburg, 29 November/11 December 1868

¹⁶ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899

¹⁷ <<Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience>> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 T. A Tiperhurst, *The Martens Clause and the Laws of Armed Conflict* [1999] 317, *International Review of the Red Cross*

¹⁸ T. Meron, 'The Martens Clause, Principle of Humanity, and Dictates of Public Conscience' [2000] 94 *The American Journal of International Law* 79-80

achieve a serious normative character, its fundamental role had been underlined by the Nuremberg trials and international law jurisprudence¹⁹²⁰.

In the history, the 'laws of humanity' influence had been seriously misunderstood in the certain approaches towards the *ius in bello* and the 'ultimate necessity' reasons when the 'humanitarian' elements have been invoked to justify a violation of the international humanitarian law. Such an interpretation was presented by some members of the German international law scholarship under the influence of the prominent officers of the Imperial German Staff before the break of the Great War. The legal doctrine called *Kriegraison* concluded that war must be waged by all the means necessary - only a short and brutal conflict would ultimately meet a humanitarian goal (the conflict would be more violent but shorter) and all restraints upon the adversaries should be generally ignored²¹. According to this theory, the principle of military necessity became a primary value on the battlefield, prevailing over any considerations. The military conflict waged according to the *Kriegraison* legal doctrine would eventually meet a humanitarian goal - the quicker end of war and prevention of future casualties both on civilian and military targets²². Despite this concept had been outlawed by the International Military Tribunal few questions remain. Does the 'laws of humanity' demand from the belligerents to take illegal but justified by the 'humanitarian' factors acts e.g. the question whenever the United States were legally entitled to use the atomic bomb against the Empire of Japan in 1945²³. From the solely legal point of view the operation against Hiroshima and Nagasaki could be understated as a violation of relevant *ius in bello* provisions and therefore a war crime, however there are multiple reasons for treating this action as an element of 'just' and 'necessary'²⁴. Interestingly, the source of this violation, due to lack of the relevant norm concerning aerial warfare, would be placed in the Marten Clause.

3. The regional human rights protection treaties and the international humanitarian law

The modern regime of international human rights had been largely founded after World War Two, with the United Nations Universal Declaration of Human Rights as a primary example²⁵. The worldwide recognition of the values and principles described in the 1948's Declaration had been revoked in the International Covenant on Civil and Political Rights (ICCPR)²⁶. One could observe a rise of the regional systems of human rights protection e.g. European Convention of Human Rights and Fundamental Principles (ECHR)²⁷, e.g. American Convention of Human Rights (ACHR)²⁸, with the establishment of the international judicial bodies e.g. European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR). Both worldwide and regional human rights documents consider the right to life as the most crucial and inseparable

¹⁹ I.C.J Reports, The Corfu Channel Case (Merits) Judgement of April 9th 1949

²⁰ A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' [2000] The European Journal of International Law 198 - 201

²¹ C. H. Alexandrovicz (ed.) Grotian Society Papers 1986 'Studies in the History of the Law of Nations' (Dordrecht: Springer Science 1974) 74 ; L. B. Chazoune, P. Sands, 'International Law, the International Court of Justice and Nuclear Weapons' (Cambridge: Cambridge University Press 1999) 281

²² A. Bellamy, Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity (Oxford: Oxford University Press 2012) 74

²³ C. S. Maier, 'Targeting the city: Debates and silences about the aerial bombing of World War II' [2005] 859 The International Review of the Red Cross 430 - 433

²⁴ M. Piątkowski: Security of The Civilian Population From the Consequences of Aerial Warfare in The Light of The Hague Rules of Aerial Warfare, (Vilnius: Vilnius University 2015) 187

²⁵ Universal Declaration of Human Rights, United Nations Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

²⁶ International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

²⁸ American Convention of Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

value of human dignity²⁹. However, the above mentioned regulation proposed a different approaches to the question whenever the right of life is regulated during the time of the armed conflict. Certain provisions of the human rights conventions allowed Member – States to derogate from certain obligation in the time of emergency. The article 27 (2) of the ACHR underlined that suspension from the human life protection principle is not authorized even in the time of armed conflict. Similar solution had been recognized by the article 4 (1) of the ICCPR. In contrary, the approach supported by the article 15(2) of the ECHR highlighten that there is a limit of right to life protection during the armed conflict and the lawful acts of war are not considered to constitute a violation of the article 2(1) of the ECHR. Louise Doswald – Beck stated that the article 15(2) of the ECHR refers only to the international armed conflicts, while the article 2(2)(c) of the ECHR is applicable during the time of internal violence³⁰. Using the various method of treaty interpretation, as stipulated by the article 31 of the Vienna Convention of the Law of Treaties of 1968 (VCLT) of the ACHR and ECHR brings possible an conclusion that scope of protection of the right of life is unlimited and lasted during the duration of both international and non – international armed conflicts, however it is unclear whenever the 'purpose' and 'intent' of the ECHR would support this approach³¹. Additionally, the text does not make an distinction between the combatant and civilians. This summary creates an unavoidable collision point with the principles of the laws of armed conflict. On the other hand the human rights are very restrictive towards the use of the lethal power by the states agents, narrowing it to the examples of ultimate necessity and proportionality. In the opinion of the author, in the viewpoint of the human rights laws, each act of violation of the right to life is considered to became an *ultima ratio* when other means of adhering the situation fails and there exists an imminent threat to the other protected values and principles. Such requirements had been evoked in *McCann v. United Kingdom* ECtHR ruling, where the United Kingdom failed to comply with a test of absolute necessity of using lethal force against an paramilitary members of the Irish Republican Army planning an sabotage action on the Gibraltar territory³². The ECtHR judgement underlined that state agents acting in the sphere of the *imperium* must execute their tasks and orders accordingly to the 'positive' duties emerging from article 2 of the ECHR applicability. It is been vital to observe the certain factual circumstances of the case – during the time of events, the United Kingdom armed forces were engaged in long-term non – international conflict in Northern Ireland. While it could be argued whenever the threshold of violence reach the threshold of the international humanitarian law to be applied, it is worth to underlined that killings of the IRA members were placed in the area outside 'hot battlefield. In conclusion it must have been observed that the right of life scope of applicability is not narrowed by the terrorist activity of the. On the other hand, the Court in the judgement concerning the Dubrovka theatre incident (*Finogenov and Others v. Russia*), ruled out that in the situation of unpredictable, imminent danger of terrorist action, the use of disproportionate means and measures is not always considered illegal and must reviewed in the light of circumstances and basis of the case³³. In my opinion this notion would be applied by analogy to some combat situations (however the Court denied the link between military aerial

²⁹ <<1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. >>Art. 4(1) of the ACHR <<Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law>> Art. 2(1) of the ECHR << Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. >> Art. 6(1) of the ICCHR

³⁰ L. Doswald – Beck, The right to life in armed conflict: does international humanitarian law provide all the answers?, [2006] 664 'International Review of the Red Cross', 883

³¹ <<A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose >> Article 31 of the Vienna Convention on the Law of Treaties 1969 Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331

³² European Court of Human Rights, *McCann and others v. United Kingdom*, (Application no.18984/91) , Judgment 27 September 1995, 145 - 151

³³ European Court of Human Rights, *Finogenov and Others v. Russia*, (Applications nos.18299/03 and 27311/03), Judgement 20 December 2011 p. 211 - 215

operations in Chechenya and the crisis in Dubrovka theatre)³⁴.

After the year 2000 the ECtHR had been challenged by the cases concerning the war in Chechenya. It could be held that the scale of Russian military intervention in this country met the level required for international humanitarian law to be applied and the threshold of the armed violence, the organisation of the Chechen forces, fighting under command structure, holding a certain part of the republic territory would be sufficient to meet the requirements of II Additional Protocol or at least the Common Article 3. In *Isayeva v. Russia*, the Court considerations were focused on reviewing the all circumstances concerning the military operations directed against an rebel fighters in population area where non – combatants were presented at significant number. ECtHR based that the operations of Russian military outreached beyond the standards of law – enforcement model in the democratic society³⁵. While it could be disputed whenever the Court should use an 'law – enforcement' paradigm in the obvious non – international armed conflict situation, the ECtHR ruling shift of balance was aimed towards the applicant position who was clearly a non – combatant, desperately trying to flee the war zone area. In *Abakarova v. Russia* judgement highlighted that the conflict in Chechenya was allowing the government to use 'exceptional measures' to address the situation, including the deployment of the considerable military forces. In other place, the ruling confirmed that the anti-rebel operations in Katyr – Yurt in 2000 'pursue a legitimate aim'³⁶. Does this remark is suggesting that the 'positive' or even 'negative' duties of the state agents emerging from the article 2 of the ECHR are shaped differently when adhering to the combatants life? In *Esmukhabetov v. Russia* the Court expressed an interesting notion, underlining that Russian aerial operations including bombardment of mixed civilian and combatants occupied areas had to be executed to 'avoid or minimise' the harm to the life and health of 'both of person at whom the measures were directed and of civilians'³⁷. Such conclusion is an obvious hint signalling that the European Court of Human Rights in *Esmukhabetov* demand from the state agents that the right to life will be respected accordingly for both civilians and combatants and thus the law enforcement paradigm is applicable in the situation of armed conflict without distinction. In addition the 'negative' duty of state arising from the article 2 of the ECHR must be respected in time of peace, social instability and internal armed conflict. Such consideration clearly collide with the battlefields realities and adds new obligations towards belligerents, not required by the international law of armed conflicts³⁸. However, it is been unknown whenever such a standpoint of the ECHR would be followed in similar factual backgrounds in future. Most cases, including the Kurdish insurgency in southern Turkey or series of so – called 'Iraq' trials concerning the military activity of the Convention parties in occupation of Iraq during 2003 – 2008 are centred in the states violation of the 'positive duties' e.g the lack of proper investigation. In cases concerning the conflicts of international character (Cyprus and Georgia) the Strasburg – Court underlined that ' States are under an obligation to protect the lives of those not, or no longer, engaged in hostilities', suggesting a *contratio* that during a internal armed conflict the applicability of the article 2 of the ECHR had an unlimited scope of protection³⁹. Nevertheless the ECtHR jurisprudence in the opinion of the author still lacks an application challenging directly whenever the combatant live during an international or non – international conflict would be protected by the article 2 of the Convention⁴⁰.

³⁴ <<The Court does not suggest that the present case is similar to *Isayeva*; quite the contrary, there are major differences between these two cases. Thus, in the present case the hostage-taking came as a surprise for the authorities, the hostages themselves were in a more vulnerable position than the civilians in *Isayeva*, and the choice of means (gas) by the authorities was less dangerous than in *Isayeva* (bombs). >> Finogenov v. Russia... p. 216

³⁵ European Court of Human Rights, *Isayeva v. Russia*, Application no. 57950/00, Judgement 24 February 2005 p.181 - 200

³⁶ European Court of Human Rights, *Abakarova v. Russia*, (Application no.16664/07), Judgment 15 October 2015 p. 81 - 93

³⁷ European Court of Human Rights, *Esmukhabetov and Others v. Russia*, (Application no. 23445/03) 29 March 2011 p.146

³⁸ <<Whereas humanitarian law tries to control violence without the ambition to abolish armed conflict altogether, human rights law protects the individual rights of all human beings, including those of bandits and terrorists. >> A. Paulus, The Protection of Human Rights in Internal Armed Conflict in Europe Remarks on the *Isayeva* decisions of the European Court of Human Rights, Complementing IHL: Exploring the Need for Additional Norms To Govern Contemporary Conflict Situations An International Conference, Jerusalem, June 1-3 2008 24

³⁹ European Court of Human Rights, *Georgia v. Russia*, Application no. 38263/08, Decision 13 December 2011, p. 72

⁴⁰ <<A cursory reading of the Court's jurisprudence reveals that the Court has never applied or explicitly used international humanitarian law, even as an interpreting tool. >>F. Speretto, Law in Times of War the Case of Chechnya , Working Paper: 2007, <http://www.du.edu/korbel/hrhw/workingpapers/2007/47-speretto-2007.pdf> 7

The Inter-American Court of Human Rights and its precursor, the Inter – American Human Rights Commission, had been reviving an multiple cases concerning the activity of states agents in the unstable reality of certain Latin America countries. Some factual backgrounds were grounded on the situations where the certain armed groups were involved in the combat with the government forces and thus trigger the question of positive and negative duties of the ACHR parties in the light of the article 4 of the ACHR. Few judgements are essential for the purpose of this paper. In *Abella v. Argentina* the Commission had established that the confrontation between the position forces and the Argentinian military units reach the threshold of the armed conflict⁴¹. In the such circumstances the Commission decided to apply coherently the international humanitarian law, analysing whenever the ACHR or Geneva Conventions should be applied simultaneously or separately. While in question of civilian protection both system are reinforcing each other, the Commission noted that the persons actively engaged in hostilities lost their protected status as humanitarian law allowed to treated them as a legitimate target.⁴² Additionally, it has been underlined that Geneva Convention are necessary mean of correctly applying the ACHR provisions in 'combat situations'⁴³. It is been substantial to review futures legal decisions. In 1999 in the report of Columbia`s compliance with the ACHR the Commission laid down that the eventual violations of right to life, must be examined by the relevant provisions of the international humanitarian law to decide whenever the loss of life was arbitral in the light of the ACHR⁴⁴. In *Las Palmeras* case the Commission argumentation based on the standpoint that every loss of life during armed conflict must be reviewed in the light of relevant provisions of international humanitarian law as more comprehensive legal response – the outlawed loss of life will constitute a violation of the ACHR simultaneously⁴⁵. To summarize, the Inter-American human rights judicial bodies had been underlining that during the time of armed conflict the ACHR provisions are still a binding legal obligation over the state agents and armed forces members. However, in the viewpoint of the Commission the right of life during an combat situations is protected accordingly to the scope of international humanitarian law. So in fact, when adhering it to the situation of combatants, the human rights are considered to became an element of wider legal background – and therefore the law enforcement paradigm is not an suitable model for reviewing the alleged violations of right of life in the time of combat In fact, the approach suggested in the above mentioned judgements is a reflection of the International Court of Justice (ICJ) ruling decision of 1996.

4. *Lex specialis approach*

The *Legality of the Threat or Use of the Nuclear Weapons Advisory Opinion* of 1996 had been considered as a landmark judgement in the discussion concerning the interplay between the human rights regime and international humanitarian law. The Court highlighted that the article 4 of the ICCRP is applicable both in time

⁴¹ Inter – American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997)

⁴² <<The Commission believes that petitioners misperceive the practical and legal consequences that ensued with respect to the application of these rules to those MTP members who participated in the Tablada attack. Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets>> *Abella v. Argentina* p. 178

⁴³ <<Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations>> *Abella v. Argentina* p. 161

⁴⁴ <<When assessing whether the right to life protected under inter-American human rights instruments has been violated specifically in the context of armed conflict, it is also necessary to refer to corresponding norms of international humanitarian law, which provide specific standards against which to evaluate whether a deprivation of life occurring during an armed conflict was arbitrary and therefore unlawful. Such standards are used in distinguishing between civilians and combatants >> Inter-American Commission on Human Rights Report on Colombia 1999, p. 12

⁴⁵ <<Nevertheless, the Commission considered that, in an armed conflict, there are cases in which the enemy may be killed legitimately, while, in others, this was prohibited. (...) The Commission stated that, in the instant case, it had first determined whether Article 3, common to all the Geneva Conventions, had been violated and, once it had confirmed this, it then determined whether Article 4 of the American Convention had been violated. > Inter-American Court of Human Rights, *Las Palmeras v Colombia, Pantoja Ordoñez and ors v Colombia*, Preliminary objections, IACHR Series C no 67, IHRL 1449 (IACHR 2000), 4th February 2000, p. 29

of peace and war, however during the armed conflict international humanitarian law is considered to be a *lex specialis*, therefore the 'arbitrary' loss of life must a result of disregarding the *ius in bello* provisions⁴⁶. In 2004 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* the Hague Court use a complementary approach, distinguishing three possible solutions for the international humanitarian law and human rights law dilemma: the *lex specialis* approach of *ius in bello*, the simultaneously applicability concept, and the *lex specialis* approach of human rights protection standards⁴⁷. In 2005 *Armed Activities on the Territory of the Congo* the ICJ did not mention the *lex specialis* approach⁴⁸. The ICJ opinions are essential due to fact that they are rejecting the classic bi – polar vision of the international law: the human rights are binding only during the time of peace, while the laws of war are respected only during an armed conflict. According to above mentioned judicial decision international humanitarian law and human rights standard are both applied in conditions reaching the at least minimum threshold described by the Common Article 2 of the Geneva Conventions of 1949. Such a statement clearly strengthen the legal protection of civilians and those who are not considered to be an acting members of the armed groups engaged in actual combat. How those conclusion refers to the combatant right of life? In the opinion of the author the *lex specialis* approach suggested the that laws of war are adopted *exclusively*, without the interference of the other branches of international law⁴⁹. This especially covers the rules of targeting, and rules of distinction and therefore the international humanitarian law is deciding whenever the loss of life was arbitrary⁵⁰.

On the other hand the certain voices of international law scholarship underlines that even the most traditional and core rules and principles of international humanitarian law must be examined in the context of human rights protection. The Human Rights Committee in General Comment No 31. described that between those system exist an link not a exclusion and the *ius in bello* provisions are the tool for the interpretation of certain Covenant articles⁵¹. The Oxford Handbook of International Law in Armed Conflict stated that certain judgements of the ECHR (*Akhmadov v. Russia*) are signalling the applicability of the law enforcement paradigm in the combat situations, with the principles of necessity and proportionality as described in the

⁴⁶ <<In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself >>Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 25

⁴⁷ <<More generally, it considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. It notes that there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law. >> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004 p. 106

⁴⁸ <<The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation >>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 180

⁴⁹ *But see* discussion Expert Meeting On the Right To Life In Armed Conflicts and Situations of Occupation Organised by The University Centre for International Humanitarian Law, Geneva Convened at International Conference Centre, Geneva 1 – 2 September 2005 19; *See also* <<In practical terms, it is important to reiterate that the use of the *lex specialis* principle is required only when there is an apparent conflict between two norms that could be applied to a specific situation. The identification of which rule will have pre-eminence depends on an examination of the facts and of the particular protection included in the relevant rules. >>International Legal Protection of Human Rights in Armed Conflicts, UN Human Rights, New York, Geneva 2011: Office of the High Commissioner) 61

⁵⁰ <<In certain circumstances human rights law cannot be considered; for example a combatant who, within the scope of a lawful act during an armed conflict, kills an enemy combatant cannot, according to *ius in bello*, be charged with a criminal offence >> H. J Heintze, On the Relationship between Human Rights Law Protection and International Humanitarian Law, [2004] 86 The International Red Cross Review 797

⁵¹ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

human rights treaties⁵². W. Abesch is pointing out the influence of the landmark *McCann v. United Kingdom* judgement, suggesting that in the jurisprudence of ECtHR is emerging a new concept of a combatant right of life, however only in the conflicts of non – international character⁵³. In 2009 the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities made an very interestingly remark concluding that both the principles of the *ius in bello* (humanity and military necessity) are need to be interpreted in more humanitarian viewpoint, departing from the notion that combatant could be targeted and destroyed just because of his status, using the *capture rather than kill* paradigm in military situations, giving an opportunity for surrender and using the lethal force only as last resort with the as minimal as possible outcome⁵⁴. Other suggested that 'minimal feasible damage' rule described in the article 57 (2)(a)(ii) of the I Additional Protocol of Geneva Conventions 1949 is protecting not only civilians, but active combatants and limiting the the eventual harm to the soldiers life⁵⁵. However, as described in the report of the U. N Special Rapportour on extrajudicial, summary or arbitrary executions of 2013, the *capture rather than kill* conception is still a controversial *lege lata*⁵⁶.

Conclusions

In the opinion of the author, the interplay between the *ius in bello* and human rights law regime could be compare to the tree – the core of both of systems (e.g the Martens clause) is common, however the branches split somehow during its and develop in distance from each other. There is no discussion that human rights right to life protection guarantees are binding the states agents during the time of armed conflict. Human rights treaties are reinforcing (or even prevailing over) the international humanitarian law in the aspect of civilian population immunity from the negative consequences of warfare. On the other hand when adhering the to rules concerning the conduct of hostilities both branches of international law are unresolvable colliding when addressing the matter of targeting and distinction and the scope of right to life applicability especially towards the combatants or fighters in non – international armed conflict⁵⁷. In such circumstances the ICJ *lex specialis* approach emerged as a difficult but required solution⁵⁸. Elizabeth Wicks understand that the combatants are protected by the right to life, however this protection have very limited range, and the relevant principles of proportionality and necessity came to play⁵⁹. However, it is been vital to observe the new trends of the human rights judicial bodies, ICRC and experts that are undermining the belligerents right to destruction military

⁵² A. Chlapham, P. Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford, Oxford University Press 2014), 383; F. Sperotto, "Counter-Insurgency, Human Rights, and the Law of Armed Conflict." [2009] 17 Human Rights Brief, 19-23.

⁵³ << Resort to lethal force is more likely to be lawful if the insurgent is actively participating in battle, because then he poses an actual or imminent threat to others and capturing him would more likely unreasonably endanger government soldiers. But there is no per se rule that insurgents may be targeted with lethal force. >> W. Abesch 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' [2005] 16 European Journal of International Law 759; G. Oberleitner, *Human Rights in Armed Conflict* (Cambridge 2015 Cambridge Univeristy Press) 299

⁵⁴ N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva 2008, International Red Cross Committe, 78 – 79, M. Piątkowski, *Analiza porównawcza regulacji prawnych w zakresie SBBPL w kontekście międzynarodowych standardów ochrony praw człowieka* [[A comparative analysis of legal regulations on systems of unmanned armed drones in the context of international human rights law]. *Systemy Dronów Bojowych*, (Warsaw: Scholar 2015) 69 - 73

⁵⁵ <<The expert drew an analogy from the fact that under IHL the parties to the conflict do not have a right to kill enemy soldiers, but merely to put them hors de combat, and argued that the idea of minimization of damage was at the origin of the principle of superfluous injury and unnecessary suffering and the prohibition of the use of poison >> Report on *Expert Meeting—Targeting Military Objectives*, University Centre for International Humanitarian Law, Geneva, 12 May 2005 13

⁵⁶ United Nations, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Christof Heyns, 2013) A/68/382 p. 77 - 79

⁵⁷ *But see* <<under humanitarian norms does not prove to be less than under human rights law. On the other hand, the built-in limitations of human rights treaty norms provide for accommodating the requirements of military necessity, proportionality, and humanity as applicable in humanitarian law >> A. Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Confl ict, Parallelism, or Convergence?' [2008] 19 European Journal of International Law, 182

⁵⁸ D. S Coddard, *Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon*, *International Law Studies* 402(2015) 421 - 423

⁵⁹ E. Wicks, *The Right to Life and Conflicting Interests*,(Oxford: Oxford University Press 2010) 91

targets without any further requirements described in the *capture rather than kill* paradigm⁶⁰. Nevertheless, this ideas have an equivalent opposition, arguing that the applying the law enforcement model into obvious combat circumstances would imposed impossible obligations over the states, while the organized armed groups in the conditions of non – international armed conflict are not bound by the human rights treaties⁶¹.

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⁶⁰ *"Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, ICRC Report, (ed) G. Gaggioli, (Geneva: International Committee of the Red Cross 2013)19 - 23*

⁶¹ M. N Schmitt, ' The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' [2010] 1 *Harvard National Security Journal* 44; W. H Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study : no Mandate, no Expertise, and Legally Incorrect' [2010] 42 *New York University Journal of International Law and Politics* 21

RIGHT TO HAVE RIGHTS FOR IRREGULAR MIGRANT WORKERS? INTERRELATION BETWEEN MIGRATION LAW, LABOUR POLICY AND INTERNATIONAL HUMAN RIGHTS

Nastazja Potocka-Sionek¹

Abstract

Characterisation of the legal position of irregular migrant worker² is a highly delicate and complex issue. There is an evident tension between common migration policy, which is geared towards combating illegal transboundary movements, and labour law, generally governed by the idea of workers' protection. The aim of this contribution is to discuss how migration regime can be reconciled with employment law in the context of irregular migrant workers' rights. It addresses the question of whether, and to what extent, unauthorised third-country nationals can rely on illegal employment contract. The paper indicates a great discrepancy between theoretical and practical possibility of enforcing their fundamental work-related rights. In the concluding part it is argued that, contrary to the conventional perception, enhancing protection of undocumented migrant workers not only does not contravene migration policies, but also can contribute to decrease in illegal work. It is therefore necessary to turn current "security approach" into holistic approach and give more consideration to migrants' employment rights.

Keywords: migration, labour law, human rights.

Introduction

With an unprecedented surge in migration that European Union is currently faced with, the phenomenon of illegal work of third-country nationals is one of the major challenges that needs to be addressed. Policy makers strive to curb clandestine migration by toughening sanctions for illegal employment of migrants and improving the control mechanisms. The rationale behind this approach is that upholding rights of this category of workers constitutes an incentive for them to take up illegal employment. The criminalisation of immigration, also referred to as crimmigration³, considerably impacts enforcement of labour law standards. Migrant workers who fail to comply with migration regulations, although formally not excluded from labour law protection, are often defenceless against unscrupulous employers. It is therefore vital to investigate the interrelation between migration and labour law in the context of irregular migrants' rights.

The paper is structured as follows. At the outset, international legal framework for human rights protection is characterised. It is illustrated that there is a certain ambiguity as to the scope of protection of social and labour laws. Special attention is given to Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (Employers Sanctions Directive)⁴. This document, although primarily a migration policy instrument, contains provisions that fall into the ambit of labour law. The next part addresses

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² There are various terms that can be applied to migrants who reside and work in a receiving country without necessary residence permit: "irregular", "illegal", "undocumented", "unauthorised", "clandestine", "non-status", "aliens". In this paper these notions will be used synonymously. For a discussion on terminology see: CLANDESTINO Project Report, http://www.gla.ac.uk/media/media_147171_en.pdf.

³ K. L. Griffith, 'Laborer or Criminals? The Impact of Crimmigration on Labour Standards Enforcement' [2014], <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2059&context=articles>.

⁴ OJ L 168, 30.6.2009, p. 24–32.

the problem of how does illegality of an employment contract influence the possibility of invoking work-related rights by undocumented legal workers. Further, the discrepancy between theoretical and practical possibility of vindicating human rights by irregular migrants is addressed. This is followed by a core question of how the stronger protection of irregular workers' rights can be effectuated without prejudice to migration policies.

1. International framework of human rights protection

Relevant provisions on fundamental rights of irregular migrant workers' rights can be found in numerous general and specific instruments of international law. Rights enshrined in such documents as Universal Declaration of Human Rights⁵ and International Covenant on Economic, Social and Cultural Rights⁶ apply to "everyone", with no distinction based on legal status of an individual. To the contrary, these international instruments aim to eliminate imbalances between citizens and aliens⁷. Any form of discrimination on grounds of *inter alia* nationality, race, religion or sex is excluded. Irregular workers are therefore implicitly covered by the scope of these acts. In the ambit of labour law, such rights as right to work, just and favourable working conditions and freedom of association are articulated.

In recognition of particularly vulnerable condition of migrant workers, several instruments have been dedicated specifically to them. The most comprehensive one is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter ICMW)⁸, adopted by the UN General Assembly in 1990 and in force since 2003. Regrettably, no Member State of European Union, and only 5 European countries, has ratified this Convention⁹.

Relevant documents have also been established within the framework of International Labour Organisation. Most notable examples are the "Migration for Employment Convention (Revised)" (ILO-Convention No 97) and "Migrant Workers (Supplementary Provisions) Convention" (ILO-Convention No 143), which was the first one to explicitly address the situation of undocumented migrant workers¹⁰. Despite the fact that to date Convention has been ratified by only 5 Member States, basic work-related rights have universal scope of application and must be respected by all ILO Members¹¹.

The protection of irregular migrant workers is substantial, but not as comprehensive as the one granted to their documented counterparts. This is plainly visible in ICMW, which proclaims hard core of rights that apply to all migrants, independently of their legal status in Part III, whereas more extensive rights are afforded in part IV and are confined exclusively to documented migrant workers. Contrary to what the documents' title implies (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), it "codifies a fundamental inequality of two groups of human beings, dependent on their migratory status"¹².

In some cases the scope of protection is ambiguous and differently formulated in single documents. Take the principle of equality of treatment, for example. The Migration for Employment Convention (Revised), (ILO-Convention No. 97) obliges the countries to refrain from any form of discrimination against migrants staying *lawfully* within their territory. In the same vein, Migrant Workers (Supplementary Provisions)

⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁶ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁷ M. Olivier, Avinash Govindjee 'Labour Rights and Social Protection of Migrant Workers: In Search of a Co-ordinated Legal Response', p.18., https://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_OlivierxGovind.pdf.

⁸ UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158.

⁹ To date, 48 countries are parties to the Convention, from which only 3 are European states (Albania, Bosnia-Herzegovina and Turkey). Notably, the Convention lacks ratification especially on the part of countries of destination. For list of ratifications see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en.

¹⁰ Italy, Portugal, Slovenia, Sweden, Cyprus. For list of ratifications see http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288.

¹¹ The 1998 ILO Declaration on Fundamental Principles and Rights at Work stipulates that all ILO Members are under an obligation to respect, promote and realise the principles concerning the fundamental rights, irrespective of the ratification of single Conventions.

¹² G. Noll, 'Why Human Rights Fail to Protect Undocumented Migrants', [2010] 12 European Journal of Migration and Law, p. 258.

Convention 1975 (No. 143) reserves the principle of equal treatment with nationals to migrant workers and members of their families residing *lawfully* within the territory of a state¹³. Equality of treatment is granted to undocumented workers only in respect of rights regarding remuneration, social security and other benefits, which are stemming from previous employment¹⁴. Compared with the ICMW, which grants the full scope of work-related rights, including remuneration, maximum hours of work, paid holiday¹⁵, the protection under ILO Convention is limited only to the basic employment rights¹⁶. While equal treatment in respect of protection against dismissal is regulated in Part IV of ICMW, which scope is limited to authorised workers, it seems that it is already covered by “equal treatment in respect of termination of the employment relationship”, enumerated in art. 25¹⁷.

Disparity in the level of protection can be pinpointed at the example of right to form and join trade unions and to strike. As alluded to above, freedom of association is enshrined in numerous general human rights instruments, such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights¹⁸, International Covenant on Economic, Social and Cultural Rights, ILO-Convention No 87 on the Freedom of Association and European Convention on Human Rights¹⁹. None of these acts limits freedom of association exclusively to documented workers. ICMW, however, regulates the right to join trade unions and associations, participate in their activities and seek their aid in Part III, (art. 26), thus granting it to all migrant workers and their families, while the right to actively form association and trade unions is articulated in Part IV (art. 40), which caters only for lawfully residing migrants.

Yet another example of divergence in scope of protection set forth in international human rights instruments is the right to health care. ICESCR guarantees right to *highest attainable health standard*. In the General Comment No. 14 on the application of the ICESCR states are explicitly prohibited from denial or restriction of equal access to this right of any category of persons, including *inter alia* asylum seekers and illegal immigrants²⁰. In comparison, ICMW provides much more limited scope of the protection of undocumented migrant workers, as art. 28 encompasses only right to *emergency medical care*. Such a narrow wording does not correspond with the holistic understanding of the right to health²¹ and raises problems as to how the term “urgent” should be construed in practice.

On the level of European Union, standards of undocumented workers protection have been established under Employers Sanctions Directive. More precisely, the right to claim back the outstanding remuneration for performed work and access to justice have been explicitly guaranteed. Directive sets forth numerous mechanisms that shall facilitate lodging claims against abusive employers. Other work-related rights, such as freedom of association and principle of non-discrimination are not covered by the Directive. The Employers Sanctions Directive, although inextricably linked to labour policies, should be considered primarily as an immigration law instrument²². The protection under labour law and effective enforcement mechanisms does not seem to flow from the recognition of human rights standards, but is rather perceived as means to counter

¹³ Art. 10 ILO-Convention No 143.

¹⁴ *Ibidem*, art. 9.

¹⁵ Art. 25 ICMW stipulates that all migrant workers should be treated on equal footing with nationals of the host country and indicates the working conditions that should be safeguarded.

¹⁶ K. A. Häusler, 'Defenceless workers?- The protection of irregular migrant workers in Europe with focus on the situation in France and Spain', <http://idpbarcelona.net/docs/public/wp/workingpaper2.pdf>.

¹⁷ R. Cholewiński, 'Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment', www2.ohchr.org/english/bodies/cmw/docs/cholewinski.doc, p. 6.

¹⁸ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁹ The European Court of Human Rights applied a broad interpretation of art. 11 of the Convention and ruled that “the right of everyone to peacefully organise in trade unions in order to protect his or her interests” covers also right to strike. See judgement *Demir & Baykara v. Turkey*, ECHR 2391, 34503/97.

²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, para. 34.

²¹ R. Cholewiński, *supra* note 17, p. 15.

²² Legal basis for the Employers Sanctions Directive is Art. 79 TFUE, which gives EU the competence in the area of immigration. E. Dewhurst, *the Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World*, *European Journal of Migration and Law* (2011), p. 390

illegal migration²³. Main aim of this act is to reduce the pull factor for irregular migration by increasing the employer's risk of hiring an irregular immigrant²⁴.

The above brief review of main human rights instruments unequivocally indicates that undocumented migrant workers are not exempted from international protection. Numerous conventions guarantee basic human rights protection, although they are imprecise in determining its scope, leaving wide margin of appreciation to the states in terms of "minimum standards". Such rights as the right to fair and just working conditions, freedom of association and access to justice have universal application and are enjoyed by irregular migrants by virtue of their humanity.

2. Directly work-related rights and illegality of the contract

In order to specify the content of rights that are applicable under national legislations to illegal migrant workers, it is essential to elucidate how does the breach of migration law influence validity of employment contract. The crucial question in this respect is whether lack of required residence status renders the employment contract void and, given a positive answer, if it is null and void *ex tunc* or it is fully effective until the moment of its annulment (void *ex nunc*)²⁵.

Provided that, in case of a missing work authorisation, the contract is illegal *ab initio*, no contractual rights or obligations are created. Should immigration law be a precondition for applying work-related rights to migrant workers, it would come to a merely de facto labour relationship, from which no rights could be derived. Unauthorised migrant worker would be left with no legal recourse against withheld payment, unjust working conditions and discriminatory practices. This "non-protection approach"²⁶ emphasises the inextricable link between migration and labour law and, in case of conflict between them, gives the first one primacy. In view of the abovementioned international human rights instruments and Employers Sanction Directive, which explicitly recognises the right to claim the outstanding remuneration, such doctrine is untenable. Irregular migrant worker is not deprived of all employment rights, even if the contract has been concluded and performed in contravention of imperative migration law provisions. Another argument for rejection of the "illegality doctrine" is that it would allow for unjustified enrichment on the part of employer, who would profit from conditions beyond the level established by statutory regulations. Further, it would be against the general principle of law, according to which there must be a compensation for the rendered services²⁷. Still, it is interesting to note that examples of 'illegality doctrine' can be found in common law jurisdiction²⁸.

Following the alternative approach, employment contract of unauthorised worker exerts full effect until the very moment it is annulled. Accordingly, all rights and obligations stemming from the employment relationship must be fulfilled pursuant to its provisions. Assuming full legal validity of such an unauthorised contract and treating it on equal terms with a regular one is, however, not unproblematic for a number of reasons. Firstly, complete recognition of employment contract of illegal migrants is incongruent with administrative and criminal law. It implies different qualification of the same situation on grounds of diverse legal disciplines, as an administrative and criminal offence would be thoroughly acceptable under employment law²⁹. Performing employment contract does not decriminalise illegal migrant from the migration law perspective. As explicitly stated in ICMW, migrant workers are not exempted from the obligation to comply with

²³ Niklas Selberg, *The Laws of "Illegal" Work and Dilemmas in Interest Representation on Segmented Labor Markets: À propos irregular migrants in Sweden*, http://works.bepress.com/niklas_selberg/21/ p. 283.

²⁴ Recital 2 of the Employers Sanctions Directive recognizes the possibility of employment in EU without authorisation as a major incentive for migrants.

²⁵ E. Dewhurst, *supra* note 23, p. 400.

²⁶ *Ibidem*.

²⁷ K. A Häusler, *supra* note 16, p. 28.

²⁸ See e.g. *Hoffman Plastic Compounds v. NLRB*, 27 March 2002, U.S. Supreme Court, 535 U.S. 137 (2002). In this case an undocumented worker has been denied an award of back pay under National Labour Relations Act. For comparison of British, American and Canadian approach see 'Clashing laws: exploring the employment rights of undocumented migrants', *The Free Library*, (2014), <http://www.thefreelibrary.com/Clashing+laws%3a+exploring+the+employment+rights+of+undocumented...-a0350792483>; For analysis of "illicity doctrine" in Ireland see E. Dewhurst, *supra* note 23.

²⁹ J. Cichoń, 'Glosa do wyroku SN z dnia 27 marca 2000 r., I PKN 558/99', OSP 2001/3/40.

national legislation of receiving country³⁰. Moreover, such approach is against the *ratio legis* of provisions governing employment of unauthorised migrants, namely the protection of domestic labour market³¹. Further, acknowledging full legal effect of unlawfully formed employment contracts contributes to the dumping of labour standards and thus negatively impacts market situation of legally employed. Last but not least, It is commonly considered as an incentive for third country nationals, who are aware that they can engage in a valid relationship, despite illegality of their stay.

Assuming that the contract is fully valid, not only remuneration, but also other labour-related rights, such as maximum working hours, holidays, sick or maternity leave and conditions of employment termination may be invoked. The disconnection between employment and migration law may result in a situation that complying with contractual obligations imminently leads to a violation of a criminal law. Making claims for continuation of an employment contract by an unfairly dismissed irregular migrant worker could be one example³². Labour law provisions cannot be enforceable in this case, as employment of a illegally staying third-country national would make the employer liable for an infringement of domestic regulations provided for in Aliens Acts³³. In accordance with Employers Sanctions Directive, intentional employment of an alien who does not dispose of residence and work permit is subject to harsh criminal³⁴ and financial³⁵ sanctions. Consequently, even if an undocumented migrant worker is denied employment on grounds of nationality or ethical origin, it cannot be considered contrary to anti-discrimination provisions. Otherwise it would mean that employer is supposed to employ a migrant without a residence permit. It does not imply, however, that the irregular workers cannot rely on the equality of treatment principle. It should apply to them through the duration of the contract, unless it violates domestic regulations set forth in Aliens Act³⁶.

A balanced approach assumes that although a contract with unauthorised migrant worker is deprived of its legal value (*ex nunc*), employer has to comply with his contractual obligations for the period of work performance. This compromises the need to assure basic worker's protection with imposition of sanctions stipulated under migration law. It can also be seen as a deterrent for an employer and means of prevention of unjustified enrichment on his part. Legal value of a contract concluded by irregular third-country national is explicitly recognised in a legislation of a number of Member States³⁷, the scope of rights applicable to irregular migrants varies³⁸. In some Member States it is not explicitly regulated by national legislation, but such an effect is assumed by jurisprudence³⁹.

A clear statement regarding employment status of irregular third- country national can be found in Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants issued by Inter-American Court⁴⁰. It confirms that once an undocumented migrant becomes engaged in an employment relationship, he acquires rights as a worker, which must be respected, despite irregular status in the State of employment.

³⁰ Art. 34 ICMW.

³¹ J. Cichoń, *supra* note 24.

³² A. Inghammar, 'The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law', *European Journal of Migration and Law* 12 (2010), 204.

³³ *Ibidem*.

³⁴ The criminal sanctions include fine, liquidation, limitation of rights and confiscation of property. Art. 9 of the Directive provides for criminal sanctions for particularly serious cases of illegal employment, such as persistently repeated infringement, involving a significant number of third-country nationals or employment in particularly exploitative working conditions. For report on sanctions provided for in EU Member States see Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2014) 286 final.

³⁵ As results from COM (2014) 286 final, financial sanctions applied by Member States vary from 300 to 100 000 euro.

³⁶ A. Inghammar, *supra* note 32, p.209.

³⁷ For comment on Spanish legislation see K.A. Häusler, *supra* note 16, p. 29.

³⁸ For a detailed comparison between Spanish and French regulations see K. A. Häusler, *supra* note 16, p. 28-30.

³⁹ Polish Supreme Court, Judgement from 27.03.2000, I PKN 558/99.

⁴⁰ Juridical Condition and Rights of the Undocumented Migrants, Mexico, Advisory Opinion, Advisory Opinion OC-18/03, IACHR Series A no 18, IHRL 3237 (IACHR 2003), 17th September 2003, Inter-American Court of Human Rights [IACtHR], https://www1.umn.edu/humanrts/iachr/series_A_OC-18.html.

3. Law in books and law in practice

As a matter of law, comprehensive legal protection is extended to irregular migrants. As a matter of fact, though, their fundamental work-related rights are nearly non-exigible. Migrants with unregulated migratory status, labelled as “illegal aliens” and “lawbreakers”⁴¹, feel socially stigmatised and find themselves in an inferior legal position. Being aware that lodging claims against their employer will most probably come at cost of tough sanctions and deportation, they evade any contact with state authorities. For this reason, they “present human rights law with an especially hard case”⁴². Their situation is exacerbated by the fact that they are predominantly involved in low-wage, labour-intensive and high-risk industry sector. These working places are characterised by rare control, low rate of unionisation and strong subordination in the employer-employee relation, which is typically beyond the protection of labour law. Undocumented workers must rely on themselves and act as “private attorneys general”⁴³. Alternative ways of making claims for legal protection, although set forth in Employers Sanctions Directive, are very limited and still hardly accessible⁴⁴.

4. Reconciling employment protection and migration law

The regulation of migration, with its central aim of monitoring and restricting the transboundary movement of persons, is based on the personal sovereignty of states. According to this principle, they have the capacity of establishing entrance and residence criteria, as well as making distinctions between certain categories of residents. Labour law, by contrast, is constructed upon the principle of workers’ protection and compensating for his weaker bargaining position in relation to the employer⁴⁵. While employment law pivots on the principle of universal protection and non-discrimination, in the ambit of migration law various distinctions between citizens and non-citizens are drawn. These fundamental differences of rationalities illustrate why the juxtaposition of both legal disciplines results so problematic. A question arises whether it is possible to reconcile those bodies of law. In other words, can labour law be effectuated without prejudice to migration law and, conversely, can the goals of migration law be achieved without disregarding the principles of labour law?

Taken human-rights perspective as a point of reference, one could be easily driven to conclude that labour and migration law should be treated separately. Accordingly, a clear distinction between migration status and worker status should be made. Migrant worker, being illegal due to lack of valid residence and work permit, is still a worker, and in this capacity is covered by labour law provisions. As a good example of a far-reaching worker-protective approach can serve ETUC Resolution on Undeclared work. It reads as follows: “It is important that the blame for undeclared work, if identified by a controlling authority, does not fall on the worker. The legal consequence must be that the undeclared worker is considered a worker with all rights following from this status (...) In this way real protection for workers in the EU can be achieved (...). Governments should protect these workers by making sure that they do not face repression or even being automatically sent back if they look for help from labour inspection or other public authorities or try to claim their rights. They should instead be provided with routes towards regularisation”⁴⁶.

In my firm belief, this one-sided approach can be hardly reconciled with migration law. There would be no point in criminalising migrants who fail to comply with migration policy if they were granted “immunity”⁴⁷ by the mere fact that they seek redress under illicit employment contract. While sanctions are provided for both parties of employment contract- employer and worker, ultimately only the employer is penalised. Migrants incur

⁴¹ G. Noll, *supra* note 12, p. 254.

⁴² L.S. Bosniak, “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention” [1991] 25 International Migration Review 737, p. 765.

⁴³ K. L. Griffith, *supra* note 3, p. 93.

⁴⁴ Only few Member States entitled organisations of migrant workers and public authorities to act on behalf of workers. Trade unions have been given such a right in a number of states. See COM(2014) 286 final, p. 7.

⁴⁵ N. Selberg, *supra* note 24, p.285.

⁴⁶ ETUC Resolution on Undeclared Work Adopted at the ETUC Executive Committee on 11-12 March 2014, https://www.etuc.org/sites/www.etuc.org/files/document/files/etuc_resolution_on_undeclared_work.pdf.

⁴⁷ G. Noll, *supra* note 12, p.248

no risk of deportation by filing a complaint against unscrupulous employer. Whenever the migrant worker invokes his fundamental rights, national authorities are precluded from making use of the possibility of his detention or return. Following this line of reasoning, migrants would be subjected to welfare jurisdiction (covering employment and social issues), but exempted from the immigration jurisdiction. Whether such divisibility of jurisdiction could be tenable is dubious considering the territoriality approach to state jurisdiction⁴⁸.

Having said that though, effectuating labour law does not necessarily threaten the effectiveness of migration law⁴⁹. Firstly, it must be stressed that international standards of migrant workers' protection do not undermine the national competence to establish admission criteria⁵⁰. States may deny immigrants certain political rights, regulate the entry and deportation of undocumented migrants, deny them permission to work.⁵¹ One notable exception are non-refoulement cases. Secondly, respecting work-related rights and ensuring their enforceability does not imply need of regularisation of the injured migrant seeking his protection under labour law. Art. 35 of Migrant Workers Convention explicitly excludes an interpretation of the rights granted in the Convention that would be tantamount to regularisation of migrants' situation. Safeguarding labour rights does not affect the measures aimed to ensure "sound and equitable conditions for international migration". The Employers Sanction Directive acknowledges that it is legitimate for receiving states to return third-country nationals with irregular residence status to their country of origin⁵².

Labour and migration law have one mutual goal- combating the unlawful employment. However, they adapt thoroughly different, not to say contradictory, mechanisms to achieve it. In search of the balance between both disciplines the first vital step is to realise that upholding standards of work for illegal third country nationals does not interfere with migration policy. Contrarily, it contributes to the effective deterrence of illicit activity, as workers whose rights are violated are more likely to denounce this ill-practice to proper authorities. Employers are no longer able to circumvent employment statutes, since labour law protection is fully extended to undocumented migrants. In financial terms, it decreases the difference between authorised and unauthorised work and thereby makes it less viable for the employer to recourse to illegal workforce. Irregular workers respond to the growing demand on low-wage and work-intensive jobs, while employers take abuse their vulnerable position and gain competitive advantage. Informal employment of migrant workers is often not the cause but a consequence of labour market inefficiencies⁵³. Paradoxically, upholding migrants' rights may therefore contribute to reduce in number of illegal agreements and "be the best way to enhance state sovereignty"⁵⁴.

Conclusions

Member States are at the crossroads between inclusion and exclusion of illegal migrant workers. In the name of enhancement of national security, they strive to combat illegal migration by imposing severe sanctions and disregard international standards of human rights protection, leaving undocumented workers defenceless against unscrupulous employers. In balancing the goals of immigration and labour law, a holistic approach should be applied, with more consideration to the core rights of undocumented migrants. It is vital that unauthorised migrants, who are often labelled as "illegal aliens" are first and foremost recognised as workers and residents of a state. Such a need is not only underpinned by moral and humanitarian considerations. It is also in the best socio-economical interest of state, as it deters employers from engaging in an illegal labour

⁴⁸ Ibidem, p. 248.

⁴⁹ N. Selberg, *supra* note 24, p. 286.

⁵⁰ Article 79 of ICMR expressly states that none of her provisions "affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families".

⁵¹ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003), 105, 119.

⁵² Recital 2 of Employers Sanctions Directive.

⁵³ T. Straubhaar, 'Labour market relevant migration policy', [2006] 1 Zeitschrift für ArbeitsmarktForschung, P. 149-157, http://doku.iab.de/zaf/2006/2006_1_zaf_straubhaar.pdf, p.156

⁵⁴ L. Thompson 'Protection of Migrants' Rights and State Sovereignty', https://www.iom.int/files/live/sites/iom/files/about-iom/docs/DDGs_commentary_Protection_of_Migrants.pdf

relationship. Labour law does interfere with migration and criminal law perspective of closed borders, restricted access to labour market and criminal sanctions. It does not, however, contradict the goal of curbing illegal employment. Reconciling both legal disciplines, hard as it seems, is possible within current legal framework, given that guaranteeing protection under labour law is not perceived as a threat to migration policy, but rather as an effective instrument in combating clandestine migration.

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THE INDIVIDUAL CONSTITUTIONAL COMPLAINT AS AN EFFECTIVE INSTRUMENT FOR THE DEVELOPMENT OF HUMAN RIGHTS PROTECTION AND CONSTITUTIONALISM

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Abstract

This paper will analyse some of the theoretical and practical problems of the introduction of individual constitutional complaint in Lithuania. However it will mainly focus on the main reason of the delay of introduction of constitutional complaint mechanism in the national law system – the trend to contrast constitutionalism and democracy, which intensified during an economic crisis period. These issues will be analyzed on the basis of different Lithuanian and foreign constitutional law scholarly works, which enable to reveal the widest possible amplitude of approaches to the discussed subject. Specific aspects of introduction of individual constitutional complaint mechanism will be analyzed on the basis of experience of foreign countries and generalizing it “Draft study on individual access to constitutional justice” by European Commission for Democracy through Law (Venice Commission)². In this paper will be mainly used historical, comparative, analytical and systematic research methods.

Keywords: individual constitutional complaint, economic crisis, constitutionalism, human rights.

Introduction

In the constitutional legal practice of European states, the constitutional complaint, as a specific procedural instrument for the protection of the rights and freedoms guaranteed by the Constitution for a person, has become a means that is increasingly accepted and applied, and proves to be effective. The role of the constitutional complaint is not limited to the defence of concrete rights of a person. One of the peculiarities of the constitutional complaint insofar as it is addressed, namely, to the body of constitutional justice leads to the reasoning that it has a broader meaning. Since the European model of constitutional justice entails that constitutional disputes are decided by a specially established Constitutional Court or an analogous institution vested with not only the powers to declare the unconstitutionality of legal acts *inter partes* (as in the American model), but also the powers to adopt decisions with *erga omnes* effect. Therefore, the meaning of the individual constitutional complaint goes beyond the protection of an individual interest; the institution of the individual constitutional complaint also defends the public interest and the whole constitutional order.

However, the Lithuanian legal system does not provide for the institution of the individual constitutional complaint, which would enable individuals to directly apply to the Constitutional Court. Preliminary arrangements for the introduction of the individual complaint in Lithuania were made on 4 July 2007 when the Seimas approved the Conception of the Individual Constitutional Complaint, but as the economic crisis broke out, in the Lithuanian community of lawyers, in political layers, and in society in general, the discussions and initiatives on the establishment of the individual constitutional complaint in the national law faded away. The implementation of the Conception of the Individual Constitutional Complaint was postponed for an indefinite period of time, as it was believed it might possibly bring an unbearable financial burden on the state, hit by the crisis at that time. Thus, a paradoxical situation emerged as the universal ideas about creating an effective system of the protection of human rights could not be implemented due to the global economic recession.

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² European Commission for Democracy through Law, “Draft study on individual access to constitutional justice”, 2010, [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx) [last accessed: 28 March 2016].

Although it has now been some time since the end of the economic crisis was first spoken about, the aforementioned discussions have not been renewed.

1. The individual constitutional complaint in the context of the development of constitutionalism

Constitutionalism is a political doctrine requiring that state power be limited by the Constitution while seeking to protect an individual and the whole society from possible abuses of power by the authorities formed by individuals and society themselves. Contemporary constitutionalism is inconceivable without the idea of the protection of human rights and freedoms.

World-wide experience of democratic countries attests to the fact that the protection of the Constitution and of the values it enshrines, including human rights and freedoms, is best ensured by means of judicial constitutional review.

Constitutionalism is not a national development, but a phenomenon common to the whole Western democracy. A distinctive feature of contemporary constitutionalism is the role of international obligations in limiting state power and obligating it to protect and defend human rights and freedoms. It is frequently held that, in the context of the enlargement of the European Union, constitutionalism is gaining a new impetus insofar as, following the triumph of democracy and statehood in Middle and Eastern Europe, this region has become known as a union striving to achieve, in addition to economic welfare, the highest standards of the protection of human rights and freedoms³. In Europe, attention to human rights protection has become increasingly widespread. This development has undoubtedly been encouraged by the possibility of applying to the European Court of Human Rights (hereinafter referred to as the ECtHR), as well as by the possibility of invoking the jurisprudence of this Court. Meanwhile, the domestic response of states to these tendencies has been to expand the competence of the constitutional courts to promote the active participation of individuals.

Thus, in the constitutional legal practice of European states, the constitutional complaint, as a specific procedural instrument for the protection of the rights and freedoms guaranteed by the Constitution for a person, has become a means that is increasingly accepted and applied, and proves to be effective.

The individual constitutional complaint is considered to be a specific legal remedy, providing the possibility for a person, who believes that his or her constitutional rights have been violated, to petition the body responsible for constitutional justice and request that it verify the decisions adopted by a public authority. In this context, it must be noted that the establishment of the individual constitutional complaint institution is a European tendency. A broader or narrower model of the constitutional complaint is consolidated in Albania, Andorra, Austria, Belgium, Croatia, the Czech Republic, Cyprus, Germany,⁴ Hungary, Latvia, Liechtenstein, Macedonia, Malta, Montenegro, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, and Switzerland. It can be assumed that, due to this tendency, the widespread establishment of the constitutional complaint mechanism may be identified in future legal thought as a particular stage in the evolution of constitutionalism.

2. The necessity to consolidate the individual constitutional complaint institution in the national legal system

The Lithuanian legal system does not provide for the institution of the individual constitutional complaint, which would enable individuals to directly apply to the Constitutional Court. According to the Constitution of the Republic of Lithuania the right to apply to the Constitutional Court of the Republic of Lithuania is vested in the Seimas *in corpore*, not less than 1/5 of all the Members of the Seimas, the President of the Republic, the Government, and courts.

The introduction of the individual constitutional complaint is supported by the majority of Lithuanian and foreign representatives of legal thought. It has been maintained that the aim to consolidate the individual

³ E. Šileikis, „Alternatyvi konstitucinė teisė“ (Vilnius: VĮ „Teisinės informacijos centras“, 2003) 48

⁴ In Germany, the constitutional complaint exists both at the federal and land levels.

constitutional complaint institution is inseparable from the currently growing tendency to constitutionalise law⁵. Less than a year following the introduction of the individual constitutional complaint in Latvia in 2001, the then President of the Constitutional Court of Latvia, Aivars Endziņš, stated that, even in such a short period of time, it became obvious that the institution of the individual complaint was particularly important in cultivating a state under the rule of law⁶. German legal science treats the entitlement of an individual to be involved in the administration of constitutional justice as a naturally understandable feature of a constitutional state under the rule of law and as a major achievement of such a state⁷. The possibility for an individual to directly access the body of constitutional justice is actively promoted in the study "On Individual Access to Constitutional Justice", prepared by the Venice Commission in 2010⁸.

In providing reasons for the necessity to consolidate the individual constitutional complaint along with other means of protecting constitutional rights and freedoms, it is important to note that the role of the constitutional complaint is not limited to the defence of concrete rights of a person. The meaning of the individual constitutional complaint goes beyond the protection of an individual interest; the institution of the individual constitutional complaint also defends the public interest and the whole constitutional order. Once individuals are granted the right to directly access the body of constitutional justice, society is integrated into the process of the constitutionalisation of the national system of law.

The possibility for an individual to directly access the constitutional justice body is an effective measure to avoid overburdening the ECtHR. The statistics provided by the ECtHR show that those countries in which a constitutional complaint mechanism exists have a lower number of complaints before the ECtHR than others, which do not have such a mechanism⁹. It needs to be pointed out that the jurisprudence of the ECtHR follows the position that the individual constitutional complaint is an effective domestic legal remedy to be exhausted before a person can appeal to the ECtHR¹⁰.

It can be assumed that the necessity to consolidate the constitutional complaint in the legal system of Lithuania arises both from the Constitution of the Republic of Lithuania and the official constitutional doctrine formulated by the Constitutional Court. According to the provisions of the official constitutional doctrine: 1) a person whose constitutional rights or freedoms are violated has the right to apply to a court (Article 30(1) of the Constitution);¹¹ 2) the Constitutional Court is a body of judicial power¹², 3) the Constitution is a directly applicable act (Article 6(1) of the Constitution); 4) everyone may defend their rights by invoking the Constitution (Article 6(2) of the Constitution).

3. Preliminary arrangements for introducing the individual complaint and the reasons of the delay of introduction of constitutional complaint mechanism in Lithuania

⁵ A. Abramavičius, „Konstitucinio skundo samprata ir reikšmė konstitucinėje teismineje kontrolėje“ (Jurisprudencija, No.11 (101), 2007) 15

⁶ A. Endziņš, „Konstitucinio skundo institutas Latvijoje“ (Konstitucijos aiškinimas ir tiesioginis taikymas: Baltijos ir Skandinavijos šalių konferencijos medžiaga, Vilnius, 2002) 81

⁷ A. Abramavičius, „Konstitucinio skundo samprata ir reikšmė konstitucinėje teismineje kontrolėje“ (Jurisprudencija, No.11 (101), 2007) 16

⁸ European Commission for Democracy through Law, "Draft study on individual access to constitutional justice", 2010, [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx) [last accessed: 28 March 2016]

⁹ European Commission for Democracy through Law, "Draft study on individual access to constitutional justice", 2010, [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx) [last accessed: 28 March 2016].

¹⁰ See, e.g., Larionovs v. Latvia, application no. 45520/04 [2014] ECtHR and Tess v. Latvia, application no. 19363/05 [2014] ECtHR.

¹¹ The Constitution of the Republic of Lithuania (Official Gazette Valstybės žinios, 1992, no. 33-1014; 1996, no. 64-1501; 1996, no.122-2863; 2002, no. 65-2629; 2003, No.14-540; 2003, no.32-1315; 2003, no. 32-1316; 2004, no. 111-1423; 2004, no.111-4124; 2006, no.48-1701)

¹² *Inter alia*, Ruling of the Constitutional Court of the Republic of Lithuania of 6 December 2012 (Official Gazette Valstybės žinios, 2012, No. 142-7457).

Preliminary arrangements for introducing the individual complaint in Lithuania were made on 4 July 2007 when the Seimas approved the Conception of the Individual Constitutional Complaint (hereinafter also referred to as the Conception)¹³.

The following main provisions of the Conception can be mentioned: 1) a complaint may be submitted to the Constitutional Court by any private person, including a legal person (*inter alia*, a company, political party, another organization); 2) this person has to be a victim of the violation of his or her constitutional rights and freedoms, i.e. *actio popularis* would not be introduced; 3) the subject of a complaint may be the statutory law or any other legal act adopted by the Seimas, the act of the President of the Republic, or the act of the Government, which served as a legal ground for adopting the individual decision allegedly violating constitutional rights or freedoms; 4) the rule of the exhaustion of other legal remedies—a person concerned must have used all other available and effective measures of legal defence (first of all, judicial proceedings in other courts); 5) the *ratione temporis* rule—a person concerned must submit a complaint within a relatively short period of three months from the final decision of his or her case; 6) a special preliminary admissibility procedure, according to which the admissibility issue must be solved at a preliminary stage by a single justice or a special chamber of the Constitutional Court.

However, as the economic crisis broke out, the implementation of the Conception of the Individual Constitutional Complaint, approved by the 4 July 2007 resolution of the Seimas, was postponed for an indefinite period of time, as it was believed it might bring an unbearable financial burden on the state. Although it has now been some time since the end of the economic crisis was first spoken about, the aforementioned discussions have not been renewed.

While answering the question why the introduction of the individual constitutional complaint mechanism in Lithuania has been delayed, it should be mentioned, first of all, that one of the most frequent arguments voiced on the account of *practical reasoning* against the establishment of the constitutional complaint in Lithuania is that supposedly the Constitutional Court would be overloaded and the efficiency of work at the Constitutional Court would be negatively affected. But the introduction of the individual constitutional complaint possibly could even provide a reason for optimising the work of the Constitutional Court, as well as reconsidering other norms regulating the constitutional justice process, to enable the Court to cope with its workload smoothly and expeditiously.

Another practical-reasoning argument that is frequently put forward to substantiate the view opposing the necessity of the individual constitutional complaint institution is that, purportedly, limited results would be achieved at a high cost, i.e. as the practice of the states where this institution has been put in place shows, usually only a fairly small number of individual constitutional complaints (2-5 percent) is satisfied¹⁴. In this context, it should be indicated that public opinion surveys show that the Constitutional Court enjoys much greater public confidence compared to other Lithuanian judicial bodies; whereas, upon the introduction of the individual constitutional complaint institution, there is a risk not to meet the expectations of people, which would undermine the popularity of the Constitutional Court in society.

In the context of practical-reasoning doubts as to the necessity of the individual constitutional complaint, it is also quite often maintained that the current model of constitutional control is fully sufficient, in particular, considering that the Lithuanian legal system provides for the possibility of indirect access to the constitutional justice body (a person may access the constitutional justice body through intermediate bodies, which are courts in the case of Lithuania). In Lithuania, individuals have the possibility of defending their constitutional rights through the courts of general jurisdiction and the courts of special (administrative justice) competence. On the other hand, the study “On Individual Access to Constitutional Justice”, prepared by the Venice Commission in 2010, expresses the position that indirect access to the constitutional justice body is an insufficient means in ensuring the constitutional rights of an individual, since the effectiveness of this mechanism is heavily reliant on the capacity of the intermediary bodies and their willingness to identify

¹³ Resolution of the Seimas of the Republic of Lithuania of 4 July 2007 on the approval of the Conception of the Individual Constitutional Complaint (Official Gazette Valstybės žinios, 2007, No. 77-3061)

¹⁴ A. Abramavičius, „Konstitucinio skundo samprata ir reikšmė konstitucinėje teisminėje kontrolėje (Jurisprudencija, No.11 (101), 2007) 17

potentially unconstitutional legal acts and to apply to the Constitutional Court. Therefore, according to the Venice Commission, indirect access should be combined with a possibility for a person to directly access the constitutional justice body¹⁵.

Nevertheless, it is also evident that the constitutional justice process and the right of access to the constitutional court are not merely practical, but, to a large extent, also ideological issues. One of the sceptics of the individual constitutional complaint, French constitutionalist Louis Favoreu, while discussing the possibility of introducing the individual constitutional complaint in France, wrote that conferring this right on individuals would weaken the autonomy of Parliament¹⁶. More often than not it is feared that granting an individual access to the Constitutional Court will alter the traditional balance of powers between the Constitutional Court and Parliament¹⁷. Since in this case, the limitation of the powers of state authorities in terms of human rights protection would accelerate even more—upon the introduction of the individual constitutional complaint mechanism, the number of petitions before the Constitutional Court would definitely rise, while increasing the number of legal acts (or their parts) adopted by the political authority where such acts would be ruled in conflict with the Constitution. Thus, it is not without good reason that the accessibility of constitutional courts is said to be one of the key factors determining their effectiveness. So perhaps the delay to establish an individual constitutional complaint mechanism in Lithuania reflects the theoretical debates about the confrontation of the constitutionalism and democracy (majoritarian)?

Although it is difficult to prove that namely the fears of the above-mentioned character lie behind the delay by the political authority in introducing the institution of the individual constitutional complaint in Lithuania, nevertheless, this assumption can, at least partly, be confirmed by the statements made by some politicians and certain initiatives voiced by them regarding the narrowing of the competence vested in the Constitutional Court. These initiatives escalated during the economic crisis. During that period, the Constitutional Court delivered not an inconsiderable number of rulings in which it had to consider the constitutional compliance of austerity measures, i.e. legal provisions applied by the legislative and executive powers to manage the economic crisis. Obviously, after certain austerity measures had been ruled anti-constitutional, not all these rulings of the Constitutional Court were favourably received by the political authority. The then media released a number of statements by politicians not only claiming that the Constitutional Court allegedly took over the legislative and executive powers over the economic policy, but also more seriously threatening to restrict the competence of the Constitutional Court¹⁸, or even to eliminate this institution altogether.

There were repeated public calls to follow the example of Hungary, which limited the powers of its Constitutional Court in adopting decisions on budget formation and tax policy issues in 2010¹⁹. More than once proposals were voiced to prohibit the Constitutional Court from interfering with the fiscal measures applied by the Government during the times of economic hardship. One member of the Seimas even started collecting the signatures of other MPs for the amendment of the Constitution to eliminate the Constitutional Court by transferring its functions to the Supreme Court. It is important to note that European legal scholars have emphasised in their publications that there is no other country in the world that has imposed similar restrictions on their constitutional courts like Hungary, and that such restrictions of the powers of a constitutional court are not welcome and should be viewed as a 'constitutional counter-revolution'²⁰.

¹⁵ European Commission for Democracy through Law, "Draft study on individual access to constitutional justice", 2010, [http://www.venice.coe.int/webforms/documents/CDL-JU\(2010\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-JU(2010)004-e.aspx) [last accessed: 28 March 2016]

¹⁶ L. Favoreu, „Sur l'introduction hypothétique du recours individuel direct devant le Conseil constitutionnel“, 2001 <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-10/sur-l-introduction-hypothetique-du-recours-individuel-direct-devant-le-conseil-constitutionnel.52373.html> [last accessed: 28 March 2016]

¹⁷ N. Tsereteli, „Mechanism of Individual Complaints – German, Spanish and Hungarian Constitutional Courts – Comparative Analysis“, 2007., http://www.etd.ceu.hu/2007/tsereteli_nino [last accessed: 28 March 2016]3

¹⁸ „Seime sklando idėja apriboti Konstitucinio Teismo galias“, http://www.lrt.lt/naujienos/ekonomika/4/29475/seime_sklando_idėja_apriboti_konstitucinio_teismo_galias [last accessed: 16 March 2016]

¹⁹ „Premjeras norėtų apriboti Konstitucinio Teismo galias <http://www.veidas.lt/premjeris-noretuapriboti-kt-galias>“, [16 March 2016]

²⁰ G. Halmai, „From the 'rule of law' revolution to the constitutional counter-revolution in Hungary“ (European yearbook on human rights, 2012) 375–377

The economic crisis and the post-crisis period saw not an inconsiderable number of draft laws being tabled to amend the Law on the Constitutional Court; these legislative amendments can be regarded as unconstitutional attempts to limit the powers of the Constitutional Court and otherwise encumber its activities. Among those proposals, the following can be mentioned: draft Law no. XIIP-1788²¹, which contained the proposal to provide that the rulings of the Constitutional Court and decisions regarding the interpretation of the rulings come into effect only after their implementation following the procedure set out in the Statute (i.e. rules) of the Seimas; draft Law no. XIIP-1815²², which included the requirement that the results of voting on the final acts of the Constitutional Court be announced publicly; draft Law no. XIIP-1134²³, which proposed changing the present quorum of 2/3 justices required for considering cases and adopting rulings, conclusions or decisions by increasing it to eight justices; and draft Law no. XIIP-664(2)²⁴, which proposed to reduce the distance for staging rallies, pickets and other actions from 75 to 25 metres of the building of the Constitutional Court.

It must be noted in this context that all of the above political initiatives to eliminate the Constitutional Court, to limit its powers or encumber its activities are clear manifestations of the attempts by some politicians either to control the Constitutional Court so that it remains completely obedient to them or to have freedom to act without any constitutional control over them in certain areas of economy and finances. Therefore, during the economic crisis and post-crisis period, an unfavourable environment developed to discuss the possibility of expanding the circle of subjects entitled to apply to the Constitutional Court (i.e. granting individuals the possibility of a direct access to the Constitutional Court) and, thus, to reinforce the limitation of the powers of state authorities with regard to human rights protection. As a result of this tendency almost realistic idea of the individual constitutional complaint was fully abandoned.

However it is clear, that such a confrontation of constitutionalism and democracy stems from too narrow understanding of democracy, when it is defined only with the will of the majority or the emphasis on the free general election institute, as a democratic government formation basis. Modern democracy has a much broader meaning: it is not only free elections and government belonging to the majority, it also entails respect for the rights of the opposition, guaranteeing the fundamental rights and, of course, constitutionalism²⁵.

The public opinion survey²⁶ suggests that the criticism of the Constitutional Court voiced by some politicians in public, as well as the political initiatives to restrict the powers of the Constitutional Court, are not supported by society at large. E.g., 28.2 per cent of the respondents disagree with the statement that the Constitutional Court assumes the legislative and/or executive powers to implement economic policy by deciding cases regarding the lawfulness of austerity measures, and an even greater percentage of the respondents (56.1 per cent) do not approve if individuals were deprived of the possibility of contesting the decisions of political authorities to overcome the economic crisis in violation of their rights (only 12.6 per cent consent to that), 33.2 per cent of the respondents approve the introduction of individual constitutional complaint in Lithuania.

Conclusions

The essential idea of constitutionalism is the limitation of government to protect human rights and therefore the prevalence of constitutional complaint in Europe reflects an even deeper entrenchment of constitutionalism in this region. The introduction of this institute in national law system would be an important step in the promotion of human rights and the development of constitutionalism in Lithuania.

²¹ Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=470667&p_tr2=2 [16 January 2016]

²² Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=470973&p_tr2=2 [16 January 2016]

²³ Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=458441&p_tr2=2 [16 January 2016]

²⁴ Online access: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=466664&p_tr2=2 [16 January 2016]

²⁵ E. Jarašiūnas, „Konstitucinė justicija ir demokratija: keletas sąveikos problemų“, (Jurisprudencija, no. 64(56), 2005) 76.

²⁶ Qualitative representative survey of the Lithuanian population and separate target groups: Report-presentation of the research, implemented by the public opinion and market research company Factus, Kaunas, http://www.tf.vu.lt/images/dotacija/Ataskaita_Factus.pptx [last accessed:22 March 2016]

The delay of introduction of constitutional complaint mechanism in the national law system reflects the trend to contrast constitutionalism and democracy, which intensified during an economic crisis period, as if possibility for the persons to apply to the Constitutional Court would led to the constraints of the will of the majority. However, the modern concept of democracy is no longer associated only with the will of the majority and parliamentary sovereignty, its essence is the balance between majority government and respect for the fundamental rights and freedoms.

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4. G. Halmai, „From the ‘rule of law’ revolution to the constitutional counter-revolution in Hungary” (European yearbook on human rights, 2012).
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13. Resolution of the Seimas of the Republic of Lithuania of 4 July 2007 on the approval of the Conception of the Individual Constitutional Complaint (Official Gazette *Valstybės žinios*, 2007, no. 77-3061).
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15. Larionovs v. Latvia, application no. 45520/04 [2014] ECtHR.
16. Tess v. Latvia, application no. 19363/05 [2014] ECtHR.

ENVIRONMENTAL EXILE FROM SMALL ISLAND DEVELOPING STATES AS A COMPLEX RESEARCH PROBLEM

Anna Reterska-Trzaskowska¹

Abstract

The problem of environmental migration (climate exile) is not new, but so far there have been no cases of forced flee from the particular state due to the flooding that is caused by rising sea level. Such situations potentially exist in small island states such as the Maldives, Tuvalu and Kiribati. In the near future a mass relocation seems to be real, so the fundamental problem is to regulate the legal status of citizens of these states, what has not been done yet.

Climate exile is a multi-faceted phenomenon and its parts can be studied in different dimensions. As J. McAdam underlines displacement caused by climate can be recognized as the question of refugee exile, human rights, environment, security, migration, or as the humanitarian issue. The last two issues are not regulated by the so-called hard law, but left for the regulation by the policy or non-legal solutions.

The science treats movements associated with the climate as a single phenomenon. Whilst, this concept covers many different issues and only the analysis of this problem through several different scientific perspectives may produce some sensible policy or normative framework. If you not see and do not understand the differences in the nature, scale and sustainability of the potential human traffic and the need to take into account sociological, economic and cultural factors, there is a risk of perdition the essence of the phenomenon.

The small size of the islands and their extremely low location (1 meter above sea level) cause that it is not possible to transfer people inland or to higher grounds in case of emergency. Costly coastal protection measures are needed. Regarding above problems, in this states there are formed National Adaptation Plans of Action, hereinafter: NAPA. In the NAPA of these countries adaptation is a multidimensional task that aims to increase the resilience of systems vulnerable to climatic risks in order to achieve beneficial results in terms of sustainable development.

In these regions are also created the plans of sustainable development, which provide activities in the field of good governance, growth and economic stability, social development, employment, human resources and natural resources. However, migration, including full evacuation of the islands, becomes more and more real as an adaptation strategy.

There are also discussions taken with other countries to obtain a new land by purchasing or leasing it. However, at present there is no legal solution, which would provide the expected guarantees to these countries. Taken efforts, such as immigration agreements with neighboring countries or migration from outer islands to the main island, only indirectly and temporarily mitigate the problem.

One of the legal solutions to this problem is to utilize the Convention relating to the status of refugees of 1951 to the environmental refugees. However, this system is not tailored to the complex needs of environmental refugees.

Keywords: environmental refugees, migration, climate change, sea level rise, small islands

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Introduction

The problem of environmental migration (climate exile) is not new. People have been moving since the dawn of history for various reasons –economic, political, the turbulence of the environment, natural disasters and other weather phenomena. However, as so far there have been no cases of forced flee from the particular state due to its inundation, caused by rising sea level. Such situations potentially exist in small island states such as the Maldives, Tuvalu, Kiribati, Tokelau, the Marshall Islands, Fiji, Vanuatu, Papua New Guinea and the Federated States of Micronesia. In the near future a mass relocation seems to be real, so the fundamental problem is to regulate the legal status of citizens of these states, what has not been done yet.

However, environmental exile is not limited only to the case of sea level rise. It is a vast phenomenon, that can be analyzed from different perspectives, depending on the adopted definition and classification. Walter Kälin (representative of the Secretary-General on the Human Rights of Internally Displaced Persons) has identified five displacement-triggering scenarios, which were recently adopted by the Inter-Agency Standing Committee Working Group on Migration/Displacement and Climate Change². In this classification five triggers were indicated:

1.1. *The increase of hydro-meteorological disasters*, such as flooding, hurricanes, typhoons, cyclones and mudslides, leading predominantly to internal displacement.

1.2. Government-initiated *planned evacuation* of areas at high risk of disasters. This is likely to lead to permanent internal displacement.

1.3. *Environmental degradation and slow onset disasters*, such as reduced water availability, desertification, recurrent flooding and increased salinity in costal zones.

1.4. *Small island States at risk of disappearing* because of rising seas. At the point at which the territory is no longer habitable (eg because of the inability to grow crops or obtain fresh water), permanent relocation to other States would be necessary.

1.5. *Risk of conflict* over essential resources. Even though the humanitarian community is used to dealing with internal conflict, and people displaced by conflict may be eligible for protection as refugees or assistance as IDPs, resource-based conflicts ‘may be particularly challenging’ at the operational level. The likely outcome is both conflict and the displacement of a protracted nature.’³

The most common, and one of the first, was the definition of the environmental refugees given by Essam El-Hinnawi. He described environmental refugees as:

“people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life. By ‘environmental disruption’ in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life”⁴,

The above definition includes various circumstances, that lead to forced migration, from natural disruption to this triggered by man, from temporal to permanent hanges and from physical to biological changes.

The different view is presented by Fabrice Renaud, who marks out three categories:

1. *“environmentally motivated migrants”;*
2. *“environmentally forced migrants”;*
3. *“environmental refugees”;*

According to this distinction, the first category includes persons, who *may leave* permanently degrading environment *in order to pre-empt the worse*. The second category entails persons who *have to leave in order*

² J. McAdam, 'Environmental migration governance', [in:] A. Betts (eds), 'Global Migration Governance', Oxford 2010 7-8

³ W. Kälin, 'The Climate Change-Displacement Nexus', ECOSOC Panel on Disaster Risk Reduction and Preparedness: Addressing the Humanitarian Consequences of Natural Disasters, 2008

⁴ E. El-Hinnawi, 'Environmental Refugees'. United Nations Environmental Programme, New York/Nairobi 1985, 4 [cited in:] D.C. Bates, 'Environmental Refugees? Classifying Human Migration Caused by Environmental Change', Population and Environment, Vol. 23, No. 5, May 2002 2.

to avoid the worst. Only these, who *flee the worst* can be considered as environmental refugees⁵. The first two categories theoretically give the possibility of making decision on staying or fleeing (and when to do it), and the third category assumes that persons are forced to flee.

But these are only the few attempts to define this phenomenon. However, at this time, there is no legal instrument, that would regulate this matter. The absence of a coherent body of norms that could properly be described as 'international migration law' means that there is no singular response to global migration governance.

1. Complexity of the phenomenon

Although climate-induced movement could be usefully assisted by a multilateral institutional response, there is a problem in creating the complex regulation, because this kind of movement is multi-faceted and cannot be put in the narrow confines. It cannot be as well treated as a single phenomenon, though it is often treated as such in doctrine of law.

Whilst, this concept covers many different issues and only the analysis of this problem through several different scientific perspectives may produce some sensible policy or normative framework. If you not see and do not understand the differences in the nature, scale and sustainability of the potential human traffic and the need to take into account sociological, economic and cultural factors, there is a risk of perdition the essence of the phenomenon.

Climate exile is a multi-faceted phenomenon and its parts can be studied in different dimensions. As Jane McAdam underlines, interests in environmentally-driven population movement can be identified across the fields of environment, development, human rights, disaster management, migration and humanitarian relief. The last two issues are not regulated by the so-called hard law, but left for the regulation by the policy or non-legal solutions.⁶ She also adds that the traditional ways in which law and policy have been divided into 'fields' of inquiry and operation, such as 'human rights', 'trade', 'development' and so on, do not reflect the messy, complex interconnectedness of the issue.⁷

2. Small Island Developing States

Situation in small island developing states (SIDS), like Maldives or Tuvalu, is the brightest example of the complexity of the phenomenon. As L. Briguglio notes, many of these island states face special disadvantages associated with small size, insularity, remoteness and proneness to natural disasters. These factors render the economies of these states very vulnerable to forces outside their control – a condition which sometimes threatens their economic viability.⁸ Briguglio indicates these specific areas: limited natural resource endowments and high import content, small domestic market and dependence on export markets and proneness to natural disasters.⁹

Tuvalu is the one of the smallest countries in the world - its population is estimated at approximately 11,000 inhabitants. It is located near Australia. It consists of nine coral atolls which together cover an area of 26 km² of land¹⁰, and none of which reaches more than a few meters above sea level (approx. 5 m in the highest point¹¹). Tuvalu, due to the relatively low national income, weak human resources, exceptional economic vulnerability to external threats, belongs to the Least Developed Countries¹². The main threat to this country is the increase in sea level, which takes away another meters of land and entails a number of

⁵ F. Renaud, J.J. Bogardi, O. Dun, K. Warner, 'Control, Adapt or Flee: How to Face Environmental Migration?', U.N. Univ. — Institute for Environment & Human Security (UNU-EHS), InterSecTions No. 5/2007, Paffenholz, Bornheim 2007, 29-30

⁶ J. McAdam, 'Environmental ... 1

⁷ Ibidem 5-6

⁸ L. Briguglio, 'Small island developing states and their economic vulnerabilities' [1995] World Development Vol. 23, No. 9 1615-1632

⁹ Ibidem 1617

¹⁰ 'Tuvalu', New Zealand Ministry of Foreign Affairs & Trade Aid Programme, <http://www.aid.govt.nz/programmes/c-tuvalu.html>

¹¹ 'Tuvalu', CIA – The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>

¹² 'Tuvalu's National Adaptation Programme of Action, 13.

economic consequences. Current weather conditions threaten the islands habitability. Citizens of Tuvalu are dependent on agriculture and fishing, but soil becomes poor, causing the agricultural practice difficult. Floods, as well as an increase in the salinity of the soil, make the crops on which people depend, wither. Tuvalu storms are more violent, accompanied with floods¹³. In 1997, one of the uninhabited islands of Tuvalu was absorbed by the sea.

Maldives are located in the Indian Ocean. Its population is dispersed over 200 islands, many of which are smaller than 1 km². The main island has a population of 74,000. Maldives contribute 0.001% of global greenhouse gas emissions.¹⁴ Only less than 1% of the total land area is suitable for living, and 80% of the islands is less than 1 meter above sea level. National forecasts indicate, that extreme occurrences, like sea level rise, increase of temperature, rainfall and storms are likely to occur more often in the future.¹⁵

Rising sea level cause regular tidal floodings in most of the islands. The most far-reaching forecasts indicate that the periodic floodings may occur on almost all the islands. Some storm waves can completely drown all small and medium-sized islands in the Maldives.¹⁶

3. National adaptation programs

The small size of the islands and their extremely low location (1 meter above sea level) cause that it is not possible to transfer people inland or to higher grounds in case of emergency. Costly coastal protection measures are needed. There are formed *National Adaptation Programme of Actions* (hereinafter: NAPA) that regard above mentioned problems. In the NAPA of the small island countries adaptation is a multidimensional task, that aims to increase the resilience of systems vulnerable to climatic risks in order to achieve beneficial results in terms of sustainable development¹⁷.

But states like Tuvalu or Kiribati have very limited capacity for adaptation. Their plans provide a range of actions, such as improving the Tarawa weather station and meteorological services, protecting key government infrastructure and securing water supply.¹⁸ As president of Kiribati – Aote Tong stated “*Adaptation measures of moving inland and to higher ground are impractical for us. We cannot move inland due to the narrowness of our islands, nor are there higher grounds to which we could escape from the rising seas*”.¹⁹

In 2000, the government sold the Internet domain of the completion of “.tv” - for \$ 50 million, and the money allocated for publicizing worldwide the problem of the disappearance of their state.²⁰

Tuvalu also creates the sustainable development plans, like *Te Kakeega II*, which includes the actions in the fields of good governance, growth and economic stability, social development (including health, sports, poverty), the private sectors and employment, education and human resources, natural resources (including agriculture, fisheries, tourism, environment), infrastructure and development issues outer islands²¹.

4. Climate change issue

By analyzing the situation of the island states in the climate change aspects, it could be indicated, that these countries are the most vulnerable to global warming and to its result – sea level rise. In the region of South

¹³ K. K. Moberg, 'Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection', 94 Iowa Law Review 1107 2008-2009 1.

¹⁴ R. Brears, 'Environmental refugees from the Maldives: are they protected?' 4

¹⁵ A. Latheefa et. al., 'State of environment. Maldives 2011'. Ministry of Environment and Energy of Maldives, 14

¹⁶ Tuvalu's National... 16

¹⁷ Ibidem 5.

¹⁸ N. Maclellan, 'The future is here: climate change in the Pacific' [2009] Oxfam briefing paper 28

¹⁹ President Aote Tong of Kiribati, Statement to the General Debate of the 63rd UN General Assembly, 25 September 2008.

²⁰ A. Berzon, 'Tuvalu is drowning. The island nation is slowly being inundated as the ocean rises, and some citizens are fleeing. How will the world handle a flood of "climate refugees"?' , 2006, <http://www.salon.com/news/feature/2006/03/31/tuvalu>

²¹ 'Te Kakeega II. National Strategy For Sustainable Development 2005-2015', 2, 5 <http://www.sprep.org/att/IRC/eCOPIES/Countries/Tuvalu/42.pdf>.

Pacific these factors are the main threat to the survival and maintenance of existing islands. As N. Mann rightly observes climate changes are not just predictions but actual scenarios requiring a discussion on global warming and environmental migration²².

In its Fourth Assessment Report, the Intergovernmental Panel on Climate Change (IPCC) indicated, that the average air temperature is projected to increase about +1.2 to 1.4 °C²³. In the 20th Century, global mean sea level rose at a rate between 1.3 to 1.7 mm per year and since 1993 – at a rate between 2.8 to 3.6 mm per year²⁴. W. Steffen and others predicts, that sea level is likely to increase by 0.4 to 1.0 m through the 21st century. In their opinion a sea-level rise of only 0.5 m would mean, that floods (a very rare event today) would occur every few months²⁵.

In the near future these changes will cause the submersion or recession of many coastal areas, but for small island states, like Tuvalu or Kiribati, this will mean the inundation of the whole existing lands.

However, not only the loss of land is the current problem of the habitants of these islands. Already, there is a noticeable intensification of phenomena such as storms, typhoons and floods.

The IPCC expressed very high confidence that the sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities. At the same time these factors, as well as seawater intrusion into freshwater lenses, soil salinisation, and decline in water supply are very likely to adversely impact coastal agriculture.²⁶

Before the final inundation occurs, all these occurrences, caused by sea level rise will be eroding the viability of island communities, highly increasing the likelihood of migration or resettlement. Steffen and others concludes, that a sea-level rise of 0.5 to 2 m could displace 1.2 and 2.2 million people from the Caribbean region and the Indian and Pacific Ocean islands, assuming that no adaptation occurs²⁷.

These authors claim, that there is a strong evidence that the primary cause of the sea-level rise observed during the past half-century was the warming of the atmosphere and oceans due to an increase in the concentration of greenhouse gases in the atmosphere²⁸. Therefore the actions of reducing these emissions should be undertaken, what will be discussed further.

5. Human rights issue

All the above-mentioned occurrences aren't without the impact on human rights. J. McAdam indicates three main reasons why international human rights law is of importance to the present analysis. First, she writes, it sets out minimum standards of treatment to which all individuals in a State's territory or jurisdiction are entitled. It provides a criterion for measuring which rights might be at risk from climate change, and which domestic authorities are responsible for addressing them. Second, if people do relocate, then human rights law demands a minimum standard of treatment in the host State. This is relevant to the legal status granted to such people. States have a responsibility to ensure to them the full range of human rights by which the State is bound under international law. Third, it may provide a basis on which individuals can claim protection in a third State (principle of *non-refoulement*, embodied in the concept of 'complementary protection')²⁹.

²² N. Mann, 'Racism, the environment, and persecution: environmental refugees in Tuvalu', Theses and dissertations. Paper 534, Toronto, Ontario 2009 15

²³ S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor, H.L. Miller, 'Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change', Climate Change 2007 14

²⁴ Ibidem 5

²⁵ W. Steffen, J. Hunter, L. Hughes, 'Counting the costs: climate change and coastal flooding' (Climate Council of Australia 2014) iv

²⁶ N. Maclellan, op. cit. 14

²⁷ W. Steffen, J. Hunter, L. Hughes, op. cit. v

²⁸ Ibidem 7

²⁹ J. McAdam, 'Environmental ... 14

Human rights are in danger in the region of Pacific because of the impacts of climate changes that undermine rights to a secure life and livelihood, food, water, health, and shelter³⁰.

Due to the changes in the environment, moving from the outlying islands to the bigger urban centres, often capitals, caused by the attraction of urban centers in terms of jobs and education is the common practise.³¹ That leads, in turn, to overcrowding, health problems and unemployment. All these factors will expose millions of people to increased rates of malaria, diarrhoeal disease, cardio-respiratory diseases, malnutrition and death, what may violate individuals' right to enjoyment of the highest attainable standard of physical and mental health.

Eventually, when these islands will inundate completely, problem connected with migration will become the main issue. Boncour and Burson indicate, that this will be the additional factor in diminishing human rights. How can peoples exercise their right to freely dispose of their natural resources, including maritime resources, if they are displaced, they ask. They also draw attention to the cultural identity, which is intimately bound with particular territory, the loss of which is likely to pose a challenge for the protection of cultural development³².

6. Sustainable development

In the region of Pacific the plans of sustainable development, which provide activities in the field of good governance, growth and economic stability, social development, employment, human resources and natural resources are also created. Pacific communities urgently need support to adapt to the impacts of climate change they are already experiencing. These adaptation strategies range from planting mangroves in order to reduce coastal erosion, building rainwater tanks to maximise fresh water supplies, to creating village level renewable energy initiatives. To improve the effectiveness of these actions governments, civil society and local communities have to take part in planning and implementing these adaptation strategies³³.

Nevertheless, sustainable development can only be perceived as the temporarily strategy, trying to delay the irreversible damages and harms of the environment. However, eventually migration – including full evacuation of the islands – becomes perceived as the more and more realistic adaptation strategy.

7. State's policy issue

Problem of environmental exile can be also analyzed from the states' policies perspective, regarding the problem of greenhouse gases emissions. In W. Steffen and others opinion, stabilizing the climate system through deep and rapid reductions in greenhouse gas emissions today is the only way to significantly reduce the level of risk that we face from coastal flooding in the second half of the century and beyond. To achieve this, wealthy, polluting countries such as Australia and New Zealand, consistent with the “polluter pays” principle, must reduce their emissions by at least 40% by 2020, and at least 95% by 2050. The current emissions reductions targets set by Australia and New Zealand fall short of their international obligations and do not much to contribute to a safe, fair global climate agreement³⁴.

Preparations to lower the risk of inundation requires a coordinated national planning framework integrated across federal, state and local governments with clear allocation of responsibilities³⁵. But these small developing island states are incapable to face the problem on their own. They should be supported by other countries, which should support their efforts to explore and access a range of renewable energy sources and protect forests across the region, as well as provide financing³⁶.

³⁰ M. Elliott, D. Fagon, 'From Community to Copenhagen: Civil Society Action on Climate Change in the Pacific', (in) B. Burson (eds.), 'Climate Change and Migration South Pacific Perspectives' University of Wellington, Wellington, New Zealand 2010 61

³¹ L. Briguglio, op. cit. 1618

³² P. Boncour, B. Burson, 'Climate Change and Migration in the South Pacific Region: Policy Perspectives', (in) B. Burson (eds.), 'Climate Change and Migration South Pacific Perspectives' University of Wellington, Wellington, New Zealand 2010 20-21

³³ N. Maclellan, op. cit. 9-10

³⁴ Ibidem 7

³⁵ W. Steffen, J. Hunter, L. Hughes, op. cit. vi

³⁶ N. Maclellan, op. cit. 7

If the local states' community fail to support these policies and actions, in near future they will face more expensive, complex and irreversible problem, that is mass immigration.

8. Migration policy issue

The most important problem regarding the situation of environmental refugees is to ensure safe and legally guaranteed migration to the neighbouring countries. But as the President of Kiribati – Anote Tong stated in his address to the opening session of the 2008 UN General Assembly: *“The relocation of the 100,000 people of Kiribati, for example, cannot be done overnight. It requires long-term forward planning and the sooner we act, the less stressful and the less painful it would be for all concerned. This is why my Government has developed a long-term merit-based relocation strategy as an option for our people. As leaders, it is our duty to the people we serve to prepare them for the worst-case scenario.”*³⁷

In the first place Australia and New Zealand are taken into account due to their short distance and vast land mass. But these states are restrained in creating solutions to the climate change impacts. The current *Pacific Islands Framework for Action on Climate Change* (PIFACC) doesn't mention the displacement or migration. Tuvalu says, that it raised the issue of a resettlement scheme with Australian officials in Canberra in 2001, but there was not a positive response³⁸.

Although New Zealand has not yet made specific provision for people displaced by climate change, there are two ways, allowing migrating to New Zealand.

First possibility – *Pacific Access Category (PAC)* – is a special access category for Pacific island countries created in 2002 in order to facilitate immigration from Pacific neighbours it has especially close ties with, and which replaced previously working visa programs³⁹. This scheme allows for the settlement of 1,100 Samoans, 75 people from Kiribati and Tuvalu, and 250 Tongans – with their partners and children – each year in New Zealand⁴⁰. This scheme, however, is restricted to persons between 18 and 45 years, who have the job offer in New Zealand, speak English, pass the health control and have the minimum required income⁴¹. Still, it excludes from the protection those, who are most vulnerable to change, that is the children, persons with disabilities and old ones⁴².

V.O. Kolmannskog has noticed, that this program does not mention environmental refugees, nor the threat of climate change, so this is not a special category aimed at accommodating people displaced by climate change and does not differ from the normal migration solutions⁴³.

The second possibility to migrate to New Zealand is the seasonal migration program, issuing a work permit for a period of few months (six or nine), after which worker has to turn back to his country⁴⁴. But this program in practice gives the possibility to work on a fruit harvest, what for example for Tuvaluans, who mainly work in public sector, this vision is perceived sometimes as the “slave immigration”⁴⁵.

Nevertheless, the Tuvalu Government continues to negotiate migration possibilities for its citizens in case of need to move. At the 2009 United Nations climate change conference in Copenhagen, Fiji expressed its willingness to take in Tuvaluans and I-Kiribati as environmental migrants because of its historical links with

³⁷ Ibidem 36

³⁸ Ibidem 35

³⁹ J. McAdam, 'Refusing 'refuge' in the Pacific: (de)constructing climate-induced displacement in international law' 18.

⁴⁰ Immigration New Zealand, 'Pacific Access Category', <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>

⁴¹ R. Cohen, M. Bradley, 'Disasters and Displacement: Gaps in Protection', *Journal of International Humanitarian Legal Studies*, vol. 1, 2010, 13.

⁴² Ibidem.

⁴³ V. O. Kolmannskog, 'Future floods of refugees. A comment on climate change, conflict and forced migration', Norwegian Refugee Council, Oslo 2008 28

⁴⁴ 'Preliminary findings from the EACH-FOR project on Environmentally Induced Migration', *Environmental Change and Forced Migration Scenarios Project (EACH-FOR) 2008 9*.

⁴⁵ J. McAdam, 'Refusing ... 18; see Department of Labour, 'Seasonal Migration Programme for Pacific Islanders Boosts Incomes Back Home', <http://www.dol.govt.nz/News/Media/2010/seasonal-migration-programme.asp>

the two nations⁴⁶. However, these are only the declarations, for this reason proper immigration policies should be developed by Australia and New Zealand, before this escalates to an emergency situation⁴⁷.

9. New lands

The small island states don't confine themselves only to actions regarding the current situation and trying to impede the impacts of climate change. They lead the discussions with other countries to obtain a new land by purchasing or leasing it to secure the future rights of citizens of island states.

Through the acquisition of new territory of another state by an assignment agreement, the sovereignty over the land would be transferred entirely to the vanishing state, which then would relocate its population to the new territorial location⁴⁸.

The lease of the territory, however, gained importance in the last century as a way of gaining control over strategic areas without the need for actual annexation. The leaseholding state would be granted jurisdiction over this territory, but this jurisdiction would be constrained by the territorial jurisdiction of the State owning the land.

Eventually, only by ensuring the permanent solution the problem of environmental exile and statelessness can be combated.

10. Refugee system

Problem has also been widely analysed from the refugee law perspective. There have been many attempts to put the phenomenon of environmental refugees into the frames of the Convention relating to the status of refugees of 1951⁴⁹.

According to article 1 A(2) of the above convention, the refugee is a person, who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"⁵⁰.

As it can be seen from this definition, many legal doubts arise. First of all environmental refugees cannot be classified to any of the five reasons of persecution. Nor can be the environment recognized as the persecutor, like some authors suggest⁵¹. Problematic is also the distinction between forced movements and voluntarily decision to improve life conditions.

Nonetheless the refugee protection system is currently overload and inefficient and is not tailored to the complex needs of environmental refugees.

Conclusions

The most extreme threat to self-determination arises in the context of whole-island displacement, where States, such as Tuvalu, Kiribati and the Maldives are threatened with extinction due to rising sea levels⁵². However, the islands will become uninhabitable a long before the whole inundation, through the gradual

⁴⁶ S. Malua, 'The Tuvalu Community in Auckland. A focus on health and migration' in: "Transnational Pacific Health through the Lens of Tuberculosis" Research Group Report No. 4, University of Auckland, New Zealand 2014 7

⁴⁷ N. Maclellan, op. cit. 36

⁴⁸ R. Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', Sydney 2009, <http://ssrn.com/abstract=1412028> 7

⁴⁹ Convention relating to the status of refugees of 28.07.1951 (Dz.U. 1991 nr 119 poz. 515);

⁵⁰ Art. 1 A(2) Convention relating to the status of refugees of 28.07.1951 (Dz.U. 1991 nr 119 poz. 515);

⁵¹ J. McAdam, 'Environmental ... 11.

⁵² Ibidem 16

processes, like floods, salination and erosion. The multidimensional adaptation actions, leading to reverse these effects, can only delay the inevitable.

Nevertheless, according to J. McAdam, the permanent displacement of a population not only threatens a peoples' right to self-determination, but also the very existence of their State as a matter of international law⁵³.

From the above considerations emerges a multifaceted phenomenon of environmental refugees. To fully analyze them, researchs cannot be limited only to the particular aspects. Its sources and controlling factors have to be considered and the prevailing public moods in the region, which determine what steps should be taken, have to be evaluated. Besides focusing on the causes, it is necessary to reliably estimate the potential consequences of the phenomenon, in order to bring appropriate solutions. Migration policy of neighboring countries should also be considered, in order to answer the question to what extent the future existence of the residents of small island states is protected and to what degree it is exposed to human rights violations. Besides, the possibility to predict consequences often are the basis for undertaking the preventive actions.

Currently, this problem affects substantially only the underdeveloped countries, who are not able to deal with it, but probably soon the effects of climate change and as well the existence of climate refugees will be felt by the majority of the international community and by all of us.

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⁵³ Ibidem.

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PSYCHOLOGICAL ASPECTS OF THE REGULATIONS FOR MOBBING IN THE POLISH LABOUR CODE

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Abstract

There is no doubt that the law can not exist in isolation from other science disciplines whose achievements have had and still have a huge impact on its development and application in practice. Particular importance should be attributed to psychology, as the branch of science that has a strong relationship with the law.

The purpose of this paper is to show the important role of research in psychology in solving some problems in the area of labour law.

The issue of using knowledge of psychology is rarely discussed in the context of labour law disputes resolution. Its achievements are mentioned more often at criminal, family law, etc. Meanwhile, taking into account that in modern society there is a need to create more and more legal regulations both to protect the employee, as well as implementing specific solutions for broadly defined labour relations, using the knowledge of psychology in the creation and application of labour law standards seems to be necessary.

Due to the scope of this study, I concentrated on the presentation of one institution regulated by the Polish Labour Code - provisions concerning mobbing in the context of its psychological aspects.

There are few reason why I chose this issue. One of them is that the rules concerning the concept of mobbing are relatively newly in force in the Polish Labour Code - normative significance in Polish law was given to it by the Law of 14 Nov. 2003.

Due to the fact that it is a new provision, there are many issues concerning its interpretation that require multifaceted discussion in the Polish Labour Code.

Another reason for tackling these issues is that it is very difficult to apply these provisions without reference to knowledge of psychology. Even the very legal definition of the mobbing concept includes the psychological aspects. According to Art. 94 (3) paragraph 2 of the Polish Labour Code, mobbing is: attitudes: 1) regarding an employee or directed against an employee, 2) consisting of persistent and prolonged harassment or intimidation of an employee 3) causing him low opinion of professional usefulness 4) causing or intended to humiliation or ridiculing the employee 5) causing isolation or eliminating from team of employees.

It should be noted that long before this institution was introduced to the Polish Labour Code, mobbing was the subject of research in psychology and still is to this day.

This paper describes the institution of mobbing in the Polish labour law in the context of its psychological aspects, as well as it was attempted to critically analyse the provisions relating the perspective of more than 12 years of its existence in Polish law. The issues related to the person mobber were discussed, the employee, which is the subject of bullying, behaviours which are considered mobbing, as well as the effects of mobbing. Particular attention was paid to psychological conditions that determine that a given behaviour meets the criteria of mobbing.

Keywords: mobbing bullying psychological analysis comparative research intimidation

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Introduction

Long-term, systematic mental persecution of an individual by one or more people, with tacit consent or indifference from the other members of the group is sometimes referred to as bullying or psychoterror. This social phenomenon may appear in any group of people and often the victim of bullying is treated as a scapegoat. The persecutor (also called the bully) usually has a higher or equal to the victim status in the group. In the conditions of the workplace it is usually the victim's supervisor or co-worker. Sometimes, however, it is the manager who is bullied by his or her subordinates. Bullying doesn't usually adopt the form of open, overt aggression; the attack on the victim is carried out through means of mental manipulation, with the appearances of correct relations maintained, often without exceeding the formal rules of social functioning in the company.

The phenomenon of bullying causes serious harm in the workplace.² Many researchers do not hesitate to call bullying "a cancer which destroys workplaces", or the most destructive anti-social activity in the workplace. For years, empirical studies have been conducted with the aim to estimate such parameters of the phenomenon as: the percentage of staff experiencing bullying, the sex and position of the bully and the victims, the health effects incurred by the victims, the impact of bullying on the professional life of the victims, and the percentage of cases reported to senior management and the actions taken. Researchers are also interested in how many people witness bullying and how they react to the events they observe.³ The results of European research on working conditions, conducted among employees in 15 countries of the European Union, indicate that each year 6 million employees (4% of all employees) experience physical violence in the workplace, 12 million (8%) are bullied and 3 million (2%) are victims of sexual harassment (Lamanna, 2004).⁴

1. The concept of bullying (mobbing)

The term "bullying" appeared in the literature on human affairs in 1970s, while before it was used only in relation to the animal world. The phenomena currently referred to with this term were of no interest to social sciences, let alone legislation, until the time of Heinz Leymann's breakthrough research. There are multiple answers to the question of why it happened so late. First of all, it can be concluded that mobbing is a new phenomenon, an unintended product of civilisation, similar to stress and hypertension. The rat race in which we participate, the struggle for success, material wealth and better quality of life are all governed by the law of the strongest. Bullying is one of the techniques available in this struggle, justified by generally accepted selfishness. There is another possible scenario, in which it is the sensitivity born of the progress of civilization that allowed us to take notice of bullying and condemn it. Yet another answer to the question about the cause of bullying can be found in a reflection of Konrad Lorenz, who, incidentally, was the first to use this term to refer to a certain type of aggression among animals. In his book, tellingly named *The Waning of Humaneness*, the great scholar wrote that modern people are more fragile and easier to hurt than their ancestors and that constant expectation of success and pleasure in life has made them vulnerable to suffering. Bullying is a product of our weakness, a new response to an old phenomenon. Due to our frailty it has set itself apart as a figure in the field of social perception, although it has always been present in social experience as well.

A similar sentiment can be found in M. Seligman's statement, in which he claims that the dramatic increase in the incidence of depression observed in the United States today is a paradoxical effect of the greenhouse conditions created by civilization in rich democracies. Of particular importance are the new methods of raising children and young people, the dominant element of which is protection against stress, suffering and failure.

The author of the first scientific research on bullying and the most important exponent of knowledge about the subject, H. Leymann, argues that bullying is not a new phenomenon. What is more, he suggests that

² M. Najda, M. T. Romer. 'Mobbing w ujęciu psychologiczno-prawnym' (Warszawa: Lexis Nexis 2010) p. 16

³ ibidem

⁴ A. Brytek 'Fenomen mobbingu czyli przemoc psychiczna w środowisku pracy' [2004] 4 Niebieska Linia, el.

this type of aggression is known in every culture. Despite its prevalence, or perhaps because of it, due to human's natural and astounding capacity to adapt, even to evil, bullying was not the subject of systematic research until 1982, when H. Leymann's team made its first attempt to collect and scientifically analyse empirical data. The results of these studies were published at the beginning of 1984 by the National Board of Safety and Health at Work in Stockholm.⁵

There are many definitions of bullying. One example may be the definition created by one of the pioneers of research in this field, the already mentioned Heinz Leymann. He defined bullying as "psychological terror in the workplace, which involves hostile attitude and unethical communication (using abusive language, insults, libel, slander, shouting etc. in everyday employment relations) systematically maintained by one or several people in relation to another person, which consequently pushes the victim into an untenable position. These actions occur rarely (at least once a week) and last for a long period of time (at least half a year). Due to its duration and frequency, this maltreatment results in disorders in the sphere of mentality, mental health and social functioning of the victim." Attempts to define the concept of bullying are undertaken, among others, by psychologists, but also by the doctrine of law.⁶

2. Characteristics of bullying in the Polish Labour Code.

As far as Polish law is concerned, the concept of bullying was introduced to the Polish Labour Code by the act of 14 November 2003. Currently, this institution is regulated in art. 94[3] of the Labour Code, according to which:

"§ 1. The employer is obliged to counteract bullying.

§ 2. Bullying is an act or behavior related to or directed against an employee and involves persistent and prolonged harassment or intimidation of the employee, results in their low opinion of their professional usefulness, and causes or aims to cause humiliation or ridicule of the employee, their isolation or elimination from a group of colleagues.

§ 3 An employee whose health has been adversely affected by bullying may claim from the employer an appropriate pecuniary compensation for the harm suffered.

§ 4. An employee who terminated their contract of employment as a result of bullying has the right to claim compensation from the employer on the order of no less than the minimum wage, determined on the basis of separate regulations.

§ 5. The employee's notice of employment contract termination should be submitted in writing and include the reasons referred to in § 2, justifying the termination of the contract".⁷

There is no European Union directive on bullying. Regulations concerning it have only been adopted by several European countries. Perhaps for these reasons, the abovementioned provision is far from perfect. The concept and scope of bullying are vague and often difficult to distinguish from discrimination, e.g. in the case of humiliating an employee. These difficulties also stem from the use of unclear terminology in the described article and the regulations on discrimination.⁸

Due to the vaguely defined wording used, the legal definition of bullying included in Art. 94[3] § 2 of the Labour Code requires a doctrinal interpretation and, above all, an interpretation given by the Supreme Court. Difficulties with the introduction of the term bullying to legal language have multiple causes. Firstly, the very concept has no clear meaning in science, not to mention common language. The phenomenon is not sufficiently known. Despite existing since "the dawn of humanity", only recently has it become the subject of research of an interdisciplinary nature. Understanding the essence and mechanisms of bullying would enable the lawgiver to adopt legislative measures which would protect the victims in an optimal way.⁹

Secondly, the phenomenon of bullying is linked inseparably with the mentality of both the victim and the bully, and thus there are big problems with the introduction of this term to legal language. Constructing legal

⁵ M Najda, M. T. Romer, op. cit. p. 15

⁶ G. Jędrejek 'Mobbing. Środki ochrony prawnej' (Poznań: ABC 2007), p. 16

⁷ The act of 26 June 1974 Labour Code (DZ.U.98.21.94)

⁸ E. Maniewska 'Komentarz aktualizowany do ustawy z dnia 26 czerwca 1974 r kodeks pracy (DZ.U.98.21. 94)' (LEX/el. 2016)

⁹ G. Jędrejek. Op. cit, p. 17

definitions of phenomena of this nature entails the risk of "lack of completeness." One may be tempted to note that the more detailed the definition, the greater the risk of omitting the actual situations that would be considered bullying by the representatives of psychology or sociology.¹⁰

Bullying consists of a group of illegal actions or behaviours, and thus a single manifestation of generically indicated circumstances cannot be considered a sufficient definition, even when they are extremely malicious. Bullying must be characterised by systematic behavior, which may involve both action and nonfeasance of people who are members of a group associated with employment relationship, carried out without reason or for an objectively trivial reason. Another premise that allows the qualification of an event as bullying requires us to consider whether the person affected is actually an employee within the meaning of the Labour Code.

Behaviour that points to the occurrence of bullying must be characterised by its lengthy duration, and, when it comes to the specific method of its execution, persistence.¹¹

Bullying can be used actively or passively. Passive bullying is a recurring disregard for an employee, ignoring and not giving them any commands. Active bullying is burdening an employee with too much responsibility while limiting their possibilities to make decisions, thus causing the feeling of distress.¹²

The people bullying an employee may be his or her superiors or other employees. According to some views the perpetrator may also be a third party, eg. a customer. A superior may also be the victim of bullying by his or her employees. Bullying is based on persistent and prolonged actions. As per the Supreme Court ruling of 17 January 2007. I PK 176/06, OSNP 2008, no 5-6, pos. 58, the length of harassment or intimidation of an employee within the meaning of art. 94 § 2 K. P. must be considered on an individual basis and take into account the circumstances of the case. It is therefore impossible to definitively determine the minimum period of time necessary for the occurrence of mobbing. As per art. 94[3] § 2 and 3, however, an important moment for the assessment of longevity is the time when the results of harassment and intimidation occur, as well as the persistence and seriousness of the behaviour in question.¹³

Regarding § 2 of the provision mentioned above, doctrine emphasizes the lack of need to distinguish between actions and behaviours in the definition of bullying. According to M. Zych, the concept of action is contained in the concept of behaviour.¹⁴

The perpetrator of bullying may be another employee or other co-workers, as well as the employer, provided he is a natural person.

Responsibility for bullying, as set out in art. 94[3] K. P., is borne by the employer, not the direct perpetrator. It is the result of a breach of the employer's responsibilities laid down in the Labour Code.

The employer's obligation to counteract bullying described in art. 94 [3] § 1 K. P. has a complex character, and is made up of three interrelated elements: first, the prohibition of bullying addressed to the employer; second, the obligation to eliminate any practices of this nature undertaken by third parties in relation to the employee; thirdly - the obligation to prevent bullying in the workplace (anti-bullying prevention).¹⁵

The definition of bullying requires not only the unlawfulness of the action, but also of its purpose (humiliation, ridicule, isolation of an employee) and the possible effects of the employer's actions (harm to health).

3. Stages of bullying

In the literature we traditionally distinguish four stages of bullying.¹⁶ The first one is supposed to constitute an "inciting incident", which becomes the cause of the use of mental violence (although it is not a rule). The

¹⁰ *ibidem*

¹¹ M. Bosak, 'Problem mobbingu w orzecznictwie sądów polskich z perspektywy dziesięciolecia obowiązywania art. 94(3) k.p.' [2015] 24 St. Iur. Lubl, p.121

¹² S. Naszydłowska 'Mobbing-próba zdefiniowania pojęcia' [2009] 3 Ius Novum, p.93

¹³E. Maniewska, *op. cit*

¹⁴ G. Jędrejek. *op.cit*, p. 18

¹⁵ W Cieślak, J. Stelina, 'Prawne aspekty mobbingu' [2010] 10 Prokuratura i prawo, p. 70

¹⁶G. Jędrejek. *op.cit*, p. 54

second stage involves humiliation of the employee. The perpetrator often wants to put the employee "in their place", fearing them as potential competition. At this stage humiliation of the employee may occur, which may consist in the superior ignoring the employee's behaviour or disregarding what the employee says, sarcasm leading to humiliation, unjust blaming, undermining authority, patronizing treatment, etc.

The next stage is taking more serious bullying actions, among which are: isolating the employee, which may take the form of denying access to telephone or the Internet, withdrawing the employee from their prior duties, creating around the victim an "atmosphere of fear" in order to prevent contact with them, dissemination of false information about the life of the employee, ridicule, ostentatious contempt, unjustified criticism, violation of secrecy of correspondence, searching the employee's desktop, undermining their professional prestige, backbiting, blaming for the company's underperformance, etc.¹⁷

H. Leymann divides bullying behaviours into several categories.¹⁸ The most important among them are measures aimed at preventing the victim's ability to communicate. The employee is deprived of the possibility to communicate with the supervisor and other employees. Other groups of bullying activities are: obstructing the employee in their work, deliberate deterioration of working conditions. Heinz Leymann also speaks of excessive control and the use of extraordinary procedures. The bully does not hesitate to interfere in the private life of the victim by undermining their values. Another typical occurrence are attacks on the physical and mental health of victims, for example through excessive workload or giving them tasks which hazardous to health.

The last stage of bullying involves actions aimed at harming the victim's health. Direct acts of physical violence, as well as threats to use force are possible.

Naturally, for bullying to occur in legal terms not all four phases, especially not the first or the last one, are required. It is therefore not necessary to use physical violence, nor other extreme behaviors, for an act of bullying to take place. It can even be argued that bullying is often a "substitute" for such behavior. The bully, unable to allow themselves the use of direct aggression, applies its insidious forms. Proving the use of psychological violence is therefore much more difficult than the physical kind. The perpetrators of bullying usually make sure to avoid the "externalisation" of their pathological behaviours.¹⁹

Some of the consequences of bullying which affect the victims are: posttraumatic stress disorder, depression and even suicide. Bullying leads to major changes in the area of identity, destabilising the victim's mental balance. The main mechanisms responsible for the effects experienced by the victim are blocking and stigmatisation. The bully's actions aim to prevent the victim from effectively communicating their suffering and articulating their opposition, as well as marking the victim out as a "problematic employee". The victim, fighting for confirmation of their original identity and the opportunity to communicate their experience, absorbs the surrounding environment with their situation, thus becoming an actual problem. The difficulty that courts face consists in correctly diagnosing the victim's troublesome behavior as a result, not a cause of bullying.²⁰

As in the case of victims, it is difficult to definitively describe a bully's personality. It can be assumed that such characteristics as instrumental treatment of people, low agreeableness and irritability, while encouraging aggressive behaviour in general, also encourage bullying. Not every aggressive person is a bully, however. There are several most frequently cited motives that guide bullies: concern about their position, jealousy, building their self-esteem by depreciating others, micropolitics. Bullying can be used as a tactic to get rid of an employee who breaks the status quo, or a way of reducing employment in a situation of crisis. The multiplicity of motives and different degree of awareness by the perpetrators make it impossible to claim that a bully always works with clear intent or specific purpose. Some scientists highlight the need for the presence of intent in the bully, while others reject this element of the definition based on the results of studies indicating the presence of unconscious prejudice and stereotypes. Bullying aimed against people of another race or sexual orientation may be an automatic behaviour, existing beyond conscious control and thus unintentional, which happens especially in very conservative environments.

¹⁷ G. Jędrejek. op.cit, p. 55

¹⁸ M. Najda, M. T. Romer op. cit, p. 19

¹⁹ G. Jędrejek op. cit, p. 56

²⁰M. Najda, M. T. Romer, op.cit, p. 156

Another difficulty that courts face in some cases of bullying is identifying actions as bullying even without a clear intention or purpose present.²¹

Conclusions

Despite the fact it has been a common phenomenon for a long time, bullying is still difficult to define and identify in the current regulations. This study was aimed at a general approximation of the phenomenon, also in its psychological context (taking as a basis for deliberations regulations concerning bullying in the Polish Labour Code), and demonstration of its interdisciplinary nature, as well as drawing attention to the need for further work on defining bullying and its distinctive features.

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²¹M. Najda, M.T. Romer, op. cit, p. 162

INTEGRATION OF ENVIRONMENTAL CONSIDERATIONS INTO PUBLIC PROCUREMENT REGULATION AND PRACTICE

Rimantė Rudauskienė¹

Abstract

The paper deals with the complex issue of implementation of green public procurement, revealing how this concept integrates environmental considerations into public procurement law and practice. The aim is to demonstrate that currently prevailing tendency in Lithuania of embracing green public procurement is a relatively moderate step towards protecting the environment as the approach is narrow and has limited possibilities to fully contribute to implementation of environmental objectives. Existing tendencies and developments in public procurement regulation and practice are disclosed that allow to suggest the prevalence of the concept of green public procurement. Major problems that affect implementation of green public procurement are compliance with core environmental criteria and a specific perception of “greenness”. A restrictive approach, in turn, limits possibilities to fulfil the purposes of green public procurement. A reconsidered approach is suggested, calling for a greater flexibility and a wider scope that would allow for a greater integration of environmental considerations and a more meaningful contribution to sustainable development.

Keywords: environmental considerations, integration, green public procurement, protection of environment.

Introduction

In a contemporary setting public procurement is considered to be an important market-based tool being capable to deliver positive environmental outcomes, which environmental law and other legal means could not straightforwardly achieve.² Possibilities and to some extent obligations to contribute to environmental protection through public purchasing are envisaged in Lithuanian public procurement regulation. However, it can be observed that legal regulation as well as practice is oriented towards implementation of green public procurement (hereinafter in the text referred to as GPP), the concept which relies on greening the procurement by setting environmental criteria for certain products. The concept is attractive, yet not ambitious in terms that it does not reflect all possibilities to contribute to protection of environment and leaves much room for improvement.

Therefore, the aim of this paper is to demonstrate that currently prevailing tendency in Lithuania of embracing GPP is a relatively moderate step towards protecting the environment as the approach is narrow and has limited possibilities to fully contribute to implementation of environmental objectives. To reach its aim the paper goes on to disclose existing tendencies and developments in public procurement regulation and practice, reveals problems of implementation of GPP and analyses other aspects which restrict possibilities to achieve environmental aims that GPP is supposed to deliver.

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² It should be noted, however, that this view is not shared by everyone. For example, A. Sánchez Graells is of the opinion that pursuit of environmental objectives is not a desirable objective of economic regulation, part of which public procurement is, and should be left to other branches of regulation such as environmental law, tax, etc. See A. Sánchez Graells, ‘Public procurement and the EU Competition Rules’ (Oxford and Portland: Hart 2011) 100.

It is an exciting time to advocate for adoption of a more intensive integration and a more ambitious approach since implementation process of the new EU public procurement directives³ into national legal system is almost over.⁴ This will invoke a necessity to reconsider regulation on GPP. Whereas the paper draws observations from current legal framework and practice, it also assesses the problem against the background of public procurement reform. This issue has not received a proper scholarly attention in Lithuania. Thus the findings will be helpful either for policy makers and legislators or practitioners in their quest for bringing environment and public procurement together.

1. Implementation of environmental concerns in public procurement regulation and practice: tendencies and developments in Lithuania

The concept of GPP, promoted by the European Commission as a largely voluntary approach⁵, has attracted a significant amount of attention in Lithuania with respect to integration of environmental concerns in the spirit of the Article 11 of the Treaty on the Functioning of the European Union.⁶ In general, the development of legal and operational framework of GPP has been carried away by the EU's adopted indicators for monitoring and benchmarking of GPP, resting on procurement's qualification for GPP if it complies with established core environmental criteria.⁷ Apparently, one can get an impression that target setting, monitoring and benchmarking is the first and foremost facet of GPP that ultimately defines what is to be monitored.⁸

It can be observed that Lithuania has been developing its GPP framework according to the EU's guidelines.⁹ The adopted definition of GPP, defining it as a procurement when at least core (minimal) environmental criteria are included in tender documents, seeking to procure goods, services and works with a reduced environmental impact throughout one, several or all of the stages of their life cycle, aiming to produce more environmentally friendly products, puts significant weight on core environmental criteria. Further, the strictest test is applied for procurement to be considered as green – it has to meet all established core environmental criteria. Likewise, GPP is “selective” in terms that core and comprehensible environmental criteria are established for specific products, which, in the view of the European Commission, are most suitable for greening.¹⁰ Ambitions for the intensity of environmental integration, obligations to include environmental criteria in public procurement procedures, national indicative targets are defined in terms of this GPP

³ European Parliament and Council Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65, European Parliament and Council Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services and repealing Directive 2004/17/EC [2014] OJ L94/243.

⁴ At the time of writing a project of the law amending the Law on Public Procurement of the Republic of Lithuania No I-1491 (project No XIIP-3750, registration date 12 November 2015, available at: <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/93ffb1a0891311e5bca4ce385a9b7048?positionInSearchResults=3&searchModelUUID=33edcc83-e07d-441e-a8ee-efee0023b75e>> [last retrieved 12/03/2016]) has been submitted to the Parliament for review and adoption. New legislation has to be in place before April 18, 2016. It has been chosen to draft two separate laws on public procurement: one – addressing procurement of the classical sector, another – procurement of the communal sector. This paper limits itself to the analysis of integration of environmental considerations into the procurement of the classical sector and draws all observations based on the provisions of the directive 2014/24/EU and the version of project of the law amending the Law on Public procurement of the Republic of Lithuania No I-1491, as it has been submitted to the Parliament.

⁵ European Commission, ‘Public procurement for a better environment’ COM/2008/0400 final [2008]. In this Communication the European Commission developed common GPP criteria and invited Member States to include these criteria into their public procurement procedures.

⁶ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326. Article 11 requires environmental protection to be integrated into the definition and implementation of the EU's policies and activities.

⁷ It is pointed that monitoring and benchmarking exercise will act as an incentive for the uptake of the GPP criteria in national tendering procedures, *supra* n. 5.

⁸ It is declared that process-oriented definition of GPP is insufficient to allow objective benchmarking and target setting. For this to be possible it needs to be linked to compliance with clear GPP criteria, *supra* n. 5.

⁹ GPP is mainly regulated by the Order of the Minister of the Environment of the Republic of Lithuania No D1-508 [2011] Official Gazette, 2011, No 84-4110.

¹⁰ As of 2014, in Lithuania core and comprehensible environmental criteria are adopted for 4 product groups and 26 products, *supra* n. 9.

approach.¹¹ Moreover, measures aimed to implement various environmental goals are also limited to the measures related to GPP.¹² In addition, the GPP situation is chosen as an indicator of sustainable development, indicating the state of environment¹³, the level of GPP expressed in numbers and values monitors the progression of GPP. Reports of contracting authorities are limited to the indication of GPP criteria.¹⁴ Respectively, the Public Procurement Office monitors and collects statistics merely on the implementation of GPP.¹⁵

Observance of existing practices also reveals that integration of environmental aspects in Lithuania is limited to the implementation of GPP. Absence of the national case law on the issue suggests that integration of environmental criteria, other than imposed by the concept of GPP, is being avoidable. Reliable conclusions cannot be drawn on those very few cases that have appeared before the court.¹⁶

It is clear that implementing environmental concerns in public procurement regulation and practice is not an easy task.¹⁷ Hence, GPP becomes attractive in the way that it relies on having clear and ambitious environmental criteria for products and services, aspires for compatible environmental criteria to avoid distortion of the single market and a reduction of EU-wide competition and considerably reduces the administrative burden for economic operators and public administrations.¹⁸ But in fact it reflects the uneasy relationship between economic and environmental policies. It has been remarked that tensions between EU's economic and environmental goals have been expressed in notably limited environmental ambition in fields where achieving a high(er) level of environmental protection might risk limiting economic growth.¹⁹ Nevertheless, scholars argue that even though the objective of preventing any distortion of competition continues to be important, the new provisions of the Lisbon Treaty suggest a broader conception of an internal

¹¹ The Resolution of the Government of the Republic of Lithuania No 125 amending the Resolution of the Government of the Republic of Lithuania No 1133 [2016] Register of Legal Acts, 2016, No 2875.

¹² The Order of the Minister of the Environment of the Republic of Lithuania No D1-840 [2015] Register of Legal Acts, 2015, No 18763.

¹³ National Strategy of Sustainable Development, adopted by the Resolution of the Government of the Republic of Lithuania No 1160, amended by the Resolution of the Government of the Republic of Lithuania No 1247 [2009] Official Gazette 2003, No 89-4029; 2009, No 121-5215.

¹⁴ The Order of the Director of the Public Procurement Office of the Republic of Lithuania No 1S-4, amended by the Order of the Director of the Public Procurement Office of the Republic of Lithuania No 1S-192 [2014] Official Gazette, 2006, No 9-344; Register of Legal Acts, 2014, No 15173.

¹⁵ See, for example, The Public Procurement Office of the Republic Of Lithuania, 'Annual report of 2014 of the Public Procurement Office of the Republic of Lithuania' [2014], available at: <http://vpt.lrv.lt/uploads/vpt/documents/files/LT_versija/Administracine_informacija/Ketvirtines_ir_metines_ataskaitos/Metines_veiklos_ataskaitos/2014m/VPT%20veiklos%20ataskaita_%202014%20m.pdf> [last retrieved 13/03/2016], The Public Procurement Office of the Republic of Lithuania, 'Report on the results of green public procurement implemented in 2014' [2014], available at: <https://vpt.lrv.lt/uploads/vpt/documents/files/2014%20m_%20vykdyt%C5%B3%20%C5%BEali%C5%B3j%C5%B3%20pirkim%C5%B3%20rezultat%C5%B3%20ataskaita.pdf> [last retrieved 13/03/2016].

¹⁶ In procurement of ecological buses obligations to implement measures to combat climate change and reduce CO2 emissions were recognized as a sufficient ground for not splitting procurement into lots. The court referred to a problem as a very sensitive international one and even stressed the significance of the object of the contract for present and future generations (the Appellate Court of the Republic of Lithuania, decision in civil case "*Protecha*" Ltd. v. *Centrinė projektų valdymo agentūra* No 2A-1997/2012 [2012], category 45.4; 69). In another recent case the court recognized that clauses of technical specification, related to requirements of waste management, were lawful, adequate and proportionate because they related to the direct implementation of contracting authority's (municipality's) functions in the field (the Appellate Court of the Republic of Lithuania, decision in civil case "*Kauno švara*" Ltd. v. *Kauno rajono savivaldybės administracija* No 2A-747-330/2015 [2015], category 45.4; 121.18). However, it is debatable if the court would had come to the same conclusions, had the clause of waste management been an additional environmental objective in the procurement.

¹⁷ CJEU case law proves this point. See *Concordia Bus Finland Oy Ab v. Helsingin kaupunki*, Case C-513/99 [2002] ECR I-7212, *EVN AG & Wienstrom GmbH v. Republic Österreichische*, Case C-448/01 [2003] ECR I-14527, *European Commission v. Kingdom of the Netherlands*, Case C-368/10 [2012], judgment of 10 May 2012.

¹⁸ *Supra* n. 5.

¹⁹ S. Kingston, 'The uneasy relationship between EU environmental and economic policies: the role of the Court of Justice in B. Sjøfjell, A. Wiesbrock (ed.) 'Sustainable Public Procurement under EU Law – New Perspectives on the State as Stakeholder' (Cambridge: Cambridge University Press 2016) 27-28.

market that also serves non-economic objectives.²⁰ As it is acknowledged that balancing between horizontal policies and other policies remain primarily a matter for member states²¹, considerably, GPP is not the only tool, available for integration.

Yet, a brief overview of tendencies and developments in Lithuania suggests that implementation of GPP is essentially a primary strategy in Lithuania and whole legal regulation and implementation has been centring on this concept. One can figure out that prevalence of this tendency could, to some extent, have had an impact on perceptions of integration of environmental considerations into public procurement, discouraged contracting authorities from using other legally possible options of integration and eventually framed it to a narrow definition of GPP.

At last, a point must be made that the trend has not been swayed or reconsidered because of the limited success of GPP at the EU level.²² Furthermore, even though national targets were not as ambitious as the EU's, they were not implemented in full.²³ This provides grounds to suppose that GPP is considered the only strategy, "safe" for integration of environmental aspects.

2. Is GPP fulfilling its purpose?

The implementation of GPP has clear problems that should be addressed and reconsidered in the context of public procurement reform and ambitions for GPP included in the 7th Environmental Action Programme.²⁴ These difficulties, in turn, affect implementation of the purposes of GPP. Due to the limited scope of the paper only fundamental factors, restricting successful implementation of GPP and contribution to protection of environment, are addressed.

2.1. Problems of compliance with GPP criteria. Take it or leave it?

First of all, the approach, requiring compliance with all core environmental criteria, is restrictive in itself. It is declared that core environmental criteria are designed to allow easy application of GPP, focusing on the key area(s) of environmental performance of a product and aimed at keeping administrative costs for companies to a minimum.²⁵ However, they are not always tailored, especially in the case of services, to specific needs of contracting authorities. For example, established core criteria for event organization services focus on very specific requirements on the use of paper, waste management. Instead, a contracting authority may be willing to use more technologically advanced energy-efficient equipment for the same purposes. In terms of current regulation this would not qualify for GPP. But significant doubts exist as to whether such procurement is not really green. Although the law is neutral on "what to buy" decisions and contracting authorities are not bound to implement GPP if it does not meet their specific needs, the point is not to "defer" GPP. The point is to adapt the tool of public procurement to best serve functional needs of contracting authorities and wider environmental goals.

²⁰ A. Wiesbrock, B. Sjøfjell, 'Public Procurement's potential for sustainability' in B. Sjøfjell, A. Wiesbrock (ed.) 'Sustainable Public Procurement under EU Law – New Perspectives on the State as Stakeholder' (Cambridge: Cambridge University Press 2016) 233.

²¹ S. Arrowsmith, P. Kunzlik (ed.), 'Social and Environmental Policies in EC Procurement Law: New Directives and New Directions' (Cambridge: Cambridge University Press 2009) 91.

²² The level of the uptake of core GPP criteria in the EU27 was 26% of the last contracts, signed in the time frame of 2009-2010. It is well below the 50% uptake target set by the European Commission to be achieved by 2010. See CEPS, College of Europe, 'The Uptake of Green Public Procurement in the EU27' [2012], available at: <<http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf>> [last retrieved 13/03/2016].

²³ For example, national target for GPP in 2014 was 30 % in number and value (Resolution of the Government of the Republic of Lithuania No 1257 amending the Resolution of the Government of the Republic of Lithuania No 1133 [2011] Official Gazette, 2011, No 132-6285). Contracting authorities of central governmental level, obliged to implement GPP, applied GPP criteria to 17,3 % and 8,3 % of procurement respectively in value and number (overall target not met) (for the source see *supra* n. 15).

²⁴ European Parliament and Council Decision No 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L 354/171.

²⁵ *Supra* n. 5.

The difficulty of including all core environmental criteria for a product/service group has been also reported at the EU level.²⁶ However, measures are not proposed to overcome this situation.

The requirement of new directives to maintain the link to the subject-matter of the contract has been expanded to cover technical specifications, award criteria, contract performance clauses. It has emerged as a major limiting principle for sustainability considerations.²⁷ If a current setting persists, requirement of the link to the subject-matter will create even more legal barriers to include “ready-to-use” sets of environmental criteria. In each case a contracting authority will be forced to carefully consider each of the environmental criteria against the requirement of the link to the subject-matter.

In this regard, a greater degree of discretion and flexibility is inevitable. Developing environmental criteria in such a way that it provided contracting authorities with more legitimate options and alternatives to tailor them to specific needs and leave out irrelevant clauses, would greatly contribute to development of GPP and the promotion of the purpose it is supposed to serve.

Furthermore, award criteria and contract performance clauses are vital for the development of GPP as they can be formulated more flexibly than technical specifications. Arrowsmith states that for definite reasons award criteria may be preferred to other mechanisms.²⁸ As well she advises to draft contract conditions to maximise their benefits by giving suppliers the flexibility over how to meet the government’s functional requirements.²⁹ Kunzlik admits that award criteria are of key importance for ensuring that public purchases attain high, including higher-than-harmonised, standards.³⁰ Yet, compliance with environmental criteria does not foresee such flexibility. Possible award criteria and contract clauses are already formulated for a specified product. Given these circumstances, there is a pressing need to develop more combinations of possible award criteria and contract performance clauses. Otherwise contracting authorities are limited with their choices in the advancement of GPP.

Ultimately, requirement to comply with environmental criteria is flaw in the sense that even if it does establish certain requirements as contract performance clauses, it fails to cover the contract performance stage itself. It is very well noted that, oddly enough, for all the rules, oversight and transparency applied to the bid and award stage, the contract management stage appears less constrained.³¹ The procurement is assigned a “green status” after the award of the contract with no further verification of the compliance with environmental clauses in the performance stage. Obviously, changes are imminent as there is no logical explanation to this.

2.2. Perception of “greenness”

Another problem is that the concept of GPP imposes quite narrow perception of “greenness”, essentially targeting environmental impact of a product throughout one, several or all stages of its life cycle.³² Likewise, it

²⁶ *Supra* n. 21.

²⁷ A. Semple, ‘The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?’ [2014] Working paper presented at the University of Oslo as part of the European Law Conference 2014 1, available at: <<http://poseidon01.ssrn.com/delivery.php?ID=671000027113005031023121005069080094024007017009023053125008108106111096119123097014052048008024051061012100123113064102001072038038069086032100087087126095066122033082039066101125068095112067115004006005001127104113126066096122092120097007093122106&EXT=pdf>> [last retrieved 14/03/2016].

²⁸ S. Arrowsmith, ‘Horizontal Policies in Public Procurement: A Taxonomy’ [2010]. *Journal of Public Procurement*, Volume 10, Issue 2, 181.

²⁹ *Id.* 170.

³⁰ P. Kunzlik, ‘Green Public Procurement – European Law, Environmental Standards and ‘What To Buy’ Decisions’ [2013] *Journal of Environmental Law* 25:2, 182-183.

³¹ J. Gutman, ‘Is There Room for Discretion? Reforming public procurement in a compliance-oriented world’ [2014]. *Global economy & development working paper* 74 19, available at: <http://www.brookings.edu/~media/research/files/papers/2014/05/public%20procurement%20compliance%20oriented%20world%20gutman/room%20for%20discretion_gutman_final.pdf> [last retrieved 14/03/2016].

³² See definition of GPP.

generally favours life cycle approach.³³ It can be observed that this approach is not necessarily based on a from-cradle-to-grave assessment, but usually refers to a narrow version of operational and disposal costs. GPP policy seeks to identify only key environmental aspects of a given product category, instead of a comprehensible life-cycle assessment.³⁴ Therefore, this perception allows only for a limited implementation of environmental considerations and also may be one of the factors, limiting further development of GPP. Integrating natural science into the analysis of law is necessary to understand the implications of legally decisive goals of sustainability and the environmental integration rule.³⁵ The point is that contribution to protection of the environment and sustainable development do not limit itself to reducing environmental impacts of products, even though it is an essential part of it. In fact, in Lithuania, in line with the EU law, either existing legislation³⁶ or proposed new legislation on public procurement³⁷ allows contracting authorities to take environmental considerations into account by including them at different stages of the procedure. Even though it requires great efforts to be applied in practice³⁸, by no way integration is limited to implementation of GPP.

Therefore, integration of environmental aspects could be more apparent if perceptions were not centred on the product-related definition of “greenness”, but also considered wider environmental aspects.

Indeed, in many purchases environmental benefits are the very purpose of goods, services or works. Furthermore, the decisions on whether to make a particular purchase at all may be influenced by horizontal policies, separate from those to be achieved through the use of the products. These are termed “decisions involving horizontal policies”.³⁹ At last, there are decisions to buy less or not to buy. Regrettably, these sustainable consumption practices do not fall under perception of “greenness”. Even worse, not consuming might affect ability to implement the designated percentage of GPP. Apparently, these practices contribute to the promotion of sustainable development and should be at some point included in the scope.

Besides, general provisions (for example, exclusion clauses, permitting to exclude a supplier from participation if he has violated obligations in the environmental field⁴⁰, obligation to reject an abnormally low tender if that results from non-compliance with applicable obligations of environmental law⁴¹, requirement of compliance with applicable obligations of environmental law in the performance of a contract⁴²) provide some ability to enforce environmental obligations. They certainly encourage economic operators to comply with the law in order not to be denied access to public contracts. Nevertheless, in the current setting these aspects are viewed as external to the perception of GPP. Krämer has observed that in the absence of new legislative initiatives in the European environmental protection, the implementation and application of existing

³³ Definition and criteria used for identifying and promoting “greener” goods are based on a life cycle approach and cover elements which affect the whole supply chain, ranging from the use of raw materials and production methods to the types of packaging used and the respect of certain take-back conditions, *supra* n. 5.

³⁴ S. Ganley, ‘“Green product” procurement policy in the European Union: Treatment of Lifecycle Carbon Analysis and Environmental PPM Restrictions’ [2013]. Columbia Law School, Center for Climate Change Law, 14. Author notes that, for example, Ecolabel certification process does not reflect a comprehensible life cycle assessment.

³⁵ B. Sjäfjell, A. Wiesbrock, ‘Why should public procurement be about sustainability’ in B. Sjäfjell, A. Wiesbrock (ed.) ‘Sustainable Public Procurement under EU Law – New Perspectives on the State as Stakeholder’ (Cambridge: Cambridge University Press 2016) 14.

³⁶ Law on Public Procurement of the Republic of Lithuania No I-1491 [2006] Official Gazette, 1996, No 84-2000, 2006, No 4-102 (still in effect at the time of writing).

³⁷ *Supra* n. 5.

³⁸ Even though new directives claim to clarify possible legal options to implement environmental considerations and decrease legal uncertainty, it is argued that proposed changes are pointlessly complicated and cumbersome for contracting authorities, placing disproportionate administrative and financial burden, especially as it regards complex verification procedures for award criteria, life-cycle costing, exclusion clauses, etc. See E. Van den Abeele, ‘The reform of the EU’s public procurement directives: a missed opportunity?’ [2012] Working Paper, European Union Trade Union Institute. 32, 34, 37, 44.

³⁹ *Supra* n. 21, 130.

⁴⁰ Paragraph 6, point 1 of Article 45 of a project of the law amending the Law on Public Procurement of the Republic of Lithuania No I-1491, *supra* n. 4.

⁴¹ Article 55 of a project of the law amending the Law on Public Procurement of the Republic of Lithuania No I-1491, *supra* n. 4.

⁴² Article 17 of a project of the law amending the Law on Public Procurement of the Republic of Lithuania No I-1491, *supra* n. 4.

environmental legislation becomes all the more important.⁴³ Arrowsmith outlines reasons for using procurement to support general legal norms: firstly, it avoids associating the government with unlawful behaviour, secondly, it provides additional enforcement tool for securing compliance with the general law and/or punish violations, and for reducing the risk of violations of the general law during contract performance, thirdly, it ensures a level playing field.⁴⁴ Therefore, this measure could make great contribution in helping to promote compliance with environmental obligations. It is reasonable to suggest that the framework of GPP could accommodate these considerations and encourage a better environmental compliance of business. What is more, the measure to exclude a supplier for failure to respect environmental obligations is questioned for being optional.⁴⁵ Responsibility to implement the rules of exclusion for infringement of environmental obligations is conferred on contracting authorities, rather than Member States. Hence, the enforcement of this clause could be significantly strengthened if it were related to the implementation of GPP.

2.3. Are we leading by example?

One aim of GPP is to promote sustainable consumption and production, give appropriate signals to consumers and producers in their preferences that would increase demand on the market for clean products. Implementation of GPP is supposed to strengthen the link between green public and private procurement, inform private procurement practices.⁴⁶

According to some, GPP is simply a result of environmental management system-type activity within the government – but it can have important effects on the broader community of suppliers.⁴⁷ Sjøfjell argues that integrating environmental considerations into public procurement gives authorities the opportunity to be a moral beacon and show how environmental and social externalities can be internalised.⁴⁸ McCrudden also refers to leading by example as an important driver for incorporation.⁴⁹ Leading by example becomes all the more important considering that a central problem in environmental regulation is to convince firms and corporations to take environmentally-friendly actions.⁵⁰ The limited effectiveness of environmental law to regulate companies is also considered by Sjøfjell.⁵¹

It has already been demonstrated that implementation of GPP is problematic. Certainly, it influences opportunities to lead by example. But apart from it, other obstacles can also be distinguished. Until 2016 an obligation to implement a certain percentage of GPP was imposed only to central governmental bodies, whereas agencies at regional, local level and other contracting authorities were merely advised to include environmental criteria in their procurement.⁵² A recent change in setting indicative targets of GPP for the majority of contracting authorities (including regional and local level)⁵³ is considered as an important milestone towards greening public procurement and at the same time – bringing its practices closer to consumers and

⁴³ L. Krämer, 'EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement' [2013] Clientearth 1, available at: <<http://www.clientearth.org/reports/131210-enforcement-of-eu-environmental-law-and-citizens.pdf>> [last retrieved 18/03/2016].

⁴⁴ *Supra* n. 28, 154.

⁴⁵ *Supra* n. 38, 37.

⁴⁶ *Supra* n. 5.

⁴⁷ R. Arnold, A. Whitford, 'Making Environmental Self-Regulation Mandatory' [2006] Global Environmental Politics Volume 6 Number 4 6.

⁴⁸ B. Sjøfjell 'Sustainable public procurement as a driver for sustainable companies? The interface between company law and public procurement law' in B. Sjøfjell, A. Wiesbrock (ed.) 'Sustainable Public Procurement under EU Law – New Perspectives on the State as Stakeholder' (Cambridge: Cambridge University Press 2016) 204.

⁴⁹ C. McCrudden, 'Corporate social responsibility and public procurement' [2006] University of Oxford Faculty of Law Legal Studies Research Paper Series, working Paper No 9/2006 12, available at: <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047103.pdf>> [last retrieved 19/03/2016].

⁵⁰ *Supra* n. 47, 1.

⁵¹ B. Sjøfjell, 'Regulating Companies as If the World Matters – Reflections from the Ongoing Sustainable Companies Project' [2012] Wake Forest Law Review Vol. 47 121.

⁵² Resolution of the Government of the Republic of Lithuania No 1257 amending the Resolution of the Government of the Republic of Lithuania No 1133 [2011] Official Gazette, 2011, No 132-6285.

⁵³ *Supra* n. 11.

private business. So far the ambitions and achievements in the field of GPP do not provide a persuasive picture. The results of GPP are poor.⁵⁴ Noticeable changes could be brought if GPP became more dispersed on the market.

Likewise, in the opinion of the author, failure to allow contracting authorities to require tenderers to have a certain corporate social or environmental responsibility policy in place⁵⁵ affects opportunities to streamline leading by example in increasing overall environmental efficiency of economic operators. Doubts are casted that prohibition to refer to general corporate practices and strict interpretation of the link to the subject-matter requirement would deter contracting authorities to refer to general certification schemes and economic operators from choosing certifications which deliver the greatest environmental benefits based on overall activities.⁵⁶ As much as such provisions do not encourage and reward an overall environmental efficiency of suppliers, they are also quite inconsistent with pending efforts to raise the appeal of eco-management and audit scheme (EMAS) through procurement policies.⁵⁷

Generally, leading by example can only bring significant results if GPP practices are extensively widespread across public sector, are clear and consistent. It is well noted that public procurement is still too often treated as an administrative “plumbing and wiring” issue, but actually it is a powerful instrument in the toolbox of good governance proponents. Government strategies to lead by example should be very strong and encouraging.⁵⁸ Nevertheless, the aim of GPP to influence consumption and production patterns can only be effectively pursued in combination with other necessary improvements in the implementation of GPP.

Conclusions

This brief overview of fundamental problems in implementing GPP reveals that eagerness from the EU side to set targets and benchmark them has affected the overall conception of GPP which has evolved into something far from perfect. In Lithuania, even if implementation of GPP has not been particularly ambitious and successful, it has been accepted as the major instrument towards environmental protection. Looking at the national practices, an impression is imparted that environmental integration starts and ends with GPP. It should be realized that GPP is not the only way towards protecting environment; outside it other options do exist; they need to be discovered and put into practice.

Then, adoption of a restrictive approach in requiring compliance with environmental criteria and imposing a distinct perception of “greenness” makes the instrument of GPP hardly adaptable to the pursuit of environmental objectives. Moreover, it significantly limits itself in fulfilling its purposes. GPP, as it is defined and being developed now, does not have a huge potential in changing patterns of private consumption and production. The concept embraces relatively small part of contracting authorities’ needs, responsibility for development of new product groups lies entirely within the government and it does not consider wider environmental aspects. In turn, potential impact of leading by example is confined to a specific meaning of a concept. Eventually, it can invoke paradoxes while some contracting authorities can actually be greener than they are according to the concept.

It is evident that for the meaningful contribution to sustainable development the concept of GPP should be reconsidered. “Take-it-or-leave-it” approach is not compliant with encouragement to implement GPP. In addition to a greater flexibility, it is reasonable not to leave aside other considerations of a more general nature as they are able to strengthen enforcement of environmental law. At last, if to lead by example, numbers of GPP are not enough. It has to be done in the best possible manner, where environmental considerations are properly assessed and implemented.

⁵⁴ In 2014 GPP accounted respectively to 5,7 % of the total number and 8,6 % of the total value of public procurement (for the source see *supra* n. 15).

⁵⁵ Recital 97 of the directive 2014/24/EU, *supra* n. 3.

⁵⁶ *Supra* n. 27, 11.

⁵⁷ See European Parliament and Council Regulation (EC) No 1221/2009 on the voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L342/1.

⁵⁸ *Supra* n. 31, 1.

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THE RIGHT TO WITHDRAW A PUBLIC PROMISE OF REWARD UNDER GERMAN LAW – WHAT ADDITIONAL INSIGHTS CAN BE GAINED FROM A LAW AND ECONOMICS PERSPECTIVE?

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Abstract

From which kind of angles can a legal problem be approached and what kind of new insights can be gained from an interdisciplinary approach? The paper seeks to illustrate this question using the example of the right to withdraw a promise of reward (*Auslobung*) under German law. The concept of the *Auslobung* enabling the promisor to create an obligation without participation of any other person constitutes an anomaly deviating from the fundamental contract principle otherwise governing German civil law. Interestingly, even though a source of obligation has been brought into existence, its destiny is still tied to the promisor's mastery since the law allows him to withdraw it at will (§ 658 German Civil Code). As any right to free oneself from an assumed obligation endangers the value of reliable promising as expressed by the dictum *pacta sunt servanda*, applying not directly but in its underlying idea to unilateral promises, such rights have to constitute the exception and not the rule and need to be justified by important reasons. One may wonder for which reasons the right to withdraw at will exists in the case of the *Auslobung* as an entirely self-created obligation. This question is addressed in two different ways: at first, a traditional dogmatic perspective will be adopted to illuminate the legislature's intention, its underlying values and ideas such as a predominant will of the creator or notions of fairness. Subsequently, these findings will be contrasted with the results of an efficiency-centred economic analysis of the question. The comparison of both approaches ultimately aims at reaching a more enriched and comprehensive understanding of a specific legal problem and of the more general potential of interdisciplinary approaches to law.

Keywords: Public promise of reward; Right to withdraw; Law and economics; Interdisciplinary approaches in jurisprudence

Introduction

This contribution aims at demonstrating the value of a reflected application of a methodologically pluralistic approach. In contrast to other disciplines, legal scholarship tends to present its argumentatively produced findings without disclosing neither its assumptions nor its methods,² albeit such transparency can provide insights of a remarkably higher quality.³ However, in particular in the case of interdisciplinarity, it is crucial to reveal the origin and framework of points made. The latter will be illustrated using the example of the right to withdraw a promise of reward (*Auslobung*) under German law.

After highlighting the relevance of the question (1), the right to withdraw will be examined from two different angles. At first, it will be rationalised within the logic and with the tools of a traditional legal, *i.e.*, dogmatic approach (2). Subsequently, the law and economics perspective will be outlined (3). Finally, the selective perceptions of the two diverging approaches will be contrasted against the background of the strive for a modern legal scholarship.

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² Law and economics, in contrast, appears to pay attention to the theoretical framework, in particular assumptions made and models used. See, e.g., H. Schäfer/ C. Ott, 'Lehrbuch der ökonomischen Analyse des Zivilrechts' (Berlin/ Heidelberg: Springer 2012) 95 et seqq.; C. Kirchner, 'Ökonomische Theorie des Rechts' (Berlin: De Gruyter 1997) 12.

³ A methodological anchoring might appear dull and even bar certain far-reaching and fancy outcomes as to the content matter. Nevertheless, the significance of the results achieved will be enhanced by this very substantiation.

1. Relevance of the topic

Even though expressly provided for in § 658 of the German Civil Code, the withdrawability supposedly due to the one-sided construction of the promise of reward is far from being conclusive. The impact and significance of the issue is not to be underestimated in two respects.

First, by raising the constructive argument, the narrow issue exhibits greater reach in that it touches the fundamental question of how to assume private obligations, which has troubled generations of legal scholars and philosophers⁴, with regard to the two dominant promissory concepts of promise or contract.⁵ This unresolved elementary topic of the source of obligation experiences a revival as to the concept of a unilateral promise in modern European projects striving for unification and harmonisation in the field of private law.⁶ The idea of implementing such a means is nourished by inelegancies and discrepancies arising from the rigid adherence⁷ to the contract principle in real life, in particular reward situations that could be more appropriately captured by a commitment one-sidedly made.⁸ Additionally, an apt construction may lead to reasonable solutions for ensuing questions.⁹ Yet, it is very doubtful whether the constructive argument does persuasively legitimise the implementation of the right to withdraw and insofar incidentally advance the said fundamental debate.

Secondly, the right to withdraw at will as provided for in § 658 Civil Code is delicate by its very nature. As any right to free oneself from a commitment autonomously entered into, it endangers the functional value of private undertaking, that is creating reliability, securing expectations and thus providing the basis for personal plans and dispositions.¹⁰ For contracts, this binding force of commitments is expressed by the dictum *pacta sunt servanda*.¹¹ Its rationale equally applies to unilateral promises since their very concept as a validly, even though one-sidedly, created source of obligation would run *ad absurdum* otherwise.¹² Consequently, the reasons for granting the right to withdraw a promise of reward must be assessed carefully.

⁴ See, e.g., D. Bailas, 'Das Problem der Vertragsschließung und der vertragsbegründende Akt' (Göttingen: Schwartz, 1962) 77 and – with a critical survey – F. v. Hippel, 'Das Problem der rechtsgeschäftlichen Privatautonomie' (Tübingen: Mohr 1936) 90 et seq.

⁵ P. Lerner, 'Promises of Rewards in a Comparative Perspective' [2004] 10 Ann. Surv. Int'l & Comp. L. 53, 55; This topic needs clarification according to R. Schulze/ F. Zoll 'Europäisches Vertragsrecht' (Baden-Baden: Nomos 2015), 141 et seq.

⁶ An impulse towards the unilateral promise as a means of self-commitment is set by launches in model laws and drafts: Art. 2:107 of the Principles of European Contract Law (PECL) provides that "A promise which is intended to be legally binding without acceptance is binding." and, based on it, so does, in the same sense, the provision of Art. II.-1:103 (2) of the Draft Common Frame of Reference (DCFR): "A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance."

⁷ For example, a historically induced source of difficulties or inelegancies is diagnosed for English law with regard to the impact of the former formalistic system of the so-called forms of actions, see A. Kiralfy, 'Potter's Outlines of English Legal History' (London: Sweet & Maxwell 1958) 152 and the immortal quotation of W. Maitland, 'The Forms of Action at Common Law' (Cambridge: University Press 1936) 2: "The forms of action we have buried, but they still rule us from their graves."

⁸ With a critical attitude towards the concept of a *unilateral contract* to capture the very situation of rewards: A. Simpson, 'Innovation in Nineteenth Century Contract Law' [1975] 91 L.Q.R. 247, 360 and S. Whittaker, in: J. Chitty/ H. Beale/ A. Burrows, 'Chitty on contracts' (London: Sweet & Maxwell 2012), point 1-018.

⁹ In the case of rewards, it is particularly disputed whether the promise of reward can be withdrawn and whether an applicant succeeding in the required task must have known of the promise to be entitled to the reward. In some regards, the construction does predetermine the solution: whereas the conception of a contract necessarily requires knowledge as the applicant must accept the promisor's offer of reward, the unilateral promise conceptually does not since the source of obligation is created self-sufficiently without external contribution. For different solutions of European legal systems as to this question of knowledge: C. v. Bar/ R. Zimmermann, 'Grundregeln des europäischen Vertragsrechts' (Munich: Sellier European Law Publishers 2002), 179.

¹⁰ Securing expectations is necessary to enable and encourage parties to conduct exchanges not simultaneously accomplished that prove particularly risky, e.g. implying a stretched period of time for the performances or envisaged between strangers. See, e.g., S. Shavell, 'Foundations of economic analysis of law' (Cambridge, Mass.: Belknap Press of Harvard Univ. Press 2004) 296 et seqq.; H. Eidenmüller, 'Die Rechtfertigung von Widerrufsrechten' [2010] 210 AcP 67, 67.

¹¹ Cf. C. v. Bar/ E. Clive, 'Principles, definitions and model rules of European private law – Draft Common Frame of Reference' (Munich: Sellier European Law Publishers 2009), 132.

¹² This is endorsed in the case of the *Auslobung* in particular by the provision on the right to withdraw (§ 658 German Civil Code) which would be unnecessary if the unilateral promise lacked binding force.

2. Dogmatic approach

The legislator's considerations complementing the enactment of the German Civil Code (*Motive*) fail to provide helpful guidance. Instead of elaborating on the reasons for giving priority to the promisor's freedom to change her mind, the considerations are confined to picturing the free withdrawal as a conceptual consequence.¹³ Indeed, the *Auslobung*, construed as a unilateral promise, constitutes one of the rare exceptions to the contract principle underlying the German Civil Code.¹⁴ However, it may be doubted whether withdrawability conceptually evolves from this one-sidedness and whether this argument is sufficiently persuasive with regard to the jeopardised idea of reliable promising. Indeed, the ideas of a self-sufficiently created source of obligation and a persisting linkage to the will of the promisor conflict. The very concept of a unilateral promise as an independent source of obligation, on a par with contracts, would be corrupted if the promise made was subordinated to the will of the promisor.¹⁵ Such an overarching will governing the continuing existence of the promise is neither indicated nor to be inferred from the one-sided creation. Hence, the constructive explanation fails and the legislative decision can only be rationalised *ex post*. Lacking any noteworthy arguments of historical or systematic provenience, a justification of the right to withdraw might be achieved by discerning its rationale, *i.e.*, teleologically.

Unlike, for example, in the case of withdrawal rights implemented for consumer protection, that are meant to cure and compensate the assumed structural inferiority of a consumer concluding a contract with a businessman, the promisor does not appear to be in need of protection: unilaterally creating the source of obligation, she remains undisturbed by others such as the potential contracting party by definition.¹⁶ However, even without a deficiency in *assuming* the commitment, the *remaining* bound may create an imbalance that justifies allowing the promisor to renege.¹⁷ Whereas every applicant is free to decide whether or not to pursue an attempt to gain the reward or to resign from an action begun, the promisor would be bound for a possibly indefinite period of time to provide the reward to the successful applicant.¹⁸ There would be a remarkable asymmetry if the promisor was infinitely committed, irrespective of whether the requested task would still be of any use, whereas the applicants were entirely free to take up or drop any attempts. Additionally, the applicants' interests in the persistence of the promise do not appear to be worthy of protection.¹⁹ Even though a withdrawal of the promisor does necessarily and ultimately frustrate the expectation to obtain the reward, any applicant is vested but with a chance whose realisation does not only depend on her own skills and efforts, but

¹³ It is argued that the will of the promisor creating the source of obligation is decisive so that she would only be bound because and how she desired to be. Even if an explicit reservation of withdrawal were lacking, it could be assumed naturally. See B. Mugdan (ed.) 'Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich' Vol. II (Berlin: R. v. Decker 1899; reprint Berlin/New York: De Gruyter 1980) § 582 (522).

¹⁴ P. Mankowski, 'Beseitigungsrechte' (Tübingen: Mohr Siebeck 2003) 68 calls the *Auslobung* the prime example for the unilateral promise as a source of obligation.

¹⁵ However, this seems to be suggested by the editor, F. v. Kübel, in his first draft. On the one hand, he honours the unilateral promise as an independent source of obligation "on a par" with contracts. On the other, he stresses that in the case of reward, since the promisor does not want to be bound unless the requested act is fulfilled, an obligation would not come into being until this were the case so that in the meantime the promisor would not be bound and free to withdraw. Even though the entitlement to the reward depends on the fulfilment of the required task, it is the very nature of the *Auslobung* as a unilateral promise to constitute the source of obligation that has binding force on its own. See for the seemingly meandering argumentation in the considerations complementing the first draft, W. Schubert/ F. v. Kübel, 'Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches', Vol. III (Berlin/ New York: De Gruyter 1980) 1174, 1176, 1185.

¹⁶ Typical cases of the promise of reward well known to everyday life are rewards for bringing back the missed pet, providing the information leading to the conviction of a criminal or solving a technical or scientific problem, see, *e.g.*, H. Seiler, in: F. Säcker et. al., 'Münchener Kommentar zum BGB' (Munich: C.H. Beck 2012) § 657 point 8.

¹⁷ An adumbration to elaborate on a justified interest to change one's mind is to be found in the considerations of the first draft, W. Schubert/ F. v. Kübel, 'Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches', Vol. III (Berlin/ New York: De Gruyter 1980) 1185 et seq.

¹⁸ A promise of reward that does not indicate a time limit for the fulfilment of the requested task might pass to and bind the promisor's heirs, see, *e.g.*, H. Sprau, in: O. Palandt, 'Bürgerliches Gesetzbuch' (Munich: C.H. Beck 2016) § 657 point 1.

¹⁹ A different solution may be justified, for example, if the promise is only made to harm the applicant who is about to finish by a withdrawal. This topic is usually referred to tort law, see already J. Fischer, 'Die Auslobung nach dem B.G.B.' (Göttingen: Dieterichsche Univ.-Buchdruckerei/ W. Fr. Kaestner 1899) 52.

also on the endeavours of the competitors who might overtake at any time. Therefore, any applicant will invest time, effort and money on her own risk.²⁰ Considering this free, but insecure position of the applicants exposed to various risks in the competitive scenario,²¹ the legislative decision to grant the promisor a right to withdraw gains persuasive power.

Thus, the freedom granted to the promisor is not explained by the one-sided construction of the promise of reward, but might nevertheless be rationalised with regard to the interests concerned.

3. Law and economics approach

As the next step, the right to withdraw will be illuminated from an economic perspective. The economic analysis of law is defined as “the application of the theories and empirical methods of economics to the central institutions of the legal system”.²² For the given purpose, the economic model of the *homo oeconomicus* will be at the centre of the analysis. This pictures man as a rational maximizer of personal utility, *i.e.*, it is assumed that every individual seeks to maximize its welfare in that it bases its decisions on the evaluation of individual costs and benefits of different options of behaviour and accordingly chooses among them the individually most favourable. Hence, human behaviour, construed mechanically as the rational weighing of costs and benefits, becomes predictable. Based on the two coordinates of individual costs and benefits whose relation leads human decision-making, the law can intervene by setting incentives towards one or the other kind of behaviour by increasing or lowering the costs or benefits coming along with it.²³ Thus, with the help of the *homo oeconomicus* as an economic tool, human behaviour may be consciously directed by appropriately drafting the relevant laws. The normative goal to be set to conduct an economic analysis²⁴ will be efficiency according to *Kaldor/Hicks*.²⁵ In a world of restricted resources, this requires the maximization of overall welfare by allocating resources to the location of their greatest use, *i.e.*, assigning them to the individual that values them most given that her gain in utility outweighs the costs resulting for others. This is measured by ascertaining whether the individual profiting would still do so if it had to compensate those being disadvantaged. If this is the case, the allocative decision will increase overall welfare and thus be efficient. Hence, from the law and economics perspective, the right to withdraw must approximate the social optimum in that it maximizes overall welfare. In the situation of a promise of reward, this means that the promisor’s gain from having a right to withdraw must prevail over its negative impact on the applicants. Among the range of reactions possibly evoked by a right to withdraw a promise of reward, two decisive, but opposing ones will be considered.

²⁰ Cf. B. Mugdan (ed.) ‘Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich’ Vol. II (Berlin: R. v. Decker 1899; reprint Berlin/ New York: De Gruyter 1980) § 582 (522).

²¹ This result is reflected in the entire concept of the free withdrawal: § 658 German Civil Code not only grants a right to withdraw at will without any requirements as to reasons, but also abstains from imposing an obligation to compensate those having detrimentally relied on the promise validly made.

²² R. Posner, ‘The Economic Approach to Law’ [1975] 53 Tex. L. Rev. 757, 759.

²³ Since the *homo oeconomicus* responds to restrictions, *e.g.* legal sanctions, or incentives, *e.g.* tax advantages, the law can influence the individual cost/benefit-analysis on which the decisions of the rational maximizer of individual utility rests. For this directing effect see, *e.g.*, R. Cooter/ T. Ulen, ‘Law and Economics’ (Harlow: Pearson 2014) 3 et seqq.; H. Eidenmüller, ‘Effizienz als Rechtsprinzip’ (Tübingen: Mohr Siebeck 2005) 1 et seqq.; C. Kirchner, ‘Ökonomische Theorie des Rechts’ (Berlin: De Gruyter 1997) 7; A. van Aaken, “‘Rational choice’ in der Rechtswissenschaft’ (Baden-Baden: Nomos 2003), 74 et seq.

²⁴ Unlike often but incorrectly assumed, the economic analysis is not necessarily aligned with efficiency in the sense of welfare maximization – although this admittedly will often be the case (see, *e.g.*, J. Kraus, ‘Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy’ [2001] 11 Philosophical Issues 420, 428 et. seq.; A. van Aaken, “‘Rational choice’ in der Rechtswissenschaft’ (Baden-Baden: Nomos 2003), 36) – but could also be directed towards increasing justice or equality. As to the normative goal to be freely determined, see, *e.g.*, H. Eidenmüller, ‘Effizienz als Rechtsprinzip’ (Tübingen: Mohr Siebeck 2005) 55 et seq.

²⁵ See for this standard of welfare maximization including the concept of hypothetical compensation unlike preceding concepts, *e.g.*, R. Posner, ‘Economic Analysis of Law’ (New York: Wolters Kluwer Law & Business 2014) 13-17; H. Schäfer/ C. Ott, ‘Lehrbuch der ökonomischen Analyse des Zivilrechts’ (Berlin/ Heidelberg: Springer 2012) 20; H. Eidenmüller, ‘Effizienz als Rechtsprinzip’ (Tübingen: Mohr Siebeck 2005) 51 et seqq.

Prima facie, the promisor benefits from the right to withdraw as it enables her to free herself costlessly from a promise made, but regretted.²⁶ However, the right itself is not costless to the promisor: to secure the effectiveness of her setting a reward to reach the specified goal, she will have to adjust the amount of the reward in prospect to maintain the level of motivation of the applicants whose position is impaired by the right to withdraw. According to the *homo oeconomicus* model, in deciding whether or not to venture an attempt, an applicant will weigh her individual costs and benefits. As the latter consist merely in a chance to success, the expectation value²⁷ is decisive. Since an additional risk is introduced by the promisor's right to withdraw, the expectation value declines unless the decreased probability of achieving the reward is compensated by its greater height. In other words, if the probability of earning decreases, the amount to be gained has to increase, *i.e.*, the promisor will need to set a higher reward to maintain the same incentivising effect of the reward compared to a scenario without a right to withdraw, or, alternatively, she will have to accept the reduced effectivity of the reward. Thus, for efficiency reasons, it is decisive whether the advantages of the right to withdraw for the promisor prevail and are not exhausted by its negative impact, namely rendering the setting of a reward as a means to reach a certain goal ineffective either for being too costly to be worthwhile or for being incapable to motivate qualified applicants.

However, the right to withdraw could equally provoke the positive effect of disciplining potential applicants to administer their efforts in a reasonable way. On top of the competition scenario, the manifest insecurity of the withdrawal at will might remind potential applicants of their candidate status, vested but with a chance to achieve the reward: this prospect can be frustrated not only by a superior competitor but also by an arbitrary withdrawal. In this regard, the right to free withdrawal might positively impact overall welfare in that it creates an awareness of the riskiness²⁸ of the enterprise undertaken which might foster the adoption of a reasonable attitude of the applicants in their pursuits to gain the reward, and, consequently, prevent a potentially great loss incurred by disproportionate expenses of a large number of unsuccessful applicants.

Even though it is beyond the scope of this contribution to quantify these opposing effects, for example by conducting an empirical analysis, some conclusions can be drawn. At first, for efficiency reasons, it is necessary that the gain resulting from the flexibility offered by the right to withdraw to the promisor is not entirely consumed by its negative effect to create another possibly discouraging risk for the applicants. Considering the overall insecurity characterising the applicants' position in reward cases construed as a competition, it is legitimate to assume that such an undermining effect is not to be expected.²⁹ The disciplining effect, however, seems plausible and might positively influence the investment strategy of applicants helping to avoid considerable losses of a large number of unsuccessful applicants. Thus, based on a common sense evaluation, the right to withdraw might have a wealth maximizing effect and generally deserves approval from the efficiency perspective.

²⁶ This might be explained from the economic perspective as being due to a change of the circumstances (restrictions), a change of preferences exceptionally considered relevant, or the realisation that a previous decision was made incorrectly, *e.g.*, influenced by so called biases defined as systematic deviations from rational behaviour (for an example see footnote 28).

²⁷ This must be above zero to motivate the applicant to take up an action and is calculated by the difference between the result of multiplying the probability of success (influenced by the risk of failure due to a withdrawal) with the utility of success (determined by the height of the reward minus the inferred costs (*e.g.* expenditures, time)) and the result of multiplying the probability of failure with the cost of failure.

²⁸ This argument is strengthened by the findings of the behavioural law and economics scholarship proving systematic deviations from rational behaviour (*bias*) especially with regard to assessing and evaluating one's own abilities and chances, *e.g.*, the so called *overconfidence bias* leading to an overestimation of the individual chance of success which might result in a corresponding, but unreasonable attitude in taking risks and investing time and effort in the completion of the required task. See on this bias, *e.g.*, D. Griffin/ A. Tversky, in: T. Gilovich/ D. Griffin/ D. Kahneman, 'Heuristics and biases - The psychology of intuitive judgement' (Cambridge/ New York: Cambridge University Press 2002) 230, 230; D. Kahneman, 'Thinking, fast and slow' (London: Penguin Books 2012), 261 et seq.; H. Schäfer/ C. Ott, 'Lehrbuch der ökonomischen Analyse des Zivilrechts' (Berlin/ Heidelberg: Springer 2012) 105 et seq.

²⁹ Considering the various risks the applicants have to face, the withdrawability does not constitute but one single additional source of insecurity. Furthermore, the likeliness of a withdrawal by the promisor should not be overestimated: especially as the public is involved, there might be a psychological barrier to renege, for example due to fearing a loss of reputation. Hence, it seems safe to assume that the right to withdraw does not require an extraordinarily high compensation by way of an increased reward that would outweigh the benefits for the promisor or even that it might be accepted as an only marginal loss of effectivity.

Conclusions

The rough illustration of the two approaches' *modi operandi* exhibits great differences, in particular as to their assumptions and their way of thinking. Whereas the dogmatic approach focuses on whether a right to withdraw is justified considering conflicting interests and needs of protection, the law and economics perspective treats it as an instrument whose effects have to be evaluated with regard to their impact on overall welfare. That is to say, in contrast to the first approach taking into account the typified interests of the involved parties, the latter is indifferent as to individual needs and merely focuses on the summed up overall welfare instead.

To understand the argument of one or the other method, however, it is crucial to keep in mind which lens is being looked through. Otherwise, severe accusations or complacency might evolve: prominent among them is accusing the economic analysis of degrading man to a selfish, computer-like creature or challenging with an accusing undertone the scientific quality of the traditional dogmatic approach absent any extraneously produced evidence.³⁰

The analysis showed that different aspects are discovered and illuminated by the approaches. Those can be combined fruitfully, if the respective theoretical frameworks are taken into account. The economic analysis may in particular enrich a blurry or ambiguous dogmatic argumentation offering innovative insights especially as to the occurrence of undesired side-effects of (arguably) reasonable laws. For example, being apparently ignorant as to the interest of the individual, the economic analysis carves out that the right to withdraw may in fact also impose costs on the promisor who is meant to benefit according to the rationale extracted in the dogmatic approach. Furthermore, it reveals the counterintuitive result that the apparently harmful right to withdraw creating another source of insecurity for the applicants might actually serve their purpose by way of the identified disciplining effect. These findings indicate the usefulness of economic contributions in that they may relativize and disclose possibly neglected (counterproductive) effects.³¹

To close the circle, modern legal scholarship can benefit from broadening its horizon in acknowledging useful contributions from extra-legal disciplines and embark upon interdisciplinary paths that prove useful. As a precondition, however, any argumentation claiming recognition should be aware of its theoretical background. Such a profound, but pigeonhole thinking builds the fundament on which a prolific, disclosed methodological eclecticism can operate.

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5. O. Ben-Shahar/ E. Posner, 'The Right to Withdraw in Contract Law' [2011] 40 J. Legal Stud. 115

³⁰ As to reproaches against law and economics see especially K.-H. Fezer, 'Aspekte einer Rechtskritik an der economic analysis of law und am property rights approach' [1986] 41 JZ 817, 822 and *idem*, 'Nochmals: Kritik an der ökonomischen Analyse des Rechts' [1988] 43 JZ 223, 228; For a summary and discussion see G. Kirchgässner, 'Homo oeconomicus' (Tübingen: Mohr Siebeck 2013) 17, 29, 31. On the other hand, the traditional dogmatic approach might suffer from a lack of clarity or rationality that could be enhanced by taking into account economic insights, cf. K. Mathis, 'Effizienz statt Gerechtigkeit?' (Berlin: Duncker & Humblot 2009) 17.

³¹ A counterintuitive, but possibly counterproductive effect of granting rights of withdrawal is acknowledged as an issue to be borne in mind for example in the context of consumer protection, see, e.g., F. Chirico, in: F. Chirico/ P. Larouche (eds.), 'Economic analysis of the DCFR' (Munich: Sellier European Law Publishers 2010) 10, 17; cf. P. Rekaiti/ R. van den Bergh 'Cooling-Off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Approach' [2000] 23 J. Consumer Pol'y 371, 381 et seqq.; O. Ben-Shahar/ E. Posner, 'The Right to Withdraw in Contract Law' [2011] 40 J. Legal Stud. 115, 122.

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IMPACT OF ECONOMIC CHANGES IN POLAND ON DECISION-MAKING IN THE FIELD OF ESTABLISHING AND RUNNING BUSINESS AND ON POLICY-MAKING AND RESOLVING DISPUTES

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Abstract

What has happened in Polish economy over last five years? What has had an impact on Polish law and, consequently, on decision-making in the field of establishing and running business in Poland and in policy-making and resolving disputes? What can we put into this list of significant changes and why? Can economical changes lead to legal changes? Growth of Gross Domestic Product (GDP), inflow of foreign capital, increase of domestic capitals, growth of employment level, increase of costs of workforce are the changes which have determined law in Poland in many aspects during the last 5 years. The presentation of influence of these economic changes and the attempt of short scientific evaluation of certain legal issues is relevant to founding and conducting business in Poland and to decision-making in business. What is also important is the impact of those changes and their evaluation on policy-making and resolving disputes in Poland. The analyze tries to answer whether these economic scientific results have afterwards found the right and adequate expression in legal acts, policy-making or resolving disputes. The aim of the paper is not only the description of the impact but also a brief evaluation of this impact and an attempt to foresee whether and how long this impact will exist and what would or could change the scale of the impact. Considering the extent of the subject this paper is only a general sketch of the problem and only a few examples are given to present the discussed issue.

Keywords: commercial law, transaction, economic impact, scientific evaluation, policy-making, resolving disputes.

Introduction

a) Mutual relation between economy and law

Maybe it would be more justified to ask a question about the impact of legal changes on economy because law is mostly designed to determine economic processes.² Notwithstanding that the focus of this paper is based on an assumption that economic changes can have impact on law. In reality both directions are right and occur but it is mostly law and its execution that have influence on economy, and only then economy on law and its execution. Because of that, today's law constitutes an area of interdisciplinary research. An example of such research may be the economic analysis of law.³ The specific and precise express of this impact is strong for instance in: the calculation of damages in tort, contract, securities and other types of cases, and even on monetary relief in divorce cases. Economic evidence plays a big role in environmental and discrimination litigation, and a growing role in contract, labor, tax, corporate and pension law, as well as in litigation over the

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² L. Balcerowicz, Prawo a ekonomia, Ruch prawniczy ekonomiczny i socjologiczny, rok. LXVIII, zeszyt 2, 2006, s 87.

³ Ibid.

award of attorneys' fees.⁴ Therefore one has to discriminate between the economic analysis of law and the impact of economic phenomena on law.

b) Economic changes in particular

Steady Growth of Gross Domestic Product (GDP), inflow of foreign capital, increase of domestic capitals, growth of employment level, increase of costs of workforce are the economic changes, and economic phenomena as well, that – in my opinion – belong to most significant factors shaping today's picture of Polish economy. Additionally I would mention indebtedness in Swiss franc as an economic and social phenomenon. Those changes are characteristic by their objective nature. If the change is a reason and law is a result deriving from that reason, then politics and politicians must be in between in order to turn the reason, which is a need or a just opportunity, into an effect which is the law. The question is whether those changes have shaped or are shaping the picture of the contemporary Polish law which is their effect on decision-making in the field of establishing and running business.

Impact of economic changes in Poland on decision-making in the field of establishing and running business

According to the State Agency for Foreign Investment (PAIIZ), foreign direct investment in Poland to 2014 amounted to 171 billion euros. These measures replenished different sectors of economic activity in Poland, resulting in a significant influx of capital.⁵ This influx of capital relating to direct investments does not include private capital derived from Polish citizens working abroad who sent money to Poland in the years 2010–2015 that amounted to approx. 30 billion, and additionally capital from EU funds which amounted in the years 2007 to 2013 to 243 billion euros⁶. These capitals fundamentally changed the way of doing business in Poland not only because of their existence itself, but also because they have significantly contributed to the credibility of the Polish economy. The influx of capital and the arousal of new investment opportunities led to a sharp increase in the amount of capital companies operating on the market, such as limited liability companies and joint stock companies. By the end of December 2012, 210,344 limited liability companies entered the National Court Register⁷ and this legal form of conducting business has become the most popular for doing business within the company. In 2015, there were 317,698 limited liability companies. Investors leading larger companies chose the form of a joint stock company, the amount of which reached 10,491 in 2015.⁸ One should remember that besides these two types of companies there are other ways and forms of doing business, like partnerships (general partnership, limited liability partnership, limited partnership, limited joint-stock partnership), branch offices of a foreign company, representative offices of a foreign company, individual business activity (also as part of a civil partnership). All these forms of business activity expanded thanks to the aforementioned changes. According to data provided by the Polish Statistical Office (GUS), there were 1,771,460 economic entities registered in 2013.

Increased availability of capital connected with the relative economic stability of the Polish state caused incentives to start own business activities, also as limited liability companies. The Companies Commercial Code caused numerous incentives to set up and to run own business in form of the limited liability company, for instance by reducing the share capital to 5,000 PLN (Art. 154 § 1 of the CCC), through the possibility of concluding an article of association of the limited liability company on the master agreement (Art. 157 1 § 1 of

⁴ William. M Lades, R. A. Posner LAW & ECONOMICS WORKING PAPER No. 9 (2D SERIES). The influence of economics on law: a quantity study, the law School the University of Chicago.

⁵ *Działalność gospodarcza podmiotów z kapitałem zagranicznym w 2014 r.*, GUS

⁶ Narodowy Bank Polski – Bezpośrednie Inwestycje Zagraniczne
www.nbp.pl/home.aspx?f=/publikacje/zib/zib.html

⁷ Dane Ministerstwa Sprawiedliwości. Cyt za: Grzegorz Gołębiowski (red.), Adrian Grycuk, Agnieszka Tłaczała, Piotr Wiśniewski: *Analiza finansowa przedsiębiorstwa*. Warszawa: Wydawnictwo Difin, 2014, s. 24. ISBN 978-83-7930-068-6.

⁸ Główny Urząd Statystyczny, *Zmiany strukturalne grup podmiotów gospodarki narodowej 2013*.

CCC 1), by strengthening the rights of minority shareholders, by introducing the ability to pay dividends in advance for shareholders (art. 195 § 1 of the CCC). These changes introduced by the legislature in connection with the strong development of limited liability companies make this form of conducting business even more attractive and widespread. What should be noted is the decrease in the minimum amount of share capital, sometimes required to establish an extra guarantee for creditors, delivered by shareholders or members of management board to conduct the business. The amount of 5,000 PLN as initial capital is usually not sufficient to start up any economic activity. This often requires assurance provided by shareholders and, consequently, shareholders are in fact liable for debts of the company, what at the end of the day makes the reduction to 5,000 PLN quite uncomfortable for owners of the company.

The increase in the total amount of capital in Poland is not accompanied by the balanced or proportional growth of salaries. Therefore, legislative solutions have been directed to self-employment and setting up their own economic activities. Reduction of the share capital of limited liability companies to the amount of 5,000 PLN resulted in virtually anyone being able to set up such a company and run their own business, and to be self-employed. It was supposed to serve as a method to solve the relatively high unemployment. In fact, it can be stated that there was a causal connection between the increase in economic activity and the reduction of the level of unemployment. As an example it is worth noting that the unemployment rate in 2010 was 12,4 % and has fallen to 9,8 % in 2015.⁹

The rapid growth of capital in Poland led to a greater availability of money on the market. This contributed to stabilization of the Polish financial market and the sector of financial services. The increase in the entities and the increase in economic activity also resulted in an increase in bankruptcies of economic entities. According to statistics from 2010 to 2015, the number of bankrupt businesses grew as follows: in 2010 – 655, in 2011 – 723, in 2012 – 877, in 2013 – 883, in 2014 – 824.¹⁰ At the same time it should be noted that the vast majority of bankruptcies had the nature of decommissioning and led to the final completion of activities by the liquidated unit. The relatively high number of bankruptcies and of liquidations was a significant cause of the enactment by the Polish Parliament on 9 April 2015 of a new law – Law restructuring. A vast majority of the provisions of this new law entered into force already on the date of 01.01.2016. The main objective of the new law was to create broad opportunities for corporate restructuring and to avoid the liquidation of company's assets what was previously the rule.¹¹ It is therefore another example of influence of economical phenomena on creating legal solutions as results of this impact.

Another mentioned economic and social phenomenon on a large scale which took place in Poland in the years 2010 to 2015 was mass emigration of highly skilled labor from Poland to Western European countries. This has contributed to real wage growth in Poland and at the same time caused a lot of shortages of skilled workforce on the Polish market, in particular in sectors such as construction. It is estimated that in the years 2004 to 2013 2.3 million Poles went west from Poland¹² and the total number of population residing in Poland was reduced to 38.100.000 residents.

This change had a major impact on the labor market in Poland and was a factor forcing the improvement of working conditions in Poland. Under the Law of 10 October 2002 on the minimum wage, this salary was steadily growing in the years 2010–2015 but still may seem very low, as from 1 January 2016 it is to be 1850.00 PLN (about 400 Euro), but it is higher by 100 PLN (ca 25 Euro) in comparison to this wage from 2014. In 2013 the minimum wage amounted to 1.680,00 PLN. At the same time an average salary in Poland amounted to 4.335,00 PLN (ca.1000 Euro). Another example of this attempt to improve working conditions of employees is putting the burden of social security contributions on civil contacts, for example the commission agreement. This happened on the basis of the Act of 24 October 2014, amending the social security system, which introduced since January 2015 social insurance in respect of commissions contracts. This means that,

⁹ Główny Urząd Statystyczny (Main Statistical Office) – data from internet platform of GUS

¹⁰ Monitor Rynku Pracy, Sedlak&Sedlak, Bankructwa w Polsce, see too Dane na podstawie uzasadnienia ustawy Prawo upadłościowe i naprawcze oraz opracowania pt. „Skuteczność i efektywność postępowań upadłościowych w Polsce w świetle praktyki sądowej”, dr Sylwia Morawska, SGH, 2011, publikowany na stronach Polskiego Towarzystwa Ekonomicznego

¹¹ See. S. Gurgul, Komentarz. Prawo upadłościowe. Prawo restrukturyzacyjne. CH Beck, Komentarz, s.20-23

¹² Statistic dates of Main Statistic Office in Poland (Główny Urząd Statystyczny,) 2015.

concluding the commission agreement, the contractor shall receive social benefits in broader extent as so far paid on the base of this agreement. The aim of such a legislation was to remove so called "trash contracts" which do not offer social benefits for contractors and in fact substitute employment agreements.¹³ The contribution paid on the base of such commission agreement for the contractor is a part of his social benefit which he will receive in cases stipulated by the law. This contribution increases costs of labor force in Poland but, on the other hand, secures social benefits for contractors. Notwithstanding the fact that costs of labor force in Poland become higher, they still belong to the lowest in Europe. But this is the key to the Polish export success story, which only in 2015 amounted to 169 billion Euro.

As for the impact of these changes on the economic way of doing business in Poland, what is worth mentioning is the Act of 25 September 2015 amending certain acts in relation to the promotion of innovation of economy. This act was a legislative attempt to make Polish economy more innovative. Despite the inflow of capital and investments, including new technologies, the Polish economy does not belong to European top innovative economies. The inflow of capital did not help Polish economy to be more innovative or to create innovative technologies. It was a bad sign of how these funds were consumed by the Polish economy. In terms of innovation in the production and economy, Polish companies are among the least active in the European Union. According to the institution PRO INNO Europe, founded by the European Commission to study the development of innovation, Polish companies in 2009 occupied 23rd place for the 27 Union countries. Factor SII (Summary Innovation Index).¹⁴

I have also classified in the list of economic changes having impact on law the indebtedness of over 700,000 Polish citizens who have had their mortgages nominated in Swiss franc. Most of the Swiss franc mortgages were taken in 2007 and 2008. The franc has risen by 80 percent against the zloty since then, particularly after the Swiss central bank scrapped a peg on its currency. This economic phenomenon can change the Polish law in a very significant and dangerous way for the Polish banking system. Poland laid out a draft of law to saddle lenders with the costs of converting Swiss franc mortgages into zlotys. The draft law presented by the president's office is aimed at helping Poles with Swiss franc mortgages and follows the steps of Hungary which converted such loans from the past few years, imposing heavy losses on its banks. Renewed efforts to solve the problem of Swiss franc mortgages have hit Polish bank shares and weighed on the zloty. Let us consider that these consequences were provoked only by the draft of the legal act. What will happen when this draft is passed by the Polish parliament and enacted?

Impact of economic changes in Poland on policy-making and resolving disputes

Economic changes affect the formulation of policy-making in the field of state and private entities. The State depending on changes in the economy formulates its policy on social, economic, fiscal, budgetary and administrative issues. The State's response to the mentioned changes finds its expression in the appropriate legislature. The scope of the State's reaction depends on the type of the importance of economic change. Only as an example it is worth pointing out that the Polish State took advantage of the steady economic growth and the inflow of capital for tax purposes and has used it even in such a way that since January 2011 it introduced a new increased VAT amounting to 23% (previously 22%). Monetary interests of the Polish State found their expression in fiscal politic taking advantages and profits from the inflow of capital, growth of consumption and economic activity of Polish citizens. Polish State clearly used the capital inflows and development of the market economy – through the redistribution of capital almost based on administration law, to the realization of public aims, such as the expansion and construction of roads and other public investments. In the case of private entities economic changes, as I have mentioned at the beginning of the paper, they cause these entities to usually be the beneficiaries of these changes, for example by receiving EU funds or support for a specific purpose, or as a performer of investments financed with EU funds. In this regard, the possible

¹³ M. Zakrzewska, *Gazeta Prawna* 2012-03-26, Czy umowy cywilnoprawne to naprawdę umowy śmieciowe?, .see. Łukasz Piechowiak: Pracodawcy obrażają się za "umowy śmieciowe" (pol.). *Bankier*, 2012-01-12.

¹⁴ Anna Zygielwicz, *Biuro Analiz Sejmowych*: Dorota Grodzka, *Innowacyjność polskiej gospodarki*

formulation of policy-making must focus on the creation of rules and procedures to enable the best use of these economic changes.

In the case describing the impact of changes on the judgments, a general note should be expressed that thanks to the constant economic growth and inflow of capital it created a fundament for security of public finances, courts in Poland as a State institution began to run more efficiently and steadily. Polish courts got their sure financial sources, which ensured their day to day functioning. Therefore the Polish judiciary is independent but remains relatively slow. The inflow of capital stabilized the monetary situation in Poland, which contributed to the adjudication of a way to compensate for the actual harm suffered. Stabilization of the economic situation contributed to willingness of the parties to make out court settlements. Economic prospects of future cooperation between disputing parties – very often economic entities had good reason to make out court settlements. This willingness of the parties to make settlements was enhanced by the legislator introducing into the civil procedure a broad way of mediations between parties aiming to reach court or out of court settlement. It is now a leading policy in resolving disputes, especially in trials in civil cases.¹⁵

The situation of stable and well financed economy had an obvious impact on low inflation or even the existence of deflation, and this affected the reduction of the statutory interest which by 2015 had been established by the Council of Ministers. Statuary interests are subject of ministerial ordinance and in this sense are determined by law. If in 2005 the percentage was 13.50%, it has since 23.12.2014 amounted to 8.00% per annum.

Conclusions

The relationship between the impact of economic changes in Poland on decision-making in the field of establishing and running business and in policy-making and resolving disputes is broad and often not straightforward. Sometimes it may be justified to say that this impact seems more to be fictitious because of the impact of other much stronger factors like domestic policy-making or worldwide economic macro phenomena like globalization. And, importantly, these compounds are followed by legal instruments that very often are the domain of politics, which was not the subject of this paper.

All of these mentioned economic changes are in fact a result of the development of the free market economy and access to the European Union. These changes have been recognized and used by the Polish legislator. An expression of this are, on the one hand, legislative attempts to use these positive economic phenomena to deepen and intensify their good effects and, on the other hand, overuse their financial fruits on social or welfare aims. The balance of 2015 will probably show that the fruits of economic changes were partly wasted and partly squandered. An example of this is the still ongoing very strong support by the State, delivered for unprofitable sectors of the economy such as mining or shipyards. Also farmers are privileged in many aspects. The Polish government in order to rescue the mining industry has dedicated so far more than 170 billion dollars. They have made all Poles make up for it. Taking into account the subsidies from the years 1990–2012, each Pole has participated to the mining business with 76 dollars per year. In total, every Pole spent 1,876 zlotys annually on mining¹⁶. Furthermore, what also belongs to those examples of wasting the financial success are: the escape of skilled labor, the lack of innovative economy, maintaining and subsidizing a special social insurance system for farmers (KRUS), financial favoring of certain social groups, the lack of real support for small and medium-sized enterprises. These issues are clear evidence that the sole inflow of big capital is not enough to eliminate these flaws when good political and legal instruments are lacking. Therefore it seems justified from the State's position that the positive economic development is partly used and wasted to maintain those areas of the Polish national economy which are from the social point of view extremely sensitive. It can be also concluded that, despite these positive developments and legislative efforts aimed at their best use, in fact, the financial fruits of these positive developments are wasted through their misuse for purposes which have politic or even sometimes populist backgrounds. By the means of law,

¹⁵ Zofia Kinowska, Alicja Krata *Mediacja w Polsce*, "Infos" Nr 18/2010, Biuro Analiz Sejmowych Kancelarii Sejmu

¹⁶ Money.pl, Polskie górnictwo dostaje miliardy wsparcia. Każdy Polak dokłada 1876 złotych rocznie, 4.12.2014

economic changes influenced the way in which the establishment and operations are acting and have also affected policy-making and the way to settle disputes; however, the intended objectives of these changes have not yet been achieved. But one should see a kind of consolation in solid economic fundamentals that should continue to propel the strong growth despite downside risks from political uncertainty.

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COMPETITION LAW – BETWEEN LAW AND ECONOMICS

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Abstract

Article is focused short analysis of the several features of competition law such as difficulty to assign competition law to only one particular branch of law such as administrative, civil or criminal also its historical origins. Furthermore selected areas of influence of economics on competition law are reviewed as well as short overview of relation between economics and competition law in United States of America is provided.

Keywords: Competition Law; Economics; European Union; History of Competition Law, United States of America.

Introduction

It is rather difficult to identify the field of law to which the competition law² could be attribute to. Most common opinion (especially in Europe) is that competition law should be considered as a part of administrative law because an infringer in most cases is subjected to a fine imposed by state institution, however there is also a possibility of private actions for damages caused by infringement of competition law or even a criminal prosecution in various jurisdiction all around the world. Therefore completion law is rather extraordinary and is influenced by rules of very different fields of law that make it rather complicated subject not only for legal scholar but also lawyer who are taking part in practical application of competition law.

However influence of different rules of law is not the only thing that makes competition law “tricky” for the lawyer it is terms and rules of economics science. Such terms as “market”, “dominant position” and etc., can be easily learned but that might be not enough as a lawyer dealing with competition case might need for example to calculate a market share of the company and it requires not legal knowledge but knowledge of economics. As a result it is debatable if the case can be solved without the assistance of an expert in the field of economics? Should competition law be focused on “more economic approach” or not? How did the influence of economics change through history of competition law? It is unmistakable that competition law is very dependent not only on the legal science, but also on economics and such dependence is essential to make it efficient and able to keep up with contemporary challenges.

1. The Peculiarity of Competition Law as Separate Type of Law

As it was mentioned in the introduction it is a matter of discussion if competition law should be part of administrative, civil or criminal law. According to the European Union (hereinafter – EU) legislation competition law is manly a part of administrative law as it is enforced by the institution – European Commission. However EU legislation also allows (especially after the adoption of the Directive on Antitrust Damages Actions)³ private actions for damages (litigation between the private parties). In addition Regulation No 1/2003 on the

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² It can also be referred as antitrust law.

³ ³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance OJ L 349.

implementation of the rules on competition⁴ and Treaty on the Functioning of the European Union⁵ (hereinafter – EU Treaty) does not prohibit criminalization of competition law infringements (such as cartels) in legal system of Member States⁶. Moreover criminalization of activities prohibited by the Articles 101 and 102 of the EU Treaty at the EU level has become a serious subject for the discussion.⁷ The basis for such discussions are the decisions European Court of Human Rights indicating that fines applied according to Articles of EU Treaty are of criminal nature⁸. Similar interpretations were made by courts of several Member States⁹. To make things even more complicated it can be mentioned that part of Member States apply criminal sanctions for the competition law infringements such as cartels (e.g. Ireland, the United Kingdom, France, Denmark, the Czech Republic and etc.) and part of them have only administrative sanctions and private actions for damages, it should be added that some of the Member States such as Germany and Austria have imposed criminal sanctions for the competition infringements in very specific cases such as governmental procurements.

As a result it is rather difficult to analyse the influence of economics on competition law as the extent of such influence might vary depending on the branch of law the competition law is attributed to. For example: in the civil case where one party is claiming damages caused by the infringement of competition law from another party it is of particular importance to calculate the damage caused. It might be especially difficult task as calculation of the compensation for harm suffered means placing the injured parties in the position they would have been in had there been no infringement and doing this without theories and rules of economics is undoubtedly impossible. The influence of economics in this cases can also be supported by the statement of EU Commission *that economic insights into the harm caused by antitrust infringements and methods and techniques for quantifying it can evolve over time in line with the theoretical and empirical economic research and judicial practice in this area*.¹⁰ Still the situation in the criminal cases is a bit different as the guilt of the person accused of competition infringement is based on the evidence (e.g. recordings, agreements between parties, correspondence and etc.) collected during the investigation and economic analysis is not always required.

Another peculiarity of competition law is that usually a wrong assumption is made that sanctions for the infringement of competition in the market are rather new subject of the modern law. A mistake can be made if assumed that competition law is a creation of the classical and neoclassical economics and did not exist before 19th century when one of best known legal acts of the contemporary competition law was enacted in United States of America (hereinafter – USA) – Sherman Antitrust Act of 1890¹¹(even though the first ever modern competition law was enacted by Canada in 1889. This Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade¹² was passed one year before the United States enacted the most famous legal statute on competition law). However Sherman Antitrust act was not the first legal act that was designated to ensure fair competition in the market. The history of the competition law can be traced back to

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003.

⁵ Consolidated version of the Treaty on the Functioning of the European Union OJ C 326.

⁶ EU member states.

⁷ C. Beaton-Wells, A. Ezrachi 'Criminalising Cartels Critical Studies of an International Regulatory Movement' (Hart Publishing, Oxford and Portland, Oregon 2011); W.P.J. Wils 'The Optimal Enforcement of EC Antitrust Law – Essay in Law and Economics' (Hague, Kluwer Law Internationals, 2002); P. Whelan 'A Principled argument for the Personal Criminal Sanctions as Punishment under EC Cartel Law' [2007] 4 The Competition Law Review 7 and etc.

⁸ European Court of Human Rights cases: *Soci t  Stenuit v. France* 11598/85 Judgment 27.02.1992; *A. Menarini Diagnostics S.r.l. v. Italy* 43509/08 Judgment 27.9.2011.

⁹ See e.g. the decision of the French Constitutional Court of 22-23 January 1987, JORF, 25 January 1987; also The House of Lords case *Rio Tinto Zinc Corporation and others* [1978].

¹⁰ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) OJ 167.

¹¹ Officially re-designated and to be recognized from then on as the "Sherman Act" by Congress in the Hart–Scott–Rodino Antitrust Improvements Act of 1976, (Public Law 94-435, Title 3, Sec. 305(a), 90 Stat. 1383 at p. 1397).

¹² Later replaced by Board of Commerce Act and the Combines and Fair Prices Act of 1919, which were *ruled ultra vires* and were succeeded by the Combines Investigation Act of 1923. The Combines Investigation Act was also repealed and replaced by the Competition Act of 1986.

middle ages in England ruled under King Henry III or the municipal statutes of Florence in 1322 and 1325 or even back to *Codex Iustiniani* of 483 AD or *Lex Julia de Annona* (~ 50 BC). It must be noted that most of these acts imposed sanctions of a criminal nature. Therefore such long history of the competition law might be one of the reasonable explanations why some parts of it are not so easily influenced by the modern economics.

2. Competition Law and Economics

It was mentioned in the part one that competition law has some peculiarities that make it a rather unique field of law. However even with mentioned peculiarities in mind it can be assumed that competition law is one fields of law that is most influenced by economics. Some authors even like to stress out that until recently law confined the use of economics to antitrust law, regulated industries, tax, and some special topics like determining monetary damages¹³. It is understandable as competition law is essentially concerned with the study of markets, the behaviour of the companies, consumer protection and other economic issues. Understanding economic helps us to understand how markets operate, how companies will behave in particular markets, and whether their behaviours will result in competition that benefits consumers and the market itself (perfect competition maximizes social welfare and that monopoly lowers social welfare by reducing socially valuable output¹⁴).

The influence of economics on competition law can be analysed in many ways for example: application of different methods of calculation of damages suffered by the specific individual or a group of such individuals due to the breach of competition law in a particular case or possible reduction of information, litigation, drafting and other¹⁵ costs due harmonization of national competition acts of EU Member states. Economics can also be used as a part of argumentation in the reasoning of the (European) Court of Justice or national courts to identify what a predicted intent of the alleged anticompetitive behaviour was, why the undertaking wants to undergo such a practice and what its intended goals are. Like in the situation when the Court of Justice explains the intent of pricing below average variable costs in the following manner: "*In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking.*"¹⁶ It clear that economic theory is able to identify and clarify the content of vague and sometimes ambiguous terms and concepts which are usually used in competition law. Economics represents here an interpretative tool. Whether "competition", "restriction" or "market", law does not give an answer to what these terms mean. When interpreting these and other similar terms, economics provides for explications of what meaning should be assigned to them in the light of the normative basis and of the goal(s) of competition law.

In addition rules of economics may be adapted to the needs of law during the evidence assessment. In such case both the quantitative or qualitative data are taken into account and methods which were used for the assessment for such data are reviewed by courts (or national authorities). Economics is used to point out which facts are relevant, how they are relevant and why they are relevant. The evaluative method suggested by economists then requires a legal mind which would accept it as a legitimate process for the assessment of facts.

One more area of possible influence of economics on competition law is a procedural costs. Economic analysis of civil procedure (these rules cannot be applied to the administrative or criminal procedure as one of the parties has a "duty" and allocated resources¹⁷ to penalize an infringer) focuses on the issue how different procedures affect the sum of direct costs (such as time spent by the parties and other individuals involved in

¹³ R. Cooter T. Ulen 'Law & Economics' Sixth edition (2012 Addison – Wesley) p. 1.

¹⁴ P. A. Samuelson 'Economics' (1948 Maple Press Company, York, PA).

¹⁵L. Visscher 'A Law and Economics View on Harmonization of Procedural Law' [2010](No. 2010/09) Rotterdam Institute of Law and Economics (RILE) Working Paper Series p. 15-16

¹⁶ The Court of Justice case C-333/94 P, Tetra Pak II [1996] ECR I-5951 [41].

¹⁷ It is a matter of discussion if economical calculations should not made in this area too as in particular cases in USA the public persecution is not started (in order to save limited resources state institution) if there is a high possibility of a private enforcement, see E. Elhauge, D. Geradin 'Global Competition Law and Economics' (2007 HART Publishing, Oxford and Portland, Oregon) p. 19.

the procedure also material costs: lawyer's fees, expert's fees, court fees; etc.) and error costs (costs that emerge when wrong decisions are made) and how they influence the behaviour of the parties involved in the dispute resolution process.¹⁸ An important procedural 'instrument' with which procedural costs are influenced, is the burden of proof. An economic analysis of allocation of burden of proof could greatly benefit for the effective enforcement of competition law.

It is possible to list even more examples how economics can influence competition law. But can we presume that economics has always had such influence on competition law? One of the most interesting examples for the historical analysis is the USA as it was mentioned before the competition law (or it could also be called antitrust law) of USA is one of earliest examples of modern competition law.

The beginning of relation between the competition law and economics was rather difficult as most economists in the late 19th century looked down on the famous Sherman Antitrust Act of 1890.¹⁹ The Sherman Antitrust Act was regarded as a harmless measure incapable of halting an irresistible trend toward firms of larger scale and scope or even as it would impede attainment of superior efficiency promised by new forms of industrial organization²⁰. The cooperation between lawyers and economists (at least in the governmental sector) could had been better too. The U.S. Bureau of Corporations, which had been established in 1903 within the Department of Commerce and Labor and which had economists on its staff, who provided valuable research support for some of the early antitrust prosecutions undertaken by the U.S. Department of Justice, including *U.S. v. Standard Oil Co.*, 221 U.S. 1 (1911), and *U.S. v. American Tobacco Co.*, 211 U.S. 106 (1911) (Scherer 1990). An early -- possibly, the first -- testimony by an economist in an antitrust case was in *U.S. v. United States Steel Corp.*, 223 F. Rep. 55, 251 U.S. 417 (1920), which was filed in October 1911 and ultimately decided by the Supreme Court in 1920 against the U.S. Department of Justice. The Supreme Court's decision disparagingly cited the testimony of "*an author and teacher of economics whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations.*" (251 U.S. 417, 448)²¹ But in the beginning the economist were mostly only aid attorneys in the preparation of statistical data for trial, and they occasionally testified. The involvement of economists in antitrust policy, as well as litigation support, took a sharp turn upward only in the early 1980s, with the arrival at the Antitrust Division and the Federal Trade Commission of leaders who were quite sympathetic to the role and message of microeconomics in the development of antitrust policy and in litigation.²²

In the beginning of 20th century case *Maple Flooring Manufacturers' Association v. U.S.* (268 U.S. 563 [1925]) featured the Supreme Court's first citation to an economist's work in an antitrust decision—in this instance, to underscore how access to information might enable producers to make efficient output and pricing decisions. However due to World War I and World War II the beginning of 20th century was rather complicate for USA competition law as the big companies that supplied major part of resources required for warfare gained popularity and the priority was given to cooperation between government and such companies rather than to restriction of their activities. But by the mid-1960s, business managers realized that pendulum of competition regulation had swung dramatically away from the permissiveness of the 1920s and early 1930s.²³

¹⁸ S. Shavell, 'The Fundamental Difference between the Private and Social Motive to Use the Legal System', [1997] (26) *Journal of Legal Studies* pp. 575-612 and S. Shavell 'Foundations of Economic Analysis of Law' (2004 Cambridge, Mass.: The Belknap Press of Harvard University Press), p. 283.

¹⁹ W. E. Kovacic and C. Shapiro 'Antitrust Policy: A Century of Economic and Legal Thinking' [2000] *Journal of Economic Perspectives*—Volume 14, Number 1—Winter, p. 44.

²⁰ For more on this topic: W. E. Kovacic and C. Shapiro 'Antitrust Policy: A Century of Economic and Legal Thinking' [2000] *Journal of Economic Perspectives*—Volume 14, Number 1—Winter; W. Letwin, William 'Law and Economic Policy in America' [1965] New York: Random House 965, pp. 71-77; A. Mayhew 'How American economists came to love the Sherman Antitrust Act' [1998] *From Interwar Pluralism to Postwar Neoclassicism* pp.179-201 and etc.

²¹ L. J. White 'Economics, Economists, and Antitrust: A Tale of Growing Influence' from book J. J. Siegfried 'Better Living Through Economics' (2012 Harvard University Press) p. 231.

²² L. J. White 'Economics, Economists, and Antitrust: A Tale of Growing Influence' from book J. J. Siegfried 'Better Living Through Economics' (2012 Harvard University Press) p. 231.

²³ W. E. Kovacic and C. Shapiro 'Antitrust Policy: A Century of Economic and Legal Thinking' [2000] *Journal of Economic Perspectives*—Volume 14, Number 1—Winter, p. 51.

There was considerable consistency between judicial decisions and economic thinking during the 1940s, 1950s, and 1960s. Although it is uncertain how and to what extent each perspective influenced the other, judicial application of economic concepts lagged behind new scholarly developments²⁴. Even as courts strove to deal with the many tight-knit industrial oligopolies of the day, economists came to realize that departures from the perfect competition model are normal, indeed inevitable, even in “competitive” industries.²⁵ By the early 1970s, the extreme level of activism in antitrust law, reflected in public enforcement policy and Supreme Court decisions, had attracted harsh criticism from a group of commentators known as the Chicago School, including legal scholars such as Robert Bork and Richard Posner. These commentators questioned many rules of *per se* illegality that the Supreme Court created from 1940 to 1972 and argued that some conduct, such as vertical restraints, was so often benign or pro-competitive that courts should uphold it with rules of *per se* legality²⁶. The ideas of Chicago School were not disregarded by courts, in the Supreme Court’s decision in *Continental T.V. Inc. v. GTE Sylvania Inc.* (433 U.S. 36 [1977]) the Court prominently cited Chicago School commentary and emphasized that the analysis of economic effects provided the proper basis for evaluating conduct under the antitrust laws. This led to more liberal application of competition law, for the most part, the courts gave dominant firms considerable freedom to choose pricing, product development, and promotional strategies²⁷.

As for 1990s the competition policy took more stick approach as U.S. Department of Justice adopted a policy that gives criminal immunity to the first cartel member to reveal the cartel’s existence²⁸ and in 1999, using data supplied by a cartel member under the new policy, the U.S. Department of Justice obtained guilty pleas from BASF and Hoffman-La Roche to pay a total of \$750 million in criminal fines (an amount surpassing the sum of all Sherman Act criminal fines since 1890) for fixing vitamin prices.²⁹ It also should be mentioned that merger analysis became more heavily economic from 1990s, economic concepts now pervade the federal merger guidelines, and merger analysis, whether performed by prospective merger partners or antitrust agencies, routinely involves close collaboration between economists and attorneys. To summarize this short review of influence of economics on USA competition law from the historical perspective an assumption can be made that the consciously evolutionary quality of the USA competition law, with its implicit recognition of the need to adjust doctrine over time in light of experience and new learning, gives economists considerable power to influence competition law and policy.

Is it safe to presume that the influence of economics on competition law is always positive? For example: multiple strands of economic thinking have been knitted into the fabric of competition law. That fabric includes beliefs that do not necessarily find strong theoretical or empirical support in modern economics. It includes assumptions – what are sometimes called prior beliefs in Bayesian decision theory – about the relative importance of various economic factors. And it includes a recognition – sometimes explicit, often not – that legal rules affect economic incentives in uncertain ways and that the courts need to be careful to strike the right balance between condemning harmful behaviour and discouraging good behaviour. Many economists would not agree with the judgments made by the courts. But then again many economists would not agree with each other since the theoretical and empirical evidence is so undeveloped. That is especially true when it

²⁴ For more on this subject see: W.E. Kovacic ‘The Influence of Economics on Antitrust Law’ [1992] *Economic Inquiry*. April, 30, pp. 294–306.

²⁵ W. E. Kovacic and C. Shapiro ‘Antitrust Policy: A Century of Economic and Legal Thinking’ [2000] *Journal of Economic Perspectives*—Volume 14, Number 1—Winter p. 52.

²⁶ W. E. Kovacic and C. Shapiro ‘Antitrust Policy: A Century of Economic and Legal Thinking’ [2000] *Journal of Economic Perspectives*—Volume 14, Number 1—Winter p. 53.

²⁷ W. E. Kovacic and C. Shapiro ‘Antitrust Policy: A Century of Economic and Legal Thinking’ [2000] *Journal of Economic Perspectives*—Volume 14, Number 1—Winter p. 54.

²⁸ U.S. Department of Justice, Corporate Leniency Policy (Aug. 10, 1993); U.S. Department of Justice, Leniency Policy for Individuals (Aug. 10, 1994).

²⁹ U.S. Department of Justice press release on the fines, “F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel,” (May 20, 1999) available at <https://www.justice.gov/archive/atr/public/press_releases/1999/2450.htm>

comes to questions involving the role of innovation and risk taking.³⁰ Therefore a court deciding on case might end up in rather complicated situation when for example parties of a case would base their arguments on different economic theories to calculate damages suffered due to the breach of competition law. But calculation of damages might not be the most undesirable situation, as it was mentioned before, in some jurisdictions a person breaching a competition law can be subjected to the criminal sanctions and a guilt of a defendant must be proved beyond a reasonable doubt. As a result an influence of economics on competition law is undeniable and could be even considered as indispensable to make it efficient and able to keep up with contemporary challenges, however not all new ideas from the field of economics can be or even should be immediately applied to competition cases.

Conclusions

Competition law has some peculiarities that make it a rather unique field of law. It can be dated back to Ancient Roman Empire and might be part of all three branches of law: administrative, civil and criminal. However even with mentioned peculiarities in mind it can be assumed that competition law is one fields of law that is most influenced by economics.

Rules of economics are being used in various situations when competition law is applied such as evidence assessment, procedural costs, calculation of damages suffered by the specific individual or a group of such individuals due to the breach of competition law, to identify and clarify the content of vague and sometimes ambiguous terms and concepts which are usually used in competition law and etc. Example of relation between the USA competition law and economics is a good demonstration of how economics can influence competition law from the historical perspective. Considering peculiarities of competition law and different ways of usage of knowledge of economics in competition cases it can be concluded that an influence of economics on competition law is undeniable and could be even considered as indispensable to make it efficient and able to keep up with contemporary challenges, however not all new ideas from the field of economics can be or even should be immediately applied to competition cases.

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³⁰ D. S. Evans 'Economics and the Design of Competition Law' [2005] Chapter for Issues in Competition Law and Policy Edited by W. Dale Collins available online <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=827465> p. 4.

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THE INFLUENCE OF THE EUROPEAN LAW ON THE NATIONAL CRIMINAL LEGISLATION OF UKRAINE

Anna Sokhikian¹

Abstract

In recent years the process of harmonization of criminal legislation of European countries is becoming increasingly important. Comparative studies without exaggeration show the development of the process of implementation of European standards of criminal law, including in national criminal legislation of Ukraine. Given the fact that our country declared its desire to join the EU, its legislation must be compatible with the *acquis communautaire* of the European Union in priority areas. Also note the fact that cooperation between countries in combating crime is one of the three pillars of the EU. The decisions of the Court of the EU are of precedent nature. The same nature has got the ECHR's decisions.

Our study is based on the reassessment of the system of sources of criminal law of Ukraine under the influence of the integration process. Specific examples from judicial practice of the ECJ and the ECtHR, indicate the main trends of implementation of the tasks set before the country in the field of criminal law.

Based on the achievements of comparativists the author explains the processes of harmonization of criminal legislation. According to the author, the changes caused by European criminal law, accelerated the processes of humanization and democratization of modern criminal legislation of Ukraine.

Keywords: The European Court of Human Rights, the source of the criminal law, the precedent, the Criminal Code of Ukraine, comparative method of research.

Introduction

Modern criminal law is socially determined *inter alia* by the development of integration processes in the world. This phenomenon, in turn, is provoked by the tendency of rapprochement of domestic and international law and processes of the universalization of economic, social, cultural, transportation, information and other links.

Since the formation of the EU its members determined the police and judicial cooperation in criminal matters as one of the pillars (columns) of the legal framework that defines the foundation of the Union. Thus, the EU countries stress the importance of cooperation in this field, securing the principles of freedom, security and justice in the Treaty of Amsterdam of 1997. Within the frames of this pillar the different legal instruments are used: framework decisions, decisions and common positions.

Although, the adoption of the Lisbon Treaty of 2007, radically changed the European Union, nevertheless the norms of criminal law enshrined in regulatory legal acts, were unchanged.

1. The influence of European Union law on national law

In essence the European Union law regulates public relations in the process of formation and functioning of integration associations. According to the founding treaties, the only EU institution with the right to give a

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legitimate interpretation of EU law and to decide on the legality of acts of its institutions is the European Court of justice. In all cases where the national courts of member States of the EU review of the case, the solution of which requires the application of EU law and, if a question arises about the interpretation of the applicable rules of law or the applicable instruments of the EU, the national court should suspend the proceedings and request the Court's opinion the EU. Thus is enabled a prejudicial procedure².

Since the decision in the van Gend (1962) and Costa (1963)³, and up to the present time, the court gives a principled interpretation of the basic principles of law and justice in the EU. So in the case of Van Gend en Loos against the Administration of internal revenue of the Netherlands, van Gend Yong Loos - transport and forwarding company - supplied formaldehyde from West Germany to the Netherlands. Dutch customs charged for it large customs duties. The plaintiff demanded their withdrawal and the proof referred to article 12 of the EC Treaty (now article 30 TFEU). The Respondent state disputed this possibility, citing the fact that the issue concerns the application of the provisions of the contract, and the Court cannot directly apply the rules, can only interpret them. The court upheld the plaintiff admitting the claim to be justified because the debate is over the interpretation of the action of article 12. The Court further considers the main question is whether the direct application of article 12. The court concluded that this rule directly applies to private individuals gives them directly the rights and obligations that are subject to judicial protection. In support cited the following arguments: the purpose of the Agreement is the creation of a Common market, which affects the interests of each party, thus the Contract is not a simple international Treaty that establishes the agreement between the States. This is also confirmed by the establishment of institutions endowed with sovereign rights, the implementation of which has had an impact equally on member States and their citizens. In addition, citizens of member States participating in the Union's activities through the European Parliament and the Economic and Social committees. In the end, the ECJ concludes that the Union constitutes a new legal order of international law for whose benefit the States have limited their sovereign rights in certain fields and whose subjects are not only member States but also their nationals. A law of the Commonwealth, regardless of the legislation of member States not only imposes obligations on individuals but also confers on them rights which become part of their legal status. These rights arise not only where they directly expressed in the Contract, but also because of the obligations that the Contract strictly in a certain way imposes on individuals, as well as on member States and Community institutions. The application of article 12 requires no legislative intervention by States. The fact that according to this article it is member States become subjects of the negative obligations does not imply that their nationals cannot benefit from this obligation.

In the case Flaminio Costa v. ENEL (Ente Nazionale Energia Elettrica) Flaminio Costa, who was a citizen of Italy, objected to the nationalization of the Italian energy company ENEL, in which he was a shareholder. In protest, he refused to pay for electricity and stated that the nationalization violates EU law. The Italian government decided that the private individual can't handle such allegations and the dispute shall be resolved exclusively within the framework of national law. Costa has required referring the matter to the Court of the European Community and the Milan magistrate was sent to the ECJ a prejudicial inquiry. Initially, the Italian court wanted to find out the relation between national law and EU legislation in general. The court considered it possible to answer a query concerning a particular dispute.

The first question considered by the ECJ concerned the autonomy rights of Communities, as a separate legal system, the possibility of conferring the rights and responsibilities of individuals and obligations of member States directly apply the norms of the EU level. The court postulated, according to which, the Right of the European Communities is a separate legal system, which directly confers rights on individuals, the responsibilities of member States, and these rights should receive judicial protection. The reasoning of this dispute is quite logical – creating community, the government decided to turn over part of their competences to the supranational level, thereby withdrawing some of the questions at the discretion of the special organs and in advance of agreeing with their decisions. From this follows the main idea outlined in this decision, and made it fundamental. Once all member States had given up some competence in favor of the Union, they can't

²Консолидированный текст Договора о Европейском Союзе и Договора об учреждении Европейского сообщества на русском языке приводится в книге Европейское право. Учебник для вузов / Под ред. д.ю.н., проф. Л.М. Энтина. М., 2000. С. 521-699.

³ Суд Европейских сообществ. Избранные решения / Отв. ред. Л.М. Энтин. М., 2001. С. 1-23.

change when implementing the norms of the EU law, it must act independently, but member States can only issue acts based on it. It follows that EU law has a very important sign of the rule. The rule of Community law is confirmed by article 189, under which regulations "are binding and are directly applicable in all member States". This provision which admits of no reservations, would have no meaning if the state could unilaterally cancel its effect by a legislative act, which could prevail over Community law. Thus, resulting from Autonomous sources, the right, generated by the EEC Treaty, not because of its special and original nature be challenged by any domestic legal act without the remedy of the status of Community law and not to question the legal basis of the Community.

One example of such decisions of the ECJ was ruling in a case MOX and in the case Kadi (2008) rendered by the EU Court of cassation⁴. About criminal law for the first time the obligation to ensure fulfillment of requirements of the legislation of the EU was defined in the decision of the Greek maize case⁵. The court came to the conclusion that if EU legislation does not specifically lay down any sanctions for the violation of article 5 of the EEC Treaty, the member States of the EU must take all necessary measures for the effective application of EU law. The choice of penalties remains within the discretion of member States⁶.

Thus, the decision of the Court of the EU can influence the national legislation of the participating countries and serve as a basis for change. This in turn gives the basis to consider the decision of the Court of the EU, associated with changes in criminal law, source of criminal legislation of the respective countries.

Undisputed is the fact that the decisions taken by the European Union, depending on their legal force are both mandatory and recommendatory character for the member countries of the EU. However, the question arises whether the decisions of the European Union in the field of criminal law to influence the laws of countries that are not members of a supranational state? On the example of Ukraine will try to answer this question.

To date, the majority of European countries are already members of the European Union, other European countries are contenders. Ukraine also declared its desire to join the EU at the legislative level. Thus, the Law of Ukraine "On national program of adaptation of Ukraine legislation to the legislation of the European Union" provides a comparative legal study of conformity of Ukraine's legislation to the *acquis communautaire* of the European Union in priority areas⁷. The process of adaptation in itself provides for the definition of acts of *acquis communautaire*, which regulate legal relations, a comprehensive comparative analysis of regulation of legal relations in the relevant field in Ukraine and in the EU, the development of recommendations on bringing laws of Ukraine into conformity with the *acquis communautaire*. So, Ukraine's efforts aimed at fighting crimes of a transnational character (terrorism, illegal trafficking of weapons, people, drugs, computer crimes, etc.) are reflected in the following normative acts: the action Plan "Ukraine – European Union"⁸, the Agreement between Ukraine and the police office of strategic cooperation⁹, the action Plan Ukraine – The European Union in justice, freedom and security¹⁰, Directive 2005/60/EC of the European

⁴ Избранные решения Европейских судебных инстанций (постановления и комментарии). Выпуск 4: М.: МГИМО-Университет, 2011. С. 74. Решение по делу Кади получило по ряду параметров весьма критическую оценку в российской юридической литературе.

⁵ Judgment of the Court of 21 September 1989. Commission of the European Communities v Hellenic Republic. Failure of a Member State to fulfil its obligations - Failure to establish and make available the Community's own resources. Case 68/88. // European Court reports 1989 Page 02965.

⁶ Кареклас С. Кримінальне право ЄС. – Одеса, 2004. – С. 31.

⁷ Про Загальнодержавну програму адаптації законодавства України до законодавства Європейського Союзу [Електронний ресурс]. – Режим доступу: <http://zakon5.rada.gov.ua/laws/show/1629-15>.

⁸ План дій «Україна – ЄС» [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_693.

⁹ Угода між Україною та Європейським поліцейським офісом про стратегічне співробітництво [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_954.

¹⁰ План дій Україна – ЄС у сфері юстиції, свободи та безпеки [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_956.

Parliament and of the Council concerning the avoidance of the use of the financial system for the purpose of money laundering and financing of terrorism, etc¹¹.

Thus, Ukraine aligns with the EU law its criminal laws through agreements. So, in the "Agreement on partnership and cooperation between Ukraine and the European Communities and their member States" in the version dated 16.09.2014; have been assigned to the position, according to which Ukraine should accede to the multilateral conventions on intellectual property rights, in particular to the TRIPS (the Agreement on Trade Related Aspects of Intellectual Property Rights). TRIPS, in turn, provides for criminal liability for violations of intellectual property rights. For the purpose of compliance of Ukrainian legislation to the *acquis communautaire* of the European Union, designated norm, of a criminal nature were made to the criminal code of Ukraine. Thus, in the article 177 of criminal code of Ukraine (as amended from 18.02.2016 year) taken into account the provisions of TRIPS. The outlined example demonstrates the harmonization of Ukrainian legislation with European norms. Thus, the above leads to the conclusion that the extension range of sources of criminal law of Ukraine.

2. The influence of the Council of Europe on national legislation

Almost all European countries, except Belarus and the Vatican city are members of the Council of Europe. The main task is marked political organization is to promote the establishment of the principles of democracy, human rights and the rule of law and the search for joint solutions to the problems of political, legal nature, etc.

Agree with the opinion of prof. Havronyuk that the need for harmonization of legislation applies not only to the legal space of the European Union . In accordance with article 1 of the Statute of the Council of Europe is the achievement of us objectives, the Association promotes the drafting of agreements and making joint programmes in the legal field¹².

General provisions of criminal law contained in such documents of the Council of Europe: the Convention, protocols, resolutions and recommendations.

However, labeled us the list of normative-legal acts, which is a source of European law is not exhaustive. So, it is highly controversial legal nature of the solution have a unique international judicial institution whose jurisdiction extends to all member States of the Council of Europe, ratified the European Convention for the protection of human rights and fundamental freedoms - European court of human rights.

Note that in accordance with the provisions of article 46 of the European Convention for the protection of human rights and fundamental freedoms, a state that has ratified the Convention, has the responsibility to abide by the final decision of the European Court of human rights. Control over appropriate execution of the decision rests with the Committee of Ministers of the Council of Europe, its monitoring function is political and not legal nature. Thus, it is possible to come to appropriate conclusions about what decisions of the ECHR are of a precedential nature.

As you know, 14.05.1993, Lithuania became a member of the Council of Europe, and later 09.11.1995 years it has been joined by Ukraine. Lithuania ratified the European Convention for the protection of human rights and fundamental freedoms in 1995, and later, in 1997, the same was carried out and the Ukraine. Thus, according to article 46 of the European Convention for the protection of human rights and fundamental freedoms the European court of human rights are binding in the territory designated countries.

However, the question arises whether the decisions of the European court of human rights to the sources of criminal law of both countries?

In accordance with the provisions of article 1 of the criminal code of Lithuania, the criminal code of the Republic of Lithuania is unified by the criminal law, whose purpose — by means of criminal law to protect the

¹¹ Директива 2005/60/ЄС Європейського Парламенту та Ради про запобігання використанню фінансової системи з метою відми-вання коштів та фінансування тероризму [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_774.

¹² Хавронюк М.І. Кримінальне законодавство України та інших держав континентальної Європи: порівняльний аналіз, проблеми гармонізації. Монографія. – К.: Юристконсульт, 2006. – 1048 с.

rights and freedoms of man and citizen, interests of society and the state from criminal acts. Designated the provisions of article 1 of the criminal code of Lithuania correspond with the provisions of part 1 of article 3 of the criminal code of Ukraine.

Of legislative definition, it follows that the only source of criminal law can only be criminal law. Realizing that my position may not correspond with the opinion of Lithuanian legal scholars, I want to mention that in my opinion these statutory provisions do not fully reflect the real situation.

I believe that the source of criminal law of Ukraine is also the practice of the ECHR. In addition the practice of the ECHR can respond to the objective processes of social development and to push the law enforcement practice of the European States to solve problems in the plane, the vector which will indicate the ECHR. Thus, in accordance with article 17 of the Law of Ukraine "On implementing decisions and applying practices of the European Union on human rights" from 23.02.2006, the №3477-IV courts use in cases the Convention and the court's practice as a source of law.

Based on the identified legislative definition, it follows that the practice of the European court of human rights is a source of criminal law of Ukraine. Moreover, the practice of the ECHR does not just exist abstractly in theoretical aspect, but rather actively used.

So, ECHR judgment Scoppola v. Italy 17.09.2009 G. (prohibition of reverse operation in part to more severe penal provisions already in itself speaks of more favourable criminal law to the person who committed the crime) are applied by Ukrainian courts in 65 sentences; v Baklanov. Russia 09.06.2005 G. (achieving a fair balance between the General interests of society and the requirements of the protection of the fundamental rights of a person only becomes significant if you installed the fact that during the relevant intervention was not applied the principle of "legality" and it must not be arbitrary) is applied by Ukrainian courts in 135 sentences; v Frizen. Russia 24.03.2005 G. (achieving a fair balance between the General interests of society and the requirements of the protection of the fundamental rights of a person only becomes significant if you installed the fact that during the relevant intervention was not applied the principle of "legality" and it must not be arbitrary) is applied by Ukrainian courts in 124 convictions; Ismailov V. Russia 16.10.2008 (to ensure that the intervention was considered to be proportionate, it must meet tarkasti offences and should not represent "undue personal burden on the person) - used Ukrainian courts in the 112 sentences.

In total, the Ukrainian law enforcers turn to the case-law of the ECHR in 735 sentences, which in turn indicates the use of the ECHR in national law.

Conclusions

After analyzing only a small portion of European legislation, you can come to the conclusion that practically all the provisions concerning criminal responsibility and punishment contained in the relevant codes of European countries. However, national criminal law is formed under the strong influence of European legislation. An example of this practice serve the Court of the European Union and the European court of human rights. It should be noted that sometimes (e.g. in Ukraine) implementation of European law in national criminal law is faced with certain difficulties. And it's not just political ideological or other similar obstacles. It's just that sometimes, trying to approximate national legislation to the European standards, the legislator follows the path of decodification criminal law. Made a number of contradictions, the gaps, the imposition of norms or institution contrary to the principles or institutions of legal policy of our country.

With this in mind, the processes of implementation and harmonization of national legislation contribute to its improvement.

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LEGAL, SOCIAL AND ECONOMIC FACTORS OF FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION

Anna Stokłosa¹

Abstract

Legal, economic, demographic, geographic, and social factors are the main determinants of the direction and scale of migration flows between economic areas. Since there is still no general theory of migration, covering comprehensively all factors of migration decisions, it is necessary in research to present an interdisciplinary approach, utilizing elements of different scientific fields, such as economics, psychology, history, ethnology, sociology, demography, geography and political science.

As the introduction the paper provides European law perspective of free movement of workers, discussing the scope of Article 45(2) of the Treaty on the Functioning of the European Union on the prohibition of discrimination under the freedom of workers movement, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and their relation to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Then the paper provides recent research on demographic in Europe and challenges to the public resulting from free movement of workers. Further the paper moves to present the changing landscape of the labour market for European citizens. It considers the impact of integration on demographic trends, presenting in particular the cultural aspect of opening the European labor market. It examines social factors, including, inter alia, the attitude of societies, local communities, trade unions and politicians to immigrants inflow, the characteristics of national cultures, the existence of the traditional centers of emigration or immigration. It also presents researches regarding the impact of the labour market regulations on family life or the number of mixed marriages. It explains and discusses new phenomenon in the society such as "brain - waste problem" and "euro-orphanhood". In further part the paper concentrates on ethnics origin as the discrimination factor. In this part it also contests myths circulating on the subject of labour migration.

Finally, the author tries to answer the question whether the regulation of labour law is one of the causes of labour migration or the opposite - the role of regulation of labour law is the result of labour migration. The the paper examines the interaction between European law and economic and social factors present within the European Union, trying to find an answer to the question how much social and economic factors shall be incorporated into legal research regarding free movement of workers and how effective is the application of results of economic and social research into the process of dispute resolution (discussing horizontal as well as vertical disputes involving employer and employees representing different cultural and economic background).

Keywords: labour, freedom of movement, European Union, demographics,

Introduction

There was essentially no history of free migration between the Eastern and Western parts of Europe during the decades of separation by the "Iron Curtain". After enlargement of the European Union on 01 May 2004 Europe

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experienced the most intensive migration of workers in the whole postwar history. The European Union enlargement in 2004 was the greatest geopolitical and economic change, which Europe experienced after nearly sixty-year period set by the agreements with the Yalta and Potsdam. After enlargement of the European Union on 1 May 2004 only the United Kingdom, Ireland, and Sweden decided to open access to their labour markets immediately, whereas the rest of EU15 Member States introduced transitional periods to limit inflow of workers from EU8 countries². It resulted in Britain and Ireland experiencing the most intensive inflow of workers in the whole postwar history.

1. Free movement of workers: European law perspective

One of the four freedoms enjoyed by EU citizens is the free movement of workers. It covers workers' right to movement and residence, right of entry and residence of family members and the right to work in another EU Member State and be treated equally with nationals of that Member State. Freedom of movement for workers entails the abolition of any discrimination based on nationality of workers from different Member States as regards employment, remuneration and other conditions of work and employment.

The prohibition of discrimination has been expressed in Article 18 Treaty on the Functioning of the European Union (TFEU), in which nationality of the European Union is treated as a discrimination criterion: "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited".³ The words "without prejudice" seem to indicate a subsidiary character of the prohibition compared to detailed prohibitions of discrimination under other provisions of the Treaty.⁴ At the same time the European Parliament and the Council, acting in accordance with the ordinary legislative procedures, may adopt rules designed to prohibit discrimination on grounds of nationality. When the Amsterdam Treaty became effective, a special competence norm was incorporated into Article 13(1) TEC (presently Article 19(1) TFEU), which expanded the extent of possible antidiscrimination provisions. From that time it has been possible to legislate antidiscrimination law not only on grounds of sex but also on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. So it can be said that the problems of equal treatment have become a priority area of the community employment law.⁵

Article 45 TFEU provides:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Article 45 TFEU itself gives meaning to the concept of "freedom of movement for workers" by the specific identification of the rights to accept employment offers made, to move freely within Member States for such purpose and to stay in Member States, both for employment and after having been employed.⁶

² EU8 includes the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Slovenia.

³ Treaty on the Functioning of the European Union [Consolidated version 2012] OJ 2012/C 326/01

⁴ CJEU judgment of 12 May 1998 in case C-336/96, Gilly, ECR 1998/5/I-02793

⁵ L. Mitrus, *Wpływ regulacji wspólnotowych na polskie prawo pracy*, Kraków 2006, 55

⁶ N. Rogers, R. Scannell, J. Walsh, *Free Movement of Persons in the Enlarged European Union*, Sweet & Maxwell, 2012, 90

Since 1974, the European Court of Justice (ECJ) has clarified that Article 45 has vertical⁷ as well as horizontal⁸ direct effect. That means individuals can rely on this Article not only in actions against the state but also in action against other private actors⁹. Consequently, the prohibition of discrimination holds not only for national laws but also for private collective agreements, such as the nationality clauses by the International Cycling Union¹⁰, the UEFA's transfer rules and nationality clauses¹¹, and even discriminatory entry requirements by individual companies¹². Direct discrimination of workers on the grounds of nationality can be justified only in two ways: either on grounds of public policy, public security and public health (Article 45(3) TFEU) or because of employment in the public service where the provisions of Article 45 do not apply (Article 45(4) TFEU).

The ECJ clarified in several judgments that the Treaty prohibits not only direct, but also indirect discrimination. This refers to national measures that put the same burden in law, but a different burden in fact, on nationals from other Member States, such as requirements concerning residence, language, particular qualifications and licenses that are typically satisfied by nationals, but not by migrants. With respect to the free movement of workers, the ECJ made in *Bosman* case one more step, moving from the prohibition of discrimination to the prohibition of (even non-discriminatory) obstacles to free movement¹³. Here the ECJ judged that the UEFA transfer rules, which used to require football clubs hiring players from other clubs to pay transfer fees to the old club after the contract with the player expired, were capable of impeding free movement of workers and breached Article 39 TEC (now Article 45 TFEU) - even though these rules did not directly or indirectly discriminate on grounds of nationality.

Moving from primary to secondary European law, in the discussion of free movement of workers, two directives must be mentioned: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Initially the European Union law provided the prohibition of discrimination based on the sex criterion. In 2000 two new directives were adopted based on Article 19 TFEU in which discrimination on other grounds was regulated, namely Directive 2000/43 and Directive 2000/78. These two legal documents significantly expanded the extent of discrimination criteria described in Council Directive 75/117/EEC of 10 February 1975 on the approximation of laws of the Member States relating to the application of the principle of equal pay for men and women¹⁴, Council Directive 76/207/EEC of 9 February 1976 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 (76/207/EEC)¹⁵, Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (86/378/EEC)¹⁶ and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex¹⁷.

Directive 2000/43 and Directive 2000/78 were implemented because of the will to recognize equal treatment in the process of employment as a fundamental right and human right in the understanding of the Convention for the Protection of Human Rights and Fundamental Freedoms, as they result from the constitutional traditions common in the Member States as well as the contribution to the achievement of a high level of employment and social protection, increase of the level and quality of life and economic and social cohesion, solidarity and free movement of people (2000/78), and recognition of equal treatment irrespective of

⁷ Case 167/73 *Commission v. France* [1974] ECR 359; Case 41/74 *Van Duyn* [1974] ECR 1337

⁸ Case 36/74 *Walrave and Koch* [1974] ECR 1405

⁹ T. Eger, H. Schäfer, *Research Handbook on the Economics of European Union*, Edward Elgar Publishing, 2012, 149

¹⁰ Case 36/74 *Walrave and Koch* [1974] ECR 1405

¹¹ Case C-415/93 *Bosman* [1995] ECR I-4921

¹² Case C-281/98 *Angonese* [2000] ECR I-4139

¹³ Case C-415/93 *Bosman* [1995] ECR I-4921

¹⁴ 75/117/EEC (OJ 1975 L 45, p. 19)

¹⁵ 76/207/EEC (OJ 1976 L 39, p. 40)

¹⁶ 86/378/EEC (OJ 1986 L 225, p. 40)

¹⁷ 97/80/EC (OJ 1998 L 14, p. 6)

racial or ethnic origin as a fundamental right and human right, which should also lead to a high level of employment and social welfare, increase of the level of the quality of life, economic and social cohesion and solidarity and development of the European Union as a space of freedom, security and justice (2000/43). The directives aim to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace¹⁸ and recognition of equal treatment irrespective of racial or ethnic origin as a fundamental right and human right, which should also lead to a high level of employment and social welfare, increase of the level of the quality of life, economic and social cohesion and solidarity and development of the European Union as a space of freedom, security and justice. Directive 2000/43 was implemented because of recognition of equal treatment irrespective of racial or ethnic origin as a fundamental right and human right, which should also lead to a high level of employment and social welfare, increase of the level of the quality of life, economic and social cohesion and solidarity and development of the European Union as a space of freedom, security and justice (recitals).

It is difficult to say whether Directives 2000/78 and 2000/43 lay down a general framework for combating discrimination only (which is indicated by Article 1(2) in both directives, which says that the purpose of the directives is to “lay down a framework for combating discrimination” on the grounds of specific criteria), or whether it is an independent source of the prohibition of discrimination. This is indicated by the judgment in the Mangold case¹⁹, in which the CJEU said that Directive 2000/78 is not the source of the principle of non-discrimination. This judgment was criticized by attorney generals in subsequent cases.²⁰ Similar views can also be found in the doctrine.²¹ These arguments could also be applied to the prohibition of competition stipulated in Directive 2000/43. In its subsequent ECJ judgments departure from the arguments given in the Mangold case is evident.²² At the same time, in new judgments the horizontal impact of the directive as well as the character of the prohibition of discrimination and its sources are addressed. It seems that the source of the prohibition of competition based on recital 12 and Article 2(1) and Article 1 of Directive 2000/78, interpreted in a historical context, can be easily found in the provisions of the directive, which is corroborated by different authors in the doctrine.²³

Pursuant to Article 3(1) of the mentioned two directives, they are applied to “all persons, as regards both the public and private sectors, including public bodies”. The subsequent part of this provision specifying the subjects to which it applies proves that the legislator intended the directive to apply to broadly understood employment (Article 3(1(a-d) of both directives). However, in none of the directives the concept of worker has been defined. Consequently, following the interpretation of EU law, which is reflected in the CJEU case law, it must be assumed that this concept is autonomous and its meaning must be derived from the provisions of EU law and not from the provisions of individual national laws of the member states. Article 45 TFEU (ex Article 39 TEC) guarantees freedom of movement for workers. It is precisely this provision which CJEU used to formulate a definition of worker in the understanding of EU law. The word “worker” is understood very broadly. So a worker is a natural person, who performs a specific economic activity²⁴, under the direction of another person in return for which he/she receives remuneration.²⁵ The type of the employment or service relation as

¹⁸ 2000/78/EC (OJ 2000 L 303, p. 16)

¹⁹ CJEU judgment of 22 November 2005 in case C-144/04, Mangold, ECR 2005/11/I-09981

²⁰ Cf. opinion of attorney general L.A. Geelhoed of 16 March 2006, in case C-13/05, Chacón Navas, ECR 2006/7A/I-06467; opinion of attorney general J. Mazák of 15 February 2007 in case C-411/05; Palacios de la Villa, ECR 2007/10A/I-08531

²¹ K. Riesnhuber, “Mangold” verabschiedet, in: Hanua/Hau/Rohe, Gegen den Strich – Festschrift für Klaus Adomeit, 2008, p. 631-644

²² Judgment of 19 January 2010 in case C-555/07, Küçükdeveci, www.eur-lex.europa.eu; judgment of 11 July 2006 in case C-13/05, Chacón Navas, ECR 2006/7A/I-06467

²³ F. Temming, *Altersdiskriminierung im Arbeitsleben – Eine rechtsmethodische Analyse*, 2008, 393

²⁴ 4 CJEU judgment of 12 December 1974 in case 36/74, Walrave and Koch, ECR 1974/8/01405; CJEU judgment 31 May 1989 in case 344/87, Bettray, ECR 1989/5/01621

²⁵ CJEU judgment of 3 July 1986 in case 66/85, Lawrie-Blum, ECR 1986/7/02121; CJEU judgment of 2 February 1992 in case C-357/89, Raulin, ECR 1992/2/I-01027; CJEU judgment of 23 March 2004 in case C-138/02, Collins, ECR 2004/3B/I-02703; CJEU judgment of 7 June 2004 in case C-456/02, Trojani, ECR 2004/8-9A/I-07573; CJEU judgment of 17 March 2005 in case C-109/04, Krenemann, ECR 2005/3B/I-02421; CJEU judgment of 17 July 2008 in case C-94/07, Raccanelli, www.eurlex.europa.eu

well as its legal basis is not important.²⁶ The concept of a worker also covers officials of both higher and lower levels, who perform work in the framework of public law relationship. In the latter context the functionaries of uniformed services can also be treated as workers. Temporary workers, border workers, trainees and persons in management positions are also workers. The amount of remuneration, types of contract under which work is performed or time of contract are immaterial to classify a given person as a worker. The only criterion is remuneration for work. It must also be noted that directives 2000/78 and 2000/43 relate also to self-employment and to the performance of work and discrimination is prohibited in the context of access conditions to both.

The material scope of the directives is stipulated in Article 3(1) of Directive 2000/78 and 2000/43. It comprises:

- 1) conditions for access to employment or self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion;
- 2) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- 3) employment and working conditions, including dismissals and pay;
- 4) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organizations.

Directive 2000/43, compared to Directive 2000/78, extended the scope by:

- 1) social protection, including social security and healthcare;
- 2) social advantages;
- 3) education;
- 4) access to and supply of goods and services which are available to the public, including housing.

As regards to conditions of employment and promotion (Article 3(1)(a) in Directives 2000/78 and 2000/43), the judgments of the ECJ stipulate that conditions of employment should be understood as the criteria used to select a candidate for a worker as well as determination of conditions of employment and professional support. For example, it was stated that access to employment comprises not only access to occupation but also the extension of a fixed-term contract²⁷, determination of conditions of employment comprising prohibition of employment of women, prohibition of night work²⁸ or extra allowances to pay (family credit) if they determine access to employment in a situation when they affect employment taken by families²⁹. In the latter case the Court also said that the concept of access to employment cannot be understood as relating to the conditions existing prior to the establishment of the employment relationship. The prospect of obtaining a family credit on condition of accepting a low paid job encourages a worker to take the job but the family credit regulates access to employment. The concept of the "conditions of employment" (Article 3(1)(c) in Directives 2000/43 and 2000/78) is equally broadly understood in the judgments of the CJEU. It comprises a reduction or change of working time³⁰, conditions of return to paid work from maternity leave³¹, including its interruption³²; claim for re-engagement in the case of unfounded termination of a contract³³, determination of

²⁶ CJEU judgment of 7 June 2004 in case C-456/02, Trojani, ECR 2004/8-9A/I-07573; CJEU judgment of 2 February 1992 in case C-357/89, Raulin, ECR 1992/2/I-01027

²⁷ CJEU judgment of 4 October 2001 in case C-438/99, Jiménez Melgar, ECR 2001/10A/I-06915

²⁸ CJEU judgment of 3 February 1994 in case C-13/93, Minne, ECR 1994/2/I-00371; CJEU judgment of 4 December 1997 in case C-207/96, Commission vs. Italy, ECR 1997/12/I-06869; CJEU judgment of 13 March 1997 in case C-197/96, Commission vs. France, ECR 1997/3/I-01489; CJEU judgment of 2 August 1993 in case C-158/91, Levy, ECR 1993/8/I-04287

²⁹ CJEU judgment of 13 July 1995 in case C-116/94, Meyers, ECR 1995/7/I-02131; the case was about family credit allowances, aimed at supporting working families

³⁰ CJEU judgment of 11 June 2003 in case C-77/02, Steinicke, ECR 2003/8-9B/I-09027 ; CJEU judgment of 20 March 2003 in case C-187/00, Kutz-Bauer, ECR 2003/3/I-02741

³¹ CJEU judgment of 27 February 2003 in case C-320/01, Busch, ECR 2003/2/I-02041

³² CJEU judgment of 20 June 2007 in case C-116/06, Kiski, ECR 2007/8-9B/I-07643 34; CJEU judgment of 26 June 2000 in case C-322/98, Kachelmann, ECR 2000/8-9B/I07505

³³ CJEU judgment of 9 February 1999 in case C-167/97, Seymour-Smith and Perez, ECR 1999/2/I-00623 35

holiday entitlement³⁴, the right to annual assessment of performance³⁵ and the employer's right to send home a woman who is pregnant, although not unfit for work, without paying her salary in full.³⁶ The broadly understood conditions of employment also include conditions of dismissal (Article 3(1)(c) in Directives 2000/78 and 2000/43). This term should be understood as all the provisions which state when termination of contracts of employment (or termination of employment) is permissible as well as those which relate to the consequences of the termination of employment. This refers to all the conditions related to the termination of employment, which could be the result of an agreement between the parties (voluntary redundancy)³⁷ or achievement of retirement age.³⁸ The Court also said that the provision of the directive related to the conditions of dismissal does not exclude interpretation of the provisions of national law, according to which, generally speaking, part-time workers are not to be compared with full-time workers when an employer has to proceed to selection on the basis of social criteria when abolishing a part-time job on economic grounds.³⁹ The last elements, which determine the material scope of discrimination, are equal treatment relating to pay (Article 3(1)(c) of Directives 2000/43 and 2000/78). Only in this case has the EU legislator decided to formulate a legal definition of the term. It is given in Article 157(2) TFEU (ex Article 141(2) TEC). Pay is the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer. The Court of Justice of the European Union made frequent reference to this definition⁴⁰ and assumed its broad understanding. For example, it stated that under Directive 2000/78 categories of pay under Article 141 TEC (presently 157 TFEU) should include the survivor's benefit granted under an occupational pension scheme managed by the pension fund of a specified category of workers, when such a system is stipulated in the collective agreement and when its purpose is to supplement social benefits due under generally binding national regulations, when the system is financed exclusively by the workers and employers of a given sector and there is no public financial contribution to it and when its beneficiaries, according to collective agreement, include the concerned category of workers and when the amount of the pension is determined by reference to the period in which the beneficiary's spouse was insured and the full amount of the contributions paid by that worker.⁴¹

A short comment on discrimination criteria is in place. The analysis of the directives in question reveals that they include racial and ethnic origin (2000/43) and religion or belief, disability, age and sexual orientation (2000/78). As regards the criterion of racial and ethnic origin it should be emphasized that these are not criteria that relate to state origin (citizenship) although a close relation can exist between the two criteria. A similar relation can exist with respect to the criterion of religion. It is worth noting that the European Union rejects all the theories leading to the statement of the existence of separate human races (Recital 6) and prohibition of discrimination on the grounds of citizenship has been expressed *expressis verbis* in TFEU. Linguistically speaking, the concept of race denotes a group of people who have a specific group of features inherited from their predecessors. The word "ethnic" indicates membership of some nation. In this light the prohibition of discrimination comprises predominantly ethnic groups. There are no doubts about the criterion of religion or belief. As regards religion, it should be understood as a specific faith in the existence of God or gods, origin and aim of human life, creation of the world and related rites, moral principles and organizational forms. Beliefs can relate to religious and other aspects of social life. There is no doubt that also discrimination on the grounds of the lack of any religion (atheism) is prohibited. Discrimination on grounds of sexual discrimination means equal treatment irrespective of the preferences in the choice of partner. In this context we are talking about the discrimination of hetero- and homosexual people. The directive does not relate to any questions connected with family status or related benefits, leaving these problems in national legislations. Insofar as equal treatment

³⁴ CJEU judgment of 18 March 2004 in case C-342/01, Merino Gómez, ECR 2004/3B/I-02605 36

³⁵ CJEU judgment of 30 April 1998 in case C-136/95, Tibault, ECR 1998/4/I-02011 37

³⁶ CJEU judgment of 19 November 1998 in case C-66/96, Pedersen, ECR 1998/11/I-07327 38

³⁷ CJEU judgment of 21 July 2005 in case C-207/04, Vegani, ECR 2005/7B/I-07453 39

³⁸ CJEU judgment of 26 February 1986 in case 152/84, Marshall, ECR 1986/2/00723

³⁹ CJEU judgment of 26 June 2000 in case C-322/98, Kachelmann, ECR 2000/8-9B/I07505

⁴⁰ CJEU judgment of 26 June 2000 in case C-322/98, Kachelmann, ECR 2000/8-9B/I07505

⁴¹ CJEU judgment of 1 April 2008 in case C-267/06, Maruko, 2008/I-1757

of homosexual people does not give rise to such doubts as in the past, problems connected with the possible understanding and definition of the concept of sexual orientation seem to be problematic.

For the purpose of the directives in question, the principle of equal treatment means lack of any forms of direct or indirect discrimination. The key concepts of the European antidiscrimination law include direct discrimination, indirect discrimination as well as harassment and sexual harassment. Direct discrimination (Article 2(2)(a)) as defined in Directives 2000/43, 2000/78 is taken to occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to in each of the directives. The concept of direct discrimination is based on the necessity to compare a specific actual situation with a hypothetical situation where discrimination does not occur. Consequently, a person must be treated less favourably than another person only on grounds of the discrimination criterion. In the context of Directive 2000/43, direct discrimination includes an employer's announcement in which he/she stated that he/she would not be employing workers of foreign origin.⁴² Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, background, at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2(2)(b) of Directive 2000/43 and 2000/78). Consequently, indirect discrimination consists of unjustified differentiation of the status of specific groups as a result of a seemingly neutral decision. It is worth noting, however, that not each seemingly neutral decision is discriminatory since it is necessary to additionally prove that the decision was not justified (the aim is legal and the measures are appropriate and necessary). So it is necessary to meet two conditions to deem a specific conduct discriminatory.

2. Free movement of workers – demographics and challenges to the public

Level of emigration results in many myths circulating on the subject. According to one of them, immigrants take work away from locals. But in fact, there are relatively few highly qualified people among these migrant workers, thus their role in national economies is a complementary one and they do not compete with the local workforce. According to another myth, economic immigrants are a permanent burden on the budgets of the receiving countries. The reality is quite different: in fact, they also contribute to the development of a number of branches of the economy. The third myth is that immigrants work illegally. This is only partially true, as nowadays most of them would only agree to legal employment.

Massive emigration causes serious challenges to public, mainly in social and demographic area. In the context of social impact, the problem of qualification depreciation, that is taking jobs below qualifications of employees, called "brain - waste problem" is significant among skilled immigrants educated abroad. Further, often the departure of one of the spouses - especially for an extended period- causes a weakening of family ties and leads to the breakdown of the marriage. Usually, family separation causes that its enlargement decisions are postponed. Conversely, young people who go abroad often postpone the decision to establish a family. It also happens that the parents' economic migration lead to a dramatic break of ties with their children. In connection with the social transformations of orphanhood types described in the literature (nature, spiritual, social), the definition has been broadened by the definition of euro-orphan. The term "euro-orphanhood" has become commonly used and refers to children with one or both parents who emigrated from the country for work purposes. The term "euro-orphanhood" describes a situation in which both parents' emigration causes the disorder of basic functions of the family⁴³. The Polish Ministry of Education describes the "euro-orphanhood" as the destruction of the family structure, the disorder of the socialization process of children and reduction of the emotional exchanges among family members, as a result of migration of their parents. There is no precise estimation how many children in Poland are euro-orphans. Another challenge for countries regarding migration constitutes the problem of an effective re-emigration strategy for returning workers.

Emigration causes serious risks in the area of demographics, among others:

⁴² CJEU judgment of 10 July 2008 in case C-54/07, Feryn, www.eur-lex.europa.eu

⁴³ B. Walczak, *Szkoła i uczeń wobec migracji poakcesyjnych. Wstępna diagnoza społecznych i pedagogicznych skutków „euro-migracji” rodziców i opiekunów*, Pedagogium Wyższa Szkoła Pedagogiki Resocjalizacyjnej w Warszawie, 2000 r., 5

- deformation of the demographic structure: aging of population and a decrease in population and reproductive potential, especially in regions with a large outflow, which leads to the need of change the basis of retirement system;

- shortages in the labour market of medium and low-skilled workers. The phenomenon of mass exodus of young and educated workers causes in the long term drainage ability and reduction of human capital.

At the same time emigration has given a number of opportunities:

1) migration, on the level of local communities, causes a "modernisation effect", increasing the cultural and professional competences of the migrants;

2) it positively influences the wealth of migrant households, as well as the growth of their consumption and investment expenditure. However, the negative effect of money transfers was observed in the form of moral hazard. Researchers on the impact of money transfers from migration on behaviour and economic strategies of households observed that migrant families in the country are beginning to limit their professional activity hoping to permanent protection of their livelihoods from money transfers. This may lead to the result of economic stagnation;

3) positive influence on the labour market, since in the first instance emigration influenced the drop in unemployment, and later caused a labour force shortage in many sectors of the national economy;

4) reduction of social tension associated with the difficult situation on the labor market.

One of the effect of migration is the increase in the number of international families who have become pioneers of intercultural and independent ways of dealing with multiculturalism in everyday life. Depending what language or what languages parents speak at home, on one side difficulties in learning minimum two languages appear, on the other hand there is a chance for multilingualism. The probability of the emergence of conflict in mixed families, however, is large and mostly has its source in different styles of communication and language, religious practices and level of cultural adaptation of migrant partner, network of friends, culturally specific styles of parenting roles and practices of gender, customs, and tradition. A strong influence on the relations between partners and ways to educate children has the local community, as well as the level of control by legal institutions and social services allowed in the country.

Workers from other Member States are net contributors to the welfare systems of the host country. Mobile workers mostly pay more into host country budgets in taxes and social security than they receive in benefits, because they tend to be younger and more economically active than the host countries' own workforce. Healthcare spending on non-active EU mobile citizens is very small relative to total health spending (0.2%) and to the economies of the host countries (0.01% of GDP), and EU citizens account for a very small share of recipients of special non-contributory benefits.

Conclusions

As the conclusions of this paper discussing present situation on the labour market which is the result of free movement of workers within the European Union, I would like to present some demands regarding free movement of workers:

- creating a comprehensive information system for workers who take the decision to go to a particular country;

- creating a system of preparation of people who go to work abroad;

- extending consular assistance (e.g. extension of the network of honorary consulates or extension of the competencies of honorary consuls);

- the concept of establishing positions of the liaison officers cooperating with ministries of in which there is a significant number of citizens of a given country undertakes employment.

LAW, MEDICINE, ETHICS AND ASSISTED PROCREATION: RECONSIDERING THE LEGAL PROCREATIVE RELATIONSHIP

Nastė Sušinskaitė¹

Abstract

Rights to sexual and reproductive health are generally recognized as an integral part of the right to health. The right to parenthood is a basic human right which is also implemented through assisted procreation. Assisted reproductive technologies (“ARTs”) have enabled many infertile couples to have children but have long been controversial. Opposition initially focused on the “unnaturalness” of laboratory conception and the doubts that healthy children would result. Once children were born, ethical debate shifted to the status and ownership of embryos and the novel forms of family that could result. The ethics of parenthood and procreation apply not only to daily acts of decision-making by parents and prospective procreators, but also to law, public policy, and medicine. Two recent social and technological shifts make this topic especially pressing. First, changing family demographics in Europe mean that children are increasingly reared in blended families, by single parents, or by same-sex partners, prompting questions of who should be considered a child's parent and what good parenting requires. Second, the development and proliferation of ART raises questions concerning access to the technology, its permissibility, and its use to enhance future children or prevent the birth of children with certain conditions.²

The new century has brought forth both new and old ethical concerns. The growing capacity to screen the genomes of embryos has sparked fears of eugenic selection and alteration. Ethical attention has focused on whether all persons seeking ARTs should be granted access to them, regardless of their child-rearing ability, age, disability, health status, marital status, or sexual orientation.

The conference paper will focus on the above mentioned issues in the aspect of interaction of ethics, law and policy making regarding ART's regulation and implementation.

Keywords: assisted reproductive technologies, embryo, donation, ECHR (European Court of Human Rights).

Introduction

Assisted reproduction is one of the scientific disciplines which has evolved faster in the last years. The achievements allow couples to get the right of being parents. Women's reproductive rights can be located within international conventions, case law, reports and national legislation. Perhaps the most widely accepted definition of reproductive rights come from the International Conference on Population and Development Programme of Action³. It defined reproductive health as follows: Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system and to its functions and processes. Consequently, reproductive health implies that people <...> are able to reproduce and that they have a freedom to decide if, when and how often to do so. Implicit in this is the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice

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² J. A. Robertson, 'Procreative Liberty and Harm to Offspring in Assisted Reproduction' American Journal of Law & Medicine, 30 (2004): 7-40.

³ International Conference on Population and Development Programme of Action. <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action> [last viewed 2016-03-20]

for regulation of fertility, which are not against the law and the right of access to health care services that will enable women to go safely through pregnancy and childbirth". States, already regulating ARTs, face the challenges in different areas of legal regulation: what persons can use the ARTs, what methods of ARTs are accepted and legalized, what is the legal status of embryo and others. However, the legal regulation of ART's differs in different countries and there is no uniform European consensus of regulation of these technologies, states have a wide margin of appreciation when regulating ARTs.

Globally, Europe has the largest number of ART treatments. In 2005, the most recent year for which global data are available, 56 per cent of ART aspirations were in Europe, followed by Asia (23 per cent) and North America (15 per cent). ART is sometimes expected to not only be a means to alleviate the individual sufferings from involuntary childlessness, but also as a potential policy lever to raise fertility rates in Europe, thus interest in ARTs is substantial.⁴

1. What's law got to do with ARTs?

In 1978 Louise Brown, the world's first test-tube baby was born, revolutionizing the field of reproductive medicine and giving infertile women hope that they could become mothers. Now the procedure is so common that more than 5 million around the world have conceived babies through in vitro fertilization⁵.

According to professor John A. Robertson, "Concerns about the welfare of offspring resulting from ARTs cover a wide range of procedures and potential risks. In addition to physical risks from the techniques themselves, they include the risk of providing ART services to persons who could transmit infectious or genetic disease to offspring, such as persons with HIV or carriers of cystic fibrosis. Risks to offspring from inadequate parenting may arise if ARTs are provided to persons with mental illness or serious disability. Questions of offspring welfare also arise from the use of ARTs in novel family settings, such as surrogacy, the posthumous uses of gametes and embryos, or with single parents or a same sex couples. Finally, both physical and psychological risks may result from alteration or manipulation of genes, gametes, and embryos."⁶

These question must be regulated by law, because if not, the ARTs may become harmful not only to the state (in fields of economics, public health and others), reproductively challenged couples, but also to offspring.

The United States notably has little federal or state regulations pertaining to the assisted reproductive technology (ART) industry. This is in contrast to other developed nations, which provide more extensive regulations on the use of ART and in many cases restrict its use for certain ends, such as reproductive cloning. While some of these regulations may not be ideal, they are steps taken to ensure the health and safety of women utilizing ART and the children resulting from these technologies, as well as the ethical use of ART by all participants.⁷

In Europe, however, the situation is different. In 2004, a broad range of legislative quality and safety requirements for the donation, procurement, testing, processing, preservation, storage and distribution of tissues and cells was introduced by the European Parliament and the Council with the launch of the Directive 2004/23/EC. Implementation of this Directive requires clinics in all EU Member States, specialized in Medically Assisted Reproductive (MAR) technologies, including fertility treatment and pre-implantation genetic diagnosis,

⁴ P. Prag, M.C. Mills, 'Assisted reproductive technology in Europe. Usage and regulation in the context of cross-border reproductive care' <http://www.familiesandsocieties.eu/wp-content/uploads/2015/09/WP43PragMills2015.pdf> [last seen 2016-03-20]

⁵ Commission staff working document Europe's democratic future: facts and figures. http://ec.europa.eu/employment_social/social_situation/docs/sec_2007_638_en.pdf [last seen 2016-03-10]

M.N. Mascarenhas, S. R. Flaxman et cetera, National, Regional, and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001356> [last seen 2016-03-10]

⁶ J. A. Robertson 'Children of choice: freedom and the new reproductive technologies' (Princeton university press: 1994) 101-110.

⁷ K. Riggan, 'G12 Country Regulations of Assisted Reproductive Technologies' <https://cbhd.org/content/g12-country-regulations-assisted-reproductive-technologies> [last seen 2016-03-23]

to adapt to stringent measures and to implement systems and operating procedures concerning accreditation, designation, authorization, licensing, inspection and registration of MAR-treatments.⁸

2. Main ARTs issues and their legal regulation

2.1. Multiple gestations; do embryos have legal rights?

The U.S. has one of the highest rates of multiple births in the world. This rate is directly attributed to the increased use of ART in achieving pregnancy. In 2003, for example, 31% of pregnancies conceived using *in vitro* fertilization (IVF) were twin gestations and 3% were triplets or higher order gestations. Only 1% of spontaneous pregnancies are multiple gestations.⁴ The health risks of multiple pregnancies to both mother and child are well documented. Women carrying multiple embryos are at a higher risk of pregnancy complications. Multiple pregnancies also have a higher mortality rate compared to singletons. It has been calculated that the mortality rate for twins is seven times greater than singletons, whereas triplet and higher order multiples is twenty times greater.⁹

The U.S. is lagging behind European efforts to limit the number of multiple pregnancies following ART. Germany, Italy, Spain, and Switzerland have enacted regulations limiting the number of embryos transferred in one reproductive cycle to 3. In Italy, however, limiting the number of embryos transferred to 3 has actually increased rates of multiples due to the prohibition of embryo cryopreservation, encouraging women to transfer multiple embryos as a means of increasing pregnancy (50.4% of ART cycles involved the transfer of 3 embryos in 2005). The prohibition of embryo cryopreservation has caused the fertility industry in Italy to become a leader in improving methods of egg cryopreservation, an alternative to freezing supernumerary embryos (otherwise referred to as “excess” or “spare” embryos).⁸ The Human Fertilization and Embryo Authority in the United Kingdom limits the number of embryos to a maximum of 2 for women under 40 years and 3 for women over 40. As a means of contrast with actual practice, approximately 43% of ART cycles in the U.S. involved the transfer of 3 or more embryos. In 0.5% of ART cycles, 7 or more embryos were transferred.

More recently, the trend in Europe has been to transfer a single embryo per reproductive cycle (*i.e.*, “single embryo transfer” or SET), particularly in Scandinavian countries. Typically a fresh embryo is transferred in the first cycle and single cryopreserved embryos are transferred in subsequent cycles. The pursuit of SET does not eliminate the ethical issues surrounding the fate of surplus embryos or embryo destruction from the freeze/thaw process of cryopreservation, but is ethically preferred to multiple embryo transfer due to the reduction of maternal and fetal health risks associated with multiple pregnancy. Countries such as Belgium and Sweden that have regulations requiring the transfer of singleton embryos for initial ART cycles have seen a marked decrease in multiple births since SET practices were adopted. Clinical studies following SET programs have demonstrated a drop in multiple pregnancies from approximately 30% to 10%, while still achieving high overall pregnancy rates. Sweden has maintained an unchanged delivery rate while decreasing the multiple pregnancy rate to under 10% since enacting SET in 2003. These statistics demonstrate that the transfer of multiple embryos is not necessary to achieve a high pregnancy or delivery rate.

The European Society of Human Reproduction and Embryology held a consensus conference on multiple pregnancy that identified the many risks and costs. The conclusion was that transfer of more than two embryos is not advisable and that if more than two embryos are replaced, the couple must be extensively informed about the risks of multiple gestation. Some countries such as Finland and England have laws limiting the number of embryos that can be transferred. Many countries in Europe have national health plans that cover ART procedures, and the pharmaceutical and other costs are less even in cases where insurance does not cover ART costs. Thus, patients have lower out-of-pocket costs and can undergo more ART cycles, reducing the financial pressure to replace larger numbers of embryos in any given cycle. Of note, the per

⁸ Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies (SANCO/2008/C6/051)

⁹ Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies http://ec.europa.eu/health/blood_tissues_organs/docs/study_eshre_en.pdf [last seen 2016-03-10]

capita utilization of ART in Europe is approximately three times that in the United States, and in Scandinavia it is five to eight times higher.

Moral and legal controversies over basic IVF concern the control and disposition of embryos created in the process. What is the status of preimplantation embryos? Who has dispositional control over them? What actions may be done with them?

The most important standard to evaluate the acceptability of procreation is the “welfare of the child” standard. In matters concerning the welfare of children there may be tensions between the liberty rights of parents and the protection rights of children.

In Anglo-American legal view of prenatal life legal personhood does not exist until live birth and separation from the mother. Common law prohibitions on abortion protected fetuses only after quickening (roughly six-ten weeks of gestation).¹⁰

There is a lack of consensus at European level concerning the status of the embryo, reflected by the different national legal definitions given to this entity. The complexity of deciding on this status is in turn reflected by the fact that legislation in assisted reproduction techniques is absent in several countries, or does not give a legal definition of the human embryo. For instance, Belgium, Greece, Italy and Luxembourg are currently lacking legislation, contrary to Denmark, Finland, France, Ireland, the Netherlands, Portugal, Spain, Sweden and the UK. Furthermore, in countries where there is an explicit legal definition of the human embryo, this often varies considerably. In Austrian law, cells capable of development rather than the embryo are mentioned, defined as ‘inseminated ova and cells developed from them’. German law defines the entity as ‘the fertilized human egg cell capable of development, from the moment of fusion of the pronuclei, while in Spanish law the pre-embryo (the group of cells resulting from the fertilization of ovum until the implantation and formation of the primitive streak) is distinguished from the embryo (process of organ formation) and the fetus. Finally, the British legislation defines the embryo for the purpose of the Act as ‘live embryo where fertilization is complete, including an egg in the process of fertilization’.¹¹

An important question of legal status concerns the locus and scope of decisional authority over embryos. “Who” has the right or authority to choose among available options for disposition of embryos is a question separate from “what” those dispositional options are. The question of decisional authority is really the question of who “owns” – has a “property” interest in – the embryo. However, using terms such as “ownership” or “property” risk misunderstanding. Ownership does not signify that embryos may be treated in all respects like other property. Rather, the term merely designates who decides which legally available options will occur, such as creation, freezing, discard, donation, use in research, and placement in uterus.¹²

Freezing of embryos. The frozen embryo can be thawed months or even years later and implanted into a uterus (not necessarily that of the genetic mother), and it is possible that the embryo will develop into a normal child. It is however for lawmaker to decide for how long embryos can be frozen. The laws governing fertility preservation measures for women are under debate in many parts of Europe and North America. Compared with the options in most parts of Europe, regulations in the United States are not restrictive—they allow all women to cryopreserve embryos. Restrictions can be based on religious beliefs, legal systems, or opinions on what is moral. Embryo cryopreservation faces more restrictions than others because it touches on the belief that an embryo should not be frozen or destroyed because it contains a potential human life. IVF programs may also ask the couple to designate certain dispositional alternatives if contingencies such as their divorce, death, disagreement or unavailability occur.

Donation of embryos. Embryos can be donated to infertile couples (or single mothers) or for scientific research.

In ECHR case *Parillo v. Italy*¹³ ECHR was called upon for the first time to rule on the question whether the “right to respect for private life” guaranteed by Article 8 of the Convention can encompass the right invoked

¹⁰ J. A. Robertson ‘Children of choice: freedom and the new reproductive technologies’ (Princeton university press: 1994) 101-110.

¹¹ The moral status of pre-implantation embryo. ESHRE Task Force on Ethics and Law. <http://humrep.oxfordjournals.org/content/16/5/1046.full> [last seen 2016-03-15]

¹² J. A. Robertson ‘Children of choice: freedom and the new reproductive technologies’ (Princeton university press: 1994) 101-110.

¹³ *Parillo v. Italy*, application No. 46470/11 [2015] ECHR

before it by the applicant to make use of embryos obtained from *in vitro* fertilisation for the purposes of donating them to scientific research. The Court observed at the outset that, according to its case-law, the concept of “private life” within the meaning of Article 8 of the Convention is a broad one not susceptible to exhaustive definition and embraces, among other things, a right to self-determination. The concept also incorporates the right to respect for both the decisions to become and not to become a parent. The Court ruled that: “In the cases examined by the Court that have raised the particular question of the fate of embryos obtained from assisted reproduction, the Court has had regard to the parties’ freedom of choice. In the case of *Evans*, when analysing the balance to be struck between the conflicting rights that the parties to *in vitro* fertilisation may rely on under Article 8 of the Convention, the Grand Chamber “[did] not consider that the applicant’s right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than [her ex-partner]’s right to respect for his decision not to have a genetically related child with her”. <...> Like the parties, the Court considers that the ban under section /of law/ on donating to scientific research embryos obtained from an *in vitro* fertilisation and not destined for implantation constitutes an interference with the applicant’s right to respect for her private life. It points out in this connection that at the time when the applicant had recourse to *in vitro* fertilisation there were no legal provisions regulating the donation of non-implanted embryos obtained by that technique. Consequently, until the Law came into force the applicant was not in any way prevented from donating her embryos to scientific research. <...> in the Italian legal system, the human embryo is considered as a subject of law entitled to the respect due to human dignity <...> third parties <...> submitted that the human embryo had the status of “subject”. <...> The Court acknowledges that the “protection of the embryo’s potential for life” may be linked to the aim of protecting morals and the rights and freedoms of others, in the terms in which this concept is meant by the Government. However, this does not involve any assessment by the Court as to whether the word “others” extends to human embryos. <...> The Court observes at the outset that, unlike the above-cited cases, the instant case does not concern prospective parenthood. Accordingly, whilst it is of course important, the right invoked by the applicant to donate embryos to scientific research is not one of the core rights attracting the protection of Article 8 of the Convention as it does not concern a particularly important aspect of the applicant’s existence and identity. <...> Consequently, and having regard to the principles established in its case-law, the Court considers that the respondent State should be afforded a wide margin of appreciation in the present case. Furthermore, it observes that the question of the donation of embryos not destined for implantation clearly raises “delicate moral and ethical questions” and that the comparative-law materials available to the Courts show that, contrary to the applicant’s affirmations, there is no European consensus on the subject. <...> Admittedly, certain member States have adopted a non-prohibitive approach in this area: seventeen of the forty member States about which the Court has information allow research on human embryonic cell lines. In some other States there are no regulations but the relevant practices are non-prohibitive.”

Embryos usage in research. The Convention on Human Rights and Biomedicine (the Oviedo Convention)¹⁴ sets out two principles concerning embryos (Articles 14 and 18). It forbids the use of techniques of medically assisted procreation for the purpose of choosing a future child’s sex (except where serious hereditary sex-related disease is to be avoided) and the creation of human embryos for research purposes. It also stipulates that, where the law allows research on embryos, it shall ensure adequate protection of the embryo.

The case for using embryos in research is clear: embryo research may lead to the development of therapies that lengthen lives, alleviate suffering and allow parents to achieve their reproductive goals. Its proponents hope that research on embryonic stem (ES) cells will lead to techniques for inducing stem cells to form tissues and organs *in vitro* for transplantation. This may help to close the growing gap between organ demand and supply, and to improve transplantation success rates; it might be possible to produce tissues that are genetically identical to the cells of the recipient, thereby avoiding the problem of graft rejection. Tissues

¹⁴ The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine [1997] <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf98> [last seen 2016-03-23]

produced from ES cells could also be used as 'cellular models' to study a range of human diseases, and to test new drug candidates for efficacy and toxicity. This would reduce the need to conduct potentially harmful experiments on animals and people. Finally, ES cell research might also make possible the development of new infertility treatments, for example, by allowing the generation of gametes—eggs and sperm—from ES cells *in vitro*. These could be used to treat infertility in cases where a patient is unable to produce gametes, perhaps because the gonads or the ovaries were surgically removed as a treatment for cancer.¹⁵

However, opponents of using embryos in research say that this procedure will lead to total disrespect of human life (as there is still no uniform opinion if embryo is considered human) and possible cloning.

2.2. Usage of donor cells

The development of in vitro fertilization (IVF) with donor gametes (ovules and/or spermatozoa) has reinforced the difference between these two modes; biological procreation and social filiation. It has been suggested that one can make a child today by rallying different people to the cause and without anyone of them having sexual relations with anyone else. You only need the collaboration of: one genetic father, who provides the spermatozoa, one genetic mother for the ovules, one surrogate mother providing her uterus, one adoptive mother who will become the socially recognized mother of the child, one surrogate father, companion of the surrogate mother, and one adoptive father who will become the legal father.

The vast majority of countries endorse anonymous gamete donation and some countries do not allow donor offspring any information about their conception. There does, however, in recent years seem to be a discernible trend towards allowing children access to identifying information about their gamete donor. The question arises which legal value is stronger: the child's right to know his/her biological parents or the donor's right to anonymity?

2.3. Requirements for potential parents

When people conceive natural way, without interference and help of medicine, there are no questions raised at the time of conception about future's parents' personalities, health, income and other issues. However, when the couple applies to fertility clinic for the procedure, the above-mentioned issues become a substantial. These issues are:

1. Health
2. Sexual orientation
3. Personality

Health. The main issues concerning health status of positive parents are those of transmissible diseases (HIV; Hepatitis; cystic fibrosis and other genetic conditions). There are many studies now that show that reproductively challenged people might have a healthy child even if one of them is diagnosed with HIV.¹⁶

However, sometimes couples are not allowed to use embryonic screening in case the future babies may carry inherited diseases. In most recent case *Costa and Pavan v. Italy*¹⁷, on August 25, 2012, the European Court of Human Rights (ECHR) ruled that Italy's ban on embryonic screening violates article 8 of the European Convention on Human Rights. In the case of *Costa and Pavan v. Italy*, an Italian couple, Rosetta Costa and Walter Pavan, found out after their first child was born with cystic fibrosis that they were healthy carriers of the disease. When Costa became pregnant again in 2010 and underwent fetal screening, it was found that the unborn child also had cystic fibrosis, whereupon Costa had the pregnancy terminated on medical grounds. In order to have the embryo genetically screened prior to implantation, under the procedure of pre-implantation

¹⁵ T. Douglas, J. Savulescu, 'Destroying unwanted embryos in research. Talking Point on morality and human embryo research' <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672894/> [last seen 2016-03-23]

¹⁶ J. Ohl, M. Partisani et cetera, 'Assisted Reproduction Techniques for HIV serodiscordant couples: 18 months of experience' *Human Reproduction* <http://humrep.oxfordjournals.org/content/18/6/1244.full> [last viewed 2016-03-15]

G. P. Taylor, 'Ethics of assisted reproduction for HIV concordant couples' [2005] <http://humrep.oxfordjournals.org/content/20/5/1430.2.full> [last viewed on 2016-03-23].

¹⁷ *Costa and Pavan v. Italy*, application no. 54270/10 [2012] ECHR

diagnosis (PID), the couple want to use in vitro fertilization to have another child. The Court pointed out the inconsistency in Italian law, “prohibiting the implantation of only those embryos which were healthy, but authorising the abortion of foetuses which showed symptoms of the disease,” leaving the applicants with only one choice: to start a pregnancy by natural means and to abort the fetus if prenatal tests indicated it had cystic fibrosis, a course of action that “brought anxiety and suffering.”

Sexual orientation. Legal battles over same-sex marriage and technological developments in assisted reproduction have placed the question of the right of gays and lesbians to procreate on the public agenda.¹⁸ As more gays and lesbians enter into partnership arrangements, a growing number will seek to have children. To do so they will turn to ARTs to reproduce, thus raising questions about access to such techniques by heterosexuals and homosexuals alike. Once it is recognized that both married and unmarried persons have a liberty right to reproduce, including the right to use different ART combinations when infertile or when necessary to ensure a healthy offspring, there is no compelling reason for denying that right to persons because of their sexual orientation. Gay males and lesbians ordinarily are not sexually attracted to members of the opposite sex, but they may nevertheless have strong desires to have or care for offspring. They too have been brought up in families and in a society that identifies having and rearing children as an important source of meaning and fulfillment. They have, in short, the same biologic and associational interests as other persons do in having a child and the same general ability to be competent child-rearers. Yet many persons seem to find gay and lesbian reproduction to be unnatural, an improper use of medical resources, or not in the “best interests” of offspring. Such objections could lead to state or provider restrictions on gay and lesbian access to assisted reproductive technologies. It can be definitely be agreed with professor J. A. Robertson that “objections to gay and lesbian reproduction as “unnatural” or improper claim too much. The same charge can be levied against ART itself for infertile persons (or indeed, medical intervention for all illnesses). After all, if nature has not equipped people to reproduce, then we should not interfere with nature by assisting them to do so. If we reject that argument for the infertile (and its application to most other illnesses), then we should reject it here as well.”

It is obvious that there are no sufficient grounds for different treatment of same-sex couples when it comes to usage and availability of ARTs. Any different treatment should be seen as discrimination on grounds of sexual orientation

In 1994 European Parliament passed a Resolution No 8/2 1994 in which the European Parliament recommended that the Member States should start to recognize homosexual couples’ rights; The Member States should suppress the restrictions that don’t allow homosexual couples to get married, to adopt and to raise their children. Nowadays there are still part of Council of Europe member states which don’t accept same sex marriage and don’t allow ART’s to same-sex couples (for example, Lithuania). However, the situation is changing, as ECHR gets more cases regarding tis issue and the attitude is changing (for example Ollari and others v. Italy, application no. 18766/11 and 36030/11).

Personality. Some states, for example, United Kingdom, have a right to refuse ARTs to people who have damaged reputation (for example, criminals or sex workers). This requirement for good reputation always has to weighed and considered carefully. This was proven in ECHR case Dickson v. United Kingdom.¹⁹ The complainant husband was serving a minimum sentence of 15 years after a conviction for murder for kicking a drunken man to death. He and his wife, the second complainant, established a pen-pal relation while both were serving prison sentences. The couple had never lived together; there was a 14-year age difference between them; the wife, who had three children by previous relationships, was by now at an age where natural or artificial procreation was hardly possible and in any case risky. The first complainant's expected release date fell when the wife, already released, would be 51 years old. It therefore followed that any child which might be conceived would be without the presence of a father for an important part of his or her childhood years. The first application for artificial insemination facilities was made over six years before the instant

¹⁸ J. A. Robertson, ‘Gay and Lesbian Access to Assisted Reproductive Technology’ Case Western Reserve Law Review <https://law.utexas.edu/faculty/jrobertson/robertson.DARBY.pdf> [last seen 2016-03-24]

¹⁹ Dickson v. United Kingdom, application no. 44362/04 [2007] ECHR

hearing. The secretary of state's refusal had been on the grounds that the first complainant's relationship had yet to be tested in a normal environment, that there was insufficient provision for the material welfare of any child conceived, who would also be without the presence of a father for an important period of childhood, and that there would be legitimate public concern that the punitive and deterrent elements of the life sentence for a violent crime would be circumvented. He was unsuccessful in applying for judicial review, and for leave to appeal.

The Grand Chamber stated that an inability to beget children is not an inevitable consequence of imprisonment. Providing access to artificial insemination facilities would not create a security issue or any significant administrative or financial demands on the State. The Grand Chamber accepted that it is necessary that there is public confidence in the penal system, but stated that rights could not be forfeited on the basis of what might offend public opinion. Further, penal policy had evolved towards increasing the relative importance of the rehabilitative aims of imprisonment. The Grand Chamber considered that the policy placed too onerous a burden on particular applicants. Just in order for the policy to apply, the applicants had to show that the deprivation of access would prevent conception altogether. Further, once they satisfied that initial threshold, they needed to prove 'exceptional' circumstances within the meaning of the criteria set out in the Policy. The court held that the Policy set the threshold so high against the applicants from the outset that there was no real balancing of the competing individual and public interests and that therefore a proportionality analysis had not been properly undertaken. As the proportionality assessment had not been made, the UK authority's decision fell outside 'any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interest involved'.

Conclusions

The development of new methods of ART continues to provide major breakthroughs in the treatment of infertile couples. Since we are dealing with a field that is continuously developing, control of the various aspects of the medical or laboratory details of ART practice by parliamentary legislation is very desirable. In spite of the cooperation of the European countries at political, economical and other levels, there are still prominent differences in legislation on ART practice. It is quite evident that a European consensus on legislation cannot be achieved, since the whole area of infertility treatment by ART touches fundamental issues of life, family and society structures that are influenced by religion and tradition. It is suggested that Europe should have uniform rules regarding status of embryo, protection of embryo, requirements for ARTs and future parents. It is very desirable that all the uniform regulation should be harmonized with welfare of the child and future child's best interests.

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LAW AND MODERN TECHNOLOGIES IN CROSS-BORDER JUDICIAL COOPERATION

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Abstract

Contemporary life is affected by the constantly increasing use of modern information technologies. They are applied by both private individuals and public officers and lead to simplification, acceleration and qualitative improvement of the actions previously performed without them. Different technical sciences that devoted to their study and further development possess a 'universal' character, which means the similarity of their contents and subject matter worldwide.

At the same time, the disciplines that rely on technical solutions are not always so uniform. It is especially true for law, which remains largely an instrument in the hands of national states. Civil justice – an area dealing with resolution of disputes between private parties – is especially deeply rooted in national traditions and culture. In the application of technical solutions, it results in each country creating and supporting its own standards, practices and software/firmware tools to deal with the caseload. Despite a clear premise of information technologies to connect the world, such practices build new walls of misunderstanding and distrust. Neither do they promote effective access to court, especially in transnational litigation.

This paper discusses a possible introduction of a single cross-border electronic multi-purpose system in the field of civil justice. Such kind of system shall be designed for judges, officials, private parties and their attorneys and provide a possibility to perform crucial actions over a case through protected computer networks. It might be used in both cross-border and purely domestic cases and it shall be characterized by such terms as privacy, security, simplicity and efficiency. In the author's view, while there are no technical obstacles in establishing such a system, there is a number of legal and political impediments that need to be overcome in order for it to become a reality.

Keywords: judicial cooperation, information technologies, transnational litigation, exchange of legal information, e-justice.

Introduction

Our society nowadays significantly depends on modern technologies, most of which are computer and internet based and require electricity in order to be used (hereinafter – 'modern technologies'). These technologies are used by both private individuals and public officers and make it possible to simplify, speed up and improve the quality and accuracy of the actions previously performed without them. The scope of their embedding into our life is so high, that some even propose to define the current phase of social development as a new stage of human civilization, an 'information society', which is oriented towards production and distribution of information and uses modern technologies for that purpose.² The said technologies assist us in overcoming many of the traditional difficulties associated with the temporal and spacial factors³ and to improve the quality of our life in general.

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² S. Almendros, M. Dolores, 'De la sociedad de la información a la sociedad del conocimiento' [2015] 20(69) Utopia y Praxis Latinoamericana 130

³ L. Pronina, 'Information Culture as a Factor of Development of Information Society' [2008] 10 Analysis of Cultural Studies 81

Various technical sciences are devoted to studying these technologies (among them – computer science, mechanical and electrical engineering, system analysis, *etc.*) and providing solutions for their development. As lawyers, we will not go deeply into their analysis, the one thing we still may do is to admire their universal nature, the fact that the subject matter, the contents and the methods used by these disciplines are almost the same around the globe. The same is not the case with social disciplines, especially with those devoted to law.

Law remains largely a national tool of influencing human behavior⁴ and in many cases it turns into an instrument of political games at the hands of sovereign states. Nevertheless, it becomes nowadays more international (by implementing provisions emanating from various conventions and other instruments) and, what is obvious, more ‘informational’ as long as it is affected by a constantly increasing use of modern technologies in everyday life. Technologies may be applied in a number of its areas: public administration, conclusion of contracts and their performance, keeping public records in electronic databases, prosecuting of criminals by collecting and spreading information about them through internet channels, and so on.⁵ The area of civil justice (and court proceedings as its core) also relies significantly on modern technologies, moreover, all of the trial participants and the judges may possibly employ them for their purposes.

This article does not aim at exploring in detail the variety of ways in which the potential of these technologies may be applied to court proceedings in some independently taken state. Instead, it argues that nowadays we are lacking a ‘global’ view on their use in court proceedings, such that will take account of universal nature of these solutions and propose a common regulative instrument instead of particular and fragmentary laws that we now have. Current state of affairs cannot be regarded as reasonable and appropriate in modern globalized and informationalised society. The technologies shall unite the world (and are already doing it), while legislative provisions must not turn into an obstacle and a reactionary tool that bring complications instead of promotion well-being and easy life.

1. ‘E-society’, ‘e-government’ and ‘e-justice’

The “e-” component that is added to some traditional and well-known concepts suggests introducing an “electronic” element to their functioning, which transforms them into something new, not identical with their previous stance. The broadest notion is that of ‘e-society’ – it is such a society where modern electronic technologies (e-technologies) are deeply integrated into its structure, so that their use does not present something unusual. In other views, it is a society that is dependent on such technologies.⁶ In their turn, ‘e-technologies’ are the technologies of microelectronics, informatics and telecommunication.⁷ In addition, it is believed that such society is more cosmopolitan: the ties between nations are growing stronger, the global culture is gradually emerging (to a large extent due to recent technological advancement). We cannot deny that modern computer technologies have firmly penetrated into all areas of our life and have become indispensable companions of a contemporary man.⁸ At the same time, unfortunately, many of them are used primarily for political, commercial and recreational purposes, while their application in other fields of life could have helped solving some problems accumulated there.

The second term – e-government – is seen a sphere of public administration that is essentially functioning by electronic means and sources, providing public services to citizens in the Internet with as little bureaucracy as possible and as quickly as the software tools allow. In this sense this term is understood at least by the OECD.⁹ Indeed, we speak here not of a new type of governance and changes in the very structure

⁴ M. Umphrey, L. Douglas, A. Sarat, ‘Law Without Nations’ (Stanford, Calif: Stanford Law Books 2011) 2-3

⁵ K. Hanslowe, ‘Science, Technology and Law’ [1974] 1 Cornell Law Forum 8

⁶ M. Altman, K. Rogerson, ‘Open Research Questions on Information and Technology in Global and Domestic Politics Beyond “E-” [2008] 41(4) Political Science and Politics 835-836

⁷ B. Loo, ‘The E-society’ (New York: Nova Science Publishers 2012) XI

⁸ P. Calmon, ‘The Future of the Traditional Civil Procedure’ in ‘Electronic Technology and Civil Procedure. New Paths to Justice from Around the World’ (Dordrecht: Springer 2012) 67

⁹ T. Almarabeh, A. AbuAli, ‘A General Framework for E-Government: Definition Maturity Challenges, Opportunities, and Success’ [2010] 39(1) European Journal of Scientific Research 30

of the states, but rather of a new type of interaction between officials on the one side and people and organizations on the other.¹⁰

Strong demand for 'governmental services online' exists for a number of transactions. Some people may need to obtain a license, others – to register a legal title, or to submit a declaration of income. It is true that almost all of these actions can be performed from home or business premises of citizens, without any need to be present personally at the governmental office.

All aforesaid is applicable to the judicial sphere as well. 'E-justice' as a part of e-government means precisely 'the use of electronic technologies in the field of justice',¹¹ whatever it may stand for. Civil justice is a complicated sphere of social life, including court proceedings, taking of evidence, exchange of documents and execution of binding court rulings. Technologies may play a vital role in each of the named activities, the only problem is our readiness to put them into use.

2. Modern technologies in the field of civil justice

Civil justice is an area of public policy, an external manifestation of which is civil litigation (or, civil procedure), which is an activity of the courts to hear and determine civil cases between private parties.¹² It is one of the most important areas of contemporary law, since conflicts inevitably arise in our society and judicial procedure is an effective and civilized way of their solution, especially when we take the official authority of the state that is obligatory and binding.¹³

There are many ways, in which technologies may be applied in this sphere: we may lodge claims and send replies to court electronically, we may interrogate a witness or an expert out of court by means of videoconferencing, we may even present relevant evidence in an immaterial form. Some add that only the use of technical equipment in the administration of justice is to be considered as 'e-justice', while the activities that are just used to facilitate access to information contained in the judicial system and produced by it are merely to be regarded as 'informatization'.

In fact, technologies are not something totally unfamiliar to those taking part in a trial. Both judges and parties actively rely on them: most records are produced with the help of computers; electronic exchange of documents between court and litigants is not uncommon likewise. Many national legal systems provide for the possibility to file a suit and present evidence electronically, to hold a remote court session, to record court hearings on a tape, etc. Information and communication technologies (the ICT) can be used to enhance efficiency, access, transparency and accountability.¹⁴ They modernize legal regulations and help to reduce costs.¹⁵ In many cases we may trust technologies more than traditional 'offline' services: when we send an e-mail with an acknowledgment of receipt to the court or another party, we are sure that the message is delivered and the deadlines are met; quite the opposite is the situation with postal services.

We also save time considerably while applying the ICT tools. For example, they permit us to search terms and expressions within documents much faster than we could do ourselves by working with a printed copy.¹⁶ Machines may find a precise collocation where a man may overlook it, being tired of working with a large amount of data. Of another interest is a possibility to quickly transmit a case from one instance to another and perform service of documents online.

Most of these functions are not futuristic, but quite common for some jurisdictions and actively resorted to by interested parties. In the EU, for example, a number of Member States have developed their own 'e-

¹⁰ B. Loo, *op. cit.*, 9

¹¹ European Parliament Resolution of 18 December 2008 with recommendations to the Commission on e-Justice [2008] 2008/2125(INI)

¹² R. Mehren, 'International Control of Civil Procedure: Who Benefits?' [1994] 57(3) *Law and Contemporary Problems* 13

¹³ H. Genn, 'Judging Civil Justice' (The Hamlyn Lectures 2008) 181

¹⁴ M. Velicogna, 'Justice Systems and ICT: What Can be Learned from Europe?' [2007] 3 *Utrecht Law Review* 129

¹⁵ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 30 May 2008 'Towards a European e-Justice Strategy' [2008] COM(2008)329 final ('e-Justice Strategy')

¹⁶ J. Resende Chaves, 'Proceedings on the Web' in: 'Electronic Technology and Civil Procedure. New Paths to Justice from Around the World' (Dordrecht, Springer 2012) 106

justice' systems, some of which are really advanced and effective in practice, though not well coordinated with those of their partner States.¹⁷ The involvement of technologies in court proceedings is a common feature of our time, and the orientation of the government towards positive regulation in this sphere is welcomed. There are only two major problems: (1) sometimes the role of technologies is misunderstood and they are too exalted or unjustifiably neglected; (2) not all relevant activities in the field of justice are relying on the technical solutions available on the digital market. We are going to deal with these two problems successively.

3. Misunderstanding of the ICT role in the field of civil justice

Sometimes it seems that our society is not fully prepared for the introduction of modern technologies into our life, since some of its members do not catch the purpose and the aims of these tools. Technological idealism and nihilism are the two extremes of the same essence: misunderstanding of the ICT role in our life. In the field of justice this tendency is demonstrated in at least two false (from our view) ideas.

The first one claims that 'e-justice' demands the existence of an artificial intelligence (AI) that will be certainly invented in the future. Only with its introduction may we be able to speak about 'full electronic justice', since the current status quo is only intermediate and quite underdeveloped condition (as no computer is able to engage in legal reasoning¹⁸). In the distant future, justice will be brought to us by a super powerful and totally impartial AI.¹⁹ The studies, focusing on the AI, characterize it as a robotic system replicating the decision-making process of the human brain.²⁰ It is virtually an 'essence', the intellectual activity of which is no worse than of a human being. We will not argue on the possibility of implementation of AI technologies into our daily life. Rather we will express doubt on the necessity of a 'robotized trial' for the future. Since time immemorial there was an accepted right to a 'lawful judgment of [one's] peers'²¹ as a pre-requisite for any changes in personal or property status. A computer, even the most advanced, may not be considered as such a 'peer' to a human being and may not produce legally binding consequences for him. Its role shall be to submit relevant data to an operator, who will later use it to come to a decision on a case. Even in this situation the data may be distorted due to a technical failure or outside intrusion. Thus, it will require additional checks by a human-operator in all cases of doubt. Another reason is that an AI will clearly use its own logic, independent of that of its creator and guide its mental capacities to reach conclusions that do not necessarily intersect with our (human) understanding of justice.²²

Another idea expressed about technologies in litigation is that they sufficiently influence the contents of traditional principles of justice.²³ Meanwhile, principles are seen as abstract ideas enshrined in positive and/or natural law that reflect the basic values of this or that legal order.²⁴ Contrary to the existing point of view, it seems that the introduction of the ICT into the activity of the court will not bring any fundamental change to the principles of justice enshrined currently on both domestic and international level. It is precisely due to the fact that principles are quite abstract: being key and basic ideas they do not change when we choose another instruments or methods of performing procedural actions. ICT in civil procedure have an applied character and not in any way fundamental, that is why they cannot change anyhow the essence of the principles of access to justice, reasonable time and the like. Such principles may be changed only due to a radical modification of the social paradigm, the foundations of social order, which is still not the case with the introduction of ICT. Our values, beliefs and hopes do not become different when we start to use new technologies.

¹⁷ e-Justice Strategy, *op. cit.*

¹⁸ C. Sunstein, 'On Artificial Intelligence and Legal Reasoning' [2001] 8 U. Chi. L. Sch. Roundtable 31

¹⁹ A. Tyaglo, 'Logical and Probabilistic Aspects of e-Justice' [2013] 2 Philosophical Problems of Information Technologies and Cyberspace 42

²⁰ A. Kowalski, 'Artificial Intelligence and Law: a Primer and Overview' [1993] 51(4) Advocate (Vancouver) 579

²¹ Magna Carta Libertatum, http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html [last viewed on 2016-03-10]

²² 'Computers, Artificial Intelligence and the Law (book review)' [1992] 1 L. Computer & Artificial Intell. 155

²³ J. Resende Chaves, *op. cit.* 122-123

²⁴ M. Andreescu, 'The Principles of Law. Philosophical approach' [2013] 53 Challenges of the Knowledge Society. Public Law 440

At the same time the authors mention correctly that some changes may be seen in the external expression of the principles. For example, publicity becomes even more acute as the society may now control the decisions and reasoning of the judges not only from a courtroom, but through the Internet as well. In our view it only proves the immutability and 'eternal character' of the ideas, formulated by the fundamental principles. Technologies have changed, but the essence of the principles remained the same – they still require to conduct a trial within a reasonable time, to make it open, to guarantee access of citizens to the court, *etc.* At the same time the ICT may help to implement the ideas behind the principles in a better way: for example, videoconferencing may provide access to court in a situation, where otherwise no trial could have taken place at all.

In conclusion, we may say that there is no need to overestimate the importance of technologies. They have an important though applied character. Their application in judicial sphere must serve achieving the goals of justice and not become an end in itself.²⁵

4. Technologies in cross-border judicial cooperation

Nowadays people are free to travel around Europe, taking advantage of single customs area without internal borders. As both businessmen and consumers are engaged in cross-border transactions, so is the need for them to be protected in case legal disputes arise.²⁶ When it happens, they have to access information, documents, evidence and records from foreign jurisdictions, which is not always an easy task paying attention to the differences in languages, traditions, positive law and applicable remedies.²⁷

Judges also face some problems of cross-border nature: determination of jurisdiction and avoidance of parallel proceedings, dealing with co-existing and conflicting judgments on one subject matter, enforcement of foreign judgments and so on.

In the EU this problem is not overlooked and at least some political and legal instruments try to address it. Commission wants to 'dematerialize' various supranational procedures and also to create purely electronic ones. Right now there is an example of Online Dispute Resolution for consumer disputes, which will allow consumers and traders to resolve their disputes without going to court in an easy, fast and inexpensive way.²⁸ It may generally be seen as a pilot project, since there is no reason to limit the it only to consumers or to ADR.

Another EU supervised project was the 'European Judicial Atlas' that provided users with information relevant for judicial cooperation in civil matters. The Atlas helped to identify a competent court, to fill in some forms on-line and transmit them electronically.²⁹ The project was, however, 'phased out' and is now being replaced by another one – 'European e-justice Portal'. The latter one will include almost all relevant information on European Civil Procedure and will be interactive, due to the fact that many forms will be completed online. In Commission's view, it is going to present a future electronic one-stop-shop in the area of justice.³⁰

The very idea of a single place, known to the general public and sufficient to satisfy public demands for online justice is quite a promising one. The current view of EU on the project is, however, not free from flaws. Firstly, currently the portal is overloaded with information and is designed mostly for a legal professional rather than an ordinary citizen. Secondly, it refers to a number of other web pages, both belonging to European institutions and domestic organs, which does not bring any consistency in its utilization.

In order to see the future trends, we cannot pass by the Multiannual European e-Justice Action Plan 2014-2018, where the objectives of development of technological base for judicial cooperation are set out. Particularly, it provides for the following important steps: (1) interconnection of information in national registers; (2) development of effective means for the exchange of legal information across borders; (3) development of

²⁵ Y. Kondiurina, 'Implementation of the Principles of Arbitration Procedure in the System of Electronic Justice' [2013] 1(34) Herald of Omsk State University 158

²⁶ X. Kramer, 'Procedure Matters: Construction and Deconstruction in European Civil Procedure' (Rotterdam 2013) 8-9

²⁷ D. Nevin, M. Jenkins, 'Information, Knowledge, and the Pursuit of Privacy' [2015] 38(3) American Journal of Trial Advocacy 501

²⁸ Regulation (EU) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L 165/1

²⁹ http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm [last viewed on 2016-03-10]

³⁰ Draft strategy on European e-Justice 2014-2018 [2013] OJ C 376

communication between judicial authorities of the Member States (including secure data exchange); etc.³¹ What is important is that the EU wishes to involve all of the Member States in the construction of the e-justice sphere. At the same time the Commission names voluntary action and decentralization as the guiding principles in this area, which will, in a sense, hinder the development.

5. Cross-border electronic system for judicial cooperation

Despite the activities of EU institutions in the field of e-justice seem attractive and correct in essence, they lack a coherent nature. Variety of instruments proposed and a web portal that is mostly an information center (static function), rather than a dynamic system for e-trial do not bring fundamental changes. Quite the opposite may be said about a fully autonomous uniform computerized system for judicial cooperation in cross-border civil matters. Such a system presently does not exist, though we see an intention of the EU to establish something resembling it. Therefore, we will explore how this system could look like *de lege ferenda*.

First of all, it shall be a cross-border system for civil justice in its broad sense. It may include technical tools to exchange evidence, petitions and judicial acts, as well as access their archives from the territory of any contracting state. The court personnel (secretaries, assistants, judges) could put information within this system on cases received for consideration, acquired applications, reviews, evidence, judicial decisions and their copies. The courts of other states could have access to these materials in order to use them in their own proceedings. Moreover, receiving a fresh claim a court's clerk could fill in an electronic 'case card' and the system, in case of presence of a similar (identical) case in another country, would notify him of that fact. Similarly, the system could inform the court of the fact that a potential case is within an exclusive competence of another state's court according to its domestic law. It is obvious that in order to realize such possibilities we will need to introduce the necessary information to the system in the first place.

In order to be effective, the system needs to allow to identify its operators (the judges) and to be protected from non-authorized access. It shall be based on the common standards, where we may separately mention the requirements as to the software and hardware in different states, as well as the contents of the documents, the turnover of which will be performed. The system may be equipped with a special translation program, which will automatically present the contents of the documents in plain language of the operator. Of course the accuracy of machine translation is not the same as when we are speaking of the decision or a ruling of the court written in the original language. In case we have any doubts in the accuracy of the translation, the operator of the system may always request the original version.

Some concerns may arise in the mind of a reader on the essential features of the proposed system. We will try to comment on at least some of them:

(1) Public policy issue. One of the reasons the system may become a failure is the notion of public policy. The latter is a beloved instrument of the states, which is used in order to get rid of extensive obligations they are not ready to fulfil. Despite quite a negative assessment in many cases, public policy in some situations serves a legitimate aim.³² To deny the application of this principle is contrary to state sovereignty, to its very competence to deal with its internal matters independently. Will not these prerogatives of the state shrink and become insensible if we oblige the states to reveal national judicial archives to outsiders. May such a possibility of foreign actors to dig into the pile of 'black linen' of domestic case law constitute a violation of state privacy and even an encroachment upon its internal affairs? The answer is not so simple. In defense of the system we may say that many of the judicial decisions of national courts are published online in the official language. That is why a potential user will not be able to retrieve more information from the system than he potentially may obtain elsewhere in the public domain. The only thing would be that the system gives him a possibility to access this information quicker and with less expenses. As for the other materials (case files, protocols, evidence), it does not necessarily have to be kept in the system for public inspection. It may lie somewhere on the server and only be provided to an interested party upon request (which will be considered

³¹ Multiannual European e-Justice Action Plan 2014-2018 [2014] OJ C 182/2

³² X. Kramer. 'Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure' [2011] 1(2) IJPL 230

by relevant national authority). In case such authority allows to access the file, it may be opened (probably to the court seized and not to the requesting party personally).

(2) Overflow of information. Potential system shall not overload its user with information, especially with purely legal terms and conditions. These will not help an ordinary citizen, but will certainly confuse him. For example, instead of listing jurisdictional rules for various types of cases, the system could just ask the user to specify what kind of case he has, what object and sum are at stake, and then to provide him with an answer as to which court he has to address. In case of doubt he shall be provided with a link to normative texts in order to study them personally and to come to a conclusion – to agree with a machine, or to use his own solution.

(3) Availability of the system. It raises the question of disparities in access (digital inequality), since there is unequal access to the new technologies. Some citizens and/or small and medium-sized enterprises (SMEs) cannot afford approaching to electronic technologies on a day-to-day basis. Secondly, some members of the society (e.g. living in rural or isolated areas) may just be unaware of the existence of such technologies. None of the mentioned problems seems insurmountable.³³ While it is possible to overcome technological illiteracy through education and awareness campaigns, the financial accessibility may be ensured only if the system will be virtually opened to all interested parties. Consequently, a potential user of the system should: (a) know of the advantages that modern technology gives him in the trial; (b) know how to use it;³⁴ (c) know that he may count on legal aid for using the system in case his financial condition does not allow paying all the expenses. With the last condition we may rely on the provisions of Legal Aid Directive, which instructs the national legislator what criteria are to be taken into account in assessing the economic situation of a person.³⁵ In no way do we insist that the system shall be free for its users, since it may be considered as a provision of public services, which require some remuneration.

(4) Uniformity of standards. This problem is closely connected with the previous one, the only difference is that it asks to what degree the system would be available to the corresponding states. It includes financial aspects and also a technological one: there shall be an agreement on common standards and requirements to hardware and software. Moreover, states shall agree to maintain the system and perform regular updates in order for it to function smoothly.

(5) Protection from unauthorized access is really a big issue. The system shall be strong enough not to fall under a hacker attack. It shall normally use secure channels to transmit data, since its contents may include personal and quite sensitive information, which is not to be opened to third parties.

(6) Finally it is important to ensure that the system had an applied character. The notifications on similar cases and all other relevant information it could provide for the judge shall not predetermine the ultimate solution of the case. The computer only facilitates the flow of documents and cross-border cooperation, but does not substitute a judge in the administration of justice.

Of course, the very possibility of introduction of this system does not mean that it may be put into practice. There shall be an agreement between the states concerning its recognition as a valid and legitimate method for the exchange of information, which is to be preceded by a long period of negotiations on several key issues, as well as a national reform of procedural legislation and technical regulations that will be aimed at bringing together the provisions dealing with international cooperation in the field of justice.

Conclusions

We certainly believe that the introduction of the above mentioned system could sufficiently promote the cooperation in the field of justice, facilitate it, make it faster and more reliable, and to solve many other significant problems. The introduction of the system leaves more questions than answers. To be objective,

³³ G. Neagu, 'Information Society and Education System in Romania' [2013] 5(2) *Revista Romaneasca pentru Educatie Multidimensionala* 18

³⁴ 'Les moyens modernes de transmission des actes judiciaires et extrajudiciaires en Europe' (Colloque international de Paris 21 et 22 octobre 1999) 93

³⁵ Council Directive (EC) 2002/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L 026/41 (Legal Aid Directive) art. 5(2)

most of them are purely legal and/or political ones, since from a technical point of view there are no problems with such kind of system. Only time will show whether states are interested in so enhanced cooperation and are ready to work towards its establishing. From our point of view, however, the law shall change together with the society³⁶ and respond to the challenges of the time, which certainly do not advocate isolationism and misoneism.

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³⁶ P. Calmon, op. cit. 68

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TRYING TO SQUARE THE CIRCLE: THE ECB'S JANUS-FACED CHARACTER POST SSM AND ITS IMPLICATIONS FOR EFFECTIVE BANKING SUPERVISION

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Abstract

The repeated pattern of politically induced lax oversight, insufficient or delayed cross-border information sharing and the obvious moral hazard problems where an ailing national banking system can rely on international aid, culminating in the mutually reinforcing Spanish banking and sovereign debt crises in the summer of 2012, prepared the ground for one of the most ambitious regulatory projects in European history: Banking Union. While previously Eurozone Member States strongly opposed centralization in supervision and resolution of credit institutions, suddenly, they praised it as the silver bullet to internalizing externalities caused by forbearing national supervisors and to aligning incentives with the far-reaching mutualization of private and public debt. Following remarkable regulatory activism, only three years later, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) have been established as the two major pillars of the new regulatory architecture.

This paper is concerned with a particular feature of the former, namely installing the European Central Bank (ECB) as quasi-omnipotent pan-European watchdog. Generally, transferring oversight from the national to the supranational level constitutes a significant step forward in addressing the main impediment to transnational banking supervision – home bias. Yet, vesting this particular institution with the according powers could undermine, mainly as a function of conflicts of interest resulting from its henceforth two-fold mandate, the effectiveness of the otherwise relatively well-conceived supervisory regime. In fact, these concerns were already voiced when drafting the pertinent regulation, but eventually had to make way for pragmatic reasons. Nevertheless, at least in theory, tasking a central bank with banking supervision can be rationalized. However, monetary policy with its focus on price stability and banking supervision aiming to maintain financial stability pursue different, potentially colliding goals. The ultimate assessment, to what extent the latter will suffer from bundling both activities under one roof, depends on the adequacy of the institutional safeguards designed to isolate it from the former's undue influence. Finding a rather mediocre arrangement, finally an alternative solution resting on the full organizational separation of both functions will be sketched.

Keywords: Banking Supervision – Monetary Policy – Institutional Design – Single Supervisory Mechanism – European Central Bank

Introduction

The repeated pattern of politically induced lax oversight, insufficient or delayed cross-border information sharing and the obvious moral hazard problems where an ailing national banking system can rely on international aid, culminating in the mutually reinforcing Spanish banking and sovereign debt crises in the summer of 2012, prepared the ground for one of the most ambitious regulatory projects in European history: Banking Union.² While previously Eurozone Member States strongly opposed centralization in supervision and resolution of credit institutions, suddenly, they praised it as the silver bullet to internalizing externalities caused by forbearing national supervisors and to aligning incentives with the far-reaching mutualization of private and public debt. Following remarkable regulatory activism, only three years later, the Single Supervisory

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² T. Tröger, 'The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?' [2014] 15 EBOR 449, 460.

Mechanism (SSM)³ and the Single Resolution Mechanism (SRM)⁴ have been established as the two major pillars of the new regulatory architecture.⁵ This paper is concerned with a particular feature of the former, namely installing the European Central Bank (ECB) as quasi-omnipotent pan-European watchdog.⁶ Generally, transferring oversight from the national to the supranational level constitutes a significant step forward in addressing the main impediment to transnational banking supervision – home bias. Yet, vesting this particular institution with the according powers could undermine, mainly as a function of conflicts of interest resulting from its henceforth two-fold mandate, the effectiveness of the otherwise relatively well-conceived supervisory regime.⁷

In fact, these concerns were already voiced when drafting the pertinent regulation, but eventually had to make way for pragmatic reasons (*infra* 1). Nevertheless, at least in theory, tasking a central bank with banking supervision can be rationalized (*infra* 2). However, monetary policy with its focus on price stability and banking supervision aiming to maintain financial stability pursue different, potentially colliding goals (*infra* 3). The ultimate assessment, to what extent the latter will suffer from bundling both activities under one roof, depends on the adequacy of the institutional safeguards designed to isolate it from the former's undue influence (*infra* 4). Finding a rather mediocre arrangement, finally an alternative solution resting on the full organizational separation of both functions will be sketched (*infra* Conclusion).

1. Primary law and political constraints in the decision making process

Conferring banking supervision to a central bank is not an exclusive European strategy, but common practice in the international regulatory arena.⁸ This finding alone does not carry any normative weight, but suggests that there might be sound reasons for such a choice (*infra* 2). However, a closer look at the legislative process preceding the adoption of the SSM Regulation reveals primary law and political constraints as driving forces behind the actual decision. The only – relatively solid – legal basis for shifting supervisory competences from Member States to the EU the Treaties' framework had to offer was Art. 127 (6) TFEU which invariably called

³ Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 [hereinafter: SSM Regulation].

⁴ Regulation (EU) 806/2014 of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation 1093/2010 [2014] OJ L225/1 [hereinafter: SRM Regulation].

⁵ The implementation of Basel III through a Single Rulebook completes the Banking Union. Cf. European Parliament and Council Directive (EU) 2013/36 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 [2013] OJ L176/338 [hereinafter: CRD IV] and European Parliament and Council Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012 [2013] OJ L176/1 [hereinafter: CRR].

⁶ For seminal contributions to the debate on whether the functions of monetary policy and banking supervision should be separated cf. C. Goodhard/ D. Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' [1995] 47 Oxford Economic Papers 539; G. Di Giorgio/ C. Di Noia, 'Should Banking Supervision and Monetary Policy Tasks Be Given to Different Agencies' [1999] 2 Int. Fin. 361 et seq.; A. Blinder, 'How Central Should the Central Bank Be?' [2010] 48 J. Econ. Lit. 123 et seq.; T. Beck/D. Gros, 'Monetary Policy and Banking Supervision: Coordination instead of Separation' [2010] CEPS Policy Brief No. 286.

⁷ Yet, centralization should have been implemented more vigorously, in particular supervisory power been allocated as unequivocally as possible to the ECB, at least for the banks deemed significant in order to avoid the thickets of inter-agency cooperation that arise from national supervisors being tasked with *de iure* auxiliary, *de facto* essential responsibilities, e.g. fact-finding. For an in-depth analysis, cf. T. Tröger, 'The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?' [2014] 15 EBOR 449, 461 et seq., 475 et seq.

⁸ For a current overview Bank for International Settlements, 'Central Bank Governance and Financial Stability' [2011] p. 5 et seq. Similar results can be found in an earlier, but broader study covering 24 jurisdictions, cf. C. Goodhard/ D. Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' [1995] 47 Oxford Economic Papers 539, 558 et seq. For a detailed historical analysis of the development of central bank functions cf. R. Lastra, 'International Financial and Monetary Law' (Oxford: Oxford University Press 2015), pp. 31 et seq. A prognostic account is taken by C. Goodhart, 'The Changing Roles of Central Banks' [2010] BIS Working Paper No. 326, pp. 8 et seq.

for mandating the ECB.⁹ To delegate the task to an alternative institution such as the European Banking Authority (EBA) in turn required triggering a treaty amendment procedure. Political decision makers were more than reluctant to open this Pandora's Box knowing that it would have brought a panoply of *desiderata* to the negotiation table, thereby provoking lengthy discussions, and ultimately entailed a particular high risk of rejection in jurisdictions where national constitutional laws ask for a referendum. From an academic perspective, accepting these constraints as explanatory variables of crisis-induced *ad-hoc* legislation does not warrant to cow-tow to political expediency. Rather, the search for a first best solution should be independent of the calamities primary law change indisputably involves, assuming that, in the long run, the related costs are outweighed by the welfare gains owed to a superior institutional design.

2. Rationalizing the choice for the ECB

The pragmatic reasons that inclined Eurozone lawmakers to merge banking supervision and monetary policy should not conceal more substantive grounds potentially apt to rationalize such decision: a) facilitating data exchange and thereby broadening the information base for both functions and b) synergies with lender-of-last-resort (LOLR) duties.

The first prong of argument points to the benefits monetary policy will enjoy when duly anonymized micro-data allow for a more granular analysis of macro-trends.¹⁰ Conversely, banking supervisors will be happy to encompass aggregate developments in their work. This becomes particularly crucial in adequately applying macro-prudential tools, that are, *inter alia*, designed to counter price bubbles in certain asset classes, notably where exposure is not limited to individual institutions and the perils of homogenous risk profiles, *i.e.* strongly correlated investments, threat to materialize.¹¹ Admittedly, the SSM Regulation generally leaves the respective CRR/CRD IV instruments¹² within the ambit of national supervisors, but at the same time, it enables the ECB to gold-plate them if deemed necessary, Art. 5 (2) SSM Regulation. Despite the merits of capitalizing on joint data mining efforts, it should not go unnoted that they are not inextricably linked with an integrated organizational structure, but could equally well be realized building on an alternative, so-called Y-model.¹³

The second prong of argument is a variation of "He who pays the piper calls the tune". Where central banks' mandates comprise LOLR responsibilities, there is a natural incentive – with supervision being the mean – to prevent or limit the use of the provided funds. However, at least *de iure*, the ECB is even deprived of acting as quite modestly conceptualized *Bagehotian* LOLR that is providing fully collateralized emergency liquidity assistance (ELA) at a penalty interest rate to illiquid, but solvent banks.¹⁴ Still less it is empowered to supply liquidity to insolvent institutions, thereby bearing the ultimate cost of rescue. Nonetheless, *de facto* the ECB has used its monetary policy tool-kit in the course of the ongoing sovereign debt crisis to provide quasi-backstops to wobbling banking systems cut off from market finance.¹⁵ Relevant measures exposing the ECB

⁹ Particularly the German academic discourse raised considerable doubt as to whether the far-reaching ECB preponderance exceeded the reach of the enabling clause as drawn by the limiting words „specific tasks“. Instead of many cf. M. Herdegen, 'Europäische Bankenunion: Wege zu einer einheitlichen Bankenaufsicht' [2012] WM 1889, 1891.

¹⁰ Cf. J. Peek/E. Rosengren/G. Tootell, 'Is Banking Supervision Central to Central Banking?' [1999] 114 Q. J. Econ. 629 et seq.

¹¹ Ignoring asset price contagion is only one example of underscoring the notion of systemic risk and intra-bank spill-overs in a highly connected financial system that pre-crisis supervision with its mantra of financial stability only being a function of individual institutions' stability, fall prey to. For an overview, cf. S. Hanson/A. Kashyap/J. Stein, 'A Macro-Prudential Approach to Financial Regulation', [2011] 25 J. Econ. Persp. 3.

¹² Prototypes are countercyclical capital and systemic risk buffers, Art 130, 135-140 and Art. 133-134 CRD IV.

¹³ For a draft of such a model, cf. J. Krahnert, 'Keinen Institutionskonkurrenz auf nationaler Ebene schaffen: das 'doppelte AIDA'-Modell' [2014], SAFE Policy Letter No. 30.

¹⁴ Being a non-specified function ELA falls within the ambit of national central banks, cf. Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, Art. 14(4) [2012] OJ C326/230. However, the ECB's Governing Council may intervene at any time, if it finds, by a majority of two thirds of the votes cast, that ELA interferes with the objectives and tasks of the ESCB.

¹⁵ T. Tröger, 'The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?' [2014] 15 EBOR 449, 494 et seq.

to considerable loss risk included, *inter alia*, broadening the definition of eligible collateral, lowering the minimum credit rating for this collateral or otherwise easing borrowing terms and conditions.¹⁶

Yet, creating a coherent regulatory system hardly legitimizes synchronizing supervision with LOLR responsibilities where already the takeover of the latter was *contra legem*. Incidentally, the recently implemented, comprehensive reform agenda, in particular the tightened own funds and liquidity regime pursuant to CRR/CRD IV and the establishment of the SRM, discounting for all appropriate skepticism towards any “game changer” labelling not only of the circumvention prone bail-in tool,¹⁷ should on the margin reduce the probability of recourse to central bank sourced bail-out facilities. Even if tasking the ECB with LOLR duties was socially desirable,¹⁸ effectively protecting it from deficient third-party oversight, which agency theory would suggest to occur in an unrestricted world, is not contingent on vesting it with supervisory powers. Instead, merely the competent bureaucrats’ incentives¹⁹, whoever their actual employer, e.g. the EBA, may be, needed to be aligned to the ECB’s interest of escaping LOLR exercises.

It follows from the foregoing that conventional concerns justifying the Janus-faced nature of central banking do either not apply to the Eurozone’s institutional set-up or could be addressed by equally effective alternative means.

3. Price and financial stability as potentially colliding goals

These findings compel to devote particular attention to the downsides of combining monetary policy, concerned with price stability,²⁰ and banking supervision, aiming for financial stability,²¹ within a single institution, in particular to the conflicts of interests arising from this double mandate. While economic research correctly posits the wide-ranging mutual dependence of both stability functions, they are, fully accounting for negative feedback loops from favoring one over another, not perfectly congruent. Their respective instruments even work the inverse way. Whereas supervision tends to have procyclical effects, monetary policy follows an anticyclical strategy, albeit introducing macro-prudential oversight tools might align their mode of operation to some extent.

With colliding goals, financial stability suffers where banking oversight is captured by monetary policy considerations. Interference typically appears in the guise of inaction that is the ECB refraining from tough supervisory decisions, e.g., withdrawing a licence, triggering resolution or using its Supervisory Review and Evaluation Process (SREP) powers, for fear of adversely affecting private liquidity provision, thereby potentially reinforcing deflationary tendencies and ultimately thwarting growth perspectives. Such price stability driven reluctance to take appropriate supervisory measures might be even more pronounced if and when the ECB has become (an insufficiently secured) creditor of the banks it supervises, in particular following non-

¹⁶ For a chronology of the pertinent measures cf. ECB, ‘Annex – Chronology of Monetary Policy Measures of the Eurosystem’ [2011] 11 Monthly Bulletin, pp. I-IV.

¹⁷ Originally conceived as a threat to loss participation in a pivotal banks’ failure, thereby attempting to counter moral hazard *ex ante* and enabling resolution without or only limited systemic repercussions in times of crisis, the poor implementation of the bail-in tool strongly calls its credibility into question. Notably, the numerous exceptions of whole creditor classes (Art. 27 (3) SRM Regulation), the lacking clarity as to the hierarchy between the remaining, bail-in affected junior claimholders and the discretionary power to grant exceptions from applying the tool on a case-by-case basis (Art. 27 (5) SRM Regulation) render appropriate debt pricing as a means to restore market discipline almost impossible.

¹⁸ Arguing for such an explicit LOLR mandate, *inter alia*, R. Lastra, ‘International Financial and Monetary Law’ (Oxford: Oxford University Press 2015), pp. 376 et seq.; C. Wyplosz, ‘Banking Union as a crisis- management tool’, in: T. Beck ‘Banking Union for Europe’ (London: CEPR 2012), pp. 19 et seq.

¹⁹ Generally, on bureaucrats’ incentives cf. W. Niskanen, ‘Bureaucracy and Representative Government’ (Chicago: Aldine, Atherton 1971) pp. 36-42. For a detailed application to the division of labor between ECB and national supervisors in the SSM context, cf. T. Tröger, ‘The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?’ [2014] 15 EBOR 449, 473 et seq.

²⁰ Cf. Art. 119 (2) TFEU. Deviating from an intuitive “0% reading”, for the ECB price stability equals an inflation target below, but close to 2% over the medium term, see ECB, ‘Monetary Policy Strategy’.

²¹ Neither primary nor secondary EU law properly define the term. Yet Art. 1 (1) and recital 65 of the relevant SSM Regulation implicitly describe it when referring to the “safety and soundness of credit institutions and stability of the financial system”.

standard monetary policy operations.²² Although in a fiat money system technically a central bank cannot fall into insolvency as long as its liabilities are denominated in its own currency, significant negative equity capital, not induced by exchange rate appreciation losses, could erode its most precious asset: the credibility to control inflation. The latter is at stake as markets expect a central bank either to ask for recapitalization – a move that questions its independence from political influence – or to expand the money base by firing up the printing press.²³

For the sake of completeness, despite effective supervision being the gravity center of this paper, the mirror-inverted perils for price stability resulting from financial dominance,²⁴ *i.e.* an accommodative monetary policy backing banks in distress and potentially concealing supervisory failure able to impair the central bank's reputation, should at least be mentioned.²⁵

4. Assessment of the institutional safeguards

Where conflicts of interest loom, the fate of effective supervision hinges on the institutional safeguards set up to shield it from monetary policy's undue influence. The dichotomy of European lawmakers' awareness for this regulatory challenge²⁶ and a fundamentally unsuitable primary law framework translated into a rather complex internal governance structure of the ECB: While on the operational level, the supervisory function is organizationally separated from the monetary policy arm, Art. 25 (2) 2nd subparagraph SSM Regulation, and even headed by a newly established independent spearhead tasked with planning and execution – the Supervisory Board (SB), Art. 26 (1) SSM – this duly erected Chinese Wall was torn down at the most vulnerable point, *i.e.* decision making which, for constitutional reasons,²⁷ still rests with the Governing Council (GC), Art. 26 (8) SSM Regulation.

Recognizing that with personal identity of those ultimately responsible separation easily becomes a fiction, the regulatory pendulum, constantly oscillating between the quest for an optimal institutional design and the respect for legal constraints, swung back to limit the GC's role within the decision making process. Relevant restrictions encompass separate meetings and agendas, Art. 25 (4) SSM Regulation, and a non-objection procedure, Art. 26 (8) SSM Regulation. The latter allows blocking SB's draft decisions, but prevents the GC from amending them or taking others on its own initiative. Moreover, in case of objection, a mediation panel shall resolve diverging views, Art. 25 (5) SSM Regulation. Yet, in the end, the GC decision will prevail

²² Cf. e.g. Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme (CBPP3), ECB/2014/40 [2014] OJ L 335/22. Nota Bene: In an event of default, the ECB enjoys no preferential creditor status. Cf. ECB, 'FAQ on the CBPP3'. This is perceived necessary as otherwise the benefits bond purchases aim for, that is lowering banks' spreads to stimulate credit supply, were foregone, since the remaining creditors, knowing that they would come at best second in queue, increasing their loss given default, would charge higher risk premiums.

²³ Empirical evidence supports this view. Central banks' financial strength and their inflation record appear to be negatively correlated at a statistically significant level, cf. U. Klüh/P. Stella, 'Central Bank Financial Strength and Policy Performance: An Econometric Evaluation' [2008] IMF Working Paper 08/176; G. Adler/P. Castro/C. Tovar, 'Does Central Bank Capital Matter for Monetary Policy' [2012] IMF Working Paper 12/60. Yet, these findings are contested, cf. S. Benecká/T. Holub/N. Kadlčáková/I. Kubicová, 'Does Central Bank Financial Strength Matter for Inflation? An Empirical Analysis' [2012] Czech National Bank Working Paper Series 03/2012 (arguing that results from prior studies lack robustness when including the degree of political dependence as explanatory variable).

²⁴ For a detailed description, cf. F. Smets, 'Financial Stability and Monetary Policy: How Closely Interlinked?' [2014] 10 IJCB 263 et seq.

²⁵ Empirical studies show that central banks with supervisory responsibilities have a worse track record in fighting inflation than those without such duties. These results hold even after controlling for their independence. Cf. G. Di Giorgio/ C. Di Noia, 'Should Banking Supervision and Monetary Policy Tasks Be Given to Different Agencies' [1999] 2 Int. Fin. 361, 370 et seq.

²⁶ Cf. Recital 65 SSM Regulation providing that "[monetary policy and supervision] should [...] be carried out in full separation, in order to avoid conflicts of interests and to ensure that each function is exercised in accordance with the applicable objectives."

²⁷ Cf. Art. 129 (1) TFEU and Art. 9 (3) ESCB and ECB Statute. T. Tröger, 'The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?' [2014] 15 EBOR 449, 479 et seq. correctly emphasizes that the relation between the Supervisory Board and the Governing Council is not a matter of the ECB's internal organization. Thus, there is no leeway to limit the supervisory decisions to be brought before the Council.

regardless of the outcome of the mediation.²⁸ The full scope of such arrangement comes to light considering the ESCB's primary objective, *i.e.* maintaining price stability.²⁹ This supremacy secondary law cannot deviate from³⁰ is also reflected in Art. 26 (8) sentence 5 SSM Regulation when providing for the grounds on which the GC may object SB's draft decisions ("in particular stating monetary policy concerns"). Consequently, the GC, by virtue of being the ECB's ultimate decision making body, not only *can*, but because of the unequivocal hierarchy of its objectives *must* reject supervisory measures running counter to price stability.³¹ These findings unmask diverse declarations, according to which supervision shall only pursue financial stability objectives and neither interfere with, nor be determined by monetary policy, *cf.* Art. 25 (1), (2) SSM Regulation³², as legally irrelevant, politically motivated smoke candles.

The institutional safeguards' inability to serve their purpose, *i.e.* effectively ring-fencing supervision, is aggravated by their undesirable side-effects: A two-stage process hinders swift decision making in urgent cases and empowering the GC as a body whose members have no particular supervisory expertise subverts the perception of its competence.³³ Reduced incentives for a stability-oriented oversight constitute a less obvious, yet more alarming collateral damage of the chosen governance architecture. Supervisors, either influenced by growth-hungry politicians³⁴ or merely driven by the desire to minimize efforts, will be more prone to *ex ante* forbearance where an accommodative monetary policy provides for an extra-tool to conceal supervisory failure *ex post*. Being deprived of a right to disembark the SB in case of inaction, the GC, in order to protect its impeccable reputation against negative intra-institutional spillover effects,³⁵ will indeed be left with virtually no other choice than adopting such a loosened approach.

Conclusions

In light of the adumbrated deficiencies in adequately tackling conflicts of interest within the current set-up, this paper advocates a more radical solution that rests on the full organizational separation of monetary policy and banking oversight functions. Acknowledging the related need for Treaty change, the SB should be upgraded to an ultimate decision making body of the ECB that is not bound by the primary objective of price stability. Such proposition not only speeds up decision making and aligns supervisory power with relevant expertise without distorting incentives, it also ensures that banking supervision is exclusively driven financial, not price stability considerations.

²⁸ *I.e.* in order to adopt a supervisory decision, the GC needs to incorporate the result of the mediation, *cf.* T. Tröger, 'The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?' [2014] 15 EBOR 449, 479 et seq. (2014).

²⁹ *Cf.* Art. 127 (1) sentence (1) and Art. 282 (2) sentence (2) TFEU. As its decision making body, Art. 282 (2) sentence 1 and Art. 9 (3) ESCB and ECB Statute, the GC is strictly bound to this goal. General economic policies, including maintaining financial stability, may only be supported insofar as they are not contrary to the primary objective.

³⁰ *Cf.* R. Lastra, 'Banking Union and Single Market: Conflict or Companionship' [2013] 36 Fordham Int'l L. J. 1190, 1208: "the primacy of the goal price stability [...] of course does not permit the placing of financial stability at the same level as monetary stability."

³¹ The only supervisory decision that is immune against such blockade is triggering resolution. However, this is not a merit of the SSM Regulation, but follows from overlapping competences making it independent from the ECB. According to Art. 18 (1) subparagraph 2 SRM Regulation, the Single Resolution Board (SRB) can replace the ECB when the latter refrains from laying the necessary foundations to adopt a resolution scheme, that is considering a credit institution failing or likely to fail. This provision could be the gateway for an SB and SRB alliance against a price stability servile GC where the requirements for such an assessment as laid down in Art. 18 (4) SRM Regulation are met.

³² Similar statements can be found in Art. 1 (2) and recital 2 Decision of the ECB of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the ECB, ECB/2014/39 [2014] OJ L300.

³³ *Cf.* T. Tröger, 'The Single Supervisory Mechanism (SSM) – Panacea or Quack Banking Regulation?' [2014] 15 EBOR 449, 480; E. Ferran/V. Babis, 'The European Single Supervisory Mechanism' [2013] 13 J. Corp. L. St. 255, 268.

³⁴ Though, formally, the ECB's supervisory function – in stark contrast to post-financial crisis tendencies, *cf.* the comparative study by S. Gadinis, 'From Independence to Politics in Financial Regulation' [2013] 101 Ca. L. Rev. 327 et seq. – is largely independent from political interference, Art. 19 SSM Regulation, informal pressures should not be underestimated.

³⁵ *Cf.* C. Goodhard/ D. Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' [1995] 47 Oxford Economic Papers 539, 547 (arguing that, conversely, positive spill-over effects for a central bank's reputation will stay away, even if supervision is thoroughly executed since it rarely receives any plaudits for hypothetical, averted crises).

Admittedly, this design is not able to immunize against what is beyond its sphere of influence, *i.e.* the adverse reactions of monetary policy decisions neutralizing supervisory measures. The recent ECB's Asset Backed Securities Purchase Programme (ABSPP)³⁶ provides an illustration for such a sterilizing effect: geared to boost credit supply, it attenuated the burden of Comprehensive Assessment-linked increased own funds requirements³⁷ by cleaning banks' balance sheets of capital-intensive items.³⁸ Insofar genuine conflicts of interests are not solved, but merely shifted.³⁹ However, it is far from evident that the efficient settlement of these few cases warrants a unification of both tasks within a single body such as the ECB's GC.

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³⁶ Cf. ECB, 'Press Release, October 2nd, 2014' [2014] Technical Annex I.

³⁷ Cf. ECB, 'Aggregate Report on the Comprehensive Assessment' [2014].

³⁸ In a similar vein, setting interest rates at a level price stability targets would ask for could be undesirable from a financial stability vantage, if they encourage banks to excessive risk taking, cf. F. Smets, 'Financial Stability and Monetary Policy: How Closely Interlinked?' [2014] 10 IJCB 263, 281 et seq.

³⁹ Cf. C. Goodhard/ D. Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' [1995] 47 Oxford Economic Papers 539, 547; A. Blinder, 'How Central Should the Central Bank Be?' [2010] 48 J. Econ. Lit. 123 et seq. 131; T. Beck/D. Gros, 'Monetary Policy and Banking Supervision: Coordination instead of Separation' [2012] CEPS Policy Brief No. 286, p. 6.

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THE DOCTRINE OF THE «MARGIN OF APPRECIATION» IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The main aim of this article is to discuss the essence and distinctive features of the margin of appreciation doctrine in the jurisprudence of the European Court of Human Rights. In accordance with Protocol No. 14, all Council of Europe member States have an obligation to apply a margin of appreciation.

It is worth mentioning that in the text of the Convention and in the preparatory work there is no such term as «margin of appreciation». Nevertheless, this doctrine is well established in the practice of the European Court of Human Rights (in the case of *Handyside v. the United Kingdom* etc.).

The guarantees enshrined in the European Convention on Human Rights are a minimum standard. The European Court of Human Rights doesn't define, how exactly the States must secure these rights. Thus, the member States enjoy the margins of appreciation, that is, the national authorities are better placed to settle a dispute than the Strasbourg institutions (so-called *the better position rationale*).

If different rights of the European Convention on Human Rights collide, the member States have a certain degree of discretion when deciding which right has priority. Furthermore, the member States enjoy a certain degree of discretion in the definition of such terms, as «national security» (paragraph 2 of Articles 8, 9 and 11 of the European Convention on Human Rights) or «necessity in a democratic society» (Article 10 of the European Convention on Human Rights, according to that, it is allowed to restrict the freedom of expression, provided that it is necessary in a democratic society).

In the doctrine of the «margin of appreciation» such significant principles as effective protection, subsidiarity and review, permissible interferences with Convention rights, proportionality and the «European Consensus» standard are developed.

Keywords: margin of appreciation, effective protection, dynamic interpretation of human rights, proportionality, subsidiarity and review, European Consensus.

Introduction

Respect for and effective protection of human rights and freedoms are an integral part of law-governed, democratic state. That is the main obligation of every civilized European state. Thus, it is set down in Article 3 of the Constitution of Ukraine, that “the human being, his or her life and health, honour and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State”.²

The European Court of Human Rights examines the national legislation on its accordance with agreed human rights standards. Its worth mentioning that human rights are basic capabilities of every person, which

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² Constitution of Ukraine [1996] at https://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp

are necessary to their being and development, recognized as universal, inalienable and equal for every human being and must be guaranteed by state to the extent of international standards.³

The States have positive and negative obligations under the European Convention on Human Rights (ECHR). A negative obligation requires states to abstain from human rights violations (e.g., the prohibition of torture – Article 3 of the Convention, deprivation of life – Article 2 etc.). A positive obligation requires states to take action to secure human rights. Thereby, positive obligations include social rights, economic and some cultural human rights: a right to work, right to rest and leisure etc.⁴ Nowadays all provisions of the ECHR *de facto* contain «double» requirements for the states: to abstain from human rights violations, and positive obligations to their guaranteeing and protection.⁵

Hence, the states enjoy a certain margin of appreciation by securing human rights. It allows building so-called “bridge” between supranational and national legal human rights protection systems. The integration of different cultures furthers the evolution of human rights standards, helps to find a “fair balance” of interests and to reach a “consensus” at the European level.⁶

The doctrine of the margin of appreciation is well established and developed in the case law of the European Court of Human Rights. As pointed out by the President of the European Court of Human Rights Dean Spielmann, “it devolves a large measure of responsibility for scrutinizing the acts or omissions of national authorities to the national courts, placing them in their natural, primary role in the protection of human rights. It is therefore neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review, realizing in this way the principle of subsidiarity”.⁷

1. The essence and features of the margin of appreciation doctrine

The doctrine of the margin of appreciation gives priority to the state assessment of its own facts, actions, situations and any other events within its own jurisdiction. The European Court of Human Rights (the Court) emphasizes, that it is primarily for the national public authorities, in particular for the courts, to apply and interpret domestic law. For instance, in the *Edwards v. the United Kingdom* judgment of 16 December 1992, the Court underlined: “34. ... It is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court’s task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair”⁸ (see also the *Vidal v. Belgium* judgment of 22 April 1992, para. 33,⁹ the *Klaas v. Germany* judgment of 22 September 1993, para. 29, 30,¹⁰ the *Rotaru v. Romania* judgment of 4 May 2000, para. 53,¹¹ the *Kopp v. Switzerland* judgment of 25 March, 1998, para. 59).¹² In the case of *Winterwerp v. the Netherlands* (1979) the European Court of Human Rights confirmed: “46. Whilst it is not normally the Court’s task to review the observance of domestic law by the national authorities (see the *Ringeisen judgment* of 16 July 1971, Series A no. 13, p. 40, para. 97), it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review (see the decision of the Commission on the admissibility of Application no. 1169/61,

³ О. В. Петришин та ін., ‘Теорія держави і права. Підручник для студентів юридичних вищих навчальних закладів’ (Харків: Право 2014) 297

⁴ Jean-François Akandji-Kombe, ‘Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights’ (Council of Europe: Human rights handbooks No. 7 2007) 10 – 14

⁵ Matthias Klatt, ‘Positive obligations under the European Convention on Human Rights’ [2011] ZaöRV 71 692

⁶ Howard Charles Yourow, ‘The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence’ (The Hague / Boston / London: Kluwer Law International 1996) 2

⁷ Dean Spielmann, ‘Whither the Margin of Appreciation?’ [2014] UCL-CLP 1 at http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf

⁸ *Edwards v. the United Kingdom*, application no. 13071/87 [1992] at <http://hudoc.echr.coe.int/eng?i=001-57775>

⁹ *Vidal v. Belgium*, application no. 12351/86 [1992] at <http://hudoc.echr.coe.int/eng?i=001-57799>

¹⁰ *Klaas v. Germany* application no. 15473/89 [1993] at <http://hudoc.echr.coe.int/eng?i=001-57826>

¹¹ *Rotaru v. Romania* application no.28341/95 [2000] at <http://hudoc.echr.coe.int/eng?i=001-58586>

¹² *Kopp v. Switzerland* application no. 13/1997/797/1000 [1998] at <http://hudoc.echr.coe.int/eng?i=001-58144>

X v. Federal Republic of Germany, Yearbook of the Convention, vol. 6, pp. 520 – 590, at p. 588). ... It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention “incorporates” the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection”.¹³

Thus, the main task of the Court is to verify whether the effects of national legal interpretation are compatible with the ECHR. This applies, particularly, to the interpretation by courts of rules of a procedural nature, such as time-limits governing the filing of documents or the lodging of appeals that are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty.¹⁴

Moreover, the European Court of Human Rights regarding the interpretation of international law pointed out: “54. ... It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *inter alia*, the *Pérez de Rada Cavanilles v. Spain* judgment of 28 October 1998, Reports 1998-VIII, p. 3255, § 43). This also applies where domestic law refers to rules of general international law or international agreements. The Court’s role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention”¹⁵ (see also the *Korbely v. Hungary* judgment of 19 September 2008, para. 72¹⁶ etc.).

In the case of *Slivenko v. Latvia* of 9 October 2003 the Court once again emphasized: “105. ... it is for the implementing party to interpret the treaty, and in this respect it is not the Court’s task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation. Nor is it the task of the Court to re-examine the facts as found by the domestic authorities as the basis for their legal assessment. The Court’s function is to review, from the point of view of the Convention, the reasoning in the decisions of the domestic courts rather than to re-examine their findings as to the particular circumstances of the case or the legal classification of those circumstances under domestic law”.¹⁷

For the first time the doctrine of the margin of appreciation was recognized and discussed by the Court in the case “*Handyside v. the United Kingdom*”.¹⁸ In this case the applicant published the Schoolbook, which contained some obscene episodes that might encourage children to smoke spot, consume pornography and promote sexual activity. The British authorities decided to confiscate and destroy these books. However, the author complained that it was the violation of his right to freedom of expression under Article 10 of the ECHR. The British government pointed out, that such interference was justified as necessary in a democratic society for the purpose of protection of morals (Article 10 Para. 2 of the Convention).¹⁹

The European Court in turn underlined, that the Contracting Parties to the Convention, in the first place, must secure any Convention rights (in compliance with the subsidiarity principle). Moreover, there is no common understanding of the term “morals” in Europe. Thus, the Court stressed: “48. ... The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. ... Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context”.²⁰

Hence, the national courts have priority in determining the sense of morality within their own jurisdiction. Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is

¹³ Winterwerp v. the Netherlands application no. 6301/73 [1979] at <http://hudoc.echr.coe.int/eng?i=001-57597>

¹⁴ Miragall Escolano and Others v. Spain application no. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98 [2000] at <http://hudoc.echr.coe.int/eng?i=001-58451>

¹⁵ Waite and Kennedy v. Germany application no. 26083/94 [1999] at <http://hudoc.echr.coe.int/eng?i=001-58912>

¹⁶ Korbely v. Hungary application no. 9174/02 [2008] at <http://hudoc.echr.coe.int/eng?i=001-88429>

¹⁷ Slivenko v. Latvia application no. 48321/99 [2003] at <http://hudoc.echr.coe.int/eng?i=001-61334>

¹⁸ Handyside v. the United Kingdom application no. 5493/72 [1976] at <http://hudoc.echr.coe.int/eng?i=001-57499>

¹⁹ European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁰ Handyside v. the United Kingdom application no. 5493/72 [1976] at <http://hudoc.echr.coe.int/eng?i=001-57499>

given to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to construe and apply the laws in force.²¹ The Court emphasized, however, that Article 10 Para. 2 didn’t give the States an unlimited power of appreciation. The European Court of Human Rights with the Commission are responsible for ensuring the observance of the States’ engagements (Article 19), and the Court is empowered to give the final decision on whether a “restriction” or “penalty” is reconcilable with freedom of expression as guaranteed by Article 10 of the ECHR. “49. ... The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”; it covers not only the basic legislation but also the decision applying it, even one given by an independent court”²².

In this case the European Court of Human Rights argued that the Court’s supervisory functions obliged it to pay a great attention to the principles characterizing a “democratic society”. Freedom of expression constitutes one of the most fundamental principles of such a society, which furthers its progress and the development of every person. Herewith, paragraph 2 of Article 10 provides not only the “information” or “ideas” that regarded as inoffensive, but also those that offend, shock or disturb the State or any sector of the population. These are the requirements of pluralism, tolerance and broadmindedness, which are the foundations of the conception of a “democratic society”. It means, particularly, that every “formality”, “condition”, “restriction” or “penalty” imposed in this field must be proportionate to the legitimate aim pursued.²³

In addition, the exercise of freedom of expression undertakes “duties and responsibilities” the scope of which depends on the situation and the technical means. In the present case the European Court stressed, that it wasn’t the Court’s task to take the place of the national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. Thereby, the Court had to decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of “interference” they had taken were relevant and sufficient under Article 10 Para. 2 of the Convention. Consequently, the European Court of Human Rights concluded that there hadn’t been a breach of Article 10 of the ECHR.²⁴

So, as points out Dean Spielmann, in applying the margin of appreciation “judge-made” doctrine, the Court imposes self-restraint on its power of review and accepts that domestic authorities are best placed to settle a dispute.²⁵ There are many reasons for this, for instance: respect for pluralism and State sovereignty, the Court’s failure to carry out difficult socio-economic balancing exercises, the subsidiarity of the European Court of Human Rights’ review, a shortage of resources precluding the Court from extending its examination of cases beyond a certain level, a Court’s distance to settle particularly sensitive cases etc.²⁶

At the same time, as emphasizes the judge of the European Court of Human Rights Rozakis, the application of the margin of appreciation doctrine by the Court mustn’t be automatic. In the case of *Egeland and Hanseid v. Norway* (2009) concerning the taking of photographs of a convicted person and their publication in the press, judge Rozakis expressed the concurring opinion. The Court concluded that there had been no violation of Article 10 of the ECHR, thus, the respondent State was granted a wide margin of appreciation in balancing of the conflicting interests (namely, the interest of freedom of expression against the interests of privacy). However, judge Rozakis underlined: “(a) ... the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court’s case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the “local” and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate

²¹ Ibid, Para. 48

²² Ibid, Para. 49

²³ Ibid, Para. 49

²⁴ Ibid, Para. 49, 50, 59

²⁵ Dean Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (University Cambridge faculty of law: CELS Working Paper Series 2012) 2–3

²⁶ See, for example, F. Tulkens and L. Donnay, ‘L’usage de la marge d’appréciation par la Cour européenne des droits de l’homme. Paravent juridique superflu ou mécanisme indispensable par nature?’, [2006] *Revue de science criminelle et de droit pénal comparé* 3–23

manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.”²⁷ Moreover, Rozakis stressed: “(b) ... the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation. This ground is only a *subordinate* basis for the application of the concept, if and when the Court first finds that the national authorities are better placed than the Strasbourg Court to deal effectively with the matter. If the Court so finds, the next step would be to ascertain whether the presence or absence of a common approach of European States to a matter *sub judice* does or does not allow the application of the concept.”²⁸ So, in this case judge Rozakis concluded that the European Court of Human Rights demonstrated the automaticity of reference to the margin of appreciation doctrine and pointed out, that this doctrine had to be duly limited to cases where a real need for its applicability better served the interests of justice and the protection of human rights.²⁹

2. Determination of the width of the margin of appreciation

The width of the margin allowed for the interpretation of the European Convention on Human Rights depends on many factors, *inter alia* on the interests at stake, the context of the interference, the impact of a possible consensus in such matters, the provision invoked, the aim pursued by the impugned interference, the degree of proportionality of the interference and the comprehensive analysis by superior national courts.³⁰

Hence, a certain margin of appreciation (the width of the State’s discretion) depends on specific human rights. Thereby, on the one hand, by securing absolute rights (the right to life, freedom, prohibition of torture, slavery and forced labor, prohibition of retrospective legislation, the *ne bis in idem* rule), the margin of appreciation is limited and virtually inexistent. And, on the other hand, the states enjoy a wide margin of appreciation, e.g. in order to assess an exceptional situation for the purpose of Article 15 of the Convention³¹ (Derogation of human rights in time of emergency, particularly, in time of war or other public emergency threatening the life of the nation), in respect of Article 1 of Protocol No. 1 (protection of property and prohibition of deprivation of possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law). So, Article 1 of Protocol No. 1 refers to national discretion, providing that States have the right to enforce such laws as *it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.³²

Consequently, as pointed out by the Court in the case of *Dickson v. the United Kingdom* (2007), “78. ..., where a particularly important facet of an individual’s existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted. Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities’ direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. ... There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights. ...”³³

Herewith, the absolute nature of the prohibition of torture was acknowledged by the Court in a counter-terrorism context, *inter alia*, in the *Othman (Abu Qatada) v. the United Kingdom* judgment of 17 January 2012

²⁷ Egeland and Hanseid v. Norway application no. 344308/04 [2009] ‘Concurring opinion of judge Rozakis’ at <http://hudoc.echr.coe.int/eng?i=001-92246>

²⁸ *Ibid.*, (b)

²⁹ *Ibid.*, (d)

³⁰ Dean Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (University Cambridge faculty of law: CELS Working Paper Series 2012) 11

³¹ *Ibid.*, 11

³² European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf

³³ *Dickson v. the United Kingdom* application no. 44362/04 [2007] at <http://hudoc.echr.coe.int/eng?i=001-83788>

concerning an applicant who faced deportation to Jordan, the European Court stressed:” 184. ..., as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. It is no part of this Court’s function to review whether an individual is in fact such a threat; its only task is to consider whether that individual’s deportation would be compatible with his or her rights under the Convention. ... 185. ..., it is well-established that expulsion by a Contracting State ... engages the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion. 186. ... However, it is not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.”³⁴ At the same time, the Court regards to the following factors: the terms of the assurances; person who gives the assurances (central government or local authorities of the receiving State); legality of the treatment provided by the assurances in the receiving State; whether they are given by a Contracting State; the length and strength of bilateral relations between the sending and receiving States; objective verification of the compliance with the assurances through diplomatic or other monitoring mechanisms; the existence of an effective system of protection against torture in the receiving State; the previous ill-treatment of the applicant in the receiving State; examination of the assurances’ reliability by the domestic courts of the sending/Contracting State.³⁵

If different rights of the ECHR collide, for instance, the right to respect for private and family life (Article 8) and the right to freedom of expression and information (Article 10), these rights deserve equal respect. Accordingly, the margin of appreciation should be the same in both cases. Thus, in the *Axel Springer AG v. Germany* judgment of 7 February 2012, the Court stated: “88. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.”³⁶ These criteria are as follows: the contribution made by photos or articles in the press to a debate of general interest (the publication can concern political issues or crimes and sporting issues or performing artists); the role or function of the person concerned and the subject of the report and/or photo (e.g., facts, which contribute to a debate in a democratic society, relating to politicians in the exercise of their official functions and reporting details of the private life of an individual who does not exercise such functions); the behavior of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication (however, it can’t serve as a definitive argument for the deprivation of the party concerned of all protection against publication of the report or photo at issue); the way in which the information was obtained and its veracity; the way of photo or report’s publication and the manner of its representation; the extent of the dissemination of the report and photo (national or local newspaper, its circulation); the nature and severity of the sanctions imposed (in assessing the proportionality of an interference with the exercise of the freedom of expression).³⁷

A basis for the evolution of Convention norms through the case-law of the European Court of Human Rights is the notion of consensus.³⁸ For the first time it was pointed out in the case of *Tyrer v. the United Kingdom* (1978), where the Court found, that “the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of “degrading punishment””.³⁹ The matter was that the Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the ECHR since it did not outrage public opinion in the Island. However, the Court

³⁴ *Othman (Abu Qatada) v. the United Kingdom* application no. 8139/09 [2012] at <http://hudoc.echr.coe.int/eng?i=001-108629>

³⁵ *Ibid*, Para. 189

³⁶ *Axel Springer AG v. Germany* application no. 39954/08 [2012] at <http://hudoc.echr.coe.int/eng?i=001-109034>

³⁷ *Ibid*, Para. 90 – 95

³⁸ A. Kovler, V. Zagrebelsky, L. Garlicki, D. Spielmann, R. Jaeger and R. Liddell, ‘The role of consensus in the System of the European Convention on Human Rights’, in *Dialogue between Judges, European Court of Human Rights* (Strasbourg: Council of Europe 2008) 15

³⁹ *Tyrer v. the United Kingdom* application no. 5856/72, Para. 35 [1978] at <http://hudoc.echr.coe.int/eng?i=001-57587>

stressed, that even assuming that local public opinion could have an incidence on the interpretation of the concept of “degrading punishment” under Article 3, the Court did not regard it as established that judicial corporal punishment was not considered degrading by those members of the Manx population who favoured its retention: it might well be that one of the reasons why they viewed the penalty as an effective deterrent was precisely the element of degradation which it involved. Moreover, the Court pointed out that a punishment did not lose its degrading character just because it was believed to be, or actually was, an effective deterrent or aid to crime control. The Court emphasized that it was never permissible to have recourse to punishments which were contrary to Article 3, whatever their deterrent effect might be. Thus, the Court concluded that the judicial corporal punishment inflicted on the applicant had amounted to degrading punishment within the meaning of Article 3 of the Convention.⁴⁰

In the *Tyrer v. the United Kingdom* judgment of 25 April 1978 the principle of evolutive or dynamic interpretation was also established. The Court recalled that “the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions”.⁴¹ It means that the substantive content of the rights and freedoms secured by the Convention must evolve in line with progress in the legal, social and scientific fields.⁴² For example, in the case of *Christine Goodwin v. the United Kingdom* (2002) the Court emphasized: “85. ... In the later case of *Sheffield and Horsham*, the Court’s judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”⁴³

The notion of consensus reflects “the delicate balance that has to be struck in the relationship between the Strasbourg system and domestic systems, which must go “hand in hand” – a well-known formula taken, *mutatis mutandis*, from *Handyside v. the United Kingdom*”.⁴⁴ If there is no consensus within the member States of the Council of Europe on the issues at stake, the margin of appreciation will be wider, and *vice versa*. Thus, in the *Evans v. the United Kingdom* judgment of 10 April 2007 the Court stressed: “77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted. ... Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. ...”⁴⁵

Herewith, as emphasize Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in the joint partly dissenting opinion in the case of *A, B and C v. Ireland* (2010), “5. According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that consensus decisively narrows the margin of appreciation which might

⁴⁰ Ibid, Para. 31, 35

⁴¹ Ibid, Para. 31

⁴² Dean Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (University Cambridge faculty of law: CELS Working Paper Series 2012) 18

⁴³ *Christine Goodwin v. the United Kingdom* application no. 28957/95 [2002] at <http://hudoc.echr.coe.int/eng?i=001-60596>

⁴⁴ Dean Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (University Cambridge faculty of law: CELS Working Paper Series 2012) 18

⁴⁵ *Evans v. the United Kingdom* application no. 6339/05 [2007] at <http://hudoc.echr.coe.int/eng?i=001-80046>

otherwise exist if no such consensus were demonstrated. This approach is commensurate with the “harmonizing” role of the Convention’s case-law. Indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonizing role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced – in accordance with the Convention – against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonizing role, preferring not to become the first European body to “legislate” on a matter still undecided at European level.”⁴⁶

But sometimes it is difficult to find a consensus. It can be identified in the light of State practice (case-law, legislation, administrative practice); the absence of a consensus may have different reasons (e.g., lack of official positions on very new issues, significant divergence in practices etc.).⁴⁷

The principle of proportionality, which is closely linked to the principle of effective protection, has a significant influence throughout the Convention case-law and it is an entirely legitimate judicial creation. The most of debate about what the principle of proportionality means is conducted in the context of the restrictions on the rights guaranteed by Articles 8 (2) to 11 (2) of the ECHR.⁴⁸ The assessment of the proportionality of an interference with a right requires the examination of its impact on the right, the grounds for the interference, the consequences for the litigant and the context (the importance of the local circumstances and the difficulty of objective assessment of the interests at stake). The state must justify such interference. Herewith, the grounds must be “relevant and sufficient”, the need for a restriction – “established convincingly”, any exceptions must be “construed strictly” and the interference must meet “a pressing social need”.⁴⁹

Thus, in the *Waite and Kennedy v. Germany* judgment of 18 February 1999, the Court found: “59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”⁵⁰

In the *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria* (1994) case, concerning the prohibition of distribution of a journal to soldiers, the Court emphasized: “49. ... These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question was disproportionate to the aim pursued and infringed Article 10”.⁵¹

⁴⁶ A, B and C v. Ireland application no. 25579/05 [2010] at <http://hudoc.echr.coe.int/eng?i=001-102332>

⁴⁷ Dean Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (University Cambridge faculty of law: CELS Working Paper Series 2012) 22

⁴⁸ Steven Greer, ‘The margin of appreciation: interpretation and discretion under the European Convention on Human Rights’ (Strasbourg: Council of Europe Publishing, Human rights files No. 17 2000) 20

⁴⁹ Dean Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (University Cambridge faculty of law: CELS Working Paper Series 2012) 22

⁵⁰ *Waite and Kennedy v. Germany* application no. 26083/94 [1999] at <http://hudoc.echr.coe.int/eng?i=001-58912>

⁵¹ *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria* application no. 15153/89 [1994] at <http://hudoc.echr.coe.int/eng?i=001-57908>

Conclusions

The margin of appreciation doctrine (margin of state discretion) is well established and elaborated in the practice of the European Court of Human Rights. It allows the competent national authorities to enjoy a certain degree of discretion in assessing the facts, actions, situations and any other events within their national jurisdiction. Thus, the doctrine of the margin of appreciation gives priority to the state assessment of its own situation when securing the rights enshrined in the European Convention on Human Rights. It promotes the development of uniform human rights standards, the achievement of a 'fair balance' of different interests at stake.

The European Court has developed a number of principles that determine the scope of the Convention rights and the legality of any interference. The principle of subsidiarity and review means, that the mechanisms for human rights protection established by the European Convention is subsidiary to the national human rights protection system. The Court becomes involved in this process only after all domestic remedies have been exhausted. Herewith, the margin of appreciation available to national authorities goes hand in hand with a European supervision (*mutatis mutandis* rule). So, the main task of the European Court of Human Rights is to ensure whether the domestic authorities have remained within the limits of their discretion and whether the Convention rights are protected effectively. It depends on the specific right in question and on the sphere of life in which the right is at stake. Thereby, absolute rights reduce the degree of state discretion, and conversely.

The principle of the effective protection represents one of the most significant function of the European Convention on Human Rights, that is the effective protection of human rights instead of the mutual obligations' enforcement between States.

The principle of proportionality requires that the domestic authorities strike a fair balance between the competing public and private interests at stake. Consequently, the European Court evaluates such factors as the importance of the interests at stake; the objectivity of the restriction in question; the existence of a consensus among the Member States of the Council of Europe on the specific issue at stake.

The "European Consensus" refers to the existence or inexistence of a common ground, view of the concerned issues in the law and practice of the States. If there is no consensus within the Member States on the issues in question, the States enjoy a wide margin of appreciation. If the consensus exists, the margin will be narrow. Hence, the "European Consensus" furthers the dynamic interpretation of the European Convention on Human Rights.

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THE POSSIBILITIES OF CRIMINAL LAW TO MEASURE THE SOCIAL MATURITY OF YOUNG ADULTS (18-20 YEARS)

Laura Ūselė¹

Abstract

The paper deals with the challenges the term of social maturity poses distinguishing the age group of young adults and dealing with the question of their criminal responsibility according to the Penal Code of the Republic of Lithuania. Legal norms foresee the possibility to apply the peculiarities of Juvenile Justice system to young adults (18–20 years), when their social maturity is equal to juvenile's maturity. The term of social maturity in this context creates the intersection of criminal law, criminology, psychology and sociology and makes the judicial practice applying the legal norm of young adults complicated. The Juvenile Justice system's borders have broadened, but only theoretically. The author analyses the concept and content of social maturity both from legal and psychological perspective, and its realization in the practice of Lithuanian courts dealing with the criminal cases of young offenders. The author argues that the ambiguous concept of social maturity is the main reason why the evaluation of young adults' social maturity is so rare. In judicial practice the content of social maturity is usually identified assessing the character of the criminal offence, motive and other circumstances that seem important for the judge. But what content of these circumstances witnesses one or other level of social maturity, the Law is not able to answer unless invoking psychological and sociological knowledge. The tools and procedures for such interdisciplinary cooperation are facing difficulties and are still under development.

Keywords: young adults, social maturity, criminal responsibility, juvenile justice.

Introduction

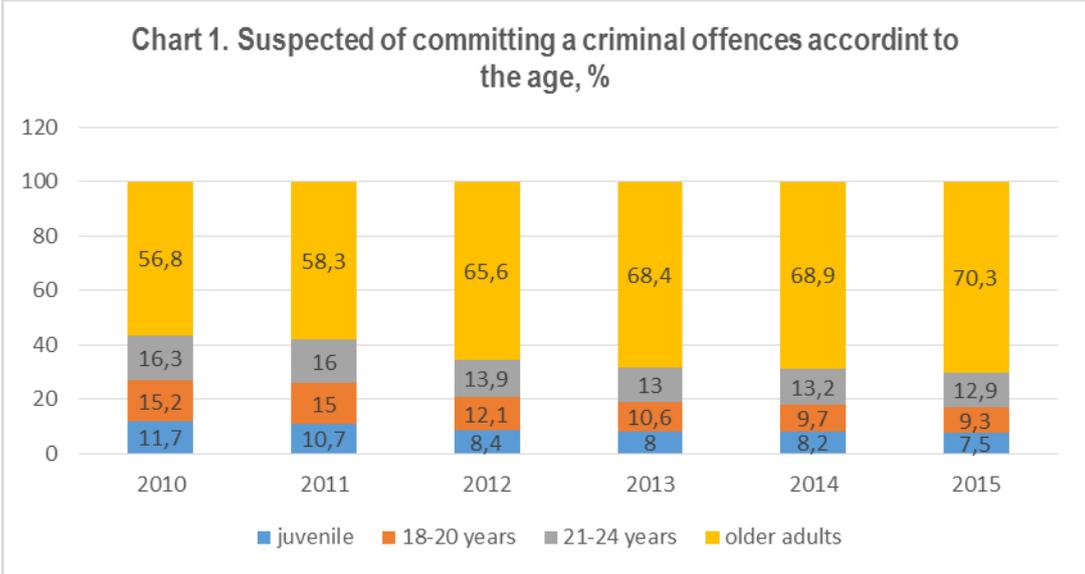
Lithuanian Penal Code stipulates the possibility to apply the majority of peculiarities of minors' criminal responsibility, including the educational sanctions, against a person who was of the age of 18 years at the time of commission of a criminal act, however was below the age of 21 years. The requirement for application is - the Court, considering the nature of the offence, motives, as well as other circumstances of the case and, if necessary, the explanations or a conclusion of an expert, decides that such a person in the approach of his or her *social maturity* equals to a juvenile and application of peculiarities of criminal responsibility for him or her would correspond to the purpose of peculiarities of criminal responsibility of minors (Art. 81, para. 2). It's been almost 13 years as this legal norm may be applied, but the practice is still very poor. For Lithuanian criminal law theoreticians and practitioners the new concept of "social maturity" is not clear and it is not widely developed yet, the term now in practice is interpreted quite narrow. This paper presents certain aspects on the importance of "young adults" norm and possible ways of improvement of its application.

1. Young adults in Lithuania: crime statistics

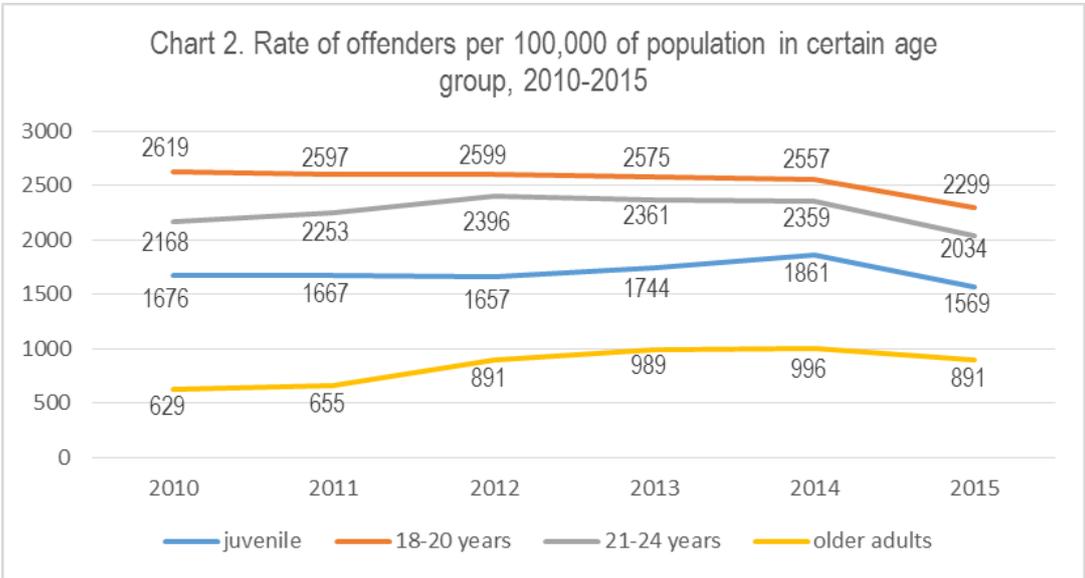
The importance of adequate and individualised response to the young adults' crime could be explained by the situation of young adults in criminal statistics and changes of criminal activity in different age groups.

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According to the statistics², there were 2491 young adults (18-20 years old) that were suspected of committing a criminal offences, i.e. 9,3 % of all registered persons in Lithuania in 2015. In comparison, juveniles respectively made 7,5 %, 21-24 years old persons - 12,9 %, older adults – 70,3 % of all accused persons. Youngsters of 14-24 years old make 1/3 or sometimes almost 1/2 of all accused persons in Lithuania a year (Chart 1).



The other important indicator is the criminal activity of young adults. Chart 2 shows that criminal offences are more prevalent among young people than adults. Comparing different age groups, young adults show the highest rate of criminal activity in all population. The rate of young adult offenders 2,6 - 4 times exceed all adults'rate (24 years old and above).



Starting from the adolescence and moving to grown-up the rising wave of criminal activity is observed; it has a tendency to decline starting from 21-24 years old and further. The tendency of criminal activity peak in

² Statistical Data from Information Technology and Communications Department under the Ministry of the Interior of the Republic of Lithuania. Data on suspected (accused) persons in the Republic of Lithuania: http://www.ird.lt/infusions/report_manager/report_manager.php?metai=2012&menu=12&idAta=4&rt=1&oldYear=2012&id=198&idStat=10®ionas=0&id3=1

similar age and sudden decline of it after reaching the age of 21 - 25 is observed in majority European countries. That is why the opinion that young adult crime usually has temporary nature is common³.

The changes in criminal activity through different age groups could be explained by D. Matza's drift theory. According to it, youngsters because of the process of their physical, psychological and social maturity and changes determined by it "drift" between socially acceptable and deviant norms of behaviour. After the period of transition the majority of them return to socially conventional way of living. The criminologists emphasize that during this formation of personality and self-search period criminal justice system should try to avoid official procedure of stigmatization of this youngster as a "criminal" and apply alternative measures provided by the law. Otherwise, if a youngster was labelled and a new stigma of "criminal" was interiorized by him or her, the risk of longer criminal career increases significantly. This fact should encourage the society and criminal justice system for patient reaction to the young adults' crime, looking for the measures responding also the needs of the young adults⁴.

2. International standards for state reaction to young adult crime

In the International legal acts the issue of young adults and their criminal responsibility was started to be raised in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules", 1985) and Recommendation No. R (87) 20 of the Committee of Ministers to member states on social reaction to juvenile delinquency (Council of Europe, 1987). These documents recommend for the states to put efforts „to extend the principles embodied in the Rules to young adult offenders“(Rule 3.3, Beijing Rules) and to review, „if necessary, legislation on young adult delinquents, so that the relevant courts also have the opportunity of passing sentences which are educational in nature and foster social integration, regard being had for the personalities of the offenders“(Rule 17, Recommendation No. R (87) 20).

First international initiatives on criminal responsibility of young adults do not provide any criteria defining a person as a young adult. Recommendation No. R (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice stated that „reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as full adults“(Rule 11). The criteria, defining a young adult, stipulated in these Recommendations are followed in the criminal laws of the majority countries that provide certain legal norms for young adults⁵. Although recommendatory nature of international legal acts and certain legal regulation in criminal laws of different countries are accompanied by quite rare practice of application of these norms by the courts. The only exception is Germany, where material and procedural legal norms on young adults are applied very often and are treated as a rule when the 18-20 years old youngster's criminal case is under the consideration. Such tendencies in the majority of the countries make search for the reasons and explanations why young adults' legal norm is not strongly approved by the practice.

3. Peculiarities of young adults' criminal responsibility in Lithuania

The Penal Code of Lithuania (Art. 81, para. 2) provides for possibility to apply upon the young adults the peculiarities of the criminal responsibility, which are meant for the juvenile offenders. These are: educational measures, penalties, special rules of imposition of the penalty, release from criminal responsibility, suspension of the penalty, and release from a custodial sentence before the term. Although it should be noticed that in Lithuania we have no statistical data about the application of Art. 81 para. 2 of the Penal Code. As the age

³ European Committee on Crime Problems. Council of Europe, 'Young adult offenders and crime policy - proceedings: reports presented to the 10th Criminological Colloquium' (Council of Europe: Council of Europe Press 1994).

⁴ Ibid.

⁵ Dünkel, F., Grzywa, J., Horsfield, Ph., Pruin, I. (Eds.). (2010). Juvenile Justice Systems in Europe. Current situation and Reform Developments. Vol. 4 1557-1577.

group of young adults was distinguished in the Penal Code 13 years ago, statistical registration forms were not adjusted yet to follow the state reaction to the young adults' crime.

In 2010 - 2011 the Law Institute of Lithuania conducted the research on application and effectiveness of the Art. 81 para. 2 of the Penal Code⁶. The Information system LITEKO, administered by the National Court Administration, was used to get the access to the decisions of the courts of all instances. Different types of decisions in criminal cases, in which the issue of the application of the young adults' norm was considered, were analysed, according to the before prepared questionnaire. All criminal cases proceeded in 2005 – 2009, in which the words "social maturity" or "Art. 81 para. 2" were mentioned, were selected and analysed. The decisions that fitted with these criteria went through the qualitative and quantitative analysis. This was the way to get the information about all the arguments for and against application of young adults' norms that were used by the courts in their motivation.

The total number of decisions found was only 36. Such a small number of criminal cases in which young adults' criteria were under discussion shows that the possibility to apply juvenile criminal responsibility for the young adults is considered very rare. The decision to apply young adults' norm (Art. 81 para. 2) is taken in exceptional cases – 8 of 36 times the court decided that offender was a young adult with the social maturity equal to juvenile's, but 4 of these decisions were changed by the appeal court. The consideration of young adults' norms was initiated by the court only in 2 cases. In the rest cases this norm was one of the arguments for the appeal or cassation and was raised by the offender and his or her defence. These were the cases when the defence aimed less severe responsibility for his defendant.

In conclusion, talking about the application of young adults' norm, the possibility to observe the individual cases, but not tendencies is obvious. Poor practice of the courts, considering the peculiarities of criminal responsibility of young adults, brings up a question about the reasons determining such a situation.

4. Social maturity and its assessment: legal, psychological aspects and practice

Rare practice of using young adults' norm, first of all, is related to the quite new for Lithuanian criminal law term of „social maturity“. All the peculiarities foreseen by the Penal Code for the juveniles could be applied to the young adults only if they meet the criteria of not sufficient for their age social maturity. It is admitted that „social maturity“ is not legal, but psychological or sociological term. That is why legal knowledge is not enough to find out the content of this term. The knowledge of individual's maturity, its stages, its perception in different periods of history, etc. is essential to reveal what social maturity is.

For many years, psychologists and researchers of medicine are claiming that at the age of 18 a person does not always become an adult and the process of maturity can take several years more. It is obvious that as adolescence does not start suddenly and unexpectedly, the same way maturation does not end at a certain strictly defined age. For these reasons, the idea that behaviour with the young adults in the criminal justice system should be different than the reaction to the adults' offences in the second part of the twentieth century was realized in the criminal laws of many countries: specific penalties and other sanctions, also the rules of criminal procedure for the young adult offenders or similar to the rules applied to juveniles.

The age limits do not tell much about the person's maturity, since each stage of life has its own "psycho-social task"(E. Ericson)⁷. Previously, personal growth, development, social tasks, had about the same range: school, leaving of parents' home, the first sexual intercourse, studies in higher education, finding a job, creation of a family, etc. In such circumstances the age limits had a great sense. However, the current social tasks sequence varies a lot. Flow of life has become very individual and there is neither psychological nor social empirical base to draw the steps of life based on the age limits. Thus, social maturity is the stage of person's physical, mental, and social development, which everyone reaches at a different age. It should be assessed studying the person and its compliance with certain social tasks.

⁶ L. Ūselė, M. Dobrynina, 'Nepilnamečių baudžiamosios atsakomybės ypatumų taikymo 18–20 metų jaunuoliams Lietuvoje tyrimas' (Vilnius: Teisės institutas 2012).

⁷ D.G. Myers, 'Psychology' (Worth Publishers, Tenth Edition edition 2010) 107.

It is difficult to transfer to the law the characteristics of social maturity, which are distinguished by the psychology, and to measure their content using the data about the offender and his or her offence, collected in a criminal case. This problem was also highlighted by the judges in the survey conducted in Lithuania in 2007. Respondents indicated that it was difficult to measure social maturity, applying Art. 81 para. 2 of the Penal Code, as the law does not specify how to understand the term "social maturity" and there was no any validated methodology for the assessment of person's social maturity⁸. Art. 81 para. 2 provides that the *nature of and reasons for the committed criminal act* as well as *other circumstances of the case*, and, where necessary, clarifications or conclusion of an expert should show that a person is equal to a minor according to his or her social maturity.

Analysis of court practice shows which circumstances of the case the court considers as indicating minor's, not adult's, social maturity. Usually spontaneous, not prepared activity, also offence which was determined by prevailing circumstances indicates that youngster's social maturity is similar to the juvenile's one. And contrary, well-planned, deliberate actions, finding the accomplices in majority cases shows adult's maturity⁹. Also the offence committed in a group often witnesses about the social maturity that is close to juvenile's one. Attention should also be paid to the details that show the importance of image, style, demonstration of life-style, strength, etc.

There are no typical youthful offence sorts, which could witness the particular stage of the development of the personality. The fact that thefts prevail in a registered juvenile crime, and that the violation of public order is often committed by the minors do not mean that such offences cannot be committed by a mature adult. Therefore, evaluating the level of social maturity, the key consideration should be focused not so much on the offence itself, but on „youthful, teenage” way of thinking, reasons of the offence, youngster's conduct before and after the offence and so on. It is important though that the judge hearing the criminal case of a young adult has at his disposal sufficient knowledge of the young adult's way of living, the circumstances of the offence, young offender's attitude to his or her offence.

The reasons, motivation of the committed crime could also help to presume the level of social maturity¹⁰. For a part of juveniles the criminal offence is perceived as an adventure, entertainment; the property crime very often for a minor is the way to be and to have what is popular and fashionable, to be or to have what his or her peers have. Violent crimes are realized as opportunities to demonstrate their strength, power, courage, to be a hero or a real man, or to have “just a kind of risk”¹¹.

The third legal criterion to evaluate young adult's social maturity is “other circumstances of the case”. The Penal Code's Commentary provides criteria list for evaluation of juvenile's maturity (Art. 91), but the same aspects are significant while evaluating young adult's maturity. These are: his or her knowledge, attitude towards the environment and the people around him or her, the ability to assess the requirements of the society for his or her age; understanding of his or her place in the surrounding environment, the ability to anticipate the consequences of his or her actions and to plan them; the ability to criticize and to be self-critical; aspiration of his or her goals; the ability to control his or her emotions and actions in critical situations, etc. In addition, it is important to pay attention to the person's behaviour after the offence, as it partly reflects the core values of the individual, the ability to understand and assess the damage caused by the offence, its consequences¹². The list of these circumstances is not limited, and the court may draw attention to any other circumstance that the court considers to be significant in determining what level of social maturity is reached by the youngster. For example, in analyzed cases, the fact of the defendant's education or studies in a university is often considered to be a sufficient basis for adult's social maturity. On the other hand, the failure of studying at school and frequent changes of schools show the instability of the person and a certain immaturity.

⁸ A. Dapšys, J. Misiūnas, A. Čaplinskas, 'Baismės individualizavimo teisinės problemos' Teisės instituto mokslo tyrimai Vol. 5 (Vilnius: Teisės institutas 2008) 73-76.

⁹ L. Ūselė, M. Dobrynina, 'Nepilnamečių baudžiamosios atsakomybės ypatumų taikymo 18–20 metų jaunuoliams Lietuvoje tyrimas' (Vilnius: Teisės institutas 2012).

¹⁰ J. Bluvšteinas (Ed.), 'Kriminologija' (Vilnius 1994) 98.

¹¹ A. Jatkevičius, 'Nepilnamečių smurtinio nusikalstamumo prevencija. Daktaro disertacija' (Vilnius: Vilniaus universitetas 2003) 17.

¹² G. Švedas (Ed.), 'Lietuvos Respublikos baudžiamojo kodekso komentaras. Bendroji dalis' (Vilnius: TIC 2004) 465-466.

Social maturity is more qualitative characteristics, content of certain criteria. Quantitative and formal criteria (age, driver's license, etc.) do not reveal the content of the person's social maturity.

Each circumstance content should be described as specific as possible by the court, avoiding the general terms that are used by the law or statistics, because these terms on the nature of the offence, motives and other circumstances reveal what and how it was done, but do not reflect the young adult's attitude to that, his or her relation with it. The court pointed out that individual's social maturity is related not to any specific circumstance or fact of life, but to the complex of such factors as: the education and profession, getting a job, independence from parents, military service, starting of family life, realistic life planning, membership of formal/informal groups (their composition, activities and impact on the youngster), self-presentation (appearance and behaviour), the ability to create emotionally close relationships, and other circumstances¹³, i.e. when person's social status in the society matches certain values and the social expectations of that society.

Very often the courts in their practice of assessing the social maturity are trying to evaluate if the offender was able to realize the nature and danger of his or her actions¹⁴. But it is important to stress that when the youngster is of juvenile's social maturity, there is no doubt that he or she is able to realize the dangerous nature of the actions (i.e. the situations when he or she is capable) and he or she should respond in accordance with the criminal law. The assessment of social maturity should give the answer to the question of how severe and what type of measures of criminal responsibility would be most effective.

The norm of young adults would have more opportunities to make a real impact if experts of psychology, pedagogy and sociology are involved in the assessment of social maturity process. Certain guidelines, a list of criteria or assessment methodology would be valuable assistance for the court considering the issue of the application of the legal norm. Also these instruments would help to make the assessment of young adult's social maturity a common procedure in the criminal cases.

Conclusions

1. The Penal Code of Lithuania provides for certain peculiarities of criminal responsibility for offender who was 18 years old at the time of commission of a criminal offence, however was below the age of 21 years. The possibility to apply juvenile justice norms for young offender is the way to give a flexible response of criminal justice to the youngster who has just entered the world of adults.

2. In Lithuania young adult offenders show the highest criminal activity in comparison to other age groups. The appropriate reaction to their offences is very important measure aiming to reduce future crime level in the country.

3. Social maturity is the stage of person's physical and psychological maturity, caused by the person's individual characteristics and his or her individual life circumstances. This is the process of socialization, which depends mainly on the social environment in which a person grows, develops and gets formation.

4. The social maturity of a young adult and its assessment is not just a legal issue; it is particularly associated with psychology, pedagogy, sociology and criminology. It is difficult to transfer characteristics of social maturity, distinguished by psychology, to the law and to consider the content of social maturity using data about the crime and offender, collected in a criminal case.

5. In the Penal Code of Lithuania the assessment of young adults' social maturity is related to the analysis of the nature and motives of the committed criminal act as well as other circumstances. However, it is not clear what nature of the offence, what motives or other circumstances suggest the lack of youngster's social maturity. The courts through their practice are trying to find out these links attributing certain characteristics and circumstances to a mature person (detailed planning of the offence, finding the accomplices, offender's education, etc.), while others relating to a still rapidly developing personality.

¹³ L. Ūselė, 'Socialinės brandos sampratos ir turinio problema sprendžiant jaunu pilnamečių (18–20 metų) baudžiamosios atsakomybės klausimą' [2011] Mokslo darbai. Teisė. Vol. 78 182-196.

¹⁴ L. Ūselė, M. Dobrynina, 'Nepilnamečių baudžiamosios atsakomybės ypatumų taikymo 18–20 metų jaunuoliams Lietuvoje tyrimas' (Vilnius: Teisės institutas 2012).

6. The young adults' norm (Art. 81 para. 2) practice by the courts is very poor, first of all because of ambiguous term of social maturity. This norm would have more opportunities to make a real impact if experts of psychology, pedagogy and sociology are involved in the assessment of social maturity process.

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21. Recommendation CM/Rec (2008)11 of the Committee of Ministers to members states on the European Rules for juvenile offenders subject to sanctions or measures [2008].
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NEUROSCIENCE IS COMING TO THE LAW: WHAT IS HAPPENING AND WHAT SHOULD WE KNOW ABOUT IT?

Dovile Valanciene¹

Abstract

Today the world is in a time of change where values, attitudes, and thought paradigms are changing. These days, old science – deterministic and mechanistic thinking, based on absolute clarity, predictability, and objectivity – resists the new postmodern science of complex dynamic systems. This new scientific paradigm, implying an open interdisciplinary approach, contextual relevance, integrity, and “the demolition of the walls” is a new phase of changes in which the world of science struggles, and in which scientific paradigms and methodologies change. Interdisciplinarity is a very important feature of the new science. The new science encourages sciences to engage with each other. One phenomenon that is growing in importance in terms of interdisciplinarity is neuroscience and its dialogue with other sciences. Neuroscience is appearing everywhere and it is coming to the law. It is of great importance to evaluate the dialogue between neuroscience and law, how it manifests itself, is it inevitable dialogue or temporary dialogue. The aim of this paper is a conceptual overview what is neuroscience, the dialogue between neuroscience and law, what is happening in the world about the dialogue between neuroscience and law, how much it is widespread over scientific articles, and answering the question whether this dialogue is inevitable. Methods: theoretical–scientific analytical, systematic and critical review and analysis of scientific literature and other relevant sources; empirical–quantitative analysis of scientific articles. The main finding: it is high time to change the approach to science itself. Legal science should become increasingly open to cognition, innovation and changes. We suppose that legal scholars increasingly will be able to maintain, develop and improve the dialogue both “inside” among legal scholars and practitioners as well as with representatives of other sciences, and in particular in search of truth and justice. I believe that neuroscience and law dialogue is inevitable, we should be critical, but open to new changes. I hope that Lithuania will have not to wait long to enormous changes that will allow us to get closer the truth and justice, which are very important to each of us.

Keywords: neuroscience and law, brain, justice, decision-making.

Introduction

Today the world lives in a time of changes: values, attitudes, the thinking paradigm are changing, and postmodern ideas are becoming more popular. The old (classical), deterministic and mechanistic thinking based on absolute clarity, certainty, and search for objectivity is “struggling” with new (postmodern) science which is understood as science of complex dynamic systems by many researchers (e.g., I. Prigogine², S. A. Kauffman³, S. Strogatz⁴, J. Gleick⁵, J. Elster⁶). The new science “does not divide” the sciences into parts, science is increasingly becoming integral. One example of scientific integrity, when different scientists try to

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² I. Prigogine, ‘The End of Certainty. Time, Chaos and New Laws of Nature’ (Oxford: The Free Press 1997).

³ S. A. Kauffman, ‘Investigations’ (Oxford: Oxford University Press, 2000).

⁴ S. Strogatz, ‘Sync: The Emerging Science of Spontaneous Order’ (New York: Hyperion 2003).

⁵ J. Gleick, ‘Chaos: Making a New Science’ (New York: Viking 1987).

⁶ J. Elster, ‘Explaining Social Behavior: More Nuts and Bolts for the Social Sciences’ (Cambridge: Cambridge University Press 2007).

communicate, is the dialogue between neuroscience and law science. This integration has various names—neurolaw, neurojurisprudence, sometimes it is simply called law and neuroscience. More and more western scientists talk about the dialogue between neuroscience and law (e.g., Aronson, 2010; Greene, Cohen, 2004; Jones, Chen, 2012). Although neurolaw is a brand new “product”, and almost nobody talks about it Lithuania, this article aims to at least conceptually cover the manifestations this new dialogue. Aiming at “opening” and perfection, expanding the limits of their knowledge, Lithuanian law science needs to know what neurolaw is, what is happening in the world about it and what we should know in purpose to strengthen Lithuanian legal science, to open it and to be ready to the big innovations in legal science.

The aim of this paper is a conceptual overview what is neuroscience, the dialogue between neuroscience and law, what is happening in the world about the dialogue between neuroscience and law, how much it is widespread over scientific articles, and answering the question whether this dialogue is inevitable. Methods: theoretical–scientific analytical, systematic and critical review and analysis of scientific literature and other relevant sources; empirical–quantitative analysis of scientific articles. For the empirical research, the Thomson Reuters (ISI) Web of Science database (1990–2016) was used to identify papers on the concepts of “neuroscience and law” and “neurolaw“. This very highly cited information database contains the world’s best scientific journals according to citation factors. The database is very suitable for ranking the best scientific articles.

1. What is neuroscience? The main features

US Society for Neuroscience⁷ defines neuroscience as “a science seeking to know human thinking, emotions, and behavior. Carrying out research neuroscientists usually try to describe the human brain and tell us what their normal functions are; determine how the nervous system develops and changes over a person’s life; look for ways to prevent or cure a number of neurological and psychiatric disorders”. In 1969 neuroscience organization included 500 members, nowadays there are more than 40 000 of them. In scientific literature we can see the following descriptions and features of neuroscience, e.g., The British Neuroscience Association⁸ defined neuroscience as “a science of the brain”, L. R. Squire et al.⁹ define neuroscience as a large field founded on the assumption that all behaviour and all mental life have their origin in the structure and function on the nervous system. D. Purves et al.¹⁰ define neuroscience as a broad range of questions about how nervous systems are organized, and how they function to generate behavior. According to the authors, these questions can be explored using the analytical tools of genetics, molecular and cell biology, systems anatomy and physiology, behavioral biology, and psychology. T. M. Spranger¹¹ identifies a wide range of neuroscience research and methods in a variety of areas: biology, medicine, chemistry, physics, psychology, mathematics, computer science, engineering, philosophy, and finally, but certainly not last—the law, which are related to neuroscience.

It would be useful to mention what are the main issues of neuroscience. Based on L. R. Squire et. al.¹² neuroscience is concerned about: cellular and molecular neuroscience (e.g. neurotransmitters), nervous system development (e.g. dendritic development), sensory systems (e.g. vision), motor systems (e.g. eye movements), regulatory systems (e.g. neuroendocrine systems) and behavioural and cognitive neuroscience (e.g. executive brain functions, learning and memory).

It would be useful to mention the most popular and valuable scientific materials about neuroscience in general: M. T. Banich et al. “Cognitive Neuroscience”¹³, M. F. Bear et al. “Neuroscience: Exploring the Brain”¹⁴,

⁷ US Society for Neuroscience. Available at: <<https://www.sfn.org/>>.

⁸ The British Neuroscience Association. Available at: <<https://www.bna.org.uk/>>.

⁹ L. R. Squire et. al., ‘Fundamental Neuroscience’ (Elsevier 2008).

¹⁰ D. Purves et al., ‘Neuroscience’ (Massachusetts: Publishers: Sunderland 2004).

¹¹ T. M. Spranger (ed.), ‘International Neurolaw: a Comparative Analysis’ (Springer 2012).

¹² L. R. Squire et. al., ‘Fundamental Neuroscience’ (Elsevier 2008).

¹³ M. T. Banich et al., ‘Cognitive Neuroscience’ (Wadsworth Publishing 2004).

¹⁴ M. F. Bear et al., ‘Neuroscience: Exploring the Brain’ (Lippincott Williams and Wilkins 2006).

S. Finger, "Origins of the Neuroscience: a History of Explorations into Brain Function"¹⁵, M. S. Gazzaniga et al. "Cognitive Neuroscience"¹⁶, S. A. Huettel et al. "Functional Magnetic Resonance Imaging"¹⁷, J. Ward "The students Guide to Cognitive Resonance"¹⁸. As S. K. Ericson¹⁹ suggests, that life is about the brain. It should be noted that neuroscience is a very broad and rapidly developing science.

2. The dialogue between neuroscience and law: what is happening in the world about it?

According to O. D. Jones, T. H. Goldsmith²⁰ "Law is stuffy, bookish, and boring. Or so many people think. But forget, for a moment, the impressions of law that often come first to mind. Wood-paneled courtrooms. Dusty texts." These scientists persuade that law is a source of order, whether it serves a regularizing function, an exchange-facilitating function, a peace-securing function, or the like. And "although the law is, of course, a form of human behavior it is also manifestly—and most importantly—a system for regulating human behavior. Which brings us to brains." The scientists note, that law is, at the base, about changing behavior, and because behavior, at the base, comes from brains, it follows that deeper understanding of the relationships between brains and behaviors (and, relatedly, about perception, judgment, decision-making, and the like) may improve the law.

In short, neurolaw is the integration of neuroscience and law, and it is the manifestation of combined sciences. This is a science which has been increasingly gaining acceptance in recent years (e.g., O. R. Goodenough, M. Tucker²¹; J. D. Aronson²²). Law and neuroscience research can be a good aid at problems where legal doctrine fails to achieve results and where existing legal scholarship cannot answer for these failures.²³ The concept "neurolawyer" was first mentioned in J. Taylor's article²⁴ in 1991 and the concept "neurolaw"—in J. Taylor's article²⁵ in 1995.

According to O. R. Goodenough and M. Tucker²⁶, the dialogue between neuroscience and law began in about the late 1990s. There have been some developments of the neurolaw aspect, e.g.: the law and neuroscience dialogue received early encouragement from the Dana Foundation²⁷ and the Gruter Institute for Law and Behavioral Research²⁸ and, beginning in 1999, it increasingly became a focus for presentations at the Society for Evolutionary Analysis in Law (SEAL)²⁹. In 2007, neurolaw received a boost forward of the Law and Neuroscience Project, funded by a \$10 million grant from the MacArthur Foundation. Today The Web site of the Law and Neuroscience Project³⁰ is a good starting point for further interests in neurolaw. It includes a big bibliography (Figure 1) of neurolaw publications, materials of conferences, videos, links and other resources about neurolaw. The most recent data shows that law and neuroscience bibliography contains 1341 entries³¹. There are a lot of resources about neurolaw issues such as, e.g., neuroscience and law dialogue; adolescent brain; the importance of emotions cognition in law; brain injuries; neuroimaging technologies and their importance in law; legal moral reasoning; legal decision-making; emotions and legal decision-making; lie

¹⁵ S. Finger, 'Origins of the Neuroscience: a History of Explorations into Brain Function' (Oxford University Press 2001).

¹⁶ M. S. Gazzaniga et al., 'Cognitive Neuroscience' (W. W. Norton & Company 2013).

¹⁷ S. A. Huettel et al., 'Functional Magnetic Resonance Imaging' (Sinauer Associates 2008).

¹⁸ J. Ward, 'The students Guide to Cognitive Resonance' (Psychology Press, 2010).

¹⁹ S. K. Erickson. 'The Limits of Neurolaw' 9 [2011] Hous J. Health L. & Pol'Y 303-320.

²⁰ O. D. Jones, T. H. Goldsmith, 'Law and Behavioral Biology' 105 Columbia Law Review 405-502.

²¹ O. R. Goodenough, M. Tucker, 'Law and Cognitive Neuroscience' [2010] 6 Annu. Rev. Law Soc. Sci. 61-92.

²² J. D. Aronson, 'The Law'S Use Of Brain Evidence' [2010] 6 Annu. Rev. Law Soc. Sci. 93-108.

²³ O. R. Goodenough, M. Tucker, 'Law and Cognitive Neuroscience' [2010] 6 Annu. Rev. Law Soc. Sci. 61-92.

²⁴ J. S. Taylor, H. J. Anderson, E. Tyron, 'Neuropsychologists and Neurolawyers' [1991] 5(4) Neuropsychology 293-305.

²⁵ J. S. Taylor, 'Neurolaw: Towards a New Medical Jurisprudence' [1995] 9(7) Brain inj. 745-751.

²⁶ O. R. Goodenough, M. Tucker, 'Law and Cognitive Neuroscience' [2010] 6 Annu. Rev. Law Soc. Sci. 61-92.

²⁷ Dana Foundation. Available at: <<http://www.dana.org>>.

²⁸ Gruter Institute for Law and Behavioral Research. Available at: <<http://www.gruterinstitute.org>>.

²⁹ The Society for Evolutionary Analysis in Law (SEAL). Available at: <<http://www.sealsite.org>>.

³⁰ Law and Neuroscience Bibliography. Available at: <<http://www.lawneuro.org/bibliography.php>>.

The MacArthur Foundation Research Network on Law and Neuroscience. Available at: <www.lawneuro.org>.

³¹ Law and Neuroscience Bibliography. Available at: <<http://www.lawneuro.org/bibliography.php>>.

detection in law; legal aspects of penalty and sentencing; memory and its aspects in law; responsibility aspects in law and so on.

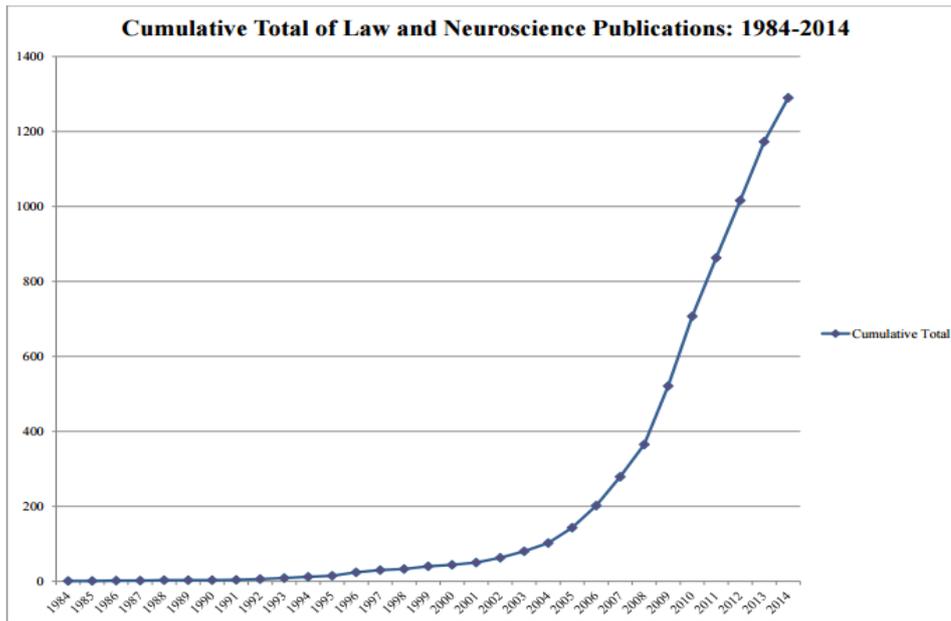


Figure 1. Cumulative growth in the number of “law and neuroscience” publications” (1984-2014). The figure is reproduced from the Law and Neuroscience Bibliography on the website of The MacArthur Foundation Research Network on Law and Neuroscience³².

To explore how the concepts “neuroscience and law or law and neuroscience” and “neurolaw” are used in scientific articles, a quantitative analysis of articles was conducted using Thomson Reuters (ISI) Web of Science (1990–2016³³). This very highly cited information database contains the world’s best scientific journals according to citation factors. During the investigation, a total of 68 scientific articles were found (“neuroscience and law or law and neuroscience”—21 articles, and “neurolaw”—47 articles) (Figure 2). Therefore, there are quite a lot articles about the manifestation of neuroscience and law dialogue in the scientific prestigious information database.

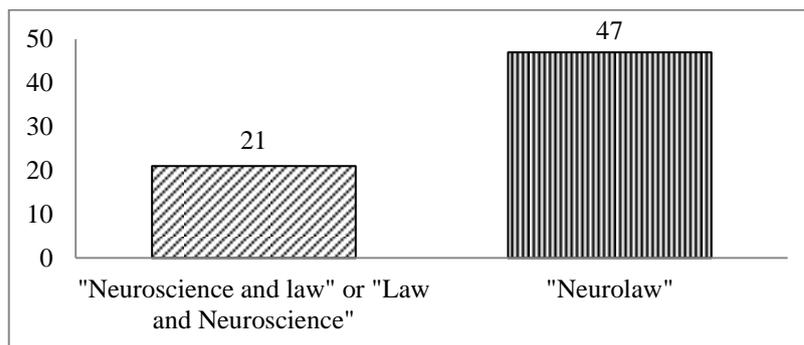


Figure 2. The number of articles that refer to neuroscience and law dialogue. Distribution in the Thomson Reuters (ISI) Web of Science database (1990–2016³⁴).

³² The MacArthur Foundation Research Network on Law and Neuroscience. Available at: <www.lawneuro.org>.

³³ By February 2016.

³⁴ By 2016 february.

There are a number other important organizations when we talk about neurolaw: The American Association for the Advancement of Science (AAAS): Science and the Law³⁵, International Neuroethics Society³⁶, Association fo psychological Science³⁷, Cognitive Neuroscience Society³⁸, Society for Social Neuroscience³⁹, European Association for Neuroscience and Law (EANL)⁴⁰, The Society for Judgment and Decision Making⁴¹, European Association for Decision Making⁴².

Universities and law schools have recognized that law and neuroscience is an important field: manifestation of neurolaw is very important. They are developing courses, organizing conferences, initiatives, and centers. More and more neurolaw lectures appear at universities⁴³, e.g., Pennsylvania University, Rice University, Vanderbilt University, Pavia University, Fordham University, College London University, Southern California University, Oxford University, Georgia State University, Macquarie University, Tulane University, Manchester Metropolitan University, Saint Mary's University, Carnegie Mellon University, The European University, Massachusetts University, Wisconsin-Madison University, Stanford University, Minnesota University, Loyola University, San Diego University, Exeter University, Duke University, Kent University, Southern California University, Washington and Lee University, Ottawa University, Dublin City University, Marquette University, Western Sydney University. This is not the exhaustive list, the number of initiatives and centers is increasing.

It would be useful to notice the initiatives and centers of neuroscience and law: and Baylor's Initiative on Neuroscience and the Law⁴⁴, The Laboratory for Perception and Action and the Initiative on Neuroscience and Law at Baylor College of Medicine⁴⁵, the University of Pennsylvania's Center for Neuroscience and Society⁴⁶, The Center for Law, Brain and Behavior (CLBB) at Massachusetts General Hospital⁴⁷, Center for Innovation and Law, Vermont Law School⁴⁸, The European Centre for Law, Science and New Technologies (ECLT)⁴⁹, Fordham's Neuroscience and Law Center DUKE science and society⁵⁰, Arizona State university The Center for Law, Science & Innovation⁵¹, Neuroscience and Society (SPINS) is a new multidisciplinary initiative based at the Stanford Law School⁵², The Neurolaw Project (Oxford University)⁵³. This is not the exhaustive list, the number of initiatives and centers are growing.

If we are interested in neurolaw, there are plenty of scientific materials published, which could be very useful aiming at learning more about the dialogue of neuroscience and law in general: O. D. Jones et al. "Law and Neuroscience"⁵⁴, M. S. Pardo, D. Patterson "Minds, Brains and Law: the Conceptual Foundations of Law

³⁵ The American Association for the Advancement of Science (AAAS): Science and the Law. Available at: <<http://www.aaas.org/program/center-science-policy-and-society-programs>>.

³⁶ International Neuroethics Society. Available at: <<http://www.neuroethicssociety.org/>>.

³⁷ Association fo psychological Science. Available at: <www.psychologicalscience.org>.

³⁸ Cognitive Neuroscience Society. Available at: <www.cogneurosociety.org>.

³⁹ Society for Social Neuroscience. Available at: <<http://www.s4sn.org/>>.

⁴⁰ European Association for Neuroscience and Law (EANL). Available at: <<http://www.neurolaw-eanl.org/>>.

⁴¹ The Society for Judgment and Decision Making. Available at: <<http://www.sjdm.org/>>.

⁴² European Association for Decision Making. Available at: <<http://eadm.eu/>>.

⁴³ Based on „Google“ search (www.google.com) and universities webpages information.

⁴⁴ Baylor's Initiative on Neuroscience and the Law. Available at: <<http://www.neulaw.org>>.

⁴⁵ The Laboratory for Perception and Action and the Initiative on Neuroscience and Law at Baylor College of Medicine. Available at: <<http://www.eaglemanlab.net/>>.

⁴⁶ The University of Pennsylvania's Center for Neuroscience and Society. Available at: <<http://neuroethics.upenn.edu>>.

⁴⁷ The Center for Law, Brain and Behavior (CLBB) at Massachusetts General Hospital. Available at: <<http://clbb.mgh.harvard.edu/about-us/>>.

⁴⁸ Center for Innovation and Law, Vermont Law School. Available at: <<http://www.vermontlaw.edu/academics/centers-and-programs/center-for-legal-innovation>>.

⁴⁹ The European Centre for Law, Science and New Technologies (ECLT). Available at: <<http://www.unipv-lawtech.eu/lang1/>>.

⁵⁰ Fordham's Neuroscience and Law Center DUKE science and society. Available at: <<https://scienceandsociety.duke.edu/>>.

⁵¹ Arizona State university The Center for Law, Science & Innovation. Available at: <<https://law.asu.edu/faculty/centers/lsci>>.

⁵² Neuroscience and Society (SPINS) is a new multidisciplinary initiative based in the Stanford Law School. Available at: <<https://law.stanford.edu/stanford-program-neuroscience-society/>>.

⁵³ The Neurolaw Project (Oxford University). Available at: <<https://www.law.ox.ac.uk/research-and-subject-groups/neurolaw-project>>.

⁵⁴ O. D. Jones, J. D. Schall, F.X. Shen, 'Law and Neuroscience' (Aspen Publishers 2014).

and Neuroscience”⁵⁵, H. Burton “Neurolaw: a Conversation with Nita Farahany”⁵⁶, T. M. Spranger (ed.) “International Neurolaw: a Comparative Analysis”⁵⁷, W. Glannon (ed.), “Free Will and the Brain”⁵⁸, B. Garland (ed.) “Neuroscience and the Law”⁵⁹, N. A. Vincent (ed.) “Neuroscience and Legal Responsibility”⁶⁰, J. Illes, B. J. Sahakian “Oxford Handbook of Neuroethics”⁶¹. The scientific materials about neuroscience and law are rapidly growing.

After reviewing the main situation in neurolaw: its manifestation, the main literature and dialogues between scientists, it would be an important question to ask about the main issues in neurolaw. In what way does neuroscience change the law? It would be useful to try to identify the main issues of neurolaw. First, we chose O. D. Jones et al.⁶² (the first neuroscience and law coursebook). We can identify the main issues in neurolaw (all book is about 800 pages and we can see on content, what are the main issues): brain, behavior and responsibility; fundamentals of cognitive neuroscience (e. g. brain structure and functions); the injured brain; the thinking and feeling brain (e. g. memory, emotions, lie detections, judging); the developing and addicted brain (e. g. adolescent brains); the future issues of neurolaw (e. g. cognitive enhancement). All these issues are very extensive and neuroscience could provide a lot of knowledge about it. It should be mentioned that neurolaw is related to ethical questions too, e.g., nootropics and its effects on humanity (how these medical preparations could affect individuals’ legal rights?). O. R. Goodenough and T. Tucker mention the main areas of neuroscience issues: knowledge and techniques about pain, memory, and truth-telling; neuroscience facts and approaches about courts; free will, responsibility, moral judgment, and punishment; adolescents; addictions; mental health; bias; emotions; and decision-making.⁶³

J. Cookson in his article mentioned O. D. Jones, who highlights six ways in which neuroscience changes and shapes the law. First, third-party decisions, researchers typically seek to understand how decisions are made, as it is known, what is bad, what is good, why and how somebody should be punished. It is very important to seek to understand these processes. Second, lie detection, which is very important in law. Neuroscience methods could help to detect the lie, e.g. fMRI-based lie detection. Third, mental state: neuroscience may also help to answer the questions about everybody mental states, e.g., defendant mental state. Fourth, memory: memory in law is very important, especially in courts, eyewitnesses memory could change all the end of the case. Neuroscience could help to understand memory more and accurate. Fifth, the adolescent brain: neuroscience methods can also determine how the brain during adolescence may react to certain stimuli which will lead to certain behavior, and so on. Sixth, the appeal as the basis of the brain: this is often relevant when considering the death penalty issue.⁶⁴

It would be useful to mention some aspects what neuroscience tells to law: neuroscience data have been used in the U.S. Supreme Court *Roper v. Simmons*⁶⁵ case in which capital death punishment was found to be unconstitutional for people under 18 years. The court mentioned L. Steinberg⁶⁶ who explore that adolescent prefrontal cortex is formed about 18-25 years and this may lead that younger people are more impulsivity, irrational, they can not be such responsible like adults; neuroscience data about memory are very important, e.g., “People can remember events that they have not in reality experienced“, “Memories of traumatic experiences, childhood events, interview and identification practices, memory in younger children

⁵⁵ M.S. Pardo, D. Patterson, ‘Minds, Brains and Law: the Conceptual Foundations of Law and Neuroscience’ (Oxford University Press 2013).

⁵⁶ H. Burton (ed.), ‘Neurolaw: a Conversation with Nita Farahany’ (Open Agenda Publishing 2015).

⁵⁷ T. M. Spranger (ed.), ‘International Neurolaw: a Comparative Analysis’ (Springer 2012).

⁵⁸ W. Glannon (ed.), ‘Free Will and the Brain’ (Cambridge University Press 2015).

⁵⁹ B. Garland (ed.), ‘Neuroscience and the Law’ (Dana Press 2004).

⁶⁰ N. A. Vincent (ed.), ‘Neuroscience and Legal Responsibility’ (Oxford University Press 2013).

⁶¹ J. Illes, B. J. Sahakian, ‘Oxford Handbook of Neuroethics’ (Oxford University Press, 2011).

⁶² O. D. Jones, J. D. Schall, F.X. Shen, ‘Law and Neuroscience’ (Aspen Publishers 2014).

⁶³ O. R. Goodenough, M. Tucker, ‘Law and Cognitive Neuroscience’ [2010] 6 Annu. Rev. Law Soc. Sci. 61-92.

⁶⁴ J. Cookson, ‘How Neuroscience is Changing the Law?’ [2013] Big Think. Available at: <<http://bigthink.com/going-mental/how-neuroscience-is-changing-the-law>>.

⁶⁵ *Roper v. Simmons*, [2005] 543 U.S. 551.

⁶⁶ L. Steinberg, ‘The Influence of Neuroscience on US Supreme Court Decisions About Adolescents’ Criminal Culpability’ [2013] 14 Nat. Rev. Neurosci. 513–518.

and older adults and other vulnerable groups all have special features⁶⁷; there are a lot of discussions about individuals free will. There are very interesting B. Libet and colleagues⁶⁸ experiments, which show, that our brain activity (related to acting) increase not less than 300ms before our conscious starts to act.

It is very important neurolaw issue—court and judges neuroscientific aspects. As D. L. Faigman⁶⁹ “While science attempts to discover the universals hiding among the particulars, trial courts attempt to discover the particulars hiding among the universals.” According to P. Casey⁷⁰ moral reasoning and decision-making processes are very important aspects in neurolaw, “Judges who aspire to be great—not just good—at their profession need to focus on how to become better at making good decisions“. We want to introduce some neuroscience research findings which are very valuable in the decision-making in law area. Scientists show that even those people who consciously seek to be conscientiousness and objective may be affected implicit biases.⁷¹ People mostly make decisions which are not good “calculated“. They make decisions which are biased, irrational and intuitive.⁷² If we want to avoid bad decisions in law, we should we want to know worsening causes and it often depends on, e.g., fatigue, the level of glucose, multifunctionality, mood, ability to process information.⁷³ Scientists show, that if we want to make better decisions we should reduce the stress.⁷⁴

As T. P. O’Neill⁷⁵ rather, a decision is the result of justice’s “priors“, i.e., the policy preferences, values, and empirical views that a justice brings to the table. In other words, the theory does not produce a result; it merely justifies a result that has already been reached. We have to recognize that emotions are integrated into our decisions. The emotional part of our brain is so efficient that it works automatically without our being conscious of its processes. According to J. Lehrer, “The process of thinking requires feeling, for feelings let us understand all the information that we can’t directly comprehend“⁷⁶. According to J. Haidt⁷⁷, “Moral judgment is like aesthetic judgment. When you see a painting, you usually know instantly and automatically whether you like it. If someone asks you to explain your judgment, you confabulate <...>. When you refute a person’s moral argument, does she generally change her mind and agree with you? Of course not, because the argument you defeated was not the cause of her position; it was made up after the judgment was already made <...>. In moral arguments <...> the reasoning part of the brain becomes a lawyer, fighting in the court of public opinion to persuade others of the emotional part of the brain’s point of view“. T. P. O’Neill apply this quotes to legal decision-making and highlights that “The relation between neuroscience and judicial decision-making has the potential to become one of the most intriguing issues legal scholars will face in the 21st century“. Therefore, emotions are such aspect about which lawyers should know. Scientists agree, that without an emotional content, much of the motivational force of normative judgment would be missing (e.g., S. Bandes⁷⁸; O. R. Goodenough, K. Prehn⁷⁹; J. D. Greene et al.⁸⁰; M. Freeman, O. R. Goodenough⁸¹). It should be noted that relationship between moral and law is of great importance. The moral aspect of the law is particularly

⁶⁷ The British Psychological Society, ‘Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory‘ (2008).

⁶⁸ B. Libet et al., ‘Time of Unconscious Intention to Act in Relation to Onset of Cerebral Activity‘ [1983] 106 Brain 623-642.

⁶⁹ D. L. Faigman, ‘Legal Alchemy‘ (1999).

⁷⁰ P. Casey, K. Burke, S. Leben, ‘Minding the Court: Enhancing the Decision Making process‘ [2013] 49(2) Court Review The Journal of the American Judges Association.

⁷¹ P. G. Devine, ‘Stereotypes and Prejudice: Their Automatic and Controlled Components‘ 56 J. [1989] Personality And Soc. Psychol. 5.

⁷² G. Gigerenzer, P. M. Todd, ABC Research group, ‘Simple Heuristics that Make Us Smart‘ (Oxford University Press 1999). Available at: <<http://www-abc.mpib-berlin.mpg.de/shtmus/>>.

⁷³ P. Casey, K. Burke, S. Leben, ‘Minding the Court: Enhancing the Decision-Making Process‘ (2013).

⁷⁴ J. A. Heydenfeldt, L. Herkenhoff and M. Coe, ‘Mind Fitness Training: Emerging Practices & Business Applications: Applied Neuroscience‘ [2011] 150 Int’l J. Humanities & Soc. Sci.

⁷⁵ T. P. O’Neill, ‘Studying the Art of Judicial Decision Making‘ [2009] 155(115) Chicago Daily Law Bulletin.

⁷⁶ J. Lehrer, ‘How We Decide‘ (Houghton Mifflin Harcourt 2009).

⁷⁷ J. Haidt, Happiness Hypothesis (Basic books 2006).

⁷⁸ S. Bandes, ‘The Passion of Law‘ (NYU Press 1999).

⁷⁹ O. R. Goodenough, K. Prehn, ‘A Neuroscientific Approach to Normative Judgment in Law and Justice‘ [2004] 359 Philosophical Transactions of the Royal Society of London Series B-Biological Science 1709–1726.

⁸⁰ J. D. Greene et al., ‘Cognitive Load Selectively Interferes With Utilitarian Moral Judgment [2008] 107 Cognition 1144-1154.

⁸¹ M. Freeman, O. R. Goodenough (eds), ‘Law, Mind and Brain‘ (Ashgate Publishing 2009).

important. It is extremely complex. It is very important how moral decision-making influences juridical decisions. The answer to this makes scientists search for the right answers in neuroscience (e.g., Greene et al.⁸²). Neuroscience generally deals with moral dilemmas, selecting a wide range of scenarios, observing human brain activity, e.g., “Trolley problem”⁸³: you need to imagine that you are a traffic regulator, clicking through the rails and you send them where it is necessary. Suddenly you see a train pelting at a high speed with no brakes. You notice that five workers with headphones standing on one track, you can see that the train soon will hit the workers, but you can still do something – direct the train to other tracks where one of the workers stands and who also does not see and cannot hear the train. That is the moral dilemma scenario. Typically, most people reply that they would save the five workers.

We have to highlight that lawyers lack knowledge about themselves. They often don't know about a lot of brain aspects, stress, happiness and how to improve (train) brain, to make a better decision, to concentrate, to be happy and etc. Depend on these aspects a lot of legal decisions, mistakes, and processes. For example, D. A. Sousa⁸⁴ said that lawyers are like teachers—they often try to change someone's brain. Lawyers are usually explaining the rule or defending the position in an effort to teach or convince the listener. So, the more lawyers know about the brain, they are likely to be successful to help people to learn and remember. What should do, e.g., judges, on purpose to make a better decision? How improve decision-making abilities? It depends on our prefrontal cortex and limbic system health. If we hurt our prefrontal cortex our decision-making abilities could get confused. The prefrontal cortex is the main decision-making region in our brain. But the limbic system, which is very related to our emotional status is very important too.⁸⁵ There are some tips how to improve decision-making abilities and our prefrontal cortex and limbic system: to concentrate on the bigger purposes instead of mechanically work, consider our heuristic decision-making, judges should be more mindful, feel feedback⁸⁶; meditate (scientists show that 8 weeks meditation improve people decision-making abilities)⁸⁷; to have a good sleep (6.5-7.5 hours per night)⁸⁸ regularly exercise, everyday 20 minutes and eat what love your brain (e.g. salmon, broccoli, blueberries, pumpkin seeds)⁸⁹, try to make decision in the morning even about 11 o'clock when your serotonin level is naturally highly level (one research shows, that Judges were more likely to award parole early in the morning and immediately after taking breaks.⁹⁰ Other research shows that we are moral in the morning but dishonest in the afternoon.⁹¹); we should intake omega-3⁹², try to achieve mindfulness state⁹³. There are not an exhaustive list. Recent studies show a lot of news about the brain and a lot of news which is very important to lawyers. What is why law scientists and neuroscientist should be in collaboration, what to know a lot of news about the human brain and try to do the better and justice world for us, resolving our disputes, changing our lives—making very important decisions.

⁸² J. D. Greene et. al., 'An fMRI Investigation of Emotional Engagement in Moral Judgment' [2001] 293 *Science* 2105-2108.

⁸³ J. J. Thomson, 'The Trolley Problem' [1985] 94(6) *The Yale Law Journal* 1395-1415.

⁸⁴ D. A. Sousa, 'How Brain Science Can Make You Better Lawyer' (ABA Publishing 2009).

⁸⁵ N. L. Denburg, D. Tranel, A. Bechara, 'The Ability to Decide Advantageously Declines Prematurely in Some Normal Older Persons' 43 [2005] *Neuropsychologia* 1099-1106; L. K. Fellows, M. J. Farah, 'Dissociable Elements of Human Foresight: a Role for the Ventromedial Frontal Lobes in Framing the Future, but not in Discounting Future Rewards' [2005] 43(8) *Neuropsychologia* 1214-1221).

⁸⁶ P. Casey, K. Burke, S. Leben, 'Minding the Court: Enhancing the Decision-Making Process' (2013).

⁸⁷ A.C. Hafenbrack, Z. Kinias, S. G. Barsade, 'Debiasing the Mind Through Meditation Mindfulness and the Sunk-Cost Bias' 6 [2013] *Psychological Science*.

⁸⁸ D. F. Kripke et al., 'Mortality Associated With Sleep Duration and Insomnia' 59(2) [2002] *Arch Gen Psychiatry* 131-136.

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⁹¹ M. Kouchaki, I. H. Smith, 'The Morning Morality Effect: The Influence of Time of Day on Unethical Behavior' 28 [2013] *Psychological Science*. Available at: <<http://pss.sagepub.com/content/early/2013/10/28/0956797613498099.abstract>>.

⁹² K. M. Appleton et al., 'Omega-3 Fatty Acids for Depression in Adults' [2015] *Cochrane Database of Systematic Reviews*. Available at: <http://www.cochrane.org/CD004692/DEPRESSN_omega-3-fatty-acids-depression-adults>.

⁹³ J. Gaa et al., 'How Do Mindfulness-based Cognitive Therapy and Mindfulness-based Stress Reduction Improve Mental Health and Wellbeing? A Systematic Review and Meta-analysis of Mediation Studies' 37 [2015] *Clinical Psychology Review* 1–12.

4. Is this dialogue inevitable?

Neuroscience more and more finds ways how to help other sciences. Law science is one of them. Is neurolaw an inevitable dialogue between neuroscience and law? It can be answered clearly, yes. Neuroscience could help law science to answer a lot of questions, but we should be critical and patient. Neurolaw is a new interdisciplinary field, so we have to be ready to accept errors and failures. But the world is changing and we can't move on if we will be afraid of errors and fails. Always it is very important to discuss, criticize and move on. Without understanding human thoughts, emotions and behaviors, law science is like a "blind" science. I think that neuroscience and law dialogue will cause dramatic changes in the future. Neurolaw is gaining great momentum in the US, but the integrity of the law and neuroscience is increasingly grabbing the attention of scientists in other countries, such as Australia, South America, Canada, Finland, Germany, Austria, Japan, Greece, Italy, and others⁹⁴. More and more scientists over the world become interested in neurolaw.

In the scientific field, there are different opinions about the future of neurolaw. We should agree that the future is uncertain, but this is not a reason to postpone the dialogue. There are scientists who are very cautious, e.g., that you do not expect too much from neurolaw⁹⁵; it is said that it can sometimes be misinterpreted on the basis of neuroscience in law⁹⁶; it is persuaded, that you can find a lot of speculations about neuroscience impact on the law⁹⁷; it is noted that neuroscience confuses law instead of improving it.⁹⁸ On the other hand, e.g., according to S. J. Morse⁹⁹ several years ago neuroscience and law dialogue was a doubtful area, but today this dialogue is less and less doubted; B. Garland¹⁰⁰ observed, that neuroscience and law dialogue is obvious and inevitable, neuroscientists and legal scientist should try to find the ways to cooperate; neuroscience methods are very important to law.; J. D. Greene and J. D. Cohen¹⁰¹ agree that neuroscience will change law, transforming people's moral intuitions about free will and responsibility.

According to O. W. Jones and F. X. Shen¹⁰² in USA, e. g., judges increasingly being taught neurolaw, it is intended to provide the basics of the newest neuroscience achievements. As S. J. Morse¹⁰³ notes, it is possible to distinguish four situations in which neuroscience can still help: provide evidence that law regulations based on the "folk" psychology are incorrect; provide data that show the characteristics new or reformed law doctrine; provide evidence that will help to make decisions in the case; provide data that will help you more efficiently make decisions.

According to S. K. Erickson¹⁰⁴ neuroscience affects the law inevitably and dramatically. We should realize that every new approach to law, every new dialogue with other sciences enriches the law science. Even if something goes wrong we always have the opportunity to return. Nowadays, perhaps, the most important feature of science is the ability to be open to the different ways of seeking knowledge.

⁹⁴ T. M. Spranger (ed.), 'International Neurolaw: a Comparative Analysis' (Springer 2012).

⁹⁵ S. J. Morse, 'Avoiding Irrational Neurolaw Exuberance: a Plea for Neuromodesty' 3(2) [2011] Law, Innovation & Technology 209-228.

⁹⁶ A. A. Baird, C. L. Barrow, M. K. Richard, 'Juvenile Neurolaw: When It's Good It Is Very Good Indeed, and When It's Bad It's Horrid' 15(1) [2012] Journal of Health Care Law & Policy 15-35.

⁹⁷ T. Brown, E. Murphy, 'Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States' [2010] 62(4) Stanford Law Review 1119-1208.

⁹⁸ M. S. Pardo, D. Patterson, 'Neuroscience and Legal Theory: Jurisprudence, Morality and Economics' Rutgers Institute for law and philosophy. Available at: <<http://lawandphil.rutgers.edu/sites/lawandphil.rutgers.edu/files/pardo.pdf>>.

⁹⁹ S. J. Morse, 'Avoiding Irrational Neurolaw Exuberance: a Plea for Neuromodesty' 3(2) [2011] Law, Innovation & Technology 209-228.

¹⁰⁰ B. Garland (ed.), 'Neuroscience and the Law' (Dana Press 2004).

¹⁰¹ J. D. Greene, J. D. Cohen, 'For the Law, Neuroscience Changes Nothing and Everything' 359 [2004] Phil. Trans. R. Soc. Lond. B. 1775-1785.

¹⁰² O. W. Jones, F. X. Shen, Law and Neuroscience in the United States. In Spranger, T. M. (Ed.) International Neurolaw. (Heidelberg: Springer, 2012) 349-380.

¹⁰³ S. J. Morse, 'Avoiding Irrational Neurolaw Exuberance: a Plea for Neuromodesty' 3(2) [2011] Law, Innovation & Technology 209-228.

¹⁰⁴ S. K. Erickson. 'The Limits of Neurolaw' 9 [2011] Hous J. Health L. & Pol'Y 303-320.

Conclusions

The dialogue between neuroscience and law is inevitable; this is confirmed by a lot of manifestations of this dialogue: courses at universities, books, associations, research groups, articles and other scientific resources. In this paper, it was observed 68 articles in the most popular scientific database (Thomson Reuters (ISI) Web of Science) related with neuroscience and law dialogue (concepts “neuroscience and law“ and “neurolaw“). So the dialogue is rapidly growing all over the world and it should be expected in Lithuania too.

We have to understand that there should be a lot of changes. The future of this inevitable integration depends on how scientists communicate and achieve the fairest goals for us. Neurolaw scientists should seek the justice and truth—not just about new discoveries about the brain but new discoveries about interdisciplinary dialogue for each of them. The dialogue and constructive criticism between scientists are the main aspects of these complex changes along the way. The scientists should open themselves to new and sometimes frightening activities and challenges in purpose to live in a better world.

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ISSUES OF ARBITRATOR'S LIABILITY AS REGARDS THE RIGHT TO FAIR TRIAL: WHAT WAY TO CHOOSE FOR POLICY-MAKER?

Tadas Varapnickas¹

Abstract

The purpose of this paper is to analyse whether the indecisiveness of most policy-makers in different countries on arbitrator's liability helps protect human right to fair trial or denies it. In order to achieve this goal, firstly, the issues of arbitrator's liability are examined: the paper tries to reveal the main problems of arbitrator's liability and examine why most laws on arbitration do not regulate the issue. Secondly, the paper analyses whether the situation, when the policy-maker guarantees immunity to arbitrator, would help ensure the right to fair trial on one hand and, on the other hand, whether the situation when arbitrator can be held liable for the damages he or she caused would ensure the impartiality and independence of arbitrator. Thirdly, the paper examines and evaluates the situations when qualified immunity is guaranteed to arbitrators.

When analysing abovementioned issues, the author argues what regulation would be the most suitable for the protection of the right to fair trial. Based on the experience of other countries and on the opinion of legal scholars, the paper concludes that limited immunity of an arbitrator would solve the analysed issue.

The paper aims to examine both laws, doctrine and case-law of various countries which have strong arbitration traditions.

Keywords: arbitration, arbitrator's liability, right to fair trial, policy-making

Introduction

Right to fair trial foreseen in Article 6 Para. 1 of the European Convention on Human Rights² is considered to be one of the essential human rights in countries respecting rule of law. It is an established case-law of the European Court of Human Rights (hereinafter, the ECHR) that "Article 6 para. 1 is intended above all to secure the interests of the parties and those of the proper administration of justice"³. Moreover, the ECHR continues that "it is left to the national authorities to ensure in each individual case that the requirements of a "fair hearing" are met"⁴. It is clear that law-givers are bound to guarantee a national regulation which would allow litigants to have a fair trial. This obligation became even more important when the ECHR concluded that the right to fair trial cannot be interpreted restrictively⁵. However, it also seems that the ECHR granted the Contracting States "a relatively wide margin of appreciation"⁶ as regards the judicial immunity.

Arbitration is one of the most popular dispute resolution methods, particularly in the international field and arbitrators are permitted to rule on the most complex legal matters. However, arbitrators are not entitled to render awards on behalf of the state. It is a contractual matter. Nevertheless, the "right of access to court and a public trial in a court of law can be waived in favour of arbitration via an agreement. However, this does not mean the European Convention on Human Rights would not have any meaning in relation to arbitration. As

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² Council of Europe, European Convention on Human Rights 1953, <http://www.hri.org/docs/ECHR50.html#C.Art8> [last viewed 12-03-2016]

³ Niderost-Huber v. Switzerland, [1997] ECHR Application no. 18990/91 para. 30

⁴ Dombó Beheer B.V. v. The Netherlands, [1993] ECHR Application no. 14448/88 para. 33

⁵ Delcourt v. Belgium, [1970] ECHR Application no. 2689/65 para. 25

⁶ Matthias Kolth, 'Immunities and the Right to Access to Court under Article 6 of the European Convention on Human rights' (Leiden: Martinus Nijhoff Publishers 2010) 185

arbitration is a kind of surrogate for normal court procedure, some procedural standards need to be upheld to compensate for loss to access to court⁷.

If it is so, the question arises if parties to the arbitration are entitled to compensation of damages, if any, incurred during the arbitration proceedings because of either illegal activities or other misconduct of the arbitrator. In order to achieve the goals of Article 6 Para. 1 of the European Convention on Human Rights, ought the national policy-makers to adopt the regulation which guarantees the immunity or allows the liability of arbitrators. This issue is the subject-matter of this article.

The article aims to determine how either an immunity or a liability of arbitrator would deal with the right to fair trial and whether policy-makers should adopt a specific regulation on the issue or leave it to the practice and academia to be solved.

When writing this paper, the main research methods were systematic and analytical. The author discussed the most important positions found in the case-law and legal doctrine. As regards the right to fair trial itself, the case-law of the ECHR was used as a main source without analysing case-law of other national and international courts, because of the limited extent of the paper.

1. Different countries – same issue: situation on arbitrator’s liability

Famous British arbitration academic and practitioner Jan Paulsson once wrote: the “idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers”⁸. Those chosen decision-makers is one of the fundamental attributes of arbitration because “it involves the submission of disputes to a non-governmental decision-maker selected by or for the parties”⁹. It follows that the parties to the dispute are responsible for the selection of decision-makers themselves and this is one of the main differences from the dispute resolution in national courts where judges are appointed by the state. However, although a regulation on judicial liability is clear, the same cannot be said about the arbitration.

First of all, if one looked at the laws on arbitration of various countries he would notice that majority of those laws are silent on arbitrator’s liability. For instance, the Swedish Arbitration Act¹⁰ adopted in 1999 as well as the Federal Statute on Private International Law of Switzerland¹¹ or Estonian Code of Civil Procedure of 2005¹² are tacit on arbitrators’ liability. Moreover, even the new laws adopted on arbitration, for example French arbitration law adopted in 2011¹³, Lithuanian Law on Commercial Arbitration of 2012¹⁴ or Latvian Arbitration Act¹⁵ adopted in 2014, did not see the necessity to regulate those issues.

UNCITRAL Model Law on International Commercial Arbitration¹⁶ which is one of the main examples for national law-givers when adopting arbitration laws does not regulate the issues of arbitrator’s liability either. As the doctrine states, the question was considered to be too controversial when UNCITRAL drafted the Model Law in 1985¹⁷. One of the rare but famous exception is the English Arbitration Act 1996¹⁸. Article 29(1) of the Arbitration Act 1996 explicitly states that “[a]n arbitrator is not liable for anything done or omitted in the

⁷ Matti S. Kurkela, Santtu Turunen, ‘Due Process in International Commercial Arbitration. Second edition’ (New York: Oxford University Press 2010) 2

⁸ Jan Paulsson, ‘The Idea of Arbitration’ (New York: Oxford University Press 2013) 1

⁹ Gary B. Born, ‘International Arbitration: Law and Practice’ (Alphen aan den Rijn: Kluwer Law International 2012) 5

¹⁰ The Swedish Arbitration Act 1999 (SFS 1999:116)

¹¹ Federal Statute on Private International Law of Switzerland 1987

¹² Code of Civil Procedure of the Republic of Estonia 2005 (RT I 2005, 26, 197)

¹³ Code of Civil Procedure of the Republic of France. Book IV: Arbitration 2011

¹⁴ Law on Commercial Arbitration of the Republic of Lithuania 2012 (Valstybės žinios 2012, Nr. 76-3932)

¹⁵ Law on Arbitrations of the Republic of Latvia 2014 (Latvijas Vestnesis 2014, No. 194)

¹⁶ UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [last viewed 12-03-2016]

¹⁷ John Savage, Emmanuel Gaillard, ‘FOUCHARD, GAILLARD, GOLDMAN on International Commercial Arbitration’ (The Hague: Kluwer Law International 1999) 592

¹⁸ Arbitration Act of the United Kingdom 1996

discharge or purported discharge of his function as arbitrator unless the act or omission is shown to have been in bad faith”.

Second, arbitration is compared to judicial process by many scholars and practitioners. Judicial (or jurisdictional) theory of arbitration is one of the two main arbitration ideologies too and it states that “arbitration is analogous to litigation the purpose of which is the authoritative finding of the law and a final determination of the dispute between the parties on the basis thereof”¹⁹. Arbitration and litigation are indeed similar in many ways: the award adopted is mandatory for the parties, both methods of dispute resolution are adversarial *etc.* However, one of the differences important in the context of this article is that most of the laws on judicial system provide for qualified immunity for judges, for example, Article 47(6) of the Law on the Courts of Lithuania²⁰.

Furthermore, The United Nations Basic Principles on the Independence of the Judiciary²¹ foresees that “[w]ithout prejudice to any disciplinary procedure or any right of appeal or to compensation from the State, in accordance to national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions”. Nevertheless, “vicarious state liability allows a litigant to seek damages for injuries caused by the actions of a judge acting in an official capacity, in addition to any civil or criminal liability of the individual judge. <..> The focus of each of these systems is not, however, on achieving judicial accountability, but rather on protecting judges from harassing and vexing lawsuits. Judicial independence is primary; compensation for a victim of an erroneous or malicious decision, secondary”²². The abovementioned Law on the Courts of Lithuania actually foresees state liability.

It follows that policy-makers on both international and national levels are undivided and agree that immunity for judges is needed but in case a litigant incurred damages due to the misconduct of a judge, the state may be held liable. However, the same is not true about the arbitrators, although they perform the same or at least very similar duties in resolving disputes. What is more, the state would not compensate the damages incurred because the arbitrator is not an appointed officer of the state. Therefore, three scenarios are possible when analysing arbitrator’s liability: (A) full immunity; (B) full liability and (C) qualified immunity. Which scenario to choose for policy-maker in order to protect right to fair trial is discussed below.

However, the question is why so many law-givers decided not to address the issue of arbitrator’s liability when drafting and adopting the laws on arbitration. The reasons may be summarized as follows. As it was already mentioned the issue was deemed to be too controversial to be included in the Model law. Whereas many countries transposed Model law in their respective laws the issue was naturally left unsolved. On the other hand, law-makers are concerned that more disputes would be solved via arbitration because there are too many cases in the dockets of national courts and it is difficult to examine those disputes in time. Moreover, larger countries are interested in foreign parties to agree on the arbitration seat in their country, therefore they are willing to propose a legislation which would not frighten neither the arbitants nor the arbitrators of the highest level. Even smaller countries, Lithuania for example, are concerned to become regional arbitration centres at least, therefore friendly arbitration laws are of the highest importance. Thus, leaving the issue of arbitrator’s liability to be solved in practice or by the academics is thought to be the best solution.

2. Full immunity of arbitrators in the context of the right to fair trial

This paper already mentioned that one of the theories of arbitration conceptualizes arbitration as a surrogate of a judicial process, therefore it follows that “arbitral immunity stems from judicial immunity. <...> In brief, the rule is that judges of courts of record are not liable for damages for their decisions”²³.

¹⁹ Alexander J. Belohavlek, ‘The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures’ [2011] 2 Law of Ukraine 19

²⁰ Law on the Courts of the Republic of Lithuania 1994 (Valstybės žinios 1994, Nr. 46-851)

²¹ Basic Principles on the Independence of the Judiciary, GA Res 40/32, GA Res 40/146, 1985

²² Mary L. Volcensek *et al*, ‘Judicial Misconduct: A Cross-National Comparison’ (Gainesville: University Press of Florida 1996) 121

²³ Dennis R. Nolan, Roger I. Abrams, ‘Arbitral Immunity’ [1989] 228 Berkeley J. Emp. & Lab. L. 229-230

Following this, if a judge is not liable then an arbitrator cannot be held liable too. "It is common law jurisdictions that generally have supported this exclusion of liability for the arbitrators. They have traditionally based the justification for it on the ground that arbitrators should be treated akin to judges. In *Bremer Schiffbau v. South India Shipping Corp. Ltd.*, Donaldson J. asserted that "courts and arbitrators are in the same business, namely the administration of justice"²⁴. The broadest immunity for arbitrators is granted in the United States²⁵, for instance, it is established in case-law that if a party believed the arbitrator performed something badly, party's "remedy was an action for review of the award. <...> Dissatisfaction with the result of an arbitration is not a sufficient ground to overcome an arbitrator's or the sponsoring organization's immunity"²⁶.

In case an immunity is granted for arbitrator, parties to arbitration have no right to claim damages for the wrongful acts of their decision-makers. If the same wrongful acts were performed by a state appointed judge, a party could bring an action against the state because the state is bound to compensate damages caused by judges. However, it would not be possible in arbitration, whereas an arbitrator was appointed by the parties (or on behalf of the parties) and not by the state. Therefore, party's right to access the court (which is inseparable part of the right to fair trial) becomes limited. Thus, the question is whether a full immunity of arbitrator is compatible with the right to fair trial.

First of all, it is an established case-law of the ECHR that "Article 6 para. 1. secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal"²⁷. In case an arbitrator is granted with a full immunity, persons concerned do not have a right to bring actions before the courts, therefore an access to court is limited. To the author's knowledge, there is no case-law as regards arbitrator's immunity examined by the ECHR.

However, the Court dealt with other types of immunities. For example, in *A v. the United Kingdom* the issue was related to the parliamentary immunities. The British Government claimed that "it is a fundamental constitutional principle that statements made in Parliament should be protected by absolute privilege"²⁸. The ECHR cited its judgement in abovementioned *Golder* case, nevertheless it argued that "the right of access to a court is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 Para. 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved"²⁹. In this case the Court agreed that the parliamentary immunity pursued "the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary"³⁰. It follows, that in the context of the right to fair trial, restrictions related to the respondent's immunity are allowed on the condition that it is necessary and pursue a legitimate aim.

Second, in the case *Ernst v. Belgium*, the ECHR found justified an immunity given to a magistrate from civil claims in damages, however, it "placed weight on the fact that there were other means by which the applicants could protect their interests"³¹. In the case related to the judicial immunity the Court also observed that "litigants can protect themselves from judicial errors by taking their complaints to an appeal court without

²⁴ Ramon Mullerat, 'The liability of Arbitrators: a survey of current practice' [2006] 9 http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators__impartiality_and_independence/mullerat_ilability_arbs.pdf [last viewed on 12-03-2016]

²⁵ Alan Redfern, Martin Hunter et al, 'Redfern and Hunter on International Arbitration. Student Version' (Oxford: Oxford University Press 2015) 323

²⁶ Paul Higdon and Alice Higdon v. Construction Arbitration Associates, Ltd., Case 2001-CA-000842-MR [2002] Court of Appeals of Kentucky

²⁷ *Golder v. The United Kingdom*, [1975] ECHR Application no. 4451/70 para. 36

²⁸ *A v. The United Kingdom*, [2002], ECHR Application no. 35373/97 para. 66

²⁹ *Ibidem*, para. 74

³⁰ *Ibidem*, para. 74

³¹ Nuala Mole, Catharina Harby, 'The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights' [2006] 3 Human rights handbooks 42

resorting to suits for personal liability. <...> [The ECHR] further notes that the applicant was at liberty to challenge the truthfulness of the judge's allegations within the framework of the disciplinary proceedings"³².

Taking the abovementioned into account it must be noted that arbitral awards normally are not subjected to appeal. However, it is possible to apply for setting aside an arbitral award. For example, Article 34 of the UNCITRAL Model Law provides for this mechanism and Para. 2(a)(iv) states that one of the grounds for setting aside an arbitral award is if the arbitral procedure was not in accordance with the agreement of the parties. Furthermore, a party to arbitration is not forbidden to inform the arbitral institution which administrated the dispute about the misconduct of arbitrator listed in the list of arbitrators of that institution. Or in case of *ad hoc* arbitration or when the arbitrator was not selected from the proposed list, the party may inform other relevant institutions, for instance, when arbitrator is an advocate, the Bar may be informed that its advocate does not act in accordance with the established ethical duties.

As the Court noted the judicial immunity "has been established for the benefit of the public, in whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences"³³. It would be difficult to deny that the immunity given to arbitrators serves the same purpose. However, unlimited immunity would allow arbitrators to act airily or do not perform their duties carefully if they knew that no consequences may arise for misconduct.

To summarize above, the ECHR found that immunities may be granted if it is necessary and is compatible with a legitimate aim. Arbitrator's immunity serves as a safeguard from groundless claims of unsatisfied parties. It is important in order to ensure impartiality and independence of those decision-makers. Therefore, in case the policy-maker has decided to give arbitrator an immunity it would be compatible with a right to fair trial. Nevertheless, when choosing this way, the law-givers must consider whether absolute immunity would ensure that arbitrators perform their duties carefully.

3. Full liability of arbitrators in the context of the right to fair trial

Contractual theory of arbitration is another major theory of arbitration. As prof. Belohavlek states, this theory "is based on the assumption that the arbitrators' authorization to hear and settle a dispute is based on the agreement of the parties stipulating that, on the one hand, courts of law [meaning courts of public authorities] will be excluded from the settlement of their disputes arising from a particular legal obligation and, on the other hand, the parties will voluntarily / on the basis of their own agreement submit to arbitration"³⁴. "This contractual approach to liability is usually associated with civil law countries, and some Islamic countries. In many civil law jurisdictions, arbitrators are merely professionals whose liability is determined by the general principles of contractual liability contained within the civil code"³⁵. It follows that if a policy-maker prefers a contractual theory of arbitration, arbitrator should be held liable for his misconduct because if a party to contract fails to perform his obligation, contractual liability is unavoidable.

Indeed, as the doctrine notes, the arbitrator is a professional being paid for his services, and he is, therefore, expected to carry out his function with a professional duty of care³⁶. However, the question is if a full liability is compatible with a right to fair trial.

To begin with, arbitrators are granted with immunity due to the "concern for the independence and integrity of the decision making process. The fear is that if arbitrators, unlike judges, are liable: (1) unhappy parties might threaten or harass arbitrators, or (2) arbitrators might not make principled decisions if they are concerned about being sued and reprisals from dissatisfied litigants. In other words, without immunity, the integrity of the judicial process will be sacrificed because normally diligent arbitrators will be intimidated by the possibility of dissatisfied parties bringing lawsuits"³⁷. The ECHR has once noted that "there is also a vital public

³² Sergey Zubarev v. Russia, [2015], ECHR Application no. 5682/06 para. 32, 35

³³ Ibidem, para. 32

³⁴ Cit. op. 19, 18

³⁵ Susan D. Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' [2000] 20(1) N.Y.L. Sch. J. Int'L & Comp. L. 7

³⁶ Cit. op. 24, 13

³⁷ Cit. op. 35, 28

interest in preserving the integrity of the judicial process and thus the values of civilized societies founded upon the rule of law³⁸.

Furthermore, independence and impartiality of arbitrators might be threaten in case of full liability. For example party-appointed arbitrator may be predisposed towards a party which appointed him in order to avoid action against him after the arbitration. Independence and impartiality are the main elements of arbitration enshrined also in the Article 12 of the UNCITRAL Model Law. Dependence and partiality of the arbitral tribunal are also one of the grounds for non-recognition of the arbitral award under the Article V(1)(d) of the New York Convention³⁹. Therefore, the author is of opinion that full liability of arbitrator itself would contravene to the arbitration laws (which have a provision on the independence and impartiality).

Moreover, the ECHR emphasized that “the scope of the State’s obligation to ensure a trial by an “independent and impartial tribunal” under Article 6 Para. 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the [States] respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices⁴⁰. It follows from this case-law that policy-maker is obliged to guarantee not only judicial independence and impartiality but also of other authorities. Although arbitration is not a public body, nevertheless, if a law-giver allows arbitration in its jurisdiction, that arbitration would have to meet these criteria. Otherwise, Article 6 Para. 1 would be breached.

To summarize, full liability of arbitrator would allow parties to arbitration bring actions against the arbitrators for any action they committed or omitted. Although this would ensure that any damages suffered by the party would be compensated, however, it would threaten arbitrator’s independence and impartiality as well as the integrity of arbitration process itself. Therefore, taking into account the case-law of the ECHR, policy-maker should ensure that the criteria of independence and impartiality are respected in arbitration, namely do not allow full liability of arbitrator.

4. Qualified immunity of arbitrators in the context of the right to fair trial

The paper already dealt with full immunity as well as full liability of arbitrators. Although the author agrees that full immunity of arbitrator would be compatible with the right to fair trial, however, full immunity of arbitrators is rarely accepted in the doctrine. Indeed, many authors believe that qualified immunity would serve its purpose best⁴¹. In this respect qualified immunity would mean the most severe breaches of arbitrator’s duties, mostly committed intentionally.

According to the academia, although full liability would not be appropriate, neither would be full immunity because “it does not create preconditions for arbitrators to be responsible for their actions before the parties who pay them salary. Full immunity would protect arbitrators even in the situations when they abuse their discretion intentionally. It would be very risky taking into account the limited possibilities to review arbitral awards⁴².

Indeed, if full liability allowed parties to abuse their rights, then full immunity would let arbitrators to perform their duties airily. It must be mentioned in this regard that even the judges do not enjoy full immunity. For example, according to the Article 47(8) of the Law on Courts of Lithuania, in case judge made a crime when performing justice, the state, after compensating the damages, has a recourse right to demand judge’s liability.

³⁸ Gafgen v. Germany, [2010], ECHR Application no. 22978/05 para. 175

³⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

⁴⁰ Agrokompleks v. Ukraine, [2011], ECHR Application no. 23465/03 para. 136

⁴¹ E.g., Beata Kozubovska, Rimantas Daujotas, ‘Arbitrų atsakomybė ir imunitetas nuo atsakomybės’ [2014] 92 Teisė 55; Joseph D. Becker, ‘The Liability of Arbitrators: The United States’ [1980] 8 Int’L Bus. Law 341, 343; Matthew Rasmussen, ‘Overextending Immunity: Arbitral Institutional Liability in the United States, England and France’ [2003] 26 Fordham Int’L L. J. 1824, 1874 etc.

⁴² Beata Kozubovska, Rimantas Daujotas, ‘Arbitrų atsakomybė ir imunitetas nuo atsakomybės’ [2014] 92 Teisė 54

Therefore, “arbitrators should have qualified immunity. For nonfeasance, arbitrators should only be liable when they have unjustifiably abandoned their arbitral mandate. For affirmative misconduct, arbitrators should only be liable to an injured party where they have engaged in bad-faith, intentional misconduct”⁴³. Furthermore, “adoption of qualified immunity by common law or statute would ensure both that arbitrators will be protected from vexatious litigation and that parties to arbitration will be able to recover damages caused by arbitrator misconduct. <...> [K]nowing that if an arbitrator consciously breaches his contractual obligations, he will be personally held liable for his misconduct is essential to any society hoping to further both justice and professional competency”⁴⁴.

Further, qualified immunity would be compatible with the right to fair trial. The ECHR observed that “the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals”⁴⁵. The primary purpose of arbitration is to solve dispute between the parties under the agreement to arbitrate and in a manner compatible with the mandatory laws. Arbitration, undeniably, may be compared to judicial proceedings. Whereas, judges are given immunity (and it is not necessarily full immunity), granting qualified immunity for arbitrators would create “an appropriate balance between the needs of international commercial actors, private arbitrators, and the public”⁴⁶.

On the other hand, “one of the fundamental features of the rule of law is respect for the principle of legal certainty”⁴⁷. This principle is recognized by the ECHR as well⁴⁸. It means that if it is agreed on qualified immunity, it is up to policy-maker to identify on what grounds arbitrators could be held liable for the damages incurred and in what circumstances they would be granted with immunity.

To sum up, qualified immunity of arbitrators is acknowledged as the best scenario by many scholars in different countries. The qualified immunity would also be the most compatible with the right to fair trial and help create an appropriate balance between the parties and the arbitrators. However, in this case, the policy-maker should adopt regulation explaining in what circumstances arbitrators are liable and when they are given with immunity.

Conclusions

Although by signing arbitration agreement, parties exclude the jurisdiction of national courts, mandatory provisions of national law, including those of human rights, are applicable in arbitration proceedings as well. Therefore, policy-makers are bound to ensure legal regulation protecting essential human rights before, during and after the arbitration proceedings.

Arbitrator’s liability is a sensitive topic and most arbitration laws are silent on the issue. After examining the case-law of the ECHR, it may be concluded that a right to fair trial would not be infringed if a full immunity was guaranteed to arbitrators. And on the contrary, full liability of those decision-makers would be incompatible with the abovementioned human right. However, in order to protect both – the parties to arbitration and arbitrators themselves, the policy-makers should adopt the regulation on qualified immunity (as it was done by the British law-giver). Latter would ensure that arbitrators are independent and impartial decision-makers. Nevertheless, it would not allow them to abuse the power given by the parties and the state itself.

⁴³ *Cit. op.* 35, 59

⁴⁴ Emmanuela Truli, ‘Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case against Absolute Arbitral Immunity’ [2006] 17 *Am. Rev. Int. Arb.* 31.

⁴⁵ *Stanev v. Bulgaria*, [2012], ECHR Application no. 36760/06 para. 230

⁴⁶ *Cit. op.* 35, 59

⁴⁷ Jean-Paul Costa, ‘The European Court of Human Rights and Its Recent Case Law’ [2003] 38:455 *Tex. Int’l L. J.* 463

⁴⁸ *Bochan v. Ukraine*, [2015], ECHR Application no. 22251/08 para. 57

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40. Paul Higdon and Alice Higdon v. Construction Arbitration Associates, Ltd., Case 2001-CA-000842-MR [2002] Court of Appeals of Kentucky

ANNEX 1. CONFERENCE PROGRAMME

21 – 22 April 2016

4th International Conference of PhD Students and Young Researchers
INTERDISCIPLINARY APPROACH TO LAW IN MODERN SOCIAL CONTEXT

Venue: Vilnius University Faculty of Law, Saulėtekio av. 9, I Building, Vilnius, Lithuania

Day One: 21st of April, 2016

9.30 - 10.00	Registration (Room JR4, 1 st Floor)		
10.00 - 10.10	Opening of the Conference by Prof. Dr. Tomas Davulis , Dean of the Vilnius University Law Faculty		
10.10 - 11.00	Consequentialism in legal analysis – Guest Lecture - Prof. Dr. Tobias Tröger , Frankfurt am Main J.W. Goethe University and Research Center SAFE		
SESSION I			
Section I (Room 302, 3rd Floor)		Section II (Room JR4, 1st Floor)	
Moderator: Prof. Dr. Eric Millard / Paris West University Nanterre La Défense		Moderator: Prof. Dr. Tobias Tröger / Frankfurt am Main J.W. Goethe University and Research Center SAFE	
11.15 - 11.30	"Cross-disciplinary" approaches to law: a theoretical analysis Baltazar Durand – Jamsis / Paris West University Nanterre La Défense	11.15 - 11.30	Law and Economics: Competition Law - Between Law and Economics Vytė Skrupskas / Vilnius University
11.30 - 11.45	Legal precedents and innovation Johanas Baltrimas / Vilnius University and Law Institute of Lithuania	11.30 - 11.45	Constitutional law and economic policy: dissenting opinions on the constitutional review of austerity measures Andrius Valuta / Vilnius University
11.45 - 12.00	The importance of the cognition of social relations in defining and implementing their legal regulation Daiva Bakšienė / Vilnius University	11.45 - 12.00	Trying to square the circle. The ECB's Janus-faced character post SSM and its implications for effective banking supervision Gerrit Tönningesen / Frankfurt am Main J.W. Goethe University
12.00 - 12.15	Environmental exile from small island developing states as a complex research problem Anna Reterska-Trzaskowska / Lodz University	12.00 - 12.15	The economic crisis and its checkmate to our traditional inheritance system: should we not restart the game? Mónica Garcia Golder / University of Santiago de Compostela
12.15 - 12.45	Discussion and Conclusions	12.15 - 12.45	Discussion and Conclusions
12.45 - 14.00	LUNCH BREAK		
SESSION II			
Section III (Room JR4, 1st Floor)		Section IV (Room 302, 3rd Floor)	
Moderator: Prof. Dr. Tomas Davulis / Vilnius University		Moderator: Dr. Justyna Levon / Vilnius University	
14.00	A new shift in economic relations: is there a need to rethink employment relations? Auša Bagdonaitė / Vilnius University	14.00	Some basis and explanation of legal norms: problems in criminal and criminal procedure law Dr. Anton Liutytsky / North-West institute (branch) of University n.a. O. E. Kutafin
14.15	Social partnership infrastructure for employment maintenance: economic, legal and institutional instruments Muslim Khassenov / L.N. Gumilyov Eurasian National University	14.15	Convergence of measures of criminal law Dr. Katerina Novikova / National Ukrainian Academy of Law Sciences
14.30	Legal, social and economic factors of free movement of workers within the European union Anna Stokłosa / Jagiellonian University in Krakow	14.30	The possibilities of criminal law to measure the social maturity of young adults (18-20 years) Laura Ūselė / Vilnius University
14.45	Right to have rights for irregular migrant workers? Interrelation between migration law, labour policy and international human rights Nastazja Potocka-Sionek / Lodz University	14.45	The influence of the European law on the national criminal legislation of Ukraine Anna Sokhikian / Yaroslav Mudryi National Law University
15.00	Minimum wage and freedom of contract: an interdisciplinary perspective Ricardo Pazos / University of Santiago de Compostela	15.00	Discussion and Conclusions
15.15	Discussion and Conclusions	15.30	Discussion and Conclusions
15.45	Discussion and Conclusions	15.30	Discussion and Conclusions
Section V (Room K. Jablonskio, 2nd Floor)			
Moderator: Dr. Izabela Skomerska-Muchowska / Lodz University			
14.00	Impact of economic changes in Poland on decision – making in the field of establishing and running business and on policy-making and resolving disputes Krzysztof Skwianczyk / Jagiellonian University in Krakow	14.00	The doctrine of the «margin of appreciation» in the case-law of the European court of human rights Kristina Trykhlis / Yaroslav Mudryi National Law University
14.15	Sharia councils in western society – compromise or surrender (with particular reference to the United Kingdom) Karolina Mendecka / Lodz University	14.15	Philosophical analysis of legal language: definition of terms "life" and "person" Milda Burnytė / Vilnius University
14.30	Discussion and Conclusions	14.30	Discussion and Conclusions
14.45	Discussion and Conclusions	14.45	Discussion and Conclusions
15.00	Discussion and Conclusions	15.00	Discussion and Conclusions
15.15	Discussion and Conclusions	15.15	Discussion and Conclusions
15.30	Discussion and Conclusions	15.30	Discussion and Conclusions

Day Two: 22nd of April, 2016

9.30 - 10.00	Registration (Room JR4, 1 st Floor)		
10.00 - 10.50	International recognition of states: torn between law, politics and ethics – Guest Lecture - Prof. Dr. Gediminas Vitkus , Vilnius University, Institute of International Relations and Political Science		
SESSION III			
Section VI (Room JR4, 1st Floor)		Section VII (Room 302, 3rd Floor)	
Moderator: Dr. Indrė Isokaitė / Vilnius University		Moderator: Dr. Mindaugas Lukas / Vilnius University	
11.00	Common Foreign and Security Policy and Foreign Policy Analysis Luigi Lonardo / King's College London	11.00	Sociological Approach to Legal Provision for National Tax Security Dr. Kirill Maslov / Dostoevsky Omsk State University
11.15	Human rights protection and right to life in armed conflict – on the crossroad between the human rights law and international humanitarian law Mateusz Piątkowski / Lodz University	11.15	The general tax anti avoidance measure in the times of tax planning Agnė Petkevičiūtė / Vilnius University
11.30	Understanding humanity in 'remote warfare' Neringa Mickevičiūtė / Mykolas Romeris University	11.30	Transparency in Accounting and Corporate Governance, Politics and Law – Towards Improved Regulation of Lobbying Monika Ambrašaitė / Vilnius University
11.45	An Interdisciplinary Approach in Combating ISIS. Legal, Political, Sociology and Economic Aspects Alaa G. Al Aridi / Vilnius University	11.45	The individual constitutional complaint as an effective instrument for the development of human rights protection and constitutionalism Dovilė Pūraitė-Andrikienė / Vilnius University
12.00	Discussion and Conclusions	12.00	Discussion and Conclusions
12.30	Discussion and Conclusions	12.30	Discussion and Conclusions
12.30 - 13.30	LUNCH BREAK		
SESSION IV			
Section IX (Room JR4, 1st Floor)		Section X (Room 302, 3rd Floor)	
Moderator: Dr. Beata Martišienė / Vilnius University		Moderator: Dr. Edvinas Meškys / Vilnius University	
13.30	Psychological aspects of the regulations for mobbing in the Polish Labour Code Katarzyna Rozmus-Grzesiak / Jagiellonian University in Krakow	13.30	Neuroscience is coming to the law: what is happening and what should we know about it? Dr. Dovilė Valančienė / Vilnius University
13.45	The application of the work-life balance conception as an example of an interdisciplinary approach to labour law Irmina Miernicka / Lodz University	13.45	Interdisciplinary approach: a useful but challenging tool for the regulation of science and technologies Margo Bernein / Paris West University Nanterre La Défense
14.00	Reconciliation of professional, private and family life – the key measures Inga Klimašauskienė / Vilnius University	14.00	The implications of bioethics on different concepts of law: human clinical research perspective Justina Januševičienė / Vilnius University
14.15	Employment non-competition clauses – impacts of social network Duarte Abrunhosa e Sousa / University of Santiago de Compostela	14.15	Law, Medicine, Ethics and Assisted Procreation: Reconsidering the Legal Procreative Relationship Nastė Sušinskaitė / Vilnius University
14.30	Discussion and Conclusions	14.30	Discussion and Conclusions
15.00	Discussion and Conclusions	15.00	Discussion and Conclusions
Section VIII (Room K. Jablonskio, 2nd Floor)			
Moderator: Prof. Dr. Hab. Monika Namysłowska / Lodz University			
11.00	Efficiency of law in innovation environment Yuliya Milto / University of Bologna	11.00	Law and Modern Technologies in Cross-Border Judicial Cooperation Victor Terekhov / Vilnius University
11.15	Cyber Security in Brave New world Karolis J. Jonuška / Vilnius University	11.15	Law by technology or technology by law? – an illustration using the example of video surveillance Ass. iur. Sebastian Brethauer / Frankfurt am Main J.W. Goethe University
11.30	Discussion and Conclusions	11.30	Discussion and Conclusions
11.45	Discussion and Conclusions	11.45	Discussion and Conclusions
12.00	Discussion and Conclusions	12.00	Discussion and Conclusions
12.30	Discussion and Conclusions	12.30	Discussion and Conclusions
Section XI (Room K. Jablonskio, 2nd Floor)			
Moderator: Assoc. Prof. Dr. Vīgita Vėbraite / Vilnius University			
13.30	The right to withdraw a public promise of reward under German law – what additional insights can be gained from a law and economics perspective? Henriette Karoline Sigmund / Frankfurt am Main J.W. Goethe University	13.30	Integration of environmental considerations into public procurement regulation and practice Rimantė Rudauskienė / Vilnius University
13.45	Limited liability company without share capital as the example of economic, political and international legal approach to trade law in Poland Justyna Kopalka – Siwińska / Lodz University	13.45	Issues of arbitrator's liability as regards the right to fair trial: what way to choose for policy-maker? Tadas Varapnickas / Vilnius University
14.00	Discussion and Conclusions	14.00	Discussion and Conclusions
14.15	Discussion and Conclusions	14.15	Discussion and Conclusions
14.30	Discussion and Conclusions	14.30	Discussion and Conclusions
15.00	Discussion and Conclusions	15.00	Discussion and Conclusions
END OF CONFERENCE			

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