

## “Chilling Effect” in the Judicial Decisions of the Polish Constitutional Tribunal as an Example of Legal Transplant

Piotr Chybalski

Dr, Associate Professor, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw, correspondence address: ul. Wóycickiego 1/3, 01-938 Warsaw, Poland; e-mail: [p.chybalski@uksw.edu.pl](mailto:p.chybalski@uksw.edu.pl)

 <https://orcid.org/0000-0002-7703-1767>

### Keywords:

Constitutional law,  
comparative law,  
legal transplant,  
Polish Constitutional  
Tribunal,  
European Court  
of Human Rights

**Abstract:** The paper is dedicated to describing the way of reception by the Polish Constitutional Tribunal of the “chilling effect”, i.e. an institution related to such activities of public authorities that form an indirect act of deterrence regarding the execution of constitutionally guaranteed rights and freedoms, esp. the freedom of expression. The discussed concept has originated in judicial decisions of the US Supreme Court and has spread into many contemporary legal systems, including jurisprudence of the European Court of Human Rights. Although it is evident that the Tribunal “took over” that concept from the ECHR, it in fact developed its own, unfortunately internally inconsistent, understanding of the chilling effect. Four different ways of application of chilling effect may be noticed in judicial decisions of the Polish CT, while only two of them reflect the perception of this institution by the US Supreme Court and the ECHR.

## 1. Introduction

The purpose of this paper<sup>1</sup> is to discuss an institution (and, as some point out, a legal metaphor<sup>2</sup>) which is well-known in many contemporary legal systems, namely the so called “chilling effect”, as introduced into the Polish legal system by the judicial decisions of its constitutional court, i.e. the Constitutional Tribunal. So far, it has been explicitly mentioned in more than twenty judgments and decisions of the Tribunal as well as appeared recently in the jurisprudence produced by other Polish courts.<sup>3</sup> Nowadays, the concept of the chilling effect (Polish: *efekt mrozący*) is becoming increasingly popular in Poland, not only in the judicial work and academic discussions, but also in the public debate in the broad sense. For instance, it has been invoked by the mass media in the course of disputes over the ongoing – to say euphemistically – controversial reforms of the Polish judicial system (which included “reshaping” the Polish Supreme Court), introduced in 2017 by the current ruling party.<sup>4</sup>

However, the aim of the present article is not to provide a mere description of the Polish version of the chilling effect as such, but this description serves another purpose. Since the analyzed institution has not been inserted into the Polish legal system by the constitution, a statute or any other act of positive (enacted) law, but through the judgments of the Constitutional Tribunal, it may be perceived as an example of the so-called judicial legal transplant. Thus, a discussion on the manner of implementing the chilling effect in Poland should be seen in a wider perspective, as an addition

---

<sup>1</sup> This paper has been prepared as a result of the research project no. 2017/01/X/HS5/01344, financed by the National Science Centre (Poland) within the MINIATURA I funding scheme. A short summary of results of the research projects was presented in Piotr Chybalski, “Reception of chilling effect by the Polish Constitutional Tribunal” *Academia Letters* 654 (2021), [https://www.academia.edu/46939730/Reception\\_of\\_chilling\\_effect\\_by\\_the\\_Polish\\_Constitutional\\_Tribunal](https://www.academia.edu/46939730/Reception_of_chilling_effect_by_the_Polish_Constitutional_Tribunal), <https://doi.org/10.20935/AL654>.

<sup>2</sup> See e.g. Andrzej Wróbel, “Krótki szkic o metaforze prawniczej,” *Teka Komisji Prawniczej. Polska Akademia Nauk. Oddział w Lublinie* (2014): 139.

<sup>3</sup> For instance in: Supreme Administrative Court, Judgment of 12 December 2014, Ref. No. I OSK 900/13, available at [www.orzeczenia-nsa.pl](http://www.orzeczenia-nsa.pl), or Appellate Court in Warsaw, Judgment of 1 March 2017, Ref. No. VI ACa 1538/15, available at [orzeczenia.waw.sa.gov.pl](http://orzeczenia.waw.sa.gov.pl).

<sup>4</sup> Wojciech Tumidalski, “Sędziowie czasu ‘dobrej zmiany’ rozważają swą przyszłość w todze,” *Rzeczpospolita* (22 October 2018): 5.

to current debates among experts in comparative constitutional law concerning the advantages and drawbacks of judicial borrowings of constitutional ideas from foreign legal systems, including foreign judicially shaped institutions. The problem of usefulness of transplanting legal institutions from other legal systems to the domestic regime has belonged to important and highly controversial matters of comparative law for a long time. So far, no universally adopted attitude to this issue has been developed, but one can easily find clearly opposite opinions in literature, from broad approval expressed by Alan Watson<sup>5</sup> to a strong rejection by Pierre Legrand.<sup>6</sup> The problem of transplanting legal ideas is currently particularly visible in constitutional case-law. The number of instances when constitutional courts use foreign law seems to be steadily growing,<sup>7</sup> although the frequency varies throughout the world, which makes the future of such practice still fairly uncertain.<sup>8</sup> The Polish Constitutional Tribunal seems to belong to those constitutional courts which are quite open to taking advantage of foreign legal systems, including the case-law of its counterparts from various countries.<sup>9</sup> Nevertheless, some of the borrowings seem to have been made in a controversial manner, indicating dangers that may be caused by a careless and superficial use of comparative law in adjudicating domestic constitutional problems. In my opinion, the implementation by

---

<sup>5</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993).

<sup>6</sup> See e.g. Pierre Legrand, “The Impossibility of ‘Legal Transplants,’” *Maastricht Journal of European and Comparative Law* 4, vol. 2 (June 1997): 120–121.

<sup>7</sup> See esp. statistical data provided in András Jakab et al. (eds.), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017), 790.

<sup>8</sup> Tania Groppi and Marie-Claire Ponthoreau, “Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future,” in *The Use of Foreign Precedents by Constitutional Judges*, ed. Tania Groppi and Marie-Claire Ponthoreau (Oxford and Portland: Hart Publishing, 2014), 428–431.

<sup>9</sup> See Ada Paprocka, “An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal,” *Adam Mickiewicz University Law Review* 8 (February 2018): 242, <https://doi.org/10.14746/ppuam.2018.8.16>.

the Tribunal of the concept of the chilling effect may serve as a notable example of such a doubtful practice.<sup>10</sup>

## 2. American Origins

The institution of chilling effect is of American origin; it appeared in the jurisprudence of the Supreme Court of the United States in the middle of the 20<sup>th</sup> century. In 1952, the Court produced a judgment in *Wieman v. Updegraff*.<sup>11</sup> In a concurring opinion, Justice Felix Frankfurter argued that the teacher's duty to take an oath of loyalty to the USA, imposed by Oklahoma's state legislation, could "chill that free play of the spirit which all teachers ought especially to cultivate and practice".<sup>12</sup> The term "chilling effect" emerged eleven years later in *Gibson v. Florida Legis. Investigation Comm.*<sup>13</sup> In both these judgments, "chilling" referred to the rights and freedoms guaranteed by the First Amendment to the US Constitution, i.e. freedom of belief, expression, press and assembly and the right to submit petitions. According to a classical view, "chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity".<sup>14</sup> Similar definitions may be found in other judgments and many legal papers. For instance according to Black's Law Dictionary, chilling effect in its basic sense means "the result of law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right to free speech".<sup>15</sup> It is worth mentioning that this view is broader than the

---

<sup>10</sup> It is worth adding that the Constitutional Tribunal's way of transplanting the concept of chilling effect into its jurisprudence has already been put into question in the Polish constitutional literature, but without a broad discussion of that matter. See Wojciech Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona* (Warsaw, Wydawnictwo Sejmowe, Warsaw, 2016): 173 (note 6). See also a newer student's paper by Katarzyna Kos, *Evolution or Entropy of the Concept of Chilling Effect? – Polish Perspective*, *Teisė* 110 (February 2019), <https://doi.org/10.15388/Teise.2019.110.11>.

<sup>11</sup> 344 U.S. 183, 195 (1952).

<sup>12</sup> The text of this judgment may be found in various Internet sources, accessed January 10, 2021, see for instance [scholar.google.com/scholar\\_case?case=7195768557410104751](https://scholar.google.com/scholar_case?case=7195768557410104751).

<sup>13</sup> 372 U.S. 539, 556–557 (1963).

<sup>14</sup> Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect,'" *Boston University Law Review* 58 (1978): 693.

<sup>15</sup> Bryan A. Garner (ed.), *Black's Law Dictionary* (Eagan: Thomson West, 2004), 724.

Supreme Court’s original concept, because it does not link the chilling effect only to the scope of the First Amendment. However, it should be noted that in its later judgments made in the course of the 1960s, the Court extended the scope of application of the doctrine of chilling effect. Above all, the term was used in the context of protecting rights guaranteed by the Fourteenth Amendment, such as equal protection of laws with regard to all citizens. A notable example concerns judgments related to counteracting racial discrimination.<sup>16</sup>

It seems evident that, due to its vagueness, the above description of the chilling effect needs clarification. According to the US Supreme Court, the key problem is determining the presence of “an act of deterrence”.<sup>17</sup> A chilling effect occurs when a person refrains from exercising his/her constitutional rights due to a fear of potential sanctions or when the exercise of such rights is tightened by specific additional requirements. It is stressed that a chilling effect may be caused by two typical reasons: a statute (state or federal) violating the US Constitution or a requirement to follow certain administrative procedures in order to be able to take advantage of a constitutionally guaranteed right. The second type of situation may be illustrated with an example referring to the freedom of assembly. We can speak of its violation if organizing an assembly requires a permission which may be granted only in an “unreasonably burdensome” procedure.<sup>18</sup>

The above remark indicates that not every action of the state resulting in deterrence regarding the use of constitutionally protected rights may be classified as causing the prohibited chilling effect. In each situation, the so-called balancing test is needed, which allows the court to determine if the state activities in question are justified in given circumstances. Still, the methods of reasoning used in determining whether the chilling effect occurs are characterized by a considerable degree of ambiguity, causing controversies among American lawyers.<sup>19</sup> Moreover, the term “chilling ef-

---

<sup>16</sup> Note, “The Chilling Effect in Constitutional Law,” *Columbia Law Review* 69 (1969): 834.

<sup>17</sup> Michael N. Dolich, “Alleging a First Amendment ‘Chilling Effect’ to Create a Plaintiff’s Standing: a Practical Approach,” *Drake Law Review* 43, no. 1 (1994): 176.

<sup>18</sup> Note, “The Chilling Effect,” 818.

<sup>19</sup> See esp. the criticism of the usefulness of the concept with regard to the protection of the freedom of speech in Leslie Kendrick, “Speech, Intent and the Chilling Effect,” *William & Mary Law Review* 54 (2013): 1684–1690.

fect” is often used in other legal contexts than the original one as well in everyday public debates. The evolution of its usage prompted the development of its second, broad meaning, i.e. discouragement from any practice.<sup>20</sup> As a result, the concept of the chilling effect is sometimes described as a legal cliché, which is used on various occasions.<sup>21</sup> Yet in its strict, legal sense, it remains an important institution of the system of protection of rights and freedoms in the United States, especially the freedom of speech.

### 3. The Concept of Chilling Effect according to the European Court of Human Rights

Soon after its appearance in United States law, the concept of chilling effect began spreading to other legal systems. Either it was explicitly transplanted (e.g. into Canadian law<sup>22</sup> or into the United Kingdom<sup>23</sup>) or similar legal institutions, like the German “choking effect”,<sup>24</sup> were developed by the relevant judiciaries. Although a detailed description of the concept’s “itinerary” falls beyond the scope of this paper, it is necessary to discuss shortly the perception of the chilling effect by the European Court of Human Rights. There are no doubts that the Polish Constitutional Tribunal was primarily inspired by the former’s case-law when it decided to use the concept of chilling effect in deciding Polish constitutional problems.<sup>25</sup> The Tribunal often directly referred to the judgments of the European Court of Human Rights when

---

<sup>20</sup> Garner, *Black’s Law*, 724.

<sup>21</sup> Bryan A. Garner (ed.), *A Dictionary of Modern Legal Usage* (Oxford: Oxford University Press, 1995), 151–152.

<sup>22</sup> See examples of the relevant Canadian case law, Kent Roach and David Schneiderman, “Freedom of Expression in Canada,” *Supreme Court Law Review* 61 (2013): 471–472, 511–512.

<sup>23</sup> With regard to the role of the chilling effect in the British defamation law see Eric Barendt et al., *Libel and the Media. The Chilling Effect* (Oxford: Oxford University Press, 1997), 189–194.

<sup>24</sup> Eric Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2007), 218.

<sup>25</sup> The judgments of the European Court of Human Rights have been an important source of inspiration for the Polish constitutional jurisprudence for many years. See Lech Garlicki and Ireneusz Kondak, “Poland: Human Rights between International and Constitutional Law,” in *The Impact of the ECHR on Democratic Change in Central and Eastern Europe. Judicial Perspectives*, ed. Iulia Motoc and Ineta Ziemele (Cambridge: Cambridge University Press, 2016), 326.

describing its own application of this institution,<sup>26</sup> while it has never mentioned other foreign legal systems. Once, in a dissenting opinion, a constitutional judge seemed even to view the concept of the chilling effect as an invention of the Strasbourg Court.<sup>27</sup>

A brief analysis of the HUDOC database, enabling access to the entire case-law of the Court, indicates that the term “chilling effect” appeared several times since the 1970s in some documents produced by the then functioning European Commission of Human Rights.<sup>28</sup> The first example of its use by the European Court of Human Rights itself took place as late as in 1996, in *Goodwin v The United Kingdom*,<sup>29</sup> i.e. in one of the most significant judgments concerning the freedom of press as an important factor of the freedom of expression guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The case concerned the problem of protecting journalistic sources, i.e. a key matter related to preserving the fundamental role of the press in society – serving as the so-called public watchdog.<sup>30</sup> When discussing the legal obligation to disclose notes (which would have revealed the identity the source of information), imposed on a British journalist as a court injunction pursuant to the UK Contempt of Court Act 1981, the Strasbourg Court found a violation of Article 10 of the Convention. An important passage from that judgment includes a reference to the concept of chilling effect:

Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect

---

<sup>26</sup> The following judgments may serve as examples: Polish Constitutional Tribunal, Judgment of 28 November 2007, Ref. No. K 39/07, Journal of Laws 2007, no. 230, item 1698, and Judgment of 19 July 2011, Ref. No. K 11/10, Journal of Laws 2011, no. 160, item 964.

<sup>27</sup> Polish Constitutional Tribunal, Judgment of 27 October 2010, Ref. No. K 10/08, Journal of Laws 2010, no. 205, item 1364, dissenting opinion of Justice Mirosław Wyrzykowski.

<sup>28</sup> See e.g. ECmHR, Decision of 5 April 1973 Case *Donnelly and Others v The United Kingdom*, application no. 5577/72, 5583/72, hudoc.int., and ECmHR, Report of 18 December 1987, Case *Markt Intern Verlag GmbH and Beermann v Germany*, Ref. No. 10572/83, hudoc.int.

<sup>29</sup> ECtHR Judgement of 27 March 1996, Case *Goodwin v The United Kingdom*, application no. 17488/90, hudoc.int.

<sup>30</sup> See Alain Zysset, *The ECHR and Human Rights Theory. Reconciling the Moral and the Political Conceptions* (Abingdon: Routledge, 2017), 163.

an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest<sup>31</sup>.

Since *Goodwin v The United Kingdom*, the chilling effect has become an important and often used concept in the Court's judicial decisions.<sup>32</sup> Although the Court has not produced its own substantial definition,<sup>33</sup> even a brief analysis of the case-law shows that generally, the notion of the chilling effect is mostly understood in a similar way as by the US Supreme Court, i.e. as an inadmissible deterrence from taking advantage of the rights and freedoms proclaimed by the Convention. Above all, the assessment whether such a discouragement from the exercise of rights occurs plays an important role in the Court's proportionality tests,<sup>34</sup> whose purpose is to reveal whether certain state actions that limit the scope of some rights and freedoms are "necessary in a democratic society" in a given case.<sup>35</sup> Most of the Strasbourg Court judgments in which the notion of the chilling effect is invoked concern the already mentioned Article 10 of the Convention, in the context of not only the freedom of the press, but also, as an example, the problem of various national defamation rules (civil or criminal ones).<sup>36</sup> The second important set of case-law is related to Article 11, i.e. the freedom of assembly. For instance, in one of vital judgments on that matter,

---

<sup>31</sup> ECtHR Judgement of 27 March 1996, Case *Goodwin v The United Kingdom*, application no. 17488/90, para. 39, hudoc.int.

<sup>32</sup> A simple search of judgments in which the term appeared made with the use of the HUDOC database brings more than 200 positive results.

<sup>33</sup> Trine Baumbach, "Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases," *Bergen Journal of Criminal Law and Criminal Justice* 6, no. 1 (May 2018): 111, <https://doi.org/10.15845/bjclcj.v6i1.1555>.

<sup>34</sup> See e.g. Andrzej Wróbel's remarks concerning Article 8 of the Convention in Lech Garglicki, Piotr Hofmański and Andrzej Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18* (Warsaw: C.H. Beck, 2010), 490.

<sup>35</sup> The phrase is included in the Convention in Article 8(2), Article 9(2), Article 10(2) and Article 11(2).

<sup>36</sup> See e.g. ECtHR Judgement of 14 March 2013, Case *Eon v France*, application no. 26118/10, hudoc.int.

*Baczowski and Others v Poland*,<sup>37</sup> the Court came to the conclusion that the Mayor of Warsaw’s refusal to permit the organization of the so-called Equality Parade, which had been formally justified with the parade’s initiators failure to provide a “traffic organization plan”, constituted a violation of the Convention. The Court observed that:

the refusals to give authorization could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the grounds that they did not have official authorization and that, therefore, no official protection against possible hostile counter-demonstrators would be ensured by the authorities.

Apart from case-law related to Articles 10 and 11 of the Convention, the Court has referred to the concept of chilling effect with regard to at least two other rights. Firstly, it mentioned Article 34, which provides for the access to the Court itself for “any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”, while, at the same time, instructing the state parties “not to hinder in any way the effective exercise of this right”.<sup>38</sup> Secondly, what appears to be of particular importance in the context of the Polish Constitutional Tribunal’s reception of the notion of chilling effect, it referred to the right to a fair trial guaranteed in Article 6 of the Convention. A central problem related to the application of the discussed concept in case-law concerning this rule was the matter of the internal independence of judges, being a crucial factor for assuring the fairness of court proceedings. For instance in *Parlov-Tkalčić v Croatia*,<sup>39</sup> the European Court of Human Rights determined that “the powers vested in the court presidents could not have reasonably been viewed as running counter, or having

---

<sup>37</sup> ECtHR Judgement of 3 May 2007, Case *Baczowski and Others v Poland*, application no. 1543/06, hudoc.int.

<sup>38</sup> See e.g. ECtHR Judgement of 7 June 2007, Case *Nurmagomedov v Russia*, application no. 30138/02, hudoc.int.

<sup>39</sup> ECtHR Judgement of 22 December 2009, Case *Parlov-Tkalčić v Croatia*, application. no. 24810/06, hudoc.int.

‘chilling’ effects on, the internal independence of judges”. It should be stressed that the Court links the problem of providing a satisfactory level of judicial independence not only with Article 6, but also with Article 10 of the Convention, i.e. the freedom of expression of judges.<sup>40</sup>

Despite the general consistency of the Court’s application of the notion of chilling effect, there are several cases in which it seemed to go beyond the original rights-orientated feature of that concept. A notable example, perceived by some Polish lawyers as controversial,<sup>41</sup> is *Tysiac v Poland*,<sup>42</sup> which concerned the problem of denying the applicant a lawful abortion in Poland. When discussing Article 156(1) of the Polish Criminal Code of 1997, which provides criminal sanctions for performing illegal abortion, the Court expressed opinion that it “can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case”. Such conclusion in fact was not linked to any rights or freedoms guaranteed by the Convention, but expressed the Court’s general criticism of the vagueness of the above provision of the Criminal Code, which was used in a broad argumentation proving Poland’s violation of Article 8 of the Convention.<sup>43</sup> Another interesting example of an alleged broad application of the concept of chilling effect may be found in the dissenting opinion of five Judges in *Dubská and Krejzová v The Czech Republic*.<sup>44</sup> The case concerned the impossibility of giving birth at home (with the assistance of midwives) in the Czech Republic, caused not by an explicit legal prohibition, but indirectly, by setting, as the dissenting Judges explained, “excessively rigid requirements regarding the equipment needed for a birth, which can only be met in hospitals”. According to the cited minority, these restrictions resulted in a violation of Article 8 of the Convention due to

<sup>40</sup> Sietske Dijkstra, “The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR,” *Utrecht Law Review* 13, no. 1 (January 2017): 9, <https://doi.org/10.18352/ulr.371>.

<sup>41</sup> See. e.g. Michał Królikowski, “Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 20 marca 2007 r. w sprawie Alicja Tysiąc przeciwko Polsce (nr skargi 5410/03),” *Przeгляд Sejmowy* 80 (2007): 210–211.

<sup>42</sup> ECtHR Judgement of 20 March 2007, Case *Tysiac v. Poland*, application no. 5410/03, hudoc.int.

<sup>43</sup> Article 8 of the Convention provides for the right to respect for private and family life.

<sup>44</sup> ECtHR Judgement of 15 November 2016, Case *Dubská and Krejzová v The Czech Republic* Case, application no. 28859/11, 28473/12, hudoc.int, dissenting opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque and Keller.

the fact that “Czech law (...) prevents *de facto* home births and has a chilling effect on mothers wishing to give birth at home”.

#### 4. The Polish Constitutional Tribunal’s Reception of the Concept of Chilling Effect

The first time when the concept of chilling effect was used by the Polish Constitutional Tribunal was in 2006, in the judgment U 4/06.<sup>45</sup> The case concerned the constitutionality of the scope of enquiry performed by the so-called Banking Committee of Inquiry, which was set up by the Polish Sejm<sup>46</sup> in order to examine the decisions concerning the capital and ownership transformations in the banking sector and the activities of banking supervision authorities from 4<sup>th</sup> June 1989 to 19<sup>th</sup> March 2006. One of important matters discussed by the Tribunal regarded the possibility to examine, in the course of such parliamentary enquiry, the activities of the President of the National Bank of Poland (and in fact of several persons who had held that office during the above period). The judges claimed that such a matter exceeded the admissible scope of activity of a committee of inquiry, mainly due to the fact that the Constitution does not provide for parliamentary oversight over all the bodies of the National Bank of Poland. Besides, examining the way of their functioning could „create the impression of political pressure; such impression may have a negative ‘chilling’<sup>47</sup> effect’ on the performance of their statutory competencies by bodies independent from the Sejm”. It should be added that the Tribunal made no reference to case-law of the European Court of Human Rights concerning chilling effect.

Despite the fact that the Tribunal did not make any additional comments regarding its understanding of the notion of chilling effect, the cited passage evidently seems to indicate that it was perceived broadly. The bodies

---

<sup>45</sup> Polish Constitutional Tribunal, Judgment of 22 September 2006, Ref. No. U 4/06, Monitor Polski 2006, no. 66, item 680. English translation available at <[trybunal.gov.pl/fileadmin/content/omowienia/U\\_4\\_06\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/U_4_06_GB.pdf)>

<sup>46</sup> The possibility to establish committees of inquiry (in fact called investigative committees, Polish: *komisje śledcze*) is provided for in Article 111(1) of the Polish Constitution, which stipulates that „the Sejm may appoint an investigative committee to examine a particular matter”.

<sup>47</sup> It should be noted that the term „chilling effect” (Polish: *efekt mrozący*) was incorrectly translated as “freezing effect” in the English version of the judgment, mentioned in note 45.

of the National Bank of Poland have no rights and freedoms enshrined in the Polish Constitution. Still, a key feature of the Bank within the Polish system of government is that it remains beyond the tripartite separation of powers, thus being independent of the parliament, the executive and the judiciary.<sup>48</sup> As a result, it follows from judgment U 4/06 that the concept of chilling effect became a tool used in order to protect the independence of certain constitutional authorities by maintaining their freedom from – intrinsically political – parliamentary oversight. This notion encompassed not only the National Bank of Poland, but also other authorities of similar systemic position, including the Commissioner for Citizens’ Rights (the ombudsman) or the Supreme Audit Office<sup>49</sup>. Beyond any doubt, it also included the judiciary, especially since an examination of its activities by an inquiry commission was explicitly forbidden by the Tribunal in the same judgment, albeit with no recourse to the possibility of chilling effect harming judicial independence.

Later judicial decisions of the Tribunal indicate that the discussed concept was used inconsistently, and it is possible to distinguish four types of its application. Before we examine them, it is worth mentioning that the Polish constitutional court once tried to make some remarks concerning its understanding of the notion of chilling effect. In judgment K 39/07,<sup>50</sup> the Tribunal, referring to Tadeusz Kotarbiński, philosopher and founder of the Polish school of praxeology (the theory of human action), mentioned that such effect may be described as “potentiation of legal action” (Polish: *potencjalizacja działania prawa*), i.e. an indirect threat of making a person face legal consequences in case the person does not refrain from certain activity. It seems evident that this laconic expression is similar to

---

<sup>48</sup> The Bank is described by Polish constitutional lawyers as “a specific constitutional authority of executive character” (but not subordinated to the President of the Republic or to the Council of Ministers, which form the Polish “dualistic” executive power). See remarks by Lesław Góral and Katarzyna Koperkiewicz-Mordel concerning Article 227 of the Polish Constitution, in *Konstytucja RP. Tom II, Komentarz do art. 87–243*, ed. Marek Safjan and Leszek Bosek (Warsaw: CH Beck, 2016), 1602.

<sup>49</sup> The name of this constitutional body is sometimes translated literally as the Supreme Chamber of Control (Polish: *Najwyższa Izba Kontroli*).

<sup>50</sup> An English summary of this judgment is available at [trybunal.gov.pl/fileadmin/content/omowienia/K\\_39\\_07\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_39_07_GB.pdf).

the already-mentioned broad and at the same time controversial notion of chilling effect that appeared in the United States after the Supreme Court had developed the “canonical”, rights-orientated type of this concept. Although, as it will be shown later, the broad interpretation is clearly noticeable in the judicial decisions of the Polish Constitutional Tribunal, it was once strongly criticized from within the Tribunal itself. Justice Mirosław Wyrzykowski, dissenting from the majority position in K 10/08,<sup>51</sup> carried out a thorough analysis of the Strasbourg Court’s view of the chilling effect. It led to the conclusion that this concept could not be invoked when assessing mutual relations between public authorities, in that case – between state prosecution and the judiciary. The judge claimed that the European Court of Human Rights had developed the institution of the chilling effect in relation to:

the protection of personal rights from an excessive and disproportionate intervention of public authorities. In this interpretation, it is inseparably related to the existence of an infringement of a specific right or freedom, which has to be proven before chilling effect may be mentioned at all.<sup>52</sup>

As I entirely support this view, it should be noted that judgment K 10/08 was not the first one in which the Tribunal referred to the discussed concept. Thus, it is in my opinion unfortunate that the above justified criticism of the broad application of the concept of chilling effect appeared so late. Justice Wyrzykowski’s remark might have been well applied to the Banking Committee of Inquiry case (U 4/06), when, as already mentioned, the notion of chilling effect appeared in the jurisprudence of the Constitutional Tribunal.

The first two ways of application of the concept of chilling effect by the Polish Constitutional Tribunal seem to be in accordance with the position of the European Court of Human Rights. The first one is related to various aspects of the problem of guaranteeing the freedom of expression

---

<sup>51</sup> Polish Constitutional Tribunal, Judgment of 27 October 2010, Ref. No. K 10/08, *Journal of Laws* 2010, no. 205, item 1364, English translation available at [trybunal.gov.pl/fileadmin/content/omowienia/K\\_10\\_08\\_EN.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_10_08_EN.pdf).

<sup>52</sup> Own translation.

(Article 54(1) of the Constitution of the Republic of Poland<sup>53</sup>), its close “relative”, i.e. the freedom of conscience (Article 53(1) of the Constitution of the Republic of Poland<sup>54</sup>), and the freedom of assembly (Article 57 sentence 1 of the Constitution of the Republic of Poland<sup>55</sup>). With regard to the first of the above constitutional freedoms, the chilling effect was above all invoked when the Tribunal’s task was to assess the conformity to the constitution of various provisions stipulating criminal responsibility for certain types of defamation. The most notable judgment, P 10/06<sup>56</sup> (issued only a month after the decision concerning the Banking Committee of Inquiry), concerned the two basic types of criminal defamation, regulated in Articles 212<sup>57</sup> and 213 of the Polish Criminal Code of 1997.<sup>58</sup> The central problem was the admissibility of possible imprisonment (for a period of up to one year) of a person who committed defamation “through mass media”, as provided for in Article 212(2) of the Criminal Code. When taking into account the Strasbourg Court’s restrictive position concerning criminal defamation – as causing a chilling effect on public debates (thus easily infringing Article 10 of the Convention) – the Tribunal decided that the questioned provisions of the Criminal Code did not violate the Polish Constitution of 1997. The Tribunal balanced the potential harm to the freedom of expression with the need to protect human dignity (Article 30 of

---

<sup>53</sup> “The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone”. All translations of the provisions of the Polish Constitution of 1997 are taken from Ewelina Gierach and Piotr Chybalski (ed.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials* (Warsaw: Wydawnictwo Sejmowe, 2009).

<sup>54</sup> “Freedom of conscience and religion shall be ensured to everyone”.

<sup>55</sup> “The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone”.

<sup>56</sup> Polish Constitutional Tribunal, Judgment of 30 October 2006, Ref. No. P 10/06, *Journal of Laws* 2006, no. 202, item 1492.

<sup>57</sup> Article 212(1) of the Criminal Code defines defamation as “imputing to another person, group of persons, institution, legal person or organisational unit lacking legal personality such conduct or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type of activity”.

<sup>58</sup> A brief English description of the judgment is available in the CODICES database, [www.codices.coe.int/NXT/gateway.dll?f=templates\\$fn=contents-frame-js.htm\\$vid=Publish%3A10.1048%2Fenu\\$3.0&cp=&sel=0&tf=main&tt=document-frameset.htm&t=contents-frame-js.htm&och=onClick](http://www.codices.coe.int/NXT/gateway.dll?f=templates$fn=contents-frame-js.htm$vid=Publish%3A10.1048%2Fenu$3.0&cp=&sel=0&tf=main&tt=document-frameset.htm&t=contents-frame-js.htm&och=onClick).

the Constitution of the Republic of Poland<sup>59</sup>). According to the majority’s opinion (three out of twelve judges submitted dissenting opinions), “honor and good reputation”, evidently infringed by defamatory statements, stay in close relationship to human dignity, which justifies bringing criminal sanctions to the perpetrators of such acts. The Tribunal’s position evidently seems to be less restrictive towards criminal defamation than the standards promoted by the European Court of Human Rights as well as by the Council of Europe in general.<sup>60</sup> Still, it cannot be claimed that the Tribunal rejects the concept of chilling effect as an important factor harming the freedom of expression. In its later judicial decisions, recourse to this legal metaphor played an important role in declaring certain regulations that provided sanctions for various defamatory practices as not conforming to the Polish Constitution. For instance in the judgment SK 70/13,<sup>61</sup> the Tribunal opted for a restrictive interpretation of Article 226(1) of the Criminal Code, which provides sanctions for insulting a public official. In the Tribunal’s view, the provision in question should not be applied to situations where an insulted official is at the same time a politician. An opposite interpretation would mean that Article 226(1) could serve as an instrument of limiting public debate by means of chilling effect. Another important example is a negative assessment of the constitutionality of Article 256(2) of the Criminal Code, as amended in 2009, that concerned the use of “fascist, communist or other totalitarian symbols”. In K 11/10,<sup>62</sup> the Tribunal broadly referred to the Strasbourg Court’s position in *Vajnai v Hungary*<sup>63</sup> (which concerned the use of a five-pointed red star), after which it came to the conclusion that the vagueness of the provision in question and the possibility

---

<sup>59</sup> “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities”.

<sup>60</sup> It is worth noting that the Parliamentary Assembly of the Council of Europe has undertaken many actions promoting decriminalisation of defamation, e.g. the Resolution 1577 of 4 October 2007 Towards decriminalisation of defamation.

<sup>61</sup> Polish Constitutional Tribunal, Judgment of 12 February 2015, Ref. No. SK 70/13, Journal of Laws 2015, item 234.

<sup>62</sup> Polish Constitutional Tribunal, Judgment of 19 July 2011, Ref. No. K 11/10, Journal of Laws 2011, no. 160, item 964. English translation available at [trybunal.gov.pl/fileadmin/content/omowienia/K\\_11\\_10\\_EN.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_11_10_EN.pdf).

<sup>63</sup> ECtHR Judgment of 8 July 2008, Case *Vajnai v Hungary*, application. no. 33629/06, hudoc.int.

of multiple meanings of the seemingly totalitarian symbols do not justify imposing criminal liability on their use, since such liability may cause a chilling effect on public debate.<sup>64</sup>

Nevertheless, the Tribunal retains – in some cases – its “liberal” position concerning the impact of a possible chilling effect on the exercise of constitutional rights. Apart from the above-mentioned criminal defamation case (P 10/06), it is worth to stress the Tribunal’s approval of Article 52(1) of the Code of Misdemeanors, which provided for a fine or restriction of liberty with regard to anyone organizing an assembly without a prior notification to relevant authorities (the so-called spontaneous assembly). In K 15/08,<sup>65</sup> the Tribunal explicitly took into account the position of the European Court of Human Rights in *Baczkowski and Others v Poland*, claiming that the obligation to notify the authorities about a planned gathering could result in chilling the freedom of assembly. However, after balancing it with the need to protect public order and the safety of participants in the gathering, it decided to uphold the provision. That said, it strongly criticized the rigid three-day deadline for the notification, but since such obligation did not result from the examined Article 52(1) of the Code of Misdemeanors, it fell outside the scope of the case.

The second matter in which the concept of chilling effect proved to be useful for the Polish Constitutional Tribunal concerned the problem of judicial independence. The leading judgment (K 39/07<sup>66</sup>) regarded the 2007 amendments to the Act on the System of Common Courts of 2001, which introduced an accelerated procedure for lifting a judge’s immunity, e.g. by imposing on the relevant court the obligation to decide on the waiver of the immunity within 24 hours from the submission of the application, and without hearing the judge in question. The Tribunal turned down the new procedure stating, among others, that:

---

<sup>64</sup> See Uladzislau Belavusau, *Importing European and US Constitutional Models in Transitional Democracies* (Abingdon: Routledge, 2013), 156.

<sup>65</sup> Polish Constitutional Tribunal, Judgment of 6 March 2012, Ref. No. 15/08, Journal of Laws 2012, item 297.

<sup>66</sup> Polish Constitutional Tribunal, Judgment of 28 November 2007, Ref. No. K 39/07, Journal of Laws 2007, no. 230, item 1698, English summary available at [trybunal.gov.pl/fileadmin/content/omowienia/K\\_39\\_07\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_39_07_GB.pdf).

the situation in which the derogation of immunity is excessively available leads to a “chilling effect”, whereby the very fact of filing a motion requesting the derogation of immunity of a judge results in diminishing the judge’s reputation<sup>67</sup>.

Moreover, it noted that “the jurisprudence of the European Court of Human Rights confirms that the very emergence of the ‘chilling effect’ is often regarded as a sufficient prerequisite for the negative assessment of a national law”. The presentation of reasons of the ruling included direct referrals to the Court’s judicial decisions such as *Lombardo and Others v Malta*<sup>68</sup>, *Baczkowski and Others v Poland* and *Dyuldin and Kislov v Russia*.<sup>69</sup>

The Tribunal followed the way paved by K 39/07 in its later jurisprudence relating to judicial independence. In U 9/13,<sup>70</sup> it noted that the right of the Minister of Justice to demand any case file from the chair of an appellate court could have a chilling effect on the judge by “exercising at least an indirect pressure on the way in which the case in question is decided”.<sup>71</sup> As a result, such a competence, stipulated not in a statute, but in a by-law (regulation) issued by the Minister of Justice themselves, could have been questioned in the light of the principle of separation of powers and the right to a fair trial.<sup>72</sup>

Furthermore, the concept of chilling effect was used in order to limit the possible legal consequences of judicial errors. In SK 9/13<sup>73</sup>, the Tribunal upheld a narrow interpretation of Article 417<sup>1</sup>(2) sentence one of the Civil Code, which provides for state liability for damage arising from judicial

---

<sup>67</sup> The English summary of K 39/07, mentioned in note 66, para. 8.

<sup>68</sup> ECtHR, Judgment of 24 April 2007, Case *Lombardo and Others v Malta*, application no. 7333/06, hudoc.int.

<sup>69</sup> ECtHR, Judgment of 31 July 2007, Case *Dyuldin and Kislov v Russia*, application no. 25968/02. hudoc.int.

<sup>70</sup> Polish Constitutional Tribunal, Judgment of 8 May 2014, Ref. No. U 9/13, Journal of Laws 2014, item 674.

<sup>71</sup> Own translation.

<sup>72</sup> The Polish constitutional doctrine refers to this right simply as the right to court. According to Article 45(1) of the Constitution, “everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”.

<sup>73</sup> Polish Constitutional Tribunal, Judgment of 27 October 2015, Ref. No. SK 9/13, Journal of Laws 2015, item 1791.

decisions.<sup>74</sup> Although the right to compensation for illegal actions of public authorities has a strict constitutional basis (Article 77(1) of the Polish Constitution<sup>75</sup>), in the Tribunal's view, it should be limited in the light of the obligation to protect judicial independence (Article 178 of the Constitution<sup>76</sup>) and, indirectly, of the right to a fair trial. The Tribunal stated that the situation in which "any violation of law or any difference in jurisprudence" could lead to the civil liability of the state "would cause a chilling effect on judges and discourage them from effectively protecting the constitutional rights of the individual, in particular with regard to argumentation based on legal principles or the use of general clauses".<sup>77</sup> Thus, the right to compensation had to be limited only to "evident and grave violations of law" resulting from the final judgment of a civil court.

As it has already been suggested, the above manner of applying the concept of chilling effect seems to be in common with the standard of the European Court of Human Rights. It also reflects the Tribunal's perception of the constitutional right to a fair trial, especially due to the fact that since 2007, the Tribunal, supported by the entire doctrine of the Polish constitutional law, has seen judicial independence as a vital element of this right.<sup>78</sup> Still, a deepened analysis of the Tribunal's standard causes certain doubts. Above all, the Strasbourg Court's judicial decisions mentioned in K 39/07 do not relate to the right to a fair trial as guaranteed by Article 6 of the Convention, but to other protected rights and freedoms (e.g. the freedom of expression). Thus, it may seem that the Tribunal referred to them only in

---

<sup>74</sup> The provision stipulates that if damage is caused by a final and binding court decision or other final decision, remedy may be demanded once such decision has been declared incompliant with the law in the course of appropriate proceedings, unless separate regulations provide otherwise.

<sup>75</sup> "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law".

<sup>76</sup> Article 178(1) of the Polish Constitution provides that "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes".

<sup>77</sup> Own translation.

<sup>78</sup> This position appeared in Polish Constitutional Tribunal, Judgment of 24 October 2007, Ref. No SK 7/06, Journal of Laws 2007, no. 204, item 1482. See remarks of Paweł Grzegorzcyk and Karol Weitz concerning "Article 45 of the Polish Constitution," in *Konstytucja RP. Tom I, Komentarz do art. 1–86*, ed. Marek Safjan and Leszek Bosek (Warsaw: CH Beck, 2016), 1097.

an ornamental way, in order to make its reasoning look strong. It should be also noted that matching the chilling effect with the principle of separation of powers in U 9/13 may, at least at first sight, seem controversial, but possible criticism is weakened if we take into account the further reference to the right to a fair trial. Finally, using the notion of chilling effect in order to narrow the right to compensation for judicial errors in SK 9/13 is, in my opinion, paradoxical. The right of compensation, as regulated in Article 77(1) of the Polish Constitution, belongs to important means of protection of rights and freedoms. The Tribunal’s use of the concept of chilling effect in the above judgment in fact results in lowering the standard of protection of constitutional rights, while undoubtedly the concept was invented by the US Supreme Court in order to strengthen such standard.

The Tribunal’s view of chilling effect becomes even more problematic when the third way of application of this metaphor is taken into account. It relates to the status of (and mutual relations between) various constitutional authorities that possess a certain degree of independence, such as the President of the National Bank of Poland, as stressed by the Tribunal in U 4/06. Apart from the case of the Banking Committee of Inquiry, such a broad use of the concept may be noticed in Pp 1/08,<sup>79</sup> i.e. in the decision issued in the course of proceedings against the Self-Defense party (Polish: *Samoobrona*). The case concerned the possible unconstitutionality of the party’s activities<sup>80</sup> against its members who had been elected deputies to the Sejm in the parliamentary elections of 2005. Notwithstanding the fact that the Constitutional Tribunal decided to discontinue its proceedings due to formal reasons, it conducted a thorough examination of the Self-Defense party’s practice against its own MPs. It revealed that the party leader had forced certain deputies to sign blank promissory notes (Polish: *weksel in blanco*), in which they had promised to pay the party a large sum of money. The notes could be used when a given Deputy decided to leave the Self-Defense parliamentary group or even voted otherwise than the

---

<sup>79</sup> Polish Constitutional Tribunal, Decision of 24 November 2010, Ref. No. Pp 1/08.

<sup>80</sup> Pursuant to Article 188(4) of the Constitution, the Constitutional Tribunal adjudicates regarding the conformity to the Constitution of the purposes or activities of political parties. A negative assessment of a party’s activities results in its dissolution on the basis of the Act on Political Parties of 1997.

leader had recommended. The Tribunal stated that such activities of the party “were aimed at exercising a ‘chilling effect’ on potential secessionists, discouraging them with a perspective of facing a grave financial sanction”.<sup>81</sup> As a result, the practices were deemed to violate the principle of voluntariness of membership in a political party, guaranteed by Article 11(1) of the Polish Constitution.<sup>82</sup> Moreover, but without explicitly invoking the term “chilling effect”, the Tribunal stated that Self-Defense’s activities were inconsistent with the principle of free parliamentary mandate (Article 104(1) of the Polish Constitution),<sup>83</sup> i.e. one of key principles concerning the contemporary Polish (and any other democratic) parliamentary system. As the Tribunal’s assessment of the party’s illegal practices cannot be, in my opinion, questioned, the application of the notion of chilling effect could not be justified. Both constitutional principles do not relate, at least not directly, to the sphere of rights and freedoms.

The final (fourth) way of application of the concept of chilling effect encompasses all other situations of its use by the Tribunal. In most cases, the Tribunal perceived it simply as any act of deterrence – no matter who exercised it, why it was exercised and to whom it was addressed. Thus, we are clearly dealing with the broadest interpretation of chilling effect that, as already mentioned, emerged in the USA. An analysis of the Tribunal’s jurisprudence indicates a considerable number of cases of such a non-canonical application. For instance in U 5/06,<sup>84</sup> which concerned the state secondary school exam (Polish: *egzamin maturalny*), the Tribunal found that a regulation determining the technical details of organizing the exam put the students who decided to take it in the extended form in a detrimental position when compared to students taking the standard exam. Such law was described as creating a chilling effect on the former group of

---

<sup>81</sup> Own translation.

<sup>82</sup> “The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means”.

<sup>83</sup> “Deputies shall be representatives of the Nation. They shall not be bound by any instructions of the electorate”.

<sup>84</sup> Polish Constitutional Tribunal, Judgment 16 January 2007, Ref. No. U 5/06, Journal of Laws 2007, no. 10, item 70.

students, discouraging them from trying to pass an ambitious version of the exam. Another interesting example is the already-mentioned K 10/08, which concerned a highly disputable problem of possible sanctions imposed on judges who performed their duties during the period of martial law (1981–1983), i.e. who participated in criminal procedures against anti-communist opposition (above all members of the “Solidarity” trade union). While criticizing the Supreme Court’s resolution that in fact blocked the possibility of persecuting such judges, the majority of the constitutional judges claimed that:

a chilling effect may occur not only with regard to individuals, but also in relation to state bodies, which – when facing the practical inability to enforce their rights when acting within the scope of their competences – will refrain from taking action in that respect. As it has been indicated above, it is obvious that the Resolution of the Supreme Court of 20 December 2007 may effectively ‘discourage’ law enforcement authorities from undertaking any attempts to hold criminally liable judges who adjudicated on the basis of the retroactive provisions of the Decree on Martial Law.<sup>85</sup>

It is interesting to notice that in order to give the grounds for this conclusion, the Constitutional Tribunal broadly, and in fact incorrectly, referred to the judicial decisions of the European Court of Human Rights. This argumentation prompted the earlier cited dissenting opinion of Justice Mirosław Wyrzykowski, who argued that the concept of chilling effect could be used solely in reference to the sphere of rights and freedoms.

Perhaps the broadest way of application of the notion of chilling effect, which is in fact unrelated to any act of deterrence, may be found in one of the most famous judicial decisions of the Polish Constitutional Tribunal, i.e. in the so-called Vetting Judgment (K 2/07).<sup>86</sup> When discussing the term “personal sources of information” included in the preamble of the Vetting Act of 2007, the Tribunal noted that it referred both to voluntary

---

<sup>85</sup> The English translation of the judgment mentioned in note 51, para. III.3.4.

<sup>86</sup> Polish Constitutional Tribunal, Judgment of 11 May 2007, Ref. No. K 2/07, *Journal of Laws* 2007, no. 85, item 571, a detailed summary available at [trybunal.gov.pl/fileadmin/content/omowienia/K\\_2\\_07\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_2_07_GB.pdf).

collaborators of the communist secret service and to all other persons who, in most situations unintentionally, delivered information to the officers of this service. As a result, including the term in the act “gave rise to the social stigmatization of persons deemed personal sources of information (chilling effect of the Act)”. Unfortunately, the Tribunal did not provide any further comments on this surprising conclusion.

## 5. Conclusion

The above analysis of the use of the concept of chilling effect by the Polish Constitutional Tribunal indicates that the notion has become a fixed element in the jurisprudence of this court. It should not be surprising that, as it has been mentioned in the preliminary remarks of this paper, it started appearing in the judicial decisions of various Polish courts as well as in the public debate, especially in the course of the current crises taking place in Poland, e.g. with regard to judicial independence. Although in my opinion the usefulness of the discussed legal metaphor in the Polish legal system cannot be questioned, the way of its transplantation by the Tribunal causes serious controversies. It was, above all, affected by „the original error”, i.e. by its surprisingly broad application in the Banking Committee of Inquiry judgment of 2006. As early as in its initial use of the notion, the Tribunal, apparently unintentionally, severed its connection to the sphere of protecting rights and freedoms, i.e. deprived it of its key or even defining feature. The subsequent call for a restrictive use of the notion of chilling effect, made after an analysis of the standards of the European Court of Human Rights by Justice Wyrzykowski in his dissenting opinion in K 10/08, came too late. The later judicial decisions of the Tribunal included the broad, and in the same time ambiguous, understanding of the discussed concept. Thus, the way of transplanting the concept of chilling effect into the Polish law from the Court’s jurisprudence may be described as superficial, i.e. lacking an in-depth analysis of the original version of this notion. The problem of a possible lack of thorough research of foreign legal systems by courts who try to borrow foreign legal ideas has been noticed in comparative constitutional law for a long time.<sup>87</sup> Importing slogans instead of complex legal

---

<sup>87</sup> See for instance Basil Barkesinis and Jörg Fedtke, *Judicial Recourse to Foreign Law. A New Source of Inspiration* (Abingdon: Routledge, 2006), 156–161.

institutions, sometimes resulting from the use of the so-called cherry picking technique, when the borrowed notions serve only to justify conclusions that a given court wishes to reach,<sup>88</sup> has always been a potential source of reservation towards the use of foreign legal institutions by the judiciary. Referring back to the case of the Tribunal’s transplantation of the concept of chilling effect, it should be noted that the fact that the European Court of Human Rights is an international judicial body, i.e. strictly speaking not a foreign court, is, in my opinion, irrelevant. The threat of importing a legal institution incorrectly remains the same.

However, the above remarks should not be perceived as a criticism referring to „an erroneous transplantation” of the chilling effect by the Polish Constitutional Tribunal. Since according to Article 195(1) of the Polish Constitution judges of the Tribunal are, in the exercise of their office, independent and “subject only to the Constitution”, it seems obvious that formally there are not bound by jurisprudence of any foreign or international judicial body, including the Strasbourg Court. Therefore the problem of an incorrect application of a foreign legal institution into the domestic legal system cannot exist from a strictly legal perspective. It seems evident that the mere idea of transplanting (or borrowing) refers to the sphere of inspiration that may influence – when referring to judges, not lawmakers – the contents of a given judicial decision. While referring to other legal systems a court only elaborates on foreign legal concepts in order to develop its own ones, and, desirably, to match them with particularities of the given national legal system<sup>89</sup>. As a result the problem of the transplantation of the chilling effect into the Polish constitutional jurisprudence is not the one of „an incorrect application” of that concept, but of developing a too broad and too vague legal institution. The inconsistency of the Tribunal’s notion of chilling effect may lead to a conclusion that “the Polish version of chilling effect” is nothing but a mere slogan, and, as a result, its potential as an important tool of protecting rights and freedoms is weakened when compared

---

<sup>88</sup> See Michal Bobek, *Comparative Reasoning in European Supreme Court* (Oxford: Oxford University Press, 2013), 240.

<sup>89</sup> See Thomas Kadner Graziano, “Is it Legitimate and Beneficial for Judges to Compare,” in *Courts and Comparative Law*, ed. Mads Andenas and Duncan Fairgrieve (Oxford, New York: Oxford University Press, 2015), 37.

to the ones of “counterpartying chilling effects”, such as the one developed in judicial decisions of the Strasbourg Court.

On the other hand the analysis of jurisprudence of the Polish Constitutional Tribunal shows that there are notable examples of its judicial decisions when the chilling effect was used in its typical context, i.e. within the sphere of constitutional rights and freedoms. It is also interesting to note that Polish lawyers as well as other courts that refer to the concept of chilling effect have not noticed the inconsistency of the Tribunal’s way of application of this concept yet. Instead, often as a result of recourse to the judicial decisions of the European Court of Human Rights, a general perception of the notion of chilling effect by the Polish lawyers seems to be fully in common with foreign standards. The concept is, as a rule, invoked in instances of potential harm to the execution of certain rights and freedoms, e.g. the freedom of expression or the right to a fair trial.<sup>90</sup> Still, the mere fact that the concept of chilling effect has appeared in legal debates in Poland has been, in my opinion, prompted by the fact that the Constitutional Tribunal made the first step in transplanting this legal institution in 2006.

## References

- Barendt, Eric. *Freedom of Speech*. Oxford: Oxford University Press, 2007.
- Barendt, Eric. et al., *Libel and the Media. The Chilling Effect*. Oxford: Oxford University Press 1997.
- Barkesinis, Basil, and Jörg Fedtke. *Judicial Recourse to Foreign Law. A New Source of Inspiration*. Abingdon: Routledge, 2006.
- Baumbach, Trine. “Chilling Effect as a European Court of Human Rights’ Concept in Media Law Cases.” *Bergen Journal of Criminal Law and Criminal Justice* 6, no. 1 (May 2018): 92–114.
- Belavusau, Uladzislau. *Importing European and US Constitutional Models in Transitional Democracies*. Abingdon: Routledge, 2013.

---

<sup>90</sup> See e.g. Bogusław Kosmus and Grzegorz Kuczyński, remarks concerning “Article 15 of the Press Law,” in *Prawo prasowe*, ed. Grzegorz Kuczyński (Warsaw: CH Beck, 2018), 324, or Piotr Wasilewski’s remarks concerning the problem of protection of satirical comments in the USA, Piotr Wasilewski, *Wolność prasowej wypowiedzi satyrycznej. Studium cywilistyczne na tle porównawczym* (Warsaw: Wolters Kluwer Polska, 2012), 195.

- Bobek, Michal. *Comparative Reasoning in European Supreme Court*. Oxford: Oxford University Press, 2013.
- Brzozowski, Wojciech. *Niezależność konstytucyjnego organu państwa i jej ochrona*. Warsaw: Wydawnictwo Sejmowe, 2016.
- Chybalski, Piotr. “Reception of chilling effect by the Polish Constitutional Tribunal.” *Academia Letters* 654 (2021).
- Dijkstra, Sietske. “The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR.” *Utrecht Law Review* 13, no. 1 (January 2017): 1– 17.
- Dolich, Michael N. “Alleging a First Amendment ‘Chilling Effect’ to Create a Plaintiff’s Standing: a Practical Approach.” *Drake Law Review* 43, no. 1 (1994): 175– 190.
- Garlicki, Lech, Piotr Hofmański and Andrzej Wróbel. *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18*. Warsaw: C.H. Beck, 2010.
- Garlicki, Lech, and Ireneusz Kondak, “Poland: Human Rights between International and Constitutional Law.” In *The Impact of the ECHR on Democratic Change in Central and Eastern Europe. Judicial Perspectives*, edited by Iulia Motoc and Ineta Ziemele. 326. Cambridge: Cambridge University Press, 2016.
- Garner, Bryan A. (ed.). *A Dictionary of Modern Legal Usage*. Oxford: Oxford University Press, 1995.
- Garner, Bryan A. (ed.). *Black’s Law Dictionary*. Eagan: Thomson West, 2004.
- Gierach, Ewelina, and Piotr Chybalski (ed.). *Polish Constitutional Law. The Constitution and Selected Statutory Materials*. Warsaw: Wydawnictwo Sejmowe, 2009.
- Góral, Lesław, and Katarzyna Koperkiewicz-Mordel. Remarks concerning Article 227 of the Polish Constitution, In *Konstytucja RP. Tom II, Komentarz do art. 87–243*, edited by Marek Safjan, Leszek Bosek, 1602. Warsaw: CH Beck, 2016.
- Groppi, Tania, and Marie-Claire Ponthoreau. “Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future.” In *The Use of Foreign Precedents by Constitutional Judges*, edited by Tania Groppi and Marie-Claire Ponthoreau, 42 – 431. Oxford and Portland: Hart Publishing, 2014.
- Grzegorzcyk, Paweł, and Karol Weitz. Remarks concerning “Article 45 of the Polish Constitution.” In *Konstytucja RP. Tom I, Komentarz do art. 1–86*, edited by Marek Safjan and Leszek Bosek, 1097. Warsaw: CH Beck, 2016.

- Jakab, András et al. (eds.). *Comparative Constitutional Reasoning*. Cambridge: Cambridge University Press, 2017.
- Kadner, Graziano Thomas. "Is it Legitimate and Beneficial for Judges to Compare." In *Courts and Comparative Law*, edited by Mads Andenas and Duncan Fairgrieve, 37. Oxford, New York: Oxford University Press, 2015.
- Kendrick, Leslie. "Speech, Intent and the Chilling Effect." *William & Mary Law Review* 54 (2013): 1633 –1691.
- Kos, Katarzyna. "Evolution or Entropy of the Concept of Chilling Effect – Polish Perspective." *Teisė* 110 (February 2019):168 –177.
- Królikowski, Michał. "Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 20 marca 2007 r. w sprawie Alicja Tysiąc przeciwko Polsce (nr skargi 5410/03)." *Przegląd Sejmowy* 80 (2007): 200 –211.
- Legrand, Pierre. "The Impossibility of 'Legal Transplants.'" *Maastricht Journal of European and Comparative Law* 4, vol. 2 (June 1997): 111 –124.
- Note. "The Chilling Effect in Constitutional Law." *Columbia Law Review* 69 (1969): 808–842.
- Paprocka, Ada. "An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal." *Adam Mickiewicz University Law Review* 8 (February 2018): 237 –250.
- Roach, Kent, and David Schneiderman. "Freedom of Expression in Canada." *Supreme Court Law Review* 61 (2013): 429 –525.
- Schauer, Frederick. "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect.'" *Boston University Law Review* 58 (1978): 685 –732.
- Watson, Alan. *Legal Transplants: An Approach to Comparative Law*, Athens: University of Georgia Press, 1993.
- Wróbel, Andrzej. "Krótki szkic o metaforze prawniczej." *Teka Komisji Prawniczej. Polska Akademia Nauk. Oddział w Lublinie* (2014): 130 –141.
- Zysset, Alain. *The ECHR and Human Rights Theory. Reconciling the Moral and the Political Conceptions*. Abingdon: Routledge, 2017.