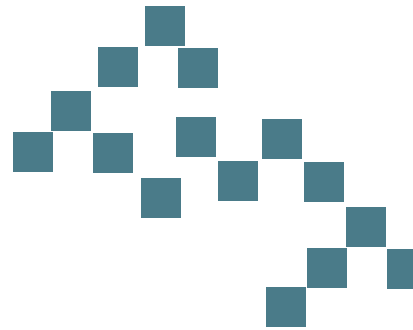
REVIEW
OF EUROPEAN AND COMPARATIVE LAW

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 46 2021/3



Wydawnictwo KUL
Lublin 2021

Cover design
Agnieszka Gawryszuk

Typesetting
Jarosław Łukasik

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e-ISSN 2545-384X

The original version is the electronic version.

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VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 7–26
DOI: https://doi.org/10.31743/recl.12389

INFORMATION POLLUTION IN A DIGITAL AND POLARIZED WORLD AS A CHALLENGE TO HUMAN RIGHTS PROTECTION – THE COUNCIL OF EUROPE'S APPROACH

*Alicja Jaskiernia**

ABSTRACT

Information pollution in a digitally connected and increasingly polarized world, the spread of disinformation campaigns aimed at shaping public opinion, trends of foreign electoral interference and manipulation, as well as abusive behaviour and the intensification of hate speech on the internet and social media are the phenomenon which concern international public opinion. These all represent a challenge for democracy, and in particular for the electoral processes affecting the right to freedom of expression, including the right to receive information, and the right to free elections. It is a growing international effort to deal with these problems. Among international organizations engaged to seek solutions is the Council of Europe (CoE). The author analyses CoE's instruments, legally binding (as European Convention on Human Rights), as well of the character of "soft law", especially resolution of the CoE's Parliamentary Assembly 2326 (2020) *Democracy hacked? How to respond?* She exposes the need for better cooperation of international organizations and states' authorities in this matter.

Keywords: information pollution, disinformation campaigns, hate speech, democracy, Council of Europe

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1. INTRODUCTION

How do we make sense of digitizing cultures?[1] Information pollution in a digitally connected and increasingly polarized world, the spread of disinformation campaigns aimed at shaping public opinion, trends of foreign electoral interference and manipulation, as well as abusive behaviour and the intensification of hate speech on the internet and social media are the phenomenon which concern international public opinion[2]. These all represent a challenge for democracy, and in particular for the electoral processes affecting the right to freedom of expression[3], including the right to receive information, and the right to free elections[4]. They need adequate legal procedures to cope with[5] the situation. The ubiquity of the Internet contrasts with the territorial nature of national legal orders[6]. However, there is a growing international effort to deal with that problem. There are important EU Internet regulatory challenges currently found in various key fields of law directly linked to the Internet such as information technology, consumer protection, personal data, e-commerce and copyright law[7].

The growth of Information and Communication Technology (ICT) and the prevalence of mobile devices make cyber security a highly topical and relevant issue. The transition from 4G to 5G mobile communication, while bringing convenience, also means cyber threats are growing

[1] Thomas Vernon Reed, *Digitized lives: culture, power, and social change in the internet era* (New York: Routledge, 2019), 24.

[2] James Ball, *The system: who owns the internet, and how it owns us* (London: Bloomsbury Publishing, 2020), 33.

[3] Susi Susi, ed., *Cyber Security: The Lifeline of Information and Communication Technology* (London, New York: Routledge, Taylor & Francis Group, 2019).

[4] Lilian Edwards, *Law, policy and the Internet* (Oxford: Hart, 2019), 34.

[5] Graham Smith, Ruth Boardman, Flynn Cathal, Gabe Maldoff, *Internet law and regulation* (London: Sweet & Maxwell, 2020), 51.

[6] Pedro de Miguel Asensio, *Conflict of laws and the internet* (Cheltenham, England, Northampton, Massachusetts: Edward Elgar Publishing, 2020), 32.

[7] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou, Thalia Prastitou, eds., *EU Internet Law in the Digital Era Regulation and Enforcement* (Cham: Springer International Publishing, 2020).

exponentially[8]. As regards cyberattacks, international organizations raised concerns[9] in particular with regard to numerous cases of mass disinformation campaigns intended to undermine security, public order and peaceful democratic processes, and to the need to develop tools to protect democracy from "information weapons"[10]. The studies are held to analyze phenomenona of Internet' content, including memes[11]. The analysis of the problem of information pollution is of particular importance in the context of the protection of the freedom of information, guaranteed, *inter alia*, by art. 10 of the European Human Rights Convention. Thus, it is of great importance in the context of the international system of human rights protection in all aspects of the functioning of political systems which depend on the full guarantee of freedom of expression.

The occasion to analyze this problem led to the creation of resolution 2326 (2020) of the Council of Europe Parliamentary Assembly entitled *Democracy hacked? How to respond?* in which it was stressed that:

> The Parliamentary Assembly is concerned about the scale of information pollution in a digitally connected and increasingly polarized world, the spread of disinformation campaigns aimed at shaping public opinion (…)[12].

As the Internet and social media seep into ever more aspects of the political landscape, the Assembly points to the need to improve the Internet's content and architecture, build up the resilience of Europe's democratic systems and societies, counter disinformation, invest in quality journalism and preserve freedom of expression and media and political pluralism, es-

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[8] Vandana Rohokale, *Cyber Security: The Lifeline of Information and Communication Technology* (Cham: Springer International Publishing, 2020), 44.

[9] PACE Resolution 2217 (2018) and Recommendation 2130 (2018) on legal challenges related to hybrid war and human rights obligations.

[10] Mohiuddin Ahmed, Abu S. S. M. Barkat Ullah, and Al-Sakib Khan Pathan, eds., *Security analytics for the internet of everything* (Boca Raton, Florida, London, New York: CRC Press, 2020).

[11] Anastasia Denisova, *Internet memes and society: social, cultural, and political contexts* (New York, London: Routledge, 2019), 43.

[12] *Assembly debate* on 31 January 2020 (9th Sitting) (see Doc. 15028, report of the Committee on Political Affairs and Democracy, rapporteur: Mr. Frithjof Schmidt; and Doc. 15056, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr. Emanuelis Zingeris). *Text adopted by the Assembly* on 31 January 2020 (9th Sitting).

pecially in the context of elections. It is worth analyzing that document in the broader perspective of challenges which bring about information pollution and activities of the Council of Europe to confront that problem.

The aim of this publication is to analyze the phenomenon of information pollution, and in particular the problem of threats which it brings about to the freedom of information perceived as a crucial human right and as an important premise for the functioning of democratic systems. The following hypothesis will be verified: contaminated information poses a threat to the realization of the freedom of speech and more effective involvement of national and international instruments are needed to combat this phenomenon. The following research methods will be used in the work: institutional and legal, legal-comparative and system analysis.

2. GENERAL CHARACTERISTICS OF THE PHENOMENON OF INFORMATION POLLUTION

Information pollution (also referred to as "info pollution") is the contamination of information supply with irrelevant, redundant, unsolicited, hampering and low-value information[13]. Information pollution generally applies to digital communication, such as e-mail, instant messaging (IM) and social media. The term acquired particular relevance when web expert Jakob Nielsen published an essay in which he raised questions surrounding the concept of "information pollution", exposing the negative side of the global trend of empowering internet users to access and produce "knowledge"[14]. The spread of useless and undesirable information can have a detrimental effect on human activities. It is considered one of the adverse effects of the information revolution. Nowadays researchers were expressing doubts about the negative effects of overloading of information seen as the digital equivalent of the environmental pollution generated by indus-

[13] Levent Orman, "Fighting Information Pollution with Decision Support Systems," *Journal of Management Information Systems* 1, no. 2 (2015): 65.

[14] Jakob Nielsen, "IM, Not IP (Information Pollution): A steady dose of realtime interruptions is toxic to anyone's health," November 2003, Association for Computing Machinery, https://dl.acm.org/doi/pdf/10.1145/966712.966731, accessed March 23, 2021.

trial processes. The new terms of information pollution like "disinfomedic" or "infodemic", have occurred as a term to describe the role of social media in the pandemic of COVID-19. The broader notion of these terms stress the possible negative influence to people who live in a "mediated reality constructed out of fake news, misinformation, rumours and lies"[15].

In recent years, data protection has become a major concern in many countries, as well as at supranational and international levels. In fact, the emergence of computing technologies that allow lower-cost processing of increasing amounts of information, associated with the advent and exponential use of the Internet and other communication networks and the widespread liberalization of the cross-border flow of information have enabled the large-scale collection and processing of personal data, not only for scientific or commercial uses, but also for political uses. A growing number of governmental and private organizations now possess and use data processing in order to determine, predict and influence individual behavior in all fields of human activity. This inevitably entails new risks, from the perspective of individual privacy, but also other fundamental rights, such as the right not to be discriminated against, fair competition between commercial enterprises and the proper functioning of democratic institutions. These phenomena have not been ignored from a legal point of view: at the national, supranational and international levels, an increasing number of regulatory instruments – including the European Union's General Data Protection Regulation applicable as of 25 May 2018 – have been adopted with the purpose of preventing personal data misuse. Nevertheless, distinct national approaches still prevail in this domain, notably those that separate the comprehensive and detailed protective rules adopted in Europe since the 1995 Directive on the processing of personal data from the more fragmented and liberal attitude of American courts and legislators in this respect[16].

The internet isn't the first technology to alter how we communicate, but it is making our language change faster and in more interesting ways

[15] Mark Deuze, "The Role of Media and Mass Communication Theory in the Global Pandemic," *Communication Today* 11, no. 2 (2020): 9.

[16] Vicente Dário Moura and Sofiade Vasconcelos Casimiro, eds., *Data Protection in the Internet* (Cham: Springer International Publishing, 2020).

than ever before. The programmers behind the apps and platforms we use decide how our conversations are structured, from the grammar of status updates to the protocols of comments and @replies. Linguistically inventive niche online communities spread slang faster than in the days when new dialects were constrained by offline space[17].

A compelling argument that the Internet of things threatens human rights and security and that suggests policy prescriptions to protect our future. The Internet has leapt from human-facing display screens into the material objects all around us. In this so-called Internet of Things – connecting everything from cars to cardiac monitors to home appliances – there is no longer a meaningful distinction between physical and virtual worlds. Everything is connected[18]. The Internet of Things (IoT) is the notion that nearly everything we use, from gym shorts to streetlights, will soon be connected to the Internet; the Internet of Everything (IoE) encompasses not just objects, but the social connections, data, and processes that the IoT makes possible. As more devices and systems become intertwined, the growing scale of the threat from hackers can easily get lost in the excitement of lower costs and smarter tech[19]. Thanks to rapid advances in sensors and wireless technology, Internet of Things (IoT)-related applications are attracting more and more attention. As more devices are connected, they become potential components for smart applications. Thus, there is a new global interest in these applications in various domains such as health, agriculture, energy, security and retail[20]. From new ways of negotiating privacy, to the consequences of increased automation, the Internet of Things poses new challenges and opens up new questions that often go beyond the technology itself, and rather focus on how the technology

[17] Gretchen McCulloch, *Because Internet: understanding the new rules of language* (New York: Riverhead Books, 2019), 38.

[18] Laura DeNardis, *The Internet in Everything: Freedom and Security in a World with No Off Switch* (New Haven, CT: Yale University Press, 2020), 52.

[19] Scott J. Shackelford, *The Internet of Things: What Everyone Needs to Know* (New York: Oxford University Press, 2020), 48.

[20] Valentina E. Balas, Vijender Kumar Solanki, and Raghvendra Kumar, eds., *Internet of Things and Big Data Applications Recent Advances and Challenges* (Cham: Springer International Publishing, 2020).

will become embedded in our future communities, families, practices, and environment, and how these will change in turn[21].

The publicly available datasets are outlined along with experimental settings. Internet and social media have become a widespread, large scale and easy to use platform for real-time information dissemination. It has become an open stage for discussion, ideology expression, knowledge dissemination, emotions and sentiment sharing. This platform is gaining tremendous attraction and a huge user base from all sections and age groups of society of the digital economy era, when technologies "mediate time"[22]. The matter of concern is that up to what extent the contents that are circulating among all these platforms every second changing the mindset, perceptions and lives of billions of people are verified, authenticated and up to standards[23].

Employees are facing information explosion in the presence of destructive information and communication technologies of industry 4.0. With the prevalent nature of information pollution, employees are finding it difficult to process large volume of information in order to access quality information. The perceived information pollution comprises five dimensions – accessible, intrinsic, contextual, representational, and distractive information pollution. With new quantum technology, hacker-proof exchange of information and ultrafast data processing will become possible. The basis for these is Albert Einstein's "quantum spook". We are not dealing here with witchcraft, but with hard-core science[24].

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[21] Alessandro Soro, Margot Brereton, and Paul Roe, eds., *Social Internet of Things* (Cham: Springer International Publishing, 2019).

[22] Bohdan Jung and Tadeusz Kowalski, "Restructuring Time Use Under COVID-19 Pandemics," *International Journal of Inspiration & Resilience Economy* 5(1) (2021): 23; Priyanka Meel and Dinesh Kumar Vishwakarma, "A temporal ensembling based semi-supervised ConvNet for the detection of fake news articles," *Expert Systems with Applications* 177 (2021): 115002.

[23] Priyanka Meel and Dinesh Kumar Vishvakarma, "Fake news, rumor, information pollution in social media and web: A contemporary survey of state-of-the-arts, challenges and opportunities," *Expert Systems with Applications* 153 (2020): 112986.

[24] Gösta Fürnkranz, *The Quantum Internet Ultrafast and Safe from Hackers* (Cham: Springer International Publishing, 2020), 19.

3. THE COUNCIL OF EUROPE'S ACTIVITY AGAINST INFORMATION POLLUTION

The Council of Europe several times analyzed the phenomenon of information pollution. Internet intermediaries, including social media, play a crucial role in providing services of public value and facilitating public discourse and democratic debate. Council of Europe standards set out the intermediaries' responsibilities with respect to ensuring human rights and fundamental freedoms on their platforms, which includes the right to free elections. In this regard, internet intermediaries should be subject to effective oversight and regular due diligence assessments of their compliance with their responsibilities[25].

In 2002, the Venice Commission adopted the Code of Good Practice in Electoral Matters[26] which ensures electoral equity and equality of opportunity. This applies, in particular, to radio and television air-time, public funds and other forms of backing and entails a neutral attitude by State authorities, in particular with regard to election campaigns, media coverage, especially by publicly owned media, and public funding of parties and campaigns. However, the Code also states that "legal provision should be made to ensure that there is a minimum access to privately owned audio-visual media, with regard to the election campaign and to advertising, for all participants in elections" and that "the principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising". Furthermore, important work is being done by the Venice Commission, which, on 24 June 2019, adopted a joint report, with the Directorate of information society and action against crime, on Digital technologies and elections, which proves relevant to my analysis. The Venice Commission also decided to prepare a list of principles for the use of digital technologies in a human rights compliant manner, in relation to elections.

In 2011, PACE adopted Resolution 1843 (2011) and Recommendation 1984 (2011) on "The protection of privacy and personal data on

[25] Venice Commission, "Joint Report on Digital Technologies and Elections", CDL-AD(2019)016; 24/06/2019, 5,8; CDL-LA(2018)002,9.

[26] Venice Commission, Opinion No. 190/2002.

the Internet and online media". The resolution emphasized that the protection of the right to data protection is a necessary element of human life and of the humane functioning of a democratic society, and that its violation affects a person's dignity, liberty and security.

In 2012, the Committee of Ministers of the Council of Europe adopted two relevant Recommendations on the protection of human rights with regard to search engines and social networking services. In the first text, the Committee of Ministers recognized the challenge caused by the fact that an individual's search history contains a footprint which may reveal the person's beliefs, interests, relations or intentions, and could reveal, *inter alia*, one's political opinions or religious or other beliefs. The Recommendation called for action to enforce data protection principles, in particular purpose limitation, data minimization and limited data storage, while data subjects must be made aware of the processing and provided with all relevant information[27].

Concerned with the interference of the right to private life by rapid technological developments, in 2013 the Committee of Ministers of the Council of Europe adopted a *Declaration on risks to fundamental rights stemming from digital tracking and other surveillance technologies*[28].

In 2017, the Council of Europe report on *Information disorder: Toward an interdisciplinary framework for research and policy making*, which suggests ways to determine the type of response suited to the threat. As the concept of "fake news" is too imprecise, the report makes a distinction between: misinformation – when false information is shared, but no harm is meant; disinformation – when false information is knowingly shared to cause harm; malinformation – when genuine information is shared to cause harm, by transferring it from private into the public sphere. The report points out that our societies need:

– in the short term, to address the most pressing issues, for instance around election security;
– in the long term, to increase society's resilience to disinformation;
– a structure capable of checking and constantly adapting responses[29].

[27] Recommendation CM/Rec (2012)3.

[28] https;/RM.coe.int/168068460d, accessed March 12, 2021.

[29] *Council of Europe Report on Information and Disorder* (Strasbourg: Council of Europe, 2017): 3.

Under the European Convention on Human Rights, as interpreted by the European Court of Human Rights, member States have an obligation to secure the rights and freedoms for everyone within their jurisdiction, both offline and online. Article 10 of the European Convention on Human Rights, which guarantees freedom of information, is fundamental to the protection of human rights in relation to freedom of expression in the member states of the Council of Europe. The crucial issue is to determine whether the obligations of the State in assuring equal publicity of political parties and candidates are to be applied to internet intermediaries and if so, in what manner. In this regard, the Committee of Ministers' Recommendation CM/Rec (2018)1 on media pluralism and transparency of media ownership and Recommendation CM/Rec (2018)2 on the roles and responsibilities of Internet intermediaries, point to the potentially disturbing impact that online platform's control over the flow, availability, findability and accessibility of information can have on media pluralism. The Committee of Ministers called on member States to act as the ultimate guarantor of media pluralism by ensuring pluralism in the entirety of the multimedia ecosystem.

The 15th Conference of Electoral Management Bodies on Security in Elections, organized by the Venice Commission on 19 and 20 April 2018, showed clearly that the right to free suffrage was facing digital challenges in two respects: voters' freedom to form an opinion and their freedom to express their will. It was also stressed that while criminal penalties should apply to cyberattacks, the effectiveness of judicial responses to date was relatively limited[30].

In the Declaration on the manipulative capabilities of algorithmic processes adopted on 13 February 2019, the Committee of Ministers of the Council of Europe called on its 47 member States to tackle the risk that individuals may not be able to form their opinions and take decisions independently of automated systems, and that they may even be subjected to manipulation due to the use of advanced digital technologies, in particular micro-targeting techniques. Machine learning tools have the growing capacity not only to predict choices but also to influence emotions and thoughts, sometimes subliminally. The Committee encouraged member

[30] Website of the 15th European Conference on Electoral Management Bodies.

States to assume their responsibility to address this growing threat in particular by taking appropriate and proportionate legislative measures against illegitimate interferences, and empowering users by promoting critical digital literacy skills. The Committee went as far as stressing the need to assess the regulatory frameworks related to political communication and electoral processes to safeguard the fairness of elections and to ensure that voters are protected against unfair practices and manipulation. It also stressed the significant power that technological advancement confers to those who may use algorithmic tools without adequate democratic oversight or control and underlined the responsibility of the private sector to act with fairness, transparency and accountability under the guidance of independent public institutions[31].

As regards cyberattacks, the Parliamentary Assembly of the Council of Europe has raised concerns in Resolution 2217 (2018) and Recommendation 2130 (2018) on legal challenges related to hybrid war and human rights obligations, in particular with regard to numerous cases of mass disinformation campaigns intended to undermine security, public order and peaceful democratic processes, and to the need to develop tools to protect democracy from "information weapons".

The work that has been done by the Council of Europe on personal data protection and electoral rights, especially the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, Convention 108) and its relevance with regard to electoral rights, welcomes other *soft law* instruments addressing different aspects of privacy and personal data protection in the context of the information society, including in social networks. The Protocol amending the Convention (CETS No. 223) modernizes the convention and addresses emerging challenges resulting from the use of new information and communication technologies, and supports the call of the United Nations' Special Rapporteur on the right to privacy. The Convention 108 on the use of personal data in elections and their possible misuse in a political context continues this activity.

On social networks, the Committee of Ministers of the Council of Europe recommended that member States take actions to provide an en-

[31] CM Declaration on the manipulative capabilities of alghoritmic processes.

vironment for users of social networks that allows them to further exercise their rights and freedoms, to raise users' awareness of the possible challenges to their human rights and of the negative impact on other people's rights when using these services, as well as to enhance transparency about data processing, and forbids the illegitimate processing of personal data[32].

The Council of Europe has invited its member States that have not already done so to sign and/or ratify and fully implement the Council of Europe Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189).

The Parliamentary Assembly of the Council of Europe has appointed Mr. Frithjof Schmidt (Germany, Socialist) to be rapporteur for preparation of the rapport *Democracy hacked? How to respond?*[33] for the Committee on Political Affairs and Democracy, which was a base for the PACE's resolution 2326 (2020). The rapporteur has analyzed the following questions: does the introduction of digital public structures threaten our public debates and current model of representative democracies? How can we increase society's resilience to disinformation? Is there not a risk that the way social media operates, by accentuating what researchers call "cocooning", i.e. the tendency of connected groups of individuals to keep to themselves and only follow "news", whether true or false, that confirms their points of view, as well as the business logic of platform operators and the lack of transparency in information distribution will cut these groups of web users off from confronting views they do not share? In other words, if democracy involves acceptance of debate among people who hold different views, does this trend render this aspect of democracy obsolete?[34] He found that the relationship between democracy and a new technological environment is a complex one. On the one hand, the internet and social media have become a central platform of political interaction. In some democracies, the use of technology tools has facilitated democratic participation and political activism. On the other hand, internet and social

[32] Recommendation CM/Rec (2012)4.

[33] PACE, Reference to committee: Bureau decision, Reference 4353 of 22 January 2018. 2020 - First part-session, Doc. 15028.

[34] PACE, Explanatory memorandum by Mr. Frithjof Schmidt, Doc. 15028, § 1.2.

media can endanger the voters' free will or the principle of equal opportunities for all candidates as well as voters' rights to privacy. As a matter of fact, the increase of content production and the centralization of online distribution channels by a few companies (Twitter, Google and Facebook) have had several unintended consequences: the proliferation of private and public disinformation tactics, and most importantly, the arrival of non-regulated private actors in the democratic arena. These new players are literally "owners" and new "gatekeepers" of the global communication infrastructure. Virtual tools can be used as a threat for the integrity of the elections in several ways, such as suppressing voter turnout, tampering with election results, stealing voter information, conducting cyberespionage or doxing of candidates for the purposes of manipulation and shaping the opinions of voters. In relation to defense, cyberattacks are becoming increasingly significant in what is now called "hybrid warfare", a new type of warfare combining conventional and non-conventional methods. This also involves a redefinition of conventional military strategy concepts of attack and defense. In this context, there is a great risk of civil society being targeted directly and its rights being jeopardized. The importance of this issue is without doubt[35].

According to Freedom House, manipulation and disinformation tactics played an important role in elections in at least 18 countries in 2017, damaging citizens' ability to choose their leaders based on factual news and authentic debate and giving rise to what has been named "digital authoritarianism". At the same time, governments around the world are tightening control over citizens' data and using claims of "fake news" to suppress dissent, eroding trust in the internet as well as the foundations of democracy[36]. In January 2018, Swedish security chief Anders Thornberg, in the context of the general elections in Sweden, pointed to several ex-

[35] Ibidem, § 1.3–5.

[36] Freedom House, *Freedom on the Net 2018, the rise of digital authoritarianism*, https://www.google.pl/search?ei=hcFMYP3SJuH6qwH9qonQDg&q=Freedom+House%2C+Freedom+on+the+Net+2021%2C+the+rise+of+digital+authoritarianism&oq=Freedom+House%2C+Freedom+on+the+Net+2021%2C+the+rise+of+digital+authoritarianism&gs_lcp=Cgdnd3Mtd2l6EAw6BwgAEEcQsANQqyVYsDtgwUtoAXACeACAAYcCiAH8BJIBBTMuMS4xmAEAoAEBqgEHZ3dzLXdpesgBCLgBAsABAQ&sclient=gws-wiz&ved=0ahUKEwi9qaWfs63vAhVh_ SoKHX1VAuoQ4dUDCAw, accessed March 13, 2021.

amples of fake news articles that sought to create division and undermine trust, including one that claimed that Muslims had vandalized a church. The latter was spread, using bots, which were from outside Sweden. He pointed out the national security implications when a foreign actor uses such disinformation campaigns. In January 2019, Facebook took down two large-scale disinformation operations linked to Russian State actors operating across Eastern and Central Europe. In February 2019, the German authorities arrested a 20-year-old student who confessed to having illegally accessed information on more than 1 000 public figures, including high-ranking politicians. In November 2019, Facebook announced that it had removed 5.4 billion fake accounts throughout the year[37]. Built as an open and democratic space, the internet is a global village allowing information to spread easily at low cost. Therefore, it is difficult to identify trustworthy information or find those responsible for illegal actions online. Online propaganda, disinformation and hate-speech have increased in the digital sphere. In this context, guaranteeing the freedom of voting and fair elections, while preserving freedom of expression, represents a major challenge. If citizens are unable to distinguish between false and true data and are unaware of the conditions under which they exercise their rights and freedoms, the purity of their will might be compromised, as well as the democratic legitimacy of the elections themselves[38]. Experts claim that misinformation, sometimes backed by governments, has already influenced several major events in Europe. For example, some claim that disinformation may have influenced the Dutch vote on the EU-Ukraine Association Agreement, the result of the Brexit vote, the debates around the independence of Catalonia, and immigration issues in Italy. According to the Final Report of the UK House of Commons' Digital, Cultural, Media and Sport Committee of 14 February 2019, following an 18-month investigation into disinformation, "democracy is at risk from the malicious and relentless targeting of citizens with disinformation and personalized 'dark adverts' from unidentifiable sources, delivered through the major so-

[37] https:/editoion.ccon.com/2019/11/13/tech/facebo ok.-take-accounts/index.html, accessed March 13, 2021.

[38] CDL-LA(2018)001; 21/11/2018,9.

cial media platforms"[39]. Furthermore, according to a Venice Commission study, the use of artificial intelligence (AI) during election campaigns raises ethical and democratic questions as there is evidence and further possibility to use them to manipulate citizens and influence the electoral results[40].

4. RECOMMENDATIONS OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE ADDRESSING DISINFORMATION CHALLENGES

In resolution 2326 (2020) the Parliamentary Assembly of the Council of Europe addressing disinformation challenges in the context of democratic elections, recommended that governments of the Council of Europe member States need to: a) recognize the transnational nature of the problem and enhance co-operation with internet intermediaries and social media operators, whose commercial interests tend to collide with human rights and political rights, for instance the principle of electoral equity, in line with the Committee of Ministers Recommendation CM/Rec(2018)2 on the roles and responsibilities of Internet intermediaries; b) enable voters to receive trustworthy information and become more informed and engaged, with a view to preserving the exercise of their right to truly free and fair elections; c) break up the monopoly of technology companies controlling, to a great extent, citizen's access to information and data; d) consider updating national legislation in order to counter disinformation campaigns more effectively[41].

To tackle these challenges, the Assembly has called on Council of Europe member States to implement a number of strategies from a European and global perspective and to create a model that includes co-responsibility and multiple regulatory and conflict-resolution approaches, in particular by: a) promoting media education and digital literacy skills to strengthen the legal and democratic culture of citizens, in line with Reso-

[39] https:/publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/179102.htm, accessed March 13, 2021.

[40] PACE, Explanatory memorandum…, § 2.12–18.

[41] PACE Res. 2326 (2020), § 5.

lution 2314 (2019) on media education in the new media environment, enhance public awareness of how data are generated and processed, enable voters to evaluate critically electoral communication and increase society's resilience to disinformation; b) encouraging and supporting collaborative fact-checking initiatives and other improvements of content moderation and curation systems which are intended to counter the dissemination of deceptive and misleading information, including through social media, in line with Resolution 2281 (2019) "Social media: social threads or threats to human rights?"; c) securing adequate funding to independent public service media, so that the media can allocate enough resources to innovate in content, form and technology to foster their role as major players in countering disinformation and propaganda and as cutting-edge stakeholders in protecting communication and media ecosystems in Europe, in line with Resolution 2255 (2019) on public service media in the context of disinformation and propaganda; d) strengthening transparency in political online advertising, information distribution, algorithms and business models of platform operators, in particular by: guaranteeing, where political parties and candidates have the right to purchase advertising space for election purposes, equal treatment in terms of conditions and rates charged; developing specific regulatory frameworks for internet content at election times and including provisions on transparency in relation to sponsored content on social media, so that the public is aware of the source that funds electoral advertising or any other information or opinion, in line with Resolution 2254 (2019) on media freedom as a condition for democratic elections, and prevent illegal foreign involvement; e) addressing the implications of the micro-targeting of political advertisements with a view to promoting a political landscape which is more accountable and less prone to manipulation; f) supporting researchers' access to data, including datasets with deleted accounts and content, with a view to examining the influence of strategic disinformation on democratic decision making and on electoral processes, and possibly proposing the setting up of a European network of researchers in this area; g) considering national and international regulation to share best practices and increase co-operation among security agencies, for instance by creating a specific mechanism for monitoring, crisis management and post-crisis analysis and sharing resources that already exist in various countries, in line with Recommendation 2144 (2019) on

internet governance and human rights; h) calling on professionals and organizations in the media sector to develop self-regulation frameworks that contain professional and ethical standards relating to their coverage of election campaigns, including enhanced news accuracy and reliability and respect for human dignity and the principle of non-discrimination, in line with Resolution 2254 (2019); i) initiating judicial reforms and setting up specialized divisions for judges and prosecutors focusing on disinformation and hate speech[42].

An analysis of the recommendations of the Parliamentary Assembly of the Council of Europe shows that the Council of Europe recognizes the dangers of disinformation on the Internet and is looking for ways to counter this phenomenon. This creates a direct threat to the realization of the freedom of speech, as protected in the international system of human rights protection. The proposed activities are comprehensive. Much attention is paid to the educational effort, but also specification of legal instruments that should be implemented by the Member States is taking place. By emphasizing the importance of national and international regulations, where the Council of Europe is an active entity that creates, this organization also takes into account the importance of self-regulation in individual environments. They can be a valuable supplement to the instruments offered by state authorities in the form of statutory regulations and by international organizations in the form of multilateral agreements.

5. FINAL COMMENT

The phenomenon of information pollution begins to have increasingly significant negative effects on modern societies. Disinformation on the Internet and in other new media affects a number of areas of social life, and has recently become an important factor disrupting political life[43]. Several fundamental problems are involved due to important questions about the influence of "fake news", "disinformation order", "post-truth politics",

[42] Ibidem, § 6.

[43] Bruce Bimber and Homero Gil de Zúñiga, "The unedited public sphere," *New Media and Society* 22(4) (2020): 700–715.

"information smog" or "information pollution", to public and individuals lives. Global problems need new tactics and alliances like never before, because information pollution also has gone global[44]. They are followed by compulsion and demands how to resolve more and more strict plot of the new technologies expansion and the need to protect several individual and social values. The new approach to recognize new strategies, including strategic coalitions and constructing new frames for the available activities, is fundamental. The efforts of the Council of Europe to counteract these negative phenomena that threaten the realization of fundamental human rights are also more comprehensive than ever. They include the activities of the Committee of Ministers and other intergovernmental cooperation bodies, as well as the Parliamentary Assembly, based on the European Convention on Human Rights and the development of its provisions, especially worked out by the European Court of Human Rights. One cannot, however, disregard the so-called "soft law", offered, *inter alia*, by the Commission for Democracy through Law (Venice Commission). But the governance processes should be more broad and complete, including partners from ICT and media sectors, as well as another pan-European organizations, like the European Union, which perceives disinformation as a major challenge for Europe[45].

The recommendations of the Parliamentary Assembly of the Council of Europe analyzed are precisely "soft law". Although they are not legally binding in terms of public international law, they should nevertheless play an important role in directing the activity of Council of Europe member states. After all, the Council of Europe is called an "organization of values" and everything it offers serves to strengthen democracy, the rule of law and protect human rights. This effort, in conjunction with the activities of other international organizations, both universal (e.g. the United Nations) and regional (e.g. the European Union, OSCE) deserve support, regardless of the legal nature of the actions taken.

[44] Mark Scott, "POLITICO Digital Bridge: COVID-19 disinformation – Digital divide-Mark Warner," March 11, 2021, https://www.politico.eu/newsletter/digital-bridge/politico-digital-bridge-covid-19-disinformation-digital-divide-mark-warner/, accessed March 22, 2021.

[45] Alicja Jaskiernia, "Europejska walka z dezinformacjami i nielegalnymi treściami w sieci. Obrona jakości mediów w Unii Europejskiej i Radzie Europy," *Studia Medioznawcze* 4(79) (2019): 384–394.

REFERENCES

Ahmed, Mohiuddin, Abu S. S. M. Barkat Ullah, and Al-Sakib Khan Pathan, eds. *Security analytics for the internet of everything*. Boca Raton, Florida, London, New York: CRC Press, 2020.

Asensio, Pedro de Miguel. *Conflict of laws and the internet*. Cheltenham, England, Northampton, Massachusetts: Edward Elgar Publishing, 2020.

Balas, Valentina E., Vijender Kumar Solanki, and Raghvendra Kumar, eds. *Internet of Things and Big Data Applications Recent Advances and Challenges*. Cham: Springer International Publishing, 2020.

Ball, James. *The system: who owns the internet, and how it owns us*. London: Bloomsbury Publishing, 2020.

Bimber, Bruce, and Homero Gil de Zúñiga. "The unedited public sphere." *New Media and Society* 22(4) (2020): 700–715.

Council of Europe Report on Information and Disorder. Strasbourg: Council of Europe, 2017.

DeNardis, Laura. *The Internet in Everything: Freedom and Security in a World with No Off Switch*. New Haven, CT: Yale University Press, 2020.

Denisova, Anastasia. *Internet memes and society: social, cultural, and political contexts*. New York, London: Routledge, 2019.

Deuze, Mark. "The Role of Media and Mass Communication Theory in the Global Pandemic." *Communication Today* 11, no. 2 (2020): 4–15.

Edwards, Lilian. *Law, policy and the Internet*. Oxford: Hart, 2019.

Fürnkranz, Gösta. *The Quantum Internet Ultrafast and Safe from Hackers*. Cham: Springer International Publishing, 2020.

Jaskiernia, Alicja. "Europejska walka z dezinformacjami i nielegalnymi treściami w sieci. Obrona jakości mediów w Unii Europejskiej i Radzie Europy." *Studia Medioznawcze* 4(79) (2019): 384–394.

Jung, Bohdan, and Tadeusz Kowalski. "Restructuring Time Use Under COVID-19 Pandemics." *International Journal of Inspiration & Resilience Economy* 5(1) (2021): 22–31.

McCulloch, Gretchen. *Because internet: understanding the new rules of language*. New York: Riverhead Books, 2019.

Meel, Priyanka, and Dinesh Kumar Vishvakarma. "Fake news, rumor, information pollution in social media and web: A contemporary survey of state-of-the-arts, challenges and opportunities." *Expert Systems with Applications* 153 (2020): 112986.

Meel, Priyanka, and Dinesh Kumar Vishwakarma. "A temporal ensembling based semi-supervised ConvNet for the detection of fake news articles." *Expert Systems with Applications* 177 (2021): 115002.

Moura, Vicente Dário, and Sofia de Vasconcelos Casimiro, eds. *Data Protection in the Internet*. Cham: Springer International Publishing, 2020.

Nielsen, Jakob. "IM, Not IP (Information Pollution): A steady dose of realtime interruptions is toxic to anyone's health." November 2003, Association for ComputingMachinery.https://dl.acm.org/doi/pdf/10.1145/966712.966731. Accessed March 23, 2021.

Orman, Levent. "Fighting Information Pollution with Decision Support Systems." *Journal of Management Information Systems* 1, no. 2 (2015): 64–71.

Reed, Thomas Vernon. *Digitized lives: culture, power, and social change in the internet era*. New York: Routledge, 2019.

Rohokale, Vandana. *Cyber Security: The Lifeline of Information and Communication Technology*. Cham: Springer International Publishing, 2020.

Scott, Mark. "POLITICO Digital Bridge: COVID-19 disinformation – Digital divide - Mark Warner." March 11, 2021. https://www.politico.eu/newsletter/digital-bridge/politico-digital-bridge-covid-19-disinformation-digital-divide-mark-warner/. Accessed March 22, 2021.

Shackelford, Scott J. *The Internet of Things: What Everyone Needs to Know*. New York: Oxford University Press, 2020.

Smith, Graham, Ruth Boardman, Flynn Cathal, and Gabe Maldoff. *Internet law and regulation*. London: Sweet & Maxwell, 2020.

Soro, Alessandro, Margot Brereton, and Paul Roe, eds. *Social Internet of Things*. Cham: Springer International Publishing, 2019.

Susi, Susi, ed. *Cyber Security: The Lifeline of Information and Communication Technology*. London, New York: Routledge, Taylor & Francis Group, 2019.

Synodinou, Tatiana-Eleni, Philippe Jougleux, Christiana Markou, and Thalia Prastitou, eds. *EU Internet Law in the Digital Era Regulation and Enforcement*. Cham: Springer International Publishing, 2020.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 27–42
DOI: https://doi.org/10.31743/recl.12432

THE RIGHT TO BE FORGOTTEN: EMERGING LEGAL ISSUES

*Oksana V. Kiriiak**

ABSTRACT

This paper contextualizes and analyzes the main emerging approaches to the understanding of the right to be forgotten and its application in praxis, using legislation and judicial practice of the European Union and Ukraine as reference scales. By bridging the gap between positive and interpretative orders of law implementation, which were previously imperatively opposed and considered mutually exclusive in the Ukrainian legal system, the paper supports the arguments that the process of mastering the protection of right to be forgotten requires a further mindset shift equally for-Internet providers and all involved law enforcers.

Keywords: right to be forgotten, right to remember, court jurisdiction, trials, human rights and freedoms

1. INTRODUCTION

At the present stage of sociolegal development, the concept of the need to establish high standards in the sphere of legal status of a person and the consolidation of individual non-property rights is becoming increasingly important. At the same time, the juridification of basic right to be forgotten (hereinafter – RTBF) has caused the emergence of a long-stand-

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ing controversy in the scientific sphere, the determinant of which is the lack of theoretical understanding of these values from a legal point of view, which imposes its impact on the normative regulation of the studied matter. Thus, we reach now to Carsten M. Wulff's (2020) idea, the element of time is highlighted as an element introduced in the balancing of competing rights which was not directly foreseen by the legislators in different countries[1].

Over the past few years, based on the research, conducted by Federico Fabbrini, and Edoardo Celeste (2020), the European framework for data protection has progressively extended its reach outside the jurisdiction of the EU. On the one hand, the European Court of Justice (hereby – ECJ) has reviewed the standard of data protection existing in third countries to decide whether this was sufficient to authorize the transfer of personal data from the EU to such third country – essentially pressuring the latter to raise its domestic standards to meet the EU benchmark[2]. But on another hand, the question of their legislative implementation to the legal system of various countries raises many empirical and conceptual difficulties, which we will consider in this article through the Ukrainian mirror. Moreover, such a wide palette of views of representatives of various scientific schools leads to the fact that the RTBF is understood as a separate sphere of legal regulation alien to national legislation, which due to many interrelated reasons objectively cannot be applied to the Ukrainian realities for different reasons.

In the system of Ukrainian legislation, there is still no single act regulating the application of RTBF, the key definition of this concept has not been defined yet, a bunch of legal norms has not been developed for procedural algorithms for the implementation of this legal structure in practice. All this requires from the legislator is a comprehensive study and in-depth research of the factors affecting the possibility of its application to specific categories, as well as determining the prospects for the development of this legal institution. Therefore, this correlates with the generalizing conclu-

[1] Carsten M. Wulff, "The Right to be Forgotten in Post-Google Spain Case Law: an Example of Legal Interpretivism in Action?," *Comparative Law Review* 26 (2020): 259.

[2] Federico Fabbrini and Edoardo Celeste, "The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders," *German Law Journal* 21 (2020): 60.

sions of Cayce Myers (2014), who reasonably asserts that the RTBF illustrates a tension in the concept of the contours of public and private space within the realm of social media, international transactions, and the new digital age in different countries[3].

Interoperability of several trends in the complex perception of the right under study is quite a complex process, and it should be considered taking into account the methodological techniques of system analysis and comparative law, consistently comparing those factors that made it possible to use the RTBF in the territory of the European Union and determine the need to apply it in Ukraine.

2. ERASION OF DIGITAL MEMORY

The institute of human rights and freedoms represents one of the most significant outcomes of the legal progression of society, from ancient times to the present day, when human rights have become an indispensable attribute of a democratic state governed by the rule of law. That is why it is reasonable that with the advancement of social order and the widespread introduction of leading-edge digital technologies into our lives, increasingly new types of rights, as well as forms of their implementation, appear, which could not even be imagined half a century ago. In addition to the very unprecedented development in mass culture of various digital forms of interaction, due to the fundamentally new quality and scale of technologies, there are more and more situations in everyday life that can be considered controversial in the light of possible law enforcement. Among other things, this problem is intensifying with legal restrictions and rules for the dissemination of information emerge, which, in turn, is due to the development of concepts of state sovereignty and its extension to the information space.

Conceivably, it was Vladimir Jankélévitch (2005) who would have us believe that it is possible to live without remembering, but impossible to

[3] Cayce Myers, "Digital Immortality vs. "The Right to be Forgotten": A Comparison of U.S. and E.U. Laws Concerning Social Media Privacy," *Revista Română de Comunicare şi Relaţii Publice*, no. 3XVI (2014): 48.

live without forgetting: being able to trace the past, enables society to forgive what happened in the past[4]. This considerations echoes the Viktor Mayer-Schönberger (2011) statements: "as remembering has become the new standard, it has created opposite needs for memory, namely, to be forgotten."[5]. As Chanhee Kwak et al. (2021) emphasize, the general capacity of human memory has dramatically increased with the help of information and communication technologies. People hardly forget the moments of their lives that are recorded and stored digitally, thereby shifting the perception of memory from being volatile to durable[6].

This finding substantiates Cayce Myers (2014) observations concerning the problem that unlike previous eras in which a person's past was relegated to a few photographs, a diary, or fading memories of those left behind, today the digital sphere provides a type of immortality within the Internet[7]. Turning to some of the literature in this area, Meg Leta Jones (2018) pointed out that the web has become a searchable and crunchable database for questions of any kind, a living cultural memory whose implications are complex and wide reaching[8]. This is directionally consistent with the findings of Viktor Mayer-Schönberger (2011), according to which the digitalization and disclosure of life's personal details "will forever tether us to all our past actions, making it impossible, in practice, to escape them."[9].

The very idea that each individual wants certain information about him to be removed from the information space is quite natural, and, without exaggeration, understandable. However, to implement it in a socie-

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[4] Vladimir Jankélévitch, *Forgiveness* (Chicago: University of Chicago Press, 2005), 27.

[5] Viktor Mayer-Schönberger, *Delete: The virtue of forgetting in the digital age* (Princeton: Princeton University Press, 2011), 165.

[6] Chanhee Kwak, Lee Junyeong, and Lee Heeseok, "Could You Ever Forget Me? Why People Want to be Forgotten Online," *Journal of Business Ethics* 168, Issue 5 (2021), https://www.scopus.com/record/display.uri?eid=2-s2.0–85100146466&origin=resultslist&sort=plf-f&src=s&st1=&st2=&sid=0daeb36f35186b6eecf36fa91bb91586&sot=b&sdt=b&sl=36&s=TITLE-ABS-KEY%28right+to+be+forgotten%29&relpos=3&citeCnt=0&searchTerm=.

[7] Myers, "Digital Immortality vs. "The Right to be Forgotten"," 48.

[8] Meg Leta Jones, *Ctrl + Z: The Right to Be Forgotten* (New York: New York University Press, 2018), 5.

[9] Mayer-Schönberger, *Delete: The virtue of forgetting in the digital age*, 163–164.

ty that declares openness and freedom of speech is not an easy task. We need to agree with Rebekah Larsen (2020), who conveyed that notably, in the eyes of the law, the RTBF is not an absolute right; it must always be balanced against "other fundamental rights," including freedom of expression, as a crucial public interest safeguard[10].

Meanwhile, it is obvious that the time has come not to oppose human rights and positive law, but to consider them in dialectical unity as parts of a unified entity. It is thought that only a modern normative legal understanding can remove the existing contradictions between the "newest" and traditional normative legal understanding, change the attitude of law enforcers to the category "human rights" not as an ideological stamp, but as a really existing legal phenomenon. This, in turn, actualizes the consideration of human rights as a legal structure that requires proper interpretation as a prerequisite for optimal law enforcement in the future.

An excellent platform for testing the hypothesis of interaction with digital memory is precisely the RTBF, which has not yet become routine for the Ukrainian legal system and therefore undergoes all the stages of positive legal perception in conjunction with the use of interpretative tools and emerging approaches to its understanding.

3. EMERGING APPROACHES TO THE RTBF

The pluralism of approaches to RTBF, the variety of models of its understanding are quite adequate to the modern development of the humanities and are not a sign of crisis in jurisprudence. To date, legal science has not achieved even a rough convergence of views among world-wide scholars as to what is to be regarded as an RTBF. This leads to the absence of a well-considered and balanced legal policy, but is able to explain why several views of this problem are now confronting one another. This was predicated on assumptions of the pluralistic, "democratic" nature of such

[10] Rebekah Larsen, "Mapping Right to be Forgotten frames: Reflexivity and empirical payoffs at the intersection of network discourse and mixed network methods," *New media* & *society* 22(7) (2020): 1246.

information networks and the comprehensive nature of network methods (Rebekah Larsen, 2020)[11].

I. Among the most common approaches to the question under study at the current stage of development of legislative practice, in our view, the following definitional turns should be correlated:

1) a right to removal (Selen Uncular, 2019)[12],
2) a right to suppression (Christopher Kuner, 2015)[13],
3) a right of oblivion (Cayce Myers, 2014)[14].

Given the content of the above-mentioned definitions, we believe that there are no grounds for opposing them, because they are more likely to complement one another and allow to use different views to investigate the same problem. Moreover, all proponents of the extended use of this legal construct are one in the same, RTBF as a chance for an individual to be relieved of his or her past and be able to start with a clean bill[15]. In the opposite case, ignoring any of the previously described components deprives the integrity of the whole picture of the existence of the right in question. As Mattias Goldmann (2020) deplores, the RTBF is relevant on many levels and only taking them together, the double decision appears as an ingenious move[16].

Notably, in the eyes of the law, once again, the RTBF is not an absolute right; it must always be balanced against "other fundamental rights."[17]. But the possibility of limiting rights and freedoms is currently a norma-

[11] Larsen, "Mapping Right to be Forgotten frames," 1247.

[12] Selen Uncular, "The right to removal in the time of post-Google Spain: myth or reality under general data protection regulation?," *International Review of Law, Computers & Technology* 33 (3) (2019): 310.

[13] Christopher Kuner, "The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines," *LSE Law, Society and Economy Working Papers* 3 (2015): 7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496060, accessed February 14, 2020.

[14] Myers, "Digital Immortality vs. "The Right to be Forgotten"," 48.

[15] Ugo Pagallo and Massimo Durante, "Legal Memories and the Right to be Forgotten," in *Protection of Information and the Right to Privacy – A New Equilibrium?*, ed. Luciano Floridi (Oxford: Springer, 2014), 19.

[16] Mattias Goldmann, "As Darkness Deepens: The Right to be Forgotten in the Context of Authoritarian Constitutionalism," *German Law Journal* 21 (2020): 53.

[17] Larsen, "Mapping Right to be Forgotten frames," 1246.

tive concept recognised by international law (Robert Tabaszewski, 2020)[18]. Moreover, according to the conclusions of Kinga Machowicz (2021), the concept of the respect for/observance of human rights began to be combined with business ethics, the idea of corporate social responsibility, when it was found that the so-called wild capitalism is not the right means to develop entrepreneurship and does not thereby achieve economic well-being[19]. However, the scope of EU data protection law in general – and of the right to be forgotten in particular – has been increasingly facing a question of jurisdictional boundaries, as it was pointed out by Federico Fabbrini and Edoardo Celeste (2020)[20].

As Jennifer Daskal (2018) has pointed out, there are now an increasing number of cases adjudicated by courts world-wide which raised "critically important questions about the appropriate scope of global injunctions, the future of free speech on the internet and the prospect for harmonization (or not) of rules regulating online content across borders"[21]. These allegations cannot be considered completely unfounded, because until recently domestic jurisprudence, if it mentioned forgetting in the texts of judicial acts, only in the context of a certain loss or neglect, which ultimately fluctuated within banal human forgetfulness (forgetting one's name, forgetting to put a seal, forgetting about a promissory note, etc.) or grammatical mistakes or typos (for example, forgetting a court decision of legal force (*instead of coming into force*), which of course does not honor the thorough preparation of court decisions and rulings) and even the village of Zabuttya (*Oblivion in Ukr.*) in Khmelnytsky region. And here we can ascertain the existence of a global problem situation, which Mattias Goldmann (2020) aptly described, noting that the cases

[18] Robert Tabaszewski, "The Permissibility of Limiting Rights and Freedoms in the European and National Legal System due to the Health Protection," *Review of European and Comparative Law* 42, no. 3 (2020): 54.

[19] Kinga Machowicz, "Observance of human rights as an element of shaping the position of the European enterprise in the knowledge-based economy," *Review of European and Comparative Law* 44, no. 1 (2021): 16.

[20] Fabbrini and Celeste, "The Right to Be Forgotten in the Digital Age," 56.

[21] Jennifer Daskal, "Google, Inc v. Equustek Solutions," *American Journal of International Law* 112, Issue 4 (2018): 730.

decided by the CJEU over the last couple of years only constitute the tip of the iceberg[22].

Instead, there are recent grounds for using the terminology "RTBF" not only in the context of comparative law and other scientific and theoretical research, but also in the literal sense enshrined in the EU Directives. In particular, appealing to the Desniansky District Court of Chernihiv in May 2018 (case № 750/5021/18, proceedings № 4-s/750/45/18[23]) with a complaint against the actions and inaction of the chief state executor of the Central Department of the State Executive Service of the city Chernihiv of the Main Territorial Department of Justice in the Chernihiv region, PERSON_1 separately expressed a requirement to apply when considering the complaint "RTBF", which is set out in Art. 17 of the General Data Protection Regulation of the European Union. Obviously, this is only a small fraction of the entire potential array of judicial appeals on the issue of implementing the RTBF in Ukrainian realities, and an unprecedented consensus among all stakeholders is reached on this issue.

The difference in research interpretations concerning the nature of RTBF counterbalances the unity of opinion of representatives of the state authorities, who adhere to the obsolescent standards in assessing social phenomena, including the digital sphere. Meanwhile, post-Soviet legal thinking and legal understanding are not always receptive to the peculiarities of the legal culture of Ukrainian society and the scientific specificity of the country. At the same time, Jure Globocnik's argumentative inferences (2020) are also worth supporting in the area of academic scholarship research because they confirm that the decisions demonstrate yet again how difficult it is to draw lines involving the internet and will have significant implications not only for internet users, but especially for tech companies in and outside the EU, as many aspects of the judgments directly affect their business models. Furthermore, as the Court is a pioneer when it

[22] Goldmann, "As Darkness Deepens," 46.

[23] Desniansky District Court of Chernihiv, Judgment of 25 May 2018, https://reyestr.court.gov.ua/Review/74269229, accessed March 31, 2021.

comes to the right to be forgotten, the decision might also indirectly affect legislation and court decisions in non-EU States[24].

But the greatest legal inconsistency, however, is not even when a court refuses to grant a petitioner's RTBF claim, but when such a decision contains a verdict positive for the applicant. The text of the judgment usually contains in the public domain full information about the parties to the case and details, the removal of which after some time may be initiated by a party to the conflict, and, accordingly, will continue to be publicly available to an uncertain circle of respondents using online registries of judicial acts. These texts are at least a part of the training process, are massively studied in educational institutions of different levels, and are the subject of dissertation surveys, continue to be replicated by other courts, appear on the pages of newspapers and other periodicals, and are finally discussed by all segments of the population under different views for a certain period of time.

This has the exact opposite effect - information, the destruction of which from the online space was the main purpose of the applicant's lawsuit, continues to spread online, engraving this information for decades to come in free access for an unlimited number of people. And even if you make appropriate editorial amendments to the text of regulations and imperatively state that the consideration of this category of cases should take place only in closed court, which will necessitate the secrecy, respectively, and the content of the judgment, it is still not will ultimately prevent access to information that should be removed during the exercise of the right to forget, because for users outside the EU, all this data will remain open in the web portal of the original source, not to mention that layered users can use VPN or other resources to hide their true location by changing the IP address and otherwise.

A certain paradox can be consistently traced in all cases of this category, which is particularly emphasized by Jure Globocnik (2020), who justifiably emphasized the following: "Here, it is usually referred to as the right to de-referencing. Based on grounds relating to her particular

[24] Jure Globocnik, "The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)," *GRUR International* 69(4) (2020): 388.

situation, a data subject can request a search engine operator to remove (de-reference) from search results links leading to websites containing personal data pertaining to her, e.g. if the data are inadequate, irrelevant or no longer relevant in the light of the purposes for which they were collected and processed. It is important to note that this only holds true for searches conducted using her name, whereas such links can still be displayed if the search is conducted using other search terms. Furthermore, the display of a link in search results has to be considered separately from the initial publication of information. The data subject is not required to exercise her right to be forgotten with regard to both of them. Similarly, even if information is de-referenced from search results, it will still be visible on the webpage where it was initially published, save the data subject successfully invokes her right to erasure vis-a'-vis the publisher of that webpage as well"[25].

A minor, but no less important addition to all of the above, in our view, should also be a revision of the procedural rules applied in this category of trials. As the arbiter of a wide variety of disputes, the Judge is forced to balance the interests of the parties to the process, who oppose excessive publicity of their problems, and those of society, which seeks to control the impartiality of judges. It seems possible to solve this problem only at the level of fixing the possibility to extend the regime of a closed court session and, accordingly, a secret court decision to all judicial acts, which are related to the issue of implementation of the PRR, both in online format and in paper-based proceedings. Thus, of course, the removal from the Internet will significantly limit the range of potential recipients of relevant information by residents of the European Union, while from other parts of the globe access to this information will remain open.

II. At the same time, there is a strong tendency to downgraded the importance of an adequate response of the relevant authorities to resolve issues related to the use of the legal construct of RTBF in relation to specific life situations and disputed legal relations. Unfortunately, the scientific and theoretical findings of the opponents of existence and, consequently, the practical implementation of the RTBF are used in this case as a legal

[25] Globocnik, "The Right to Be Forgotten is Taking Shape," 380.

basis for refusing to satisfy the claims of the plaintiffs, which are fully within the framework of the legal conditions of RTBF application under study.

Expiration of time in the described situations has been leading to what Jeffrey Rosen (2012) famously called the unfortunate misunderstanding; because Google Spain never established a 'new' right, it merely clarified the scope of the right to erasure. Advocates of this school of thought believe that the implementation of an actual RTBF would pose a serious threat to freedom of expression[26]. The above-mentioned inferences are continued to be developed by Emily Adams Shoor (2014), who maintains that the results of the downsides of mass implementation of RTBF would outweigh the benefits of its results[27]. Moreover, the German association of Internet economy argued that the same standards should apply for online and offline publications[28].

This reasoning also does not lack rationality for the following reasons. Speaking of removing information from columns, for example, online periodicals, we should not forget that the dissemination of similar information can occur in traditional print, the entire circulation of which should also be covered by a court decision, which is practically impossible to implement. In particular, if we simulate a situation where one piece of information was published simultaneously in electronic and paper form, for example, on the pages of one publication, combining publishing activities online and offline, the legislator must demonstrate consistency in the implementation of the issue. In other words, the removal of the possibility of finding this information on personal data from the world-wide web through search engines should logically follow the order to destroy the same data from the entire circulation of printed copies, which in principle is impossible, at least for the reasons that over time, it is physically impossible to identify all, without exception, the holders of this issue of a newspaper or magazine. It is also difficult to imagine the staff involved in such a court deci-

[26] Jeffrey Rosen, "The Right to Be Forgotten," *Stanford Law Review*, Symposium Issue (2012): 88–95.

[27] Emily Adams Shoor, "Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation," *Brooklyn Journal of International Law* 39 (2014): 487–521.

[28] Bundesverfassungsgericht, Recht of freie Entfaltung der Persönlichkeit. 1 (BvR 16/13), 19.

sion and the process of information retrieval. And in this case, the removal of all copies from the libraries or shelves of periodicals will still not lead to a complete and final "erasure" of information in the material world. In such a case, it is impossible to achieve the aim pursued by the applicant by applying to the court with reference to his right to be forgotten with the utmost diligence and caution. Thus, if we model the development of circumstances in this situation as far as possible, the next "logical" step would be to erase the memory of all people who have already read these sheets and can potentially disseminate them (until they receive a restraining order), thereby performing the functions of information carriers. As we see, constructing a potentially possible variant of events we can surpass ourselves and reach absurd utopias which will have no practical value, to say nothing of expediency and possibility of realization.

These related discourses create a setting and script for RTBF developments and framings. They affect which perspectives are visible. They contribute to reproducing existing inequalities via knowledge construction in a "network society." If researchers approach networks as de facto pluralistic, comprehensive representations of the social, then less visible, less powerful perspectives can become even less visible and powerful (Rebekah Larsen, 2020)[29].

III. There is also a third group of researchers, whose representatives are cautious about the changes introduced by the RTBF into the familiar use of information resources, and while not directly refuting the possibility of applying this right, at the same time they do not actively advocate the fairness of its existence in general. For example, there is a certain amount of scholarly interest in David Erdos' statement (2021), which alleges that data protection can and should enable individuals to exert some control at least ex post over online data dissemination.[30] Introduced by the European Union (EU), the RTBF is one such example. In Article 17, the General

[29] Larsen, "Mapping Right to be Forgotten frames," 1250.

[30] David Erdos, "The right to be forgotten' beyond the EU: an analysis of wider G20 regulatory action and potential next steps," *Journal of Media Law* 13 (2021), https://www.scopus.com/record/display.uri?eid=2-s2.0–85101100662&origin=resultslist&sort=plf-f&src=s&st1=&st2=&sid=0216523637ab63ccc03b179735abd04f&sot=b&sdt=b&sl=36&s=TITLE-ABS-KEY%28right+to+be+forgotten%29&relpos=2&citeCnt=0&searchTerm=.

Data Protection Regulation (GDPR) defines the RTBF as the right "to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay (European Parliament 2016, p. 43)[31].

The territorial aspect of the operation of the RTBF deserves special attention, since at present the extension of the right studied in this article relates exclusively to the borders of the European Union, whose court made the initial decision in 2014. This reasoning relies on the idea highlighted by Federico Fabbrini and Edoardo Celeste (2020), whereby the European Union (EU) has been at the forefront of the protection of the right to data protection at the global level.[32] Thus, as we presume from the Meg Leta Jones' book (2018), two cases addressing the complicated concerns of reputation, identity, privacy, and memory in in the Digital Age were decided the same day on opposite sides of the Atlantic with different conclusions. The 1st - begun in Spain (*Google Spain SL, Google Inc. v AEPD, Mario Costeja González*) and the 2nd - in the U.S. where two American Idol contestants brought every conceivable claim against Viacom, MTV, and a number of other defendants over online content that led to their disqualification from the television show[33]. I think it is not necessary to waste time detailing the nuances of litigation, because in the context of our research it is important that in formally similar situations judges in Europe and America have made diametrically opposed decisions. Although in the first case we are talking about a historic court verdict that laid the foundation for the application of the RTBF across the EU, in the second case there was a lengthy appeals process for the parties to the proceedings, but we may even give rise to a more antagonistic reading of these two decisions. It would appear, therefore, that under the Federico Fabbrini's endorsements (2020), we now live in a global digital society, which overtakes national boundaries; that is why one's right to data protection may be violated even

[31] European Parliament, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46, *Oficial Journal of the European Union* (OJ), 2016, 59(1–88), 294.

[32] Fabbrini and Celeste, "The Right to Be Forgotten in the Digital Age," 55.

[33] Jones, *Ctrl + Z: The Right to Be Forgotten*, 11–12.

where a search engine shows a specific result in a country, which is not that of residence of the data subject concerned[34].

A few key messages arise from the comparison of depicted challenges in global perspective, where the Ukrainian example, with its unsuccessful legislation and unconditional litigation practice, does not seem to be anything extraordinary at all. According to Cayce Myers (2014), the difference between the European Union and the United States in terms of confidentiality is just one example of the types of difficulties that arise from these new directives. Looking at this struggle for the right to privacy and the RTBF, there are obvious tensions between individuals and corporations, private law practice in the United States and Europe[35]. But at the same time, the worldwide web, has created a more interconnected global dialogue, it has highlighted the legal and mental differences (sometimes similar to a tectonic rift in magnitude) between freedom of speech and self-expression and legal control in common. Nevertheless, we agree with Mattias Goldmann (2020) that, there is little doubt about the plausibility of reading the RTBF decisions as opening a new chapter in judicial dialogue[36].

4. CONCLUSIONS

The digital transformation of society that is now taking place involves not only the technological development itself, but the improvement of sociolegal scope in common, complicating the process of realization of human rights and their protection in case of violation, contestation or non-recognition. Today's online challenges predetermine the formation of an information culture in which new communicative practices emerge and the old ones are modified.

Furthermore, the last decade in the whole world has become a milestone in the two-stage path of not only the Ukrainian, but also the entire European legal thought, which finally outlined the transition from nor-

[34] Fabbrini and Celeste, "The Right to Be Forgotten in the Digital Age," 64.
[35] Myers, "Digital Immortality vs. "The Right to be Forgotten"," 59.
[36] Goldmann, "As Darkness Deepens," 46.

mative to interpretive law enforcement. The emergence and development of systematic application of the RTBF in the activities of all legal institutions without exception was a crucial prerequisite, a factor that accelerated the evolution of the entrenchment of this right in Ukraine from latent manifestations in comparative legal studies to its compartmentalization into a separate ecosystem of law enforcement activity with its own socio-ideological and judicial criteria, as well as the appearance of an increasing number of court decisions, aimed at the implementation of the components of this right in practice.

REFERENCES

Adams Shoor, Emily. "Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation." *Brooklyn Journal of International Law* 39 (2014): 487–521.

Daskal, Jennifer. "Google, Inc v. Equustek Solutions." *American Journal of International Law* 112, Issue 4 (2018): 727–733.

Erdos, David. "The right to be forgotten' beyond the EU: an analysis of wider G20 regulatory action and potential next steps." *Journal of Media Law* 13 (2021): 18–30.

Fabbrini, Federico, and Edoardo Celeste. "The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders." *German Law Journal* 21 (2020): 55–65.

Globocnik, Jure. "The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)." *GRUR International* 69(4) (2020): 380–388.

Goldmann, Mattias. "As Darkness Deepens: The Right to be Forgotten in the Context of Authoritarian Constitutionalism." *German Law Journal* 21 (2020): 45–54.

Kwak, Chanhee, Lee Junyeong, and Lee Heeseok. "Could You Ever Forget Me? Why People Want to be Forgotten Online." *Journal of Business Ethics* 168, Issue 5 (2021): 3–21.

Machowicz, Kinga. "Observance of human rights as an element of shaping the position of the European enterprise in the knowledge-based economy." *Review of European and Comparative Law* 44, no. 1 (2021): 7–18.

Mayer-Schönberger, Viktor. *Delete: The virtue of forgetting in the digital age*. Princeton: Princeton University Press, 2011.

Myers, Cayce. "Digital Immortality vs. "The Right to be Forgotten": A Comparison of U.S. and E.U. Laws Concerning Social Media Privacy." *Revista Română de Comunicare şi Relaţii Publice*, no. 3XVI (2014): 47–60.

Jankélévitch, Vladimir. *Forgiveness*. Chicago: University of Chicago Press, 2005.

Jones, Meg Leta. *Ctrl + Z: The Right to Be Forgotten*. New York: New York University Press, 2018.

Kuner, Christopher. "The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines." *LSE Law, Society and Economy Working Papers* 3 (2015). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496060. Accessed March 27, 2021.

Larsen, Rebekah. "Mapping Right to be Forgotten frames: Reflexivity and empirical payoffs at the intersection of network discourse and mixed network methods." *New media & society* 22(7) (2020): 1245–1265.

Pagallo, Ugo, and Massimo Durante. "Legal Memories and the Right to be Forgotten." In *Protection of Information and the Right to Privacy – A New Equilibrium?*, edited by Luciano Floridi, 144. Oxford: Springer, 2014.

Rosen, Jeffrey. "The Right to Be Forgotten." *Stanford Law Review*, Symposium Issue (2012): 88–95.

Tabaszewski, Robert. "The Permissibility of Limiting Rights and Freedoms in the European and National Legal System due to the Health Protection." *Review of European and Comparative Law* 42, no. 3 (2020): 51–89.

Uncular, Selen. "The right to removal in the time of post-Google Spain: myth or reality under general data protection regulation?." *International Review of Law, Computers & Technology* 33 (3) (2019): 309–329.

Wulff, Carsten M. "The Right to be Forgotten in Post-Google Spain Case Law: an Example of Legal Interpretivism in Action?." *Comparative Law Review* 26 (2020): 255–279.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 43–65
DOI: https://doi.org/10.31743/recl.12439

LEGAL BASIS FOR INTRODUCING RESTRICTIONS ON HUMAN RIGHTS AND FREEDOMS DURING THE FIRST WAVE OF THE COVID-19 PANDEMIC

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ABSTRACT

In this article, we attempt to present the legal grounds for introducing restrictions on human rights during the COVID-19 pandemic from a comparative legal perspective. We refer to the findings of a research project completed in 2020, trying to synthesize them and confront them with existing theoretical models. We strive to capture general patterns in the legal basis for states' actions in response to global threats such as the COVID-19 pandemic. Comparative legal research contributes to the creation of universal solutions, which, taking into account the specificity of the system, can then be applied in local conditions.

Keywords: COVID-19 pandemic, states of emergency, restriction of human rights and freedoms

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1. INTRODUCTION

The World Health Organization declared the outbreak a Public Health Emergency of International Concern in January 2020 and a COVID-19 pandemic in March 2020. Individual states took measures to protect the health and life of the population. In many cases, the actions of public authorities took the form of applying the law in force at the time of the outbreak of a pandemic, provided for in the event of emergencies. Some solutions turned out to be insufficient in the conditions of the existing threat. For this reason, new regulations were created, adapted to the specificity of the current problem. Counteracting the pandemic had an impact on the ability of individuals in terms of exercising their rights and freedoms. The rigors introduced aimed at limiting the spread of the virus had a significant impact on the sphere of collective and individual life. The scale and nature of this impact differed from one legal order to another.

This updated the need to investigate the mechanisms which countries used to combat the pandemic and to assess their impact on fundamental legal goods. In response to the social demand, which was reflected in a lively public debate and protests against "covid" dictates and bans, a research project was undertaken under the title: "Restrictions on civil rights and freedoms during the Covid-19 pandemic. Selected countries" financed by the Institute of Justice. The project analysed solutions operating in the period from March to September 2020 in the following jurisdictions:

1) European countries: the Republic of Austria, the Kingdom of Belgium, the Republic of Belarus, the Czech Republic, the Kingdom of Denmark, the Republic of France, the Kingdom of Spain, the Kingdom of the Netherlands, the Federal Republic of Germany, the Kingdom of Sweden, Ukraine, Hungary, the Kingdom of Great Britain and Northern Ireland, and the Republic of Italy.
2) non-European: Federative Republic of Brazil, People's Republic of China, State of Israel, Canada, United States of Mexico, Republic of Peru, and the United States of America.

Studies devoted to the legal situation of an individual in the countries indicated were collected in a multi-author monograph published under our editors at the end of 2020[1].

2. LEGAL MECHANISMS USED IN EMERGENCY SITUATIONS

2.1. Each of the countries affected by the pandemic tried to adapt the resources at their disposal to the current level of threat, taking into account the conditions resulting from their own constitutional system, cultural considerations, local traditions, the size of the territory, population or population density. The states acted in various regimes – ordinary or extraordinary.

2.1.1. In some countries states of emergency were declared in 2020. In the course of their duration, public authorities were granted special powers, which usually resulted in imposing qualified restrictions on individual rights.

The declaration of a state of emergency does not always mean the same. Its effects differ from jurisdiction to jurisdiction. Most often, it is the basic laws which regulate the procedure for introducing extraordinary measures and their types, as well as the rules of operation of public authorities and the permissible scope of restrictions on the rights of an individual. These issues may also be specified in lower-level normative acts. In both instances law defines the systemic mechanism of the "state of emergency". It is made up of a set of related and coordinated legal norms indicating the purpose of the introduction of a state of emergency, the premises and the mode in which it may be proclaimed and then lifted. There are designated authorities authorized to initiate this state and the manner of their cooperation, the procedure for its declaration, extension and abolition, and sometimes also the permissible duration and territorial scope. Under this particular legal regime, different from normal constitutional solutions, the way in which public authorities and non-governmental entities func-

[1] Karol Dobrzeniecki and Bogusław Przywora, eds., *Ograniczenia praw i wolności obywatelskich w okresie pandemii Covid-19. Wybrane państwa* (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2021).

tion, i.e. enterprises, social organizations and citizens themselves, is changing. The type of parliamentary and judicial control over measures taken during the state of emergency and, possibly, the decision to introduce it, is regulated. The law defines how the scope of competence of individual supreme authorities will be modified and what extraordinary measures will be allowed. It also lays down rules of deviation from the standards of "normal" protection of civil rights. It can expand the scope of an individual's duties, modify institutional guarantees for rights and freedoms, change the system of social and economic relations and the way public officials bear responsibility[2].

2.1.2. The two dominant legal cultures in the West – civil law and common law – have developed different concepts regarding the choice of the body responsible for protecting the interests of society in connection with the introduction of the state of emergency. The former cast mainly the legislature in this role, the latter mainly the courts[3]. The minimum requirement of the law of the state of emergency in a liberal state is its prospectivity, the introduction of *a priori* and *a posteriori* control procedures and the temporary nature of emergency solutions[4]. The normatively assumed purpose of their application is to enable the fastest possible return to the normal situation. Generalizing the solutions occurring at the end of the twentieth century, one can assume the existence of several examples of the basic types of the so-called emergency legislation, the most important of which are the emergency rule and legislative empowerment. The first type, i.e. proper emergency regime, is to design a juridical form of emergency (state of siege, state of emergency, state of internal crisis, etc.). The provisions of the constitution or special laws construct this type

[2] Alexander Domrin, *The limits of Russian democratization. Emergency powers and states of emergency* (London-New York: Routledge, 2006), 27; Ergun Özbudun and Mehmet Turhan, "Emergency powers. Report of European Commission for Democracy through Law (Venice Commission)," *Science and Technique of Democracy*, no. 12 (1995): 11–30.

[3] Joseph B. Kelly and George A. Pelletier, "Theories of emergency government," *South Dakota Law Review* XI (1966): 68–69.

[4] Nicole Questiaux, "Study of the implications for human rights of recent developments concerning situations known as the states of siege or emergency," *UN Doc. E/CN.4/Sub.2/1982/15, 1982*, par. 34/35: 10.

of state in advance, and then "keep it in reserve" in the event of certain circumstances. The application of such a previously created legal mechanism most often consists in the delegation of specific competences within the organs of the executive power or within the organs of the judiciary, or between these sectors. Legislative empowerment, on the other hand, means empowering the executive to legislate in an emergency by delegating all or part of the powers of the parliament to it. Here too, various nomenclature describes the functionally identical mechanisms of law-making by the executive (orders, decree laws, regulatory laws etc.). The Basic Law defines the procedure by which the transfer of power may take place, the limits of delegated powers, the content, purpose and scope of the regulation, and sometimes also its time limits[5].

2.1.3. Most modern constitutions entrust the task of protecting the state under threat to the executive power[6]. Its participation in law-making processes is most often increased by adopting various types of acts replacing the actions of the legislature, which, *de jure* or *de facto*, cannot fulfil its tasks. The justification for the delegation of parliamentary powers to the government is usually the belief that the government, being aware of the dynamic changes in the crisis situation, can react to them more effectively. The executive makes rules in an accelerated procedure, often of a decision-making nature. Delegation of legislative powers may be limited in time and to specific situations or may have a permanent character in the event of a future crises. The basis for delegation is the statute or the constitution, depending on the constitutional conditions of a given country. It should also be noted that certain types of threats trigger a reaction of public authorities in the form of executive or legislative actions. For example, riots are more likely to be met with the executive's response, and an economic breakdown with legislative activity, sometimes delegated to the executive[7].

2.1.4. The international law of human rights uses the concept of public emergency which threatens the life of the nation and the existence of

[5] Questiaux, "Study," 20–22; Özbudun and Turhan, "Emergency powers," 3–11.

[6] Clinton L. Rossiter, *Constitutional dictatorship. Crisis government in the modern democracies* (Princeton, New Jersey: Routledge, 1948), 12.

[7] Rossiter, *Constitutional dictatorship*, 9–10.

which is officially proclaimed. The occurrence of such a case, after meeting additional conditions, entitles the state to avoid certain obligations to protect the rights of an individual[8].

In the institutional language of the universal system of human rights protection, the term state of emergency means a legally regulated situation in which state power is exercised under a special order and in accordance with an extraordinary procedure, with the fulfilment of substantive and procedural requirements. There are many categories of emergency in national orders, such as: *state of exception*[9], *state of siege*[10], *state of emergency*[11]. Some definitions of legal institutions are not the product of positive legislation, but jurisprudence and doctrine, such as the Anglo-Saxon *martial law*[12], or the Swiss *régime de strictly necessite*[13]. For example, in those countries where the French legal tradition in this area has been adopted, different categories of extraordinary measures are distinguished according

[8] Compare: art. 4 The International Covenant on Civil and Political Rights of 19 December 1966.; art. 27 The American Convention on Human Rights of 22 November 1969.; art. 15 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.; art. 30 European Social Charter of 18 October 1961.

[9] See: art. 212–215, *Political Constitution of Colombia*, in: Gisbert H. Flanz, ed., *Constitutions of the countries of the world*, v. IV, *Release 95–4*, trans. Peter B. Heller, Marcia W Coward (New York: Oceana Publications, 1995), 211–214; art. 93, *The Constitution of the People's Democratic Republic of Algeria*, in: Gisbert H. Flanz, ed., *Constitutions of the countries of the world*, v. I, *Release 2003–6*, trans. Gisbert H. Flanz (New York: Oceana Publications, 2003), 18.

[10] France (*l'état de siège*), Portugal (*estado de sítio*), Argentina (*el estado de sitio*), Romania (*starea de asediu*), Holland (*de staat van beleg*), Greece (κατάσταση πολιορκίας), Kongo (l'état de siege).

[11] *Estado de emergencia* appears inter alia in the constitution of Peru of 31 December 1993 where it is one *los estados de excepción* next to *estado de sitio*, as well as in the constitution of Equador of 11 August 1998. See art. 137, *Political constitution of Peru*, in: Gisbert. H. Flanz, ed., *Constitutions of the countries of the world*, v. XIV, *Release 95–1*, trans. Peter B. Heller (New York: Oceana Publications, 1995), 145; Art. 180, *Political constitution of the Republic of Ecuador*, in: Gisbert. H. Flanz, *Constitutions of the countries of the world*, v. VI, *Release 99–4*, trans. Reka Koerner (New York: Oceana Publications, 1999), 47.

[12] The term *martial law* was established in Great Britain Islands within *common law*. Its genesis reaches estate monarchy.

[13] See: Özbudun and Turhan, "Emergency powers," 5–6.

to the degree of threat. In the case of the greatest threat (both external and internal), the state of siege is usually introduced, when the threat is less severe, it is a different category, e.g. state of emergency[14]. Various legal solutions may apply depending on the type of threat, its source or the territorial scope of its occurrence. The state of a natural disaster, particularly important during a pandemic, is not a solution commonly used at the constitutional level in modern countries.

2.1.5. In some legal systems, issues relating to natural hazards are not regulated directly in the constitution, but belong to ordinary legislation – the field of administrative law[15]. The consequence of this is, among others, a relatively simple possibility of establishing and amending them, and as a result, significant differentiation and variability of legal solutions. Both the terminology and the normative content of the individual institutions used to counter the pandemic differ significantly. The states which did not decide to declare a state of emergency took the position that in the face of a threat, protection of the constitutional values of life and health should be ensured, while maintaining the possibility of an undisturbed functioning of their supreme organs for as long as possible. The attitude defined as constitutional absolutism is characterized by the conviction that "the constitution is equally applicable to wartime and to a period of peace. It should be strictly enforced [...] as its principles remain the same, although the effect of their application in an emergency may differ from that which would have occurred in a normal situation"[16]. In this approach, typical of mature democracies, it was assumed that all future threats were included in the legislator's intention, and the powers necessary to overcome them, assigned to the authorities operating on the basis of the constitution, without the need to resort to extraordinary solutions. Therefore, counteracting all threats, including a pandemic, may, as a rule, take place in the ordinary regime of the functioning of the state by applying the applicable law.

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[14] Krzysztof Prokop, *Modele stanu nadzwyczajnego* (Białystok: Temida 2, 2012), 80.

[15] Krzysztof Prokop, "Wokół problematyki stanu klęski żywiołowej w konstytucjach państw europejskich," in *Studia i szkice z prawa publicznego. Księga dla uczczenia pamięci Profesora Eugeniusza Smoktunowicza*, ed. Andrzej Nowakowski (Rzeszów: RS Druk, 2008), 124.

[16] Karol Dobrzeniecki, *Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa. Stowarzyszenie Wyższej Użyteczności „Dom Organizatora", 2018), 189.

In many cases, the legislation in force at the outbreak of the pandemic was subject to further modifications and supplemented with normative acts aimed at mitigating the economic and social effects of lockdown. In some jurisdictions, soft law solutions (recommendations, plans and procedures) were also important, as they determined technical and organizational issues, in particular the organization of medical and rescue services during an epidemic.

2.1.6. When assessing the response of key countries to the COVID-19 pandemic, it is necessary to take into account not only the state and variability of their legislation, but also the practice of implementing legal standards in the period from the outbreak of the COVID-19 pandemic to September 2020. Restrictions on human rights and freedoms, paying attention to the areas of government interference in this area which are characteristic of a pandemic. These restrictions most often related to personal freedom (compulsory quarantine), the right of movement, freedom of economic activity, freedom of religion (public cult), the right to education or, incidentally, voting rights. At the same time, it should be emphasized that the research took into account various perspectives, such as: the criterion of legality and proportionality (necessity to achieve the public goal), but also rationality, economic effects, appropriate time of introduction and appropriate duration of individual restrictions, the area of their introduction, and the objective scope and subjective.

3. STATES' RESPONSE TO THE COVID-19 PANDEMIC

3.1. A state of emergency have been declared in some countries as a remedy for threats caused by the COVID-19 pandemic. In Spain, the Council of Ministers announced (March 14, 2020), by royal decree, a state of alarm (*estado de alarma*) throughout the country for 15 calendar days to manage a sanitary crisis caused by the COVID-19 pandemic. This status was extended six times with successive royal decrees.

3.2. Likewise, the Government of the Czech Republic announced the state of emergency (*nouzový stav*) on March 12, 2020 by resolution[17].

[17] Usnesení Vlády České Republiky ze dne 12.03.2020, č. 194; 69/2020 Sb.

In principle, this state was to last for a period of 30 days, however – due to the development of the pandemic – it was extended twice (initially until April 30, 2020, and under another government resolution, until May 17, 2020). The basis for adopting relevant resolutions by the Government were Art. 5 and Art. 6 of the Constitutional Act of April 22, 1998 on the security of the Czech Republic[18].

3.3. In Hungary, on March 11, 2020, the Prime Minister issued a regulation on the declaration of the state of danger (*a veszélyhelyzet*) in the territory of the state caused by the spread of the COVID-19 pandemic[19]. The legal basis was Art. 53 of the Basic Law. Restrictions were introduced in the scope of, *inter alia*, movement, border crossing, schools and cultural institutions were closed.

3.4. In France, the parliament adopted the state of emergency law on March 23, 2020[20], thus, it gave the government extensive authorization to take measures to counteract the pandemic situation (especially in terms of limiting constitutional freedoms and rights of the individual). The decrees [*ordinances*] issued by the Prime Minister after the entry into force of this regulation should therefore be considered as consistent with the principle of legalism.

3.5. In Germany, no state of emergency was introduced throughout the country on the basis of Art. 91 Grundgesetz. However, disaster situations (*Katastrophenfall*) have been introduced in Bavaria and the city of Halle in Saxony-Anhalt.

3.6. In the United States of America, the US government did not take extensive legal action in the first phase of the pandemic. However, on January 31, 2020, The Secretary of Health and Human Services announced a public health emergency under Art. 319 of The Public Health Service

[18] Ústavní zákon ze dne 22.04.1998 o bezpečnosti České republiky, Zák. č. 110/1998 Sb.

[19] Regulatiion of the Government of Hungary number 40/2020 of 11 March concerning announcement of the state of threat, *A Kormány 40/2020. (III. 11.) Korm. rendelete veszélyhelyzet kihirdetéséről*, „Magyar Közlöny" 2020, no. 39.

[20] Loi n° 2020–290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de COVID-19, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&categorieLien=id, accessed March 10, 2021.

Act[21]. It was not until March 13, 2020 that the US President issued *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease COVID-19 Outbreak*[22]. The solutions adopted in individual states were important for assessing the scope of interference with civil liberties and rights. For example, in California – which as of September 28, 2020 had the highest number of confirmed cases in the United States and the highest number of confirmed cases per capita – the governor announced a state of emergency. However, under the provisions of the *Texas Government Code*[23] the governor of Texas in a declaration issued on March 13, 2020, announced a state of disaster[24]. This declaration was renewed through a series of subsequent proclamations. The Commissioner of Public Health in Texas issued a *Declaration of a public health disaster in the state of Texas*. In turn, on March 7, 2020, the governor of the state of New York on the basis of the authorization given to him by the Constitution and the law of the State of New York (section 29-A[25]) issued implementing regulation No. 202[26], in which he announced a state-wide disaster emergency.

3.7. Diversification of solutions in individual territorial units also took place in Canada. The basis for taking actions were public health and safety acts and civils emergency measures in each province. The consequence of the announcement of an emergency of public health was the extension of the powers of the person managing the Ministry of Health. The announcement of a state of emergency resulted in the provision of powers to the provincial or territorial government not only in the field of health, but also in other matters (fires, explosions, floods). The government was granted

[21] 42 U.S.C. 247d.

[22] Original text available at the address: https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/, accessed March 10, 2021.

[23] Section 418.012 of the Texas Government Code.

[24] Original text available at the address: https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03–13–2020.pdf, accessed March 10, 2021.

[25] Site of the New York Senate, https://www.nysenate.gov/legislation/laws/EXC/29-A, accessed March 10, 2021.

[26] Text of the act, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf, accessed March 10, 2021.

additional powers to take appropriate anti-crisis measures (e.g. the possibility of restricting the movement of citizens)[27]. For example, the province of Alberta announced local emergency states for Calgary and Red Deer on March 15, 2020[28]. In contrast, in the province of British Columbia, an emergency of public health was introduced on March 17, 2020 under the Public Health Act[29], and the next day – the provincial state of emergency based on the Emergency Program Act of 1996[30]. Apart from these initiatives, the activities of the authorities of several districts, such as Vancouver, New Westminster, Delta, Surrey, and Richmond, should be mentioned. They consisted in introducing emergency procedures[31]. A provincial state of emergency was announced in Manitoba on March 20, 2020 (in force for 30 days, then gradually renewed), and on March 30, 2020 – an emergency of public health. The basis for the introduction of the first state, chronologically, were the Emergency Measures Act of July 17, 1987,[32] and for the second state, the Public Health Act of June 13, 2006[33].

3.8. In Peru, counteracting the effects of the pandemic was based on legal solutions tested in similar cases in the past. First of all, it is necessary to point out the issued decrees, on the basis of which the health state of

[27] Tyler Dawson, "As the COVID-19 Pandemic Hit, Provinces Declared States of Emergency. Now Many are up for Renewal. Here is a Look at the Current States of Emergency Plans Across the Country," *National Post*, April 15, 2020, https://nationalpost.com/news/provincial-states-of-emergencies-were-issued-a-month-ago-most-are-coming-up-for-renewal, accessed March 10, 2020.

[28] See: Bill Graveland, "Calgary and Red Deer Implement State of Emergency to Help Fight Spread of Coronavirus," *The Globe and Mail*, March 16, 2020, https://www.theglobeandmail.com/canada/alberta/article-we-will-get-more-cases-calgary-implements-state-of-emergency-to, accessed March 10, 2021.

[29] Public Health Act assented to May 29, [SBC 2008] CHAPTER 28.

[30] Emergency Program Act, B.C. Reg. 477/94; O.C. 1498/94.

[31] Stephanie Ip and Scott Brown, "COVID-19 Update for March 19: Here's the Latest on Coronavirus in B.C.," *Vancouver Sun*, March 20, 2020, https://vancouversun.com/news/local-news/covid-19-update-for-march-19-heres-the-latest-on-coronavirus-in-b-c, accessed March 10, 2021.

[32] The Emergency Measures Act, assented to July 17, 1987, Continuing Consolidation of the Statutes of Manitoba c. E80.

[33] The Public Health Act, assented to June 13, 2006, Continuing Consolidation of the Statutes of Manitoba, c P210.

emergency and state of emergency were extended, as well as changes to the existing restrictions were introduced. More than 50 decrees were issued between March 2020 and September 2020. These acts took various forms depending on the purpose and nature of the norms[34]. There are: legislative decree (*Decreto Legislativo*), emergency decree (*Decreto de Urgencia*) and supreme decree (*Decreto Supremo*). The relevant government administration offices also issued decisions, including ministerial decisions (*Resolución Ministerial*) and directorial decisions (*Resolución Directoral*). National state of emergency (*Estado de Emergencia Nacional*) throughout the country was announced Decreto Supremo of March 15, 2020 for 15 days. Introduced, among others compulsory quarantine. This state of affairs was extended many times and the regulations governing it were modified. In turn, the health state of emergency (*Emergencia Sanitaria*) was announced on March 11, 2020 on the entire territory of the country on the basis of Decreto Supremo Nº 008–2020-SA.

3.9. Unlike many countries whose national or federal authorities implemented a policy of limited contact (social isolation), interfering with certain civil liberties and rights, the Brazilian government adopted a different strategy of action. The consequence of the announcement of the state of calamity (*estado de calamidade*) was the authorization of the federal public administration to make extraordinary expenses not provided for in projected budget. A different approach could be seen at the local level. It boiled down to the fact that a significant number of states and municipalities in Brazil advised the population not to leave their homes, and in several cases, entertainment and sports centres were ordered to close, and public gatherings (especially those related to recreational activities) were banned. For example, in the state of Minas Gerais, a public health emergency (*situação de emergência*) was announced on March 12, 2020.

3.10. In Mexico, after the outbreak of the pandemic, the president did not use the emergency powers provided for in the constitution, and only on March 27, 2020, he issued a decree declaring emergency actions

[34] Dale Beck Furnish, "La jerarquia del ordenamiento juridico peruano," *The American Journal of Comparative Law* 19, no. 1 (1971): 91–120.

in areas affected by a threat to public health[35]. Subsequently, the Consejo de Salubridad General introduced a health state of emergency (*estado de emergencia sanitaria*)[36]. Since May, there has been a change in the policy of the Mexican government. The Ministry of Economy issued the document "Plan for a return to a new normality". It assumed a gradual resumption of production, social and educational activities, which were halted in the earlier phases of the epidemic[37].

3.11. Israel is a special case in the context of the COVID-19 pandemic. It is a democratic state, but at the same time it has functioned in the conditions of a specific state of emergency since its inception. In response to the new threat, the executive branch used emergency regulations provided for in Israeli law in the event of a state of emergency being introduced. From the beginning of the pandemic, the government was able to spend them without having to obtain special powers. Although the Knesset, as a legislative body, had the possibility to repeal emergency regulations, it turned out to be impossible due to the specific political situation in the initial phase of the pandemic. The centralized system of executive power facilitated the implementation of the measures taken. In a short time, the government was able to issue and enforce regulations, including in the field of quarantine, supervision, and the judiciary.

3.12. In many countries, the main legal instruments used to counteract a pandemic were statutes passed by parliament or lower-order acts. Some national constitutions do not provide for a state of emergency at all, and in some cases the authorities have not decided to announce them despite the formal possibility of doing so. Italy is an example of the former. There

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[35] Decreto por el que se declaran acciones extraordinarias en las regiones afectadas de todo el territorio nacional en materia de salubridad general para combatir la enfermedad grave de atención prioritaria generada por el virus SARS-CoV-2 (COVID-19), "Diario Oficial de la Federación", accessed March 10, 2021.

[36] Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV-2 (COVID-19), "Diario Oficial de la Federación", 30.03.2020, http://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020, accessed March 10, 2021.

[37] *La Nueva Normalidad. Lineamientos Técnicos de Seguridad Sanitaria en el Entorno Laboral*, 19.05.2020, https://www.gob.mx/cms/uploads/attachment/file/552762/CPM_NN_lineamientos__19may20.pdf, accessed March 10, 2021.

is no such institution in the constitution of the republic[38]. It also does not provide for a general suspension or limitation of fundamental rights in the event of an internal threat[39]. Article 77 of the Constitution authorizes the Council of Ministers, in case of necessity and urgency, to issue a decree-law (decreti-legge) on its own responsibility, without the need to obtain a prior delegation from parliament. The government has to present the issued regulation to the chambers on the same day, which should adopt the so-called conversion law (legge di conversione) to convert a regulation into a law. This form of law-making is in addition to the authorizations under the National Health Service Act[40] and Civil Protection Code[41] was used by the government and territorial administration to issue the regulations by which the pandemic was managed in Italy[42].

3.13. Another example of counteracting a pandemic (without the use of an emergency institution) is the policy of the People's Republic of China, where cases of COVID-19 infection were first identified in Wuhan, the capital of Hubei Province[43]. The Chinese legal system, thanks to the experience of the SARS-CoV-2 coronavirus epidemic in 2002–2003, was prepared for another pandemic. Due to the legal specificity of this state, the regulations on restrictions on the exercise of freedoms and rights do not appear in constitutional regulations, but at the level of statutes as well as in executive acts. In China, the first level of threat was announced,

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[38] Constitution of the Republic of Italy of 27 December 1947.

[39] See: Marina Albisinni and Licia Giannone, "L'insegnamento del COVID-19 sullo stato di emergenza: non è mai troppo tardi," *Questione Giustizia*, June 19, 2020, https://www.questionegiustizia.it/articolo/l-insegnamento-del-COVID-19-sullo-stato-di-emergenza-non-e-mai-troppo-tardi, accessed March 10, 2021.

[40] Legge 23 dicembre 1978, n. 833. Instituzione del servizio sanitario nazionale. (GU Serie Generale n. 360 del 28–12–1978 – Suppl. Ordinario).

[41] *Decreto legislativo 2 gennaio 2018, n. 1. Codice della protezione civile. GU Serie Generale n. 17 del 22–01–2018*.

[42] Compare: Monika Urbaniak, "Lex coronavirus. Włoskie prawo w walce z pandemią," *Studia Prawa Publicznego* 1 (2020): 11, https://repozytorium.amu.edu.pl/bitstream/10593/25720/3/23300-Tekst%20artyku%c5%82u-47978–1-10–20200625.pdf, accessed March 10, 2021.

[43] Hengbo Zhu, Li Wei, and Ping Niu, "The novel coronavirus outbreak in Wuhan, China," *Global Health Research and Policy* 5, no. 1 (2020): 1, https://ghrp.biomedcentral.com/articles/10.1186/s41256–020–00135–6, accessed March 10, 2021.

albeit with a significant delay, on the basis of the *Emergency Response Law* and its implementing acts. As a consequence, the state authorities were authorized to introduce restrictions on freedoms and rights (in the first place: personal freedom, movement, respect for property, economic freedom, freedom of religion, the right to education). In the second stage of counteracting the COVID-19 pandemic, the central government of China imposed a lockdown in Wuhan. Public transport was suspended, airports, train stations and highways were closed, citizens were banned from entering and leaving Wuhan[44]. Similar rules have been imposed in other Hubei cities, implementing, *inter alia*, different levels of traffic control.

3.14. There was also no state of emergency in the Kingdom of the Netherlands. At the time of the outbreak of the pandemic, there were regulations in place regulating emergency cases in the field of public health, including in the Public Health Law of 9 October 2008 (*Wet publieke gezondheid*)[45]. The purpose of this law was to prepare the state for crises related to infectious diseases. The act defined the rules of infectious disease control. This regulation was the main instrument to introduce control measures related to combating and counteracting the COVID-19 pandemic.

3.15. The law of the United Kingdom of Great Britain and Northern Ireland provides provisions relating to the issue of mass infections. Under the Public Health (Control of Disease) Act 1984, the competent minister may, by means of ordinances, make provisions to prevent, protect, control or ensure a response from the public health service to the occurrence or spread of an infection or contamination in England and Wales (whether the risk is external or internal)[46]. This act is the basis for intro-

[44] Message of the authorities of Wuhan available in Chinese at the site: http://jyh.wuhan.gov.cn/pub/whs_70/zwgk/tzgg/202003/t20200316_972434.shtml, accessed March 10, 2021.

[45] Staatsblad 2008, 460.

[46] An Act to consolidate certain enactments relating to the control of disease and to the establishment and functions of port health authorities, including enactments relating to burial and cremation and to the regulation of common lodging-houses and canal boats, with amendments to give effect to recommendations of the Law Commission, 26 June 1984, UK Public General Acts, 1984 Chapter 22, https://www.legislation.gov.uk/ukpga/1984/22/section/45C, accessed March 10, 2021.

ducing solutions that interfere with civil liberties and rights in connection with counteracting mass infections (e.g. with regard to the organization of mass events or public gatherings, performance of school duties, etc.[47]). The Health Protection (Coronavirus Restrictions) Regulations were the basic act determining the scope of exercising civil rights during the COVID-19 pandemic in England[48]. The Regulations were issued on March 26, 2020 and entered into force on the same day. Similar legal solutions have been adopted for Wales, Scotland and Northern Ireland.

3.16. There was no state of emergency in Austria either. The operation of the provisional law-amending ordinances of the Federal President was also not permissible during the pandemic period due to the fact that not all constitutional conditions were met, in particular the condition that the National Council could not assemble in good time or its activity was impossible due to force majeure. As in many other countries, Austria had laws in place before 2020 to combat infectious diseases. The most important act was the Federal Epidemic Law dating back to 1913 (*Bundesgesetz über die Verhütung und Bekämpfung übertragbarer Krankheiten*)[49].

This law enumerated diseases subject to the obligation to notify, the occurrence of which entitles the use of extraordinary "preventive measures" (e.g. isolating the sick or suspected of falling ill, disinfection, restrictions in food circulation, events involving a large number of people, closure of educational institutions, emptying the premises, etc.). The first actions in the field of counteracting the COVID-19 pandemic at the federal level were based on this act. On February 28, 2020, the Federal Minister of Social Affairs, Health, Care and Consumer Protection issued an ordinance according to which the preventive measures provided for in the Outbreak Act to restrict the activity of entrepreneurs could also be applied in the case of COVID-19 infection.

3.17. In Ukraine, from March 2020, restrictive regulations limiting freedom and constitutional rights began to be introduced. The President

[47] Ibidem, sek. 45C 4 (a).

[48] Health Protection (Coronavirus Restrictions) (England) Regulations 2020, 26 March 2020, Statutory Instruments, 2020 N. 350, https://www.legislation.gov.uk/uksi/2020/350/contents/made, accessed March 10, 2021.

[49] Bundesgesetzblatt für die Republik Österreich of 1950, it. 186 as amended.

of Ukraine has issued a presidential decree approving the decision of the National Security and Defence Council of Ukraine about immediate measures on ensuring national security in the conditions of the outbreak of sharp respiratory disease of COVID-19. The pandemic was considered a state threatening the interests of the state and its citizens, but it was not decided to announce a state of natural disaster on all or part of the state's territory.

3.18. In the Kingdom of Belgium, the constitution does not provide for a state of emergency, nor does it contain a general limitation clause in the context of counteracting a pandemic. The first emergency measures at the federal level were introduced under the ministerial order of March 13, 2020. a ban on cultural, social, sports and entertainment activities, both in the private and public dimension, and religious ceremonies (*les activités des cérémonies religieuses*), except for funerals and activities in the circle of relatives and family; suspension of school education, partial restriction of trade on Saturdays and Sundays[50]. Further preventive measures were introduced under the ministerial order of March 23, 2020. Assemblies, all cultural, social, sports and entertainment activities, both in the private and public dimension, were banned (*les activités à caractère privé ou public, de nature culturelle, sociale, festive, folklore, sportive et récréative*), religious ceremonies (*les activités des cérémonies religieuses*), organized tours.

On March 27, 2020, the House of Representatives adopted two laws empowering the King to take the necessary measures to prevent the spread of COVID-19[51]. The power to define administrative, civil and criminal sanctions was granted for a period of three months with the possibility of extending it once for another three months. In addition, a requirement was introduced that provisions issued on the basis of *pouvoirs spéciaux* were adopted by the entire Council of Ministers (*par le Roi, délibéré en Conseil des ministres*) and approved by parliament within one year from the date

[50] Arrêté ministériel du 13 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19.

[51] Loi du 27 mars 2020 habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus, http://www.ejustice.just.fgov.be/eli/loi/2020/03/27/2020040937/justel; Loi du 27 mars 2020 habilitant le Roi à prendre des mesures de lutte contre la propagation du coronavirus COVID-19 (II), (*Moniteur belge*, 30 mars 2020), http://www.ejustice.just.fgov.be/eli/loi/2020/03/27/2020040938/justel, accessed February 28, 2021.

of entry into force. In practice, the Federal Government has been given extensive powers to mitigate the negative effects of a pandemic. Based on the aforementioned statutory delegation, it was issued, inter alia, royal decree (*arrêté royal*) of April 6, 2020 authorizing municipal authorities to introduce additional administrative sanctions for violating the provisions of the ordinance of the minister of security and internal affairs of March 23, 2020 concerning, closing stores and introducing an obligation to social distance[52]. The authorities of the Walloon Region, the French Community, the Brussels-Capital Region, the Joint Community Commission of the Brussels-Capital Region (*Commission communautaire commune*, COCOM), the French Community Commission of the Brussels-Capital Region (*Commission communautaire française*, COCOF) and the German-speaking Community took advantage of the possibility of transferring special powers to the executive[53].

3.19. In Denmark, the Parliament (Folketing) approved the government's draft amendment to the law on counteracting epidemics and infectious diseases, commonly known as the "law on epidemics". On the basis of this amendment, which entered into force on March 17, 2020 the government, health and justice ministers and relevant government agencies were given additional regulatory powers.

3.20. In the Kingdom of Sweden, unlike most countries, in the first phase of the pandemic, no restrictive model of restrictions on the freedom and rights of citizens was adopted. The authorities responded by skilfully adjusting the existing legal instruments to combat the new threat. The Swedish legislator practically did not introduce limitations of rights and freedoms at the sub-statutory level. The Swedish basic laws did not provide for the possibility of introducing emergency measures that would enable the authorities (state) to react to a pandemic. The 2010 amendment

[52] Arrêté royal n° 1 du 6 avril 2020 portant sur la lutte contre le non-respect des mesures d'urgence pour limiter la propagation du coronavirus COVID-19 par la mise en place de sanctions administratives communales. (*Moniteur belge*, 7 avril 2020), http://www.ejustice.just.fgov.be/eli/arrete/2020/04/06/2020020733/moniteur, accessed February 28, 2021.

[53] Frédéric Bouhon, Andy Jousten, Xavier Miny, and Emmanuel Slautsky, "L'État belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception," *Courrier hebdomadaire du CRISP* 2446 (2020): 26–33.

to the Instrument of Government (*Regeringsformen*)[54] created the basis for introducing limitations in the rights and freedoms of citizens in connection with the threat of "plague" in secondary legislation. In the event that the Parliament of the Kingdom of Sweden could not expeditedly adopt an amendment to the law in the form of adding a specific disease entity to the list of contagious diseases, special powers in this regard were granted to the government. In Sweden, recommendations and guidelines addressed to citizens, entrepreneurs running restaurants, organizing mass events, and manufacturers of medicines and hygiene products were widely used.

3.21. Compared to other countries covered by the study, the Belarusian authorities presented an original approach to the COVID-19 pandemic. In the first months of its duration, the government denied the need to significantly change the regulations or introduce restrictions. Authorities have declared no emergency or virtually no administrative restrictions to protect citizens' health and prevent the spread of COVID-19. A regulation of the Council of Ministers of February 5, 2020 on the organization of preventive actions (О ведении ограничительного мероприятия)[55] was issued ordering that people who came to Belarus from countries where cases of infection with COVID-19 have been reported and not self-isolate before the end of the period of self-isolation crossed the state border. The regulation of the Council of Ministers of the Republic of Belarus of April 8, 2020[56] imposed self-isolation on people infected with COVID-19 and those who had contact with the infected. Those in self-isolation were not allowed to leave their place of residence or stay, stay in the workplace, study, commercial and gastronomic facilities, sports, entertainment and concert halls, cinemas, railway stations and other places of mass concentration of people. Violation of the requirements of self-isolation established by the regulation entails liability in accordance with legislative acts. Pre-

[54] "The Svensk författningssamling" 2010:1408 Lag om ändring i regeringsformena.

[55] Постановление Совета Министров Республики Беларусь от 25.03.2020 № 171 «*о мерах по предотвращению завоза и распространения инфекции, вызванной коронавирусом COVID-19*», „Национальный правовой Интернет-портал Республики Беларусь", 27.03.2020, 5/47931 as amended.

[56] Постановление Совета Министров Республики Беларусь от 8 апреля 2020 г. N 208 „о введении ограничительного мероприятия", „Национальный правовой Интернет-портал Республики Беларусь", 9.04.2020, 5/47975.

ventive measures were introduced and revoked by a decision of the Council of Ministers of the Republic of Belarus, local executive and administrative bodies at the request of the Deputy Minister of Health – Chief State Sanitary Doctor of the Republic of Belarus, and locally in oblasts, cities and districts at the request of the chief state sanitary doctors of oblasts, cities and districts.

3.22. In the light of the above list, it seems legitimate to conclude that the legal solutions functioning in the analysed countries during the COVID-19 pandemic were determined by the varying degree of preparation of the legal system of a given country to epidemiological challenges. At the first stage of counteracting the COVID-19 pandemic, countries attempted to apply existing regulations to the resulting threat or introduced new statutory or sub-statutory solutions, primarily guided by the criterion of the effectiveness of public authority activities. The adopted political and legal strategy was influenced by experience in combating epidemic threats, as well as by the conditions of internal policy. It is impossible to notice a simple relationship between resorting to emergency solutions, provided for in the constitutions, and effectiveness in counteracting a pandemic.

4. FINAL CONCLUSIONS

A number of conclusions can be drawn from the research carried out. Firstly, states tried to adapt their measures to the current degree of threat, taking into account the conditions resulting from their own constitutional system, cultural considerations, as well as local traditions, size of the territory, population or population density. The status of an individual was influenced by the way human rights were codified in the text of the particular constitution at the time of its creation. Older constitutions, such as the Dutch, Norwegian or Danish constitutions, devote less space to freedoms and rights. The constitutions adopted after World War II – under the influence of her experiences – such as the Italian or Spanish ones, regulate this matter in a more comprehensive manner. In federal states (e.g. the USA, Canada, Germany, Belgium), the issues of protection of freedoms and rights are divided between federal regulations and regulations of states, provinces

and countries; a similar division applies to the mechanisms conditioning their compliance and protection.

Second, countries responded in different ways to emergencies related to the pandemic. In some countries, states of emergency were announced in 2020, while in others efforts were made to undertake activities based on applicable statutory regulations. Regardless of the mode, during the pandemic, public authorities were granted special powers, which usually resulted in qualified restrictions on individual rights.

Third, the above synthesis concerns the so-called the first wave of COVID-19 cases. With this in mind, it should be recognized that research on the issue of restrictions on the freedoms and rights of an individual in subsequent phases of the COVID-19 pandemic should be continued, and the final conclusions in this regard may be drawn only after its end. COVID-19 pandemic prevention constitutes an important reference point for future legislative and executive actions. States are forced to react dynamically in order to adapt legal and organizational solutions to new situations and threats in 2021. The functioning of the state and the implementation of its basic tasks when the life and health of citizens is at risk requires special involvement of public institutions within the legal framework enabling its efficient operation[57].

Fourthly, the epidemic in the analysed countries is a challenge from the point of view of ensuring the uninterrupted functioning of public institutions, as well as the possibility of running a business and guaranteeing individual rights and freedoms. The fundamental question remains: what is the limit of interference with civil rights and freedoms that is possible in the normal course of the functioning of the state and in the case of the introduction of one of the constitutional extraordinary states (as long as it is foreseen and admissible in the light of constitutional provisions).

[57] Compare: Robert Tabaszewski, "The permissibility of limiting rights and freedoms in the European and national legal systems due to health protection," *Review of European and Comparative Law* 42, no. 3 (2020): 51–89, https://doi.org/10.31743/recl.6100.

REFERENCES

Albisinni, Marina, and Licia Giannone. "L'insegnamento del COVID-19 sullo stato di emergenza: non è mai troppo tardi." *Questione Giustizia*, June 19, 2020. https://www.questionegiustizia.it/articolo/l-insegnamento-del-COVID-19-sullo-stato-di-emergenza-non-e-mai-troppo-tardi. Accessed March 10, 2021.

Bouhon, Frédéric, Andy Jousten, Xavier Miny, and Emmanuel Slautsky. "L'État belge face à la pandémie de Covid-19: esquisse d'un régime d'exception." *Courrier hebdomadaire du CRISP* 2446 (2020): 1–56.

Ip, Stephanie, and Scott Brown. "COVID-19 Update for March 19: Here's the Latest on Coronavirus in B.C." *Vancouver Sun*, March 20, 2020. https://vancouversun.com/news/local-news/covid-19-update-for-march-19-heres-the-latest-on-coronavirus-in-b-c. Accessed March 10, 2021.

Dawson, Tyler. "As the COVID-19 Pandemic Hit, Provinces Declared States of Emergency. Now Many are up for Renewal. Here is a Look at the Current States of Emergency Plans Across the Country." *National Post*, April 15, 2020. https://nationalpost.com/news/provincial-states-of-emergencies-were-issued-a-month-ago-most-are-coming-up-for-renewal. Accessed March 10, 2020.

Dobrzeniecki, Karol. *Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością*. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa. Stowarzyszenie Wyższej Użyteczności „Dom Organizatora", 2018.

Dobrzeniecki, Karol, and Bogusław Przywora, eds. *Ograniczenia praw i wolności w okresie pandemii Covid-19. Wybrane państwa*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2021.

Domrin, Alexander. *The limits of Russian democratization. Emergency powers and states of emergency*. London-New York: Routledge, 2006.

Furnish, Dale Beck. "La jerarquia del ordenamiento juridico peruano." *The American Journal of Comparative Law* 19, no. 1 (1971): 91–120.

Graveland, Bill. "Calgary and Red Deer Implement State of Emergency to Help Fight Spread of Coronavirus." *The Globe and Mail*, March 16, 2020. https://www.theglobeandmail.com/canada/alberta/article-we-will-get-more-cases-calgary-implements-state-of-emergency-to. Accessed March 10, 2021.

Kelly, Joseph B., and George A. Pelletier. "Theories of emergency government." *South Dakota Law Review* XI (1966): 42–69.

Hengbo, Zhu, Li Wei, and Ping Niu. "The novel coronavirus outbreak in Wuhan, China." *Global Health Research and Policy* 5, no. 1 (2020). https://ghrp.biomedcentral.com/articles/10.1186/s41256–020–00135–6. Accessed March 10, 2021.

Urbaniak, Monika. "Lex coronavirus. Włoskie prawo w walce z pandemią." *Studia Prawa Publicznego* 1 (2020): 9–26.

Prokop, Krzysztof. *Modele stanu nadzwyczajnego*. Białystok: Temida 2, 2012.

Prokop, Krzysztof. "Wokół problematyki stanu klęski żywiołowej w konstytucjach państw europejskich." In *Studia i szkice z prawa publicznego. Księga dla uczczenia pamięci Profesora Eugeniusza Smoktunowicza*, edited by Andrzej Nowakowski, 124–143. Rzeszów: RS Druk, 2008.

Rossiter, Clinton L. *Constitutional dictatorship. Crisis government in the modern democracies*. Princeton, New Jersey: Routledge, 1948.

Tabaszewski, Robert. "The permissibility of limiting rights and freedoms in the European and national legal systems due to health protection." *Review of European and Comparative Law* 42, no. 3 (2020): 51–89. https://doi.org/10.31743/recl.6100.

Questiaux, Nicole. "Study of the implications for human rights of recent developments concerning situations known as the states of siege or emergency." *UN Doc. E/CN.4/Sub.2/1982/15, 1982*, par. 34/35.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 67–92
DOI: https://doi.org/10.31743/recl.11815

ADMISSIBILITY OF EVIDENCE OBTAINED AS A RESULT OF ISSUING AN EUROPEAN INVESTIGATION ORDER IN A POLISH CRIMINAL TRIAL

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ABSTRACT

This article analyses the admissibility of evidence gathered by the Polish procedural authorities as a result of issuing an European Investigation Order, on the basis of provisions implemented due to the adoption on the 3th of April 2014 of the Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. This Directive created a mechanism that allows for transfer of evidence between EU Member States. In this text the question will be answered how to deal with results of investigative measures that have been legally obtained in the executing state but despite acting in accordance with the legality principle by both states, happen to be illegal in the issuing Member State. Another discussed problem is how the rules of admissibility of evidence obtained from the result of issuing an EIO work in Poland – or at least how they should operate. The second discussed issue thus will refer to the current provisions in force in Poland regulating the method of dealing with evidence obtained abroad – that is also with evidence transferred from other Member States. It will be shown that they are unclear and may lead to undesirable results. In addition, suggested changes in Polish law will be proposed.

Keywords: admissibility of evidence, evidence in criminal trial, European Investigative Order, Polish criminal trial

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1. INTRODUCTION

On the 3rd of April 2014, Directive 2014/41/UE of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO)[1] was adopted. It created a mechanism that allows for transfer of evidence between EU Member States. Implementation of this new mechanism of cooperation has led to several practical problems. This text comprises of two parts – in the first part, general problems resulting from the implementation of EIO will be discussed, especially problems related to general questions of how to deal with the results of investigative measures that have been legally obtained in the executing state, but despite acting in accordance with the legality principle by both states, happen to be illegal in the issuing Member State. A lack of adequate provisions regulating admissibility of evidence acquired in other Member States may become a problem in more Member States, as at present, European Union legal acts do not regulate the problem of admissibility – as the EIO Directive cannot require a judge to admit evidence in trial, neither indicate what evidential value and relevance the evidence should have. Therefore, admission of evidence depends on an independent decision of a national judge under national law.

Secondly, in the text it will be shown how the rules of admissibility of evidence obtained as a result of issuing an EIO work in Poland – or at least how they should operate. The second issue discussed will thus refer to the current provisions in force in Poland regulating the method of dealing with evidence obtained abroad – also with evidence transferred from other Member States as a result of issuing an EIO. It will be shown that they are unclear and may lead to undesirable results.

The text shows how the impact of European criminal law, on the one hand, creates new mechanisms of cooperation that should be incorporated into the law of the Member States, but on the other hand, leads to new problems connected with reconciling this mechanism with the existing legal orders of the Member States – as the cooperation should be both effective and in compliance with the law of the States.

[1] OJ UE 130, 1 May, 2014, p. 1–36.

2. THE NEW MECHANISM OF EXCHANGE OF EVIDENCE

Directive 2014/41/UE (the EIO Directive) introduces the principle of mutual recognition in the area of executing investigative measures – according to Article 1(2) of the Directive "Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive". It is a new attitude to transmitting evidence between Member States. The principle of mutual recognition of decisions in criminal matters has become a paradigm of cooperation in criminal matters.

The purpose of mutual recognition of evidence in criminal proceedings across all the Member States was to ensure that evidence gathered in one Member State would be presented before courts throughout the European Union. In the documents issued by the European Union the principle of "free flow of evidence" was mentioned, modeled on the principle of freedom of movement, existing in other areas of Community law. The creators of this concept based it on the assumption that criminal procedures in all the EU Member States are equivalent in the area of conducting investigative measures, and that evidence originating from one State can be used in criminal trials conducted in another Member State[2]. One of the means to implement this principle was to abandon the mechanisms adopted in the Council of Europe in Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, which was founded on the notion of mutual assistance, letters rogatory and service of writs[3]. Introducing the principle of "free flow of evidence" was not only intended to facilitate cooperation in criminal matters, but was intended to replace the model of "mutual assistance". Such was the intention of the creators of the Directive[4].

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[2] See: Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 012, 15 January, 2000, p. 2.1.1. Topic discussed in: Hanna Kuczyńska, "Zagadnienia dopuszczalności materiału dowodowego w sprawach karnych na obszarze Unii Europejskiej," *Przegląd Prawa Europejskiego i Międzynarodowego*, no. 1 (2012): 34.

[3] Journal of Laws of 1999, No. 76, item 854.

[4] See also: Zbigniew Barwina on the Framework decision 2008/978/EU on European Evidence Warrant: Zbigniew Barwina, *Zasada wzajemnego uznawania w sprawach karnych* (Warsaw: Wolters Kluwer, 2012), 123.

These are the general assumptions of the EIO Directive. However, although for the time being transfer of evidence is governed by this principle, there are two sides to mutual recognition. The purpose of applying the principle of mutual recognition to transfer of evidence in criminal matters in all Member States was to ensure that:

1. Evidence demanded by one Member State will be automatically transferred from any other Member State which will carry out necessary investigative measures in order to obtain such evidence or will transfer evidence already in their possession;
2. Evidence gathered in one Member State would be admissible before courts throughout the European Union.

The key question that is posed in this text is – on what principles should state authorities base the admissibility of evidence?

In most EU Member States (mostly those of the continental model of criminal trial), the principle of "freedom of evidence" for use in a criminal trial rules[5]. According to this principle, any information that is relevant to the case may be used in criminal trial. This freedom is usually limited by certain conditions that determine the admissibility of evidence during trial. The key issue that should be taken into consideration is that data and information are never automatically a piece of evidence. Only after an assessment by a national court, information or a potential source of evidence becomes evidence in the understanding of procedural law. The procedures of the Member States contain provisions specifying which evidence should be considered admissible or inadmissible. These conditions differ from one State to another, and they cannot be described as "uniform" or even "similar"[6]. The most visible and significant differences come into play obviously between the models of admissibility of evidence between families of continental and common law states. Whereas in a continental state the assessment of the value and credibility of evidentiary material takes place at the final stage of a trial (in a holistic assessment), at the same time as passing the judgment on guilt (in a way described as "unitary"

[5] Mireille Delmas-Marty and John R. Spencer, eds., *European Criminal Procedures* (Cambridge: Cambridge University Press, 2004), 394.

[6] See: Kuczyńska, "Zagadnienia dopuszczalności dowodów," 38.

– in common law literature)[7], the laws on admissibility of evidence in the common law states are described as "a child of a jury"[8]. In this model of rules of evidence, restrictive rules of admissibility of evidence are intended to protect jurors - who are not professionals - from improperly carried out, illegally obtained or unreliable evidence. The jurors are referred to as the "paradigmatic determining authority", because they decide about facts without prior knowledge of the matter - being a "tabula rasa" organ[9]. The rules of admissibility of evidence are consequently not only a means of protecting the defendant against proving his guilt in a manner inconsistent with the right to a fair trial[10], but also protecting the jury against adjudicating on the basis of unreliable evidence (by law it is recognized that certain evidence is simply of a "worse quality"[11]). Moreover, in this model, the admissibility of evidence is decided on both positive and negative premises: first, the evidence must qualify for one of the categories of admissible evidence, and then be subject to negative elimination - in terms of whether the evidence will not adversely affect the reliability of the trial

[7] See e.g.: Klaus Rogall, "Grundsatzfragen der Beweisverbote," in *Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen*, ed. Frank Höpfel and Barbara Huber (Freiburg in Breisgau: Edition Iuscrim, 1999), 125–126; Theodor Kleinknecht, "Die Beweisverbote im Strafprozess," *Neue Juristische Wochenschrift*, no. 19 (1966): 1539; Eduard Kern and Claus Roxin, *Strafverfahrensrecht: ein Studienbuch* (München: C.H. Beck Verlag, 1987), 141; Jerome Benedict, *Le sort des preuves illegales dans le procés pénal* (Lausanne: Editions Pro Schola, 1994), 49.

[8] James B. Thayer, *Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown and Company, 1898), 47, https://ia800206.us.archive.org/34/items/cu31924017931712/cu31924017931712.pdf, accessed April, 21, 2021.

[9] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale: Yale University Press, 1996), 137–138.

[10] See Martin Hannibal and Lisa Mountford, *The Law of Criminal and Civil Evidence. Principles and Practice* (University of Staffordshire: Longman, 2002), 57–84; John R. Spencer, "Evidence," in *European Criminal Procedures*, eds. Mireille Delmas-Marty and John R. Spencer (Cambridge: Cambridge University Press, 2004), 603; Lydia Waine, Robert May, and Steven Powles, *May on criminal evidence* (U.K.: Sweet & Maxwel, 2015), 301; Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2012), 98.

[11] Spencer, "Evidence," 603; Paul Murphy, *Murphy on Evidence* (Oxford: Oxford University Press, 2008), 10; Thayer, Preliminary Treatise, 1–2; Mirjan Damaška, "Evidentiary barriers to conviction and two models of criminal procedure: a comparative study," *University of Pennsylvania Law Review*, no. 121 (1973): 519–520.

or are not illegally obtained, and at the same time they must be relevant to the case and they cannot be subject to prohibitions of admissibility and they must have a weight to decide on the guilt of the accused[12]. Only after this two-stage assessment does information or a potential source of evidence become evidence in the understanding of procedural law. In both models the final decision on admissibility of evidence depends on the judicial balancing of various interests[13].

Although the models for deciding on admissibility of evidence are shaped so differently, in the aspect of using evidence acquired by issuance of an EIO, the key question is the same in both models: how to resolve the problem of illegal evidence (or evidence acquired in an illegal manner). The attitude towards evidence gathered in other Member States has never been uniform. The lack of uniformity in attitude towards such evidence has been often a point of interest in the literature. Several examples of these tendencies are discussed e.g. by M. Kusak: in an English case *R. v. Governor of Pentonville Prison ex parte Chinoy*[14] the English court had to decide on the results of illegal telephone tapping obtained in France in violation of French law. It stated that although the evidence was inconsistent with the *lex loci*, they were in accordance with English law – PACE, section 78 and thus admissible[15]. A Belgian court, on the other hand, required evidence in the form of telephone wiretaps in a situation where it would be incompatible with Belgian law - and after obtaining the results of wiretaps, used it in accordance with *lex fori* law, admitting them as evidence in the trial[16]. Thus, there are two ways in which evidence may

[12] S 78 PACE 1984; see: Hannibal and Mountford, *The Law of Criminal*, 31–84.

[13] Balázs Garamvölgyi, Katalin Ligeti, Anna Ondrejová, and Margarete von Galen, "Admissibility of Evidence in Criminal Proceedings in the EU," *Eucrim*, no. 3 (2020): 201–208.

[14] Discussed by Martyna Kusak, *Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search* (Antwerpen–Apeldoorn–Portland: Maklu, 2016), 173. Published in: [1992] 1 All E.R. 317.

[15] Martyna Kusak calls this phenomenon a "reverse phenomenon of process laundering", see: Kusak, *Mutual admissibility*, 173.

[16] Cour de Cassation, judgment of 2.01.1993 (en cause de Co. D.), published *Revue de droit penal* (1993), 768 – also discussed by Kusak, *Mutual admissibility*, 173.

happen to be illegal: illegal by forum and illegal by way of conducting an investigative measure.

Therefore, it results that there are two main problems before the Member States admitting evidence acquired by means of issuing an EIO:

1. to decide on the results of investigative measures illegal in the issuing Member State,
2. to decide on the results of investigative measures illegal in the executing Member State.

Currently, the EIO Directive attempts to prevent such situations, as it prohibits the issuing of an EIO in a situation where a measure would be illegal under the law of the issuing State, and executing of the EIO, if the act would be inadmissible in the executing State. It reaches this result through two provisions, obliging both the issuing state and the executing state to apply its national law. These could be called the "two sides of legality principle". Moreover, in Article 14(7) it stipulates that "Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO". This provision can be considered to constitute a general rule of admissibility of evidence on the EU level.

Firstly, the issuing authority may only issue an EIO where the condition has been met that the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case (Article 6(1)(b)). Any alternative solution would lead to a violation of the rule according to which state authorities can act only on the basis of the law. Moreover, it would allow for the use of so called "forum shopping" - allowing for gathering evidence, that is illegal in the issuing state, in a state where it is legal. In consequence it would permit choosing the forum for obtaining evidence at will, based on the lowest minimal procedural guarantees. As a result, the opposite solution would make it possible to apply for illegal evidence in the issuing State to a state where it is legal to conduct it[17].

[17] Hanna Kuczyńska, "Commentary on Article 589x § 2 CCP," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, 2020), 1598.

Secondly, on the other side is the executing state, which must ensure the EIO's execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing state (Article 9(1)). It is clear that the EIO procedure functions on the basis of the *locus regit actum* principle – according to which investigative measures are carried out according to the law of the executing state[18]. The courts should take into consideration the requirements of Article 14(7) of the EIO Directive and ensure that rights of the defence and the fairness of the proceedings are respected when admitting such evidence. Nonetheless, the problem still remains of how to deal with results of investigative measures that have been legally obtained in the executing state, but despite obliging the legality principle by both states, happen to be illegal in the issuing Member State – this problem has not yet been resolved by the provisions of the Directive[19]; despite all the efforts of state authorities, evidence might turn out to be gathered through a violation of law. Moreover, the same situation arises when the principle of legality has been breached – M. Kusak calls it a "double admissibility check" – where lack of fulfilling the legality principle in the issuing state leads to a refusal to execute the requested investigative measure and lack of fulfilling the legality principle in the executing state leads to refusal to admit the evidence[20].

Therefore, the above discussed provisions of the Directive, implemented in the Member States, solve only part of the problem of illegal evidence. However, there is still a need to decide on the results of investigative measures that were legally executed in the executing Member State, yet, after transferring their results, appear to be illegal in the issuing Member State.

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[18] Barbara Nita-Światłowska and Andrzej Światłowski, "Odczytanie w postępowaniu karnym protokołu czynności dowodowej przeprowadzonej przed obcym organem," *Europejski Przegląd Sądowy*, no. 2 (2013): 6.

[19] See also: Inés Armada, "The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?," *New Journal of European Criminal Law*, no. 1 (March 2015): 8–31.

[20] Martyna Kusak, *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Warsaw: Wolters Kluwer, 2019), 32. See also by this Author: "Mutual admissibility of evidence and the European investigation order: aspirations lost in reality," *ERA Forum*, no. 19 (2019): 399.

In principle, compliance with the rules of procedure in the executing State is a condition for the use of evidence in the issuing State. However, there is nothing in the Directive that would suggest that the unlawful manner of gathering of evidence in another Member State (as assessed by the issuing authority in accordance with national law) should automatically render evidence inadmissible in the issuing Member State[21]. According to some authors, the mere fact of carrying out an investigative measure in accordance with the law of the executing State (governing the conditions for taking evidence, its form or list of prohibited evidence) implies that the results of this measure must be covered by the principle of mutual recognition and the evidence must be considered admissible[22]. It is hard to agree with such a statement, and it would be difficult to enforce such a rule. Moreover, there is a weakness to this assumption: it is hard to discover the exact meaning of legal provisions of foreign states, which would require appointing an expert on foreign law in every case where any piece of evidence has been acquired in another Member State. In the end, the admissibility of such evidence is left to be assessed by the national courts and in the text below several issues connected with this problem will be discussed on the example of the Polish principles of admissibility of evidence acquired abroad.

3. THE MAIN ASSUMPTIONS OF THE EIO DIRECTIVE IMPLEMENTATION IN POLAND

So far, all the mechanisms of cooperation among EU Member States based on the principle of mutual recognition of decisions in criminal matters have been implemented into Polish law by adding subsequent chapters in Section XIII of the Code of Criminal Procedure (CCP)[23], which governs proceedings in international matters. According to the concept adopted in the Code, the Polish legislator does not mention this principle explicitly in the provisions implementing appropriate instruments of cooperation in

[21] Nita-Światłowska and Światłowski, *Odczytanie w postępowaniu karnym*, 6.
[22] Barwina, *Zasada wzajemnego uznawania*, 123.
[23] Act of 6 June 1997 - Journal of Laws 2017, No. 89, item 555.

criminal matters, implicitly accepting that they are based on cooperation mechanisms adopted by the European Union.

The EIO Directive has been implemented in a similar manner. On the 8th of February 2018 the Act of 10th of January 2018 entered into force[24]. It added new chapters to the Polish Code of Criminal Procedure - 62c and 62d CCP which implemented the EIO Directive. Member States were obliged to take the necessary measures to comply with this Directive by 22 May 2017 (according to Article 36 of the EIO Directive) and Poland was one of the last ones to comply.

According to Article 589w § 1 CCP: "the European Investigation Order is a decision of a court or a public prosecutor issued *ex officio* or at the request of a party, defence counsel or legal councel, if necessary to conduct or obtain evidence that is placed or may be carried out on the territory of another European Union Member State called 'the executing State' in which the EIO applies". The issuing of an order consists of issuing a decision on carrying out an appropriate investigative measure (e.g. a decision to seize an object, a decision on appointment of an expert) and on completing the form constituting Annex A to the Directive. This means that there is no need to issue a "double" procedural decision, by duplicating the decision issued for the national trial in a decision issued for the purpose of international cooperation. Such regulation presents a departure from the dualistic construction used so far in Polish law, according to which the application of a decision issued in another state is possible only after issuing the appropriate decision provided for by the provisions of the Polish procedure[25].

The basic assumption of the European Investigation Order is that the executing State must immediately take the steps necessary to comply with the order, in the same way, and in the same manner, as if the decision on the investigative measure had been ordered by the authority of the executing State. This assumption is to enable the construction of a comprehensive system of cooperation that will cover the widest possible catalogue

[24] Journal of Laws 2018, item 201.

[25] See: Sławomir Steinborn, "Komentarz do art. 589w," in *Kodeks postępowania karnego. Komentarz*, Vol. II, eds. Jan Grajewski, Lech K. Paprzycki, and Sławomir Steinborn (Warsaw: Wolters Kluwer, 2010), 604.

of evidence, based on the principle of mutual recognition[26]. The characteristic features of this system are: application to all types of evidence - both those already existing and those that must be obtained by carrying out investigation measures; set and short deadlines for carrying out the requested investigative measures; limited grounds for refusing to execute the order.

For the purpose of this text, the most important issue is that the EIO covers any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team. An EIO can be issued as regards:

1. evidence already in the possession of the competent authorities of the executing State
2. evidence obtained through or as a result of the execution of the EIO to the issuing State – as opposed to the European Evidence Warrant (Framework Decision 2008/978/EU);

The Polish legislator implemented the main assumption of Directive 2014/41/UE deciding that an EIO can be issued "in order to conduct or obtain evidence". This means that such an order may be issued not only when evidence exists and is already available in another Member State, and the only thing that must be done by the authority of the executing State is to transfer this already existing material, but it can also be an impulse to carry out activities aimed at obtaining evidence - that is, investigative measures. Thus, the scope of the activities that may be carried out by the executing State includes evidence that is physically and directly available at the time of issuance of an EIO, as well as evidence not yet in existence – as an EIO may also be used to conduct ("initiate") in another Member State procedural steps (such as for example interviewing witnesses, suspects, accused persons and victims, appointing experts, recording of evidence in real time, intercepting communications and telephone tapping, or monitoring bank accounts, taking evidence of a person from the body, i.e., DNA testing material). An order may also be issued to secure traces and evidence of crime before they are lost, distorted or destroyed[27].

[26] Grzegorz Krysztofiuk, "Europejski nakaz dochodzeniowy," *Prokuratura i Prawo*, no. 2 (2012): 91.

[27] This procedure is now the basis for carrying out such measures, replacing Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European

The Directive does not define what should be understood under the concept of an "investigative measure", leaving the decision up to Member States as to what they consider to be an investigative measure. This can be any activity carried out to in order to obtain evidence. This is certainly a suitable assumption. It allows for extending the concept of an "investigative measure" to cover all procedural steps and activities leading to obtaining evidence that are fundamentally different in the Member States and not classified in a uniform manner.

The Polish Criminal Procedure Code also does not define the concept of "investigative measures". It can be concluded that these are all procedural activities that lead to obtaining evidence that is admissible in the Polish procedure. This can be all evidence that can be legally obtained and carried out according to Polish law. This assumption complies with the basic assumption of the Directive that the method in which investigative measures will be carried out in the territory of the executing State should be determined by the executing authority in accordance with the national law.

Therefore, the two sides of legality principle are satisfied. Firstly, it is the above-mentioned principle of the legality of executed investigative measures. Secondly, a Polish authority may only request evidence that is legal according to Polish law and legally obtained. Article 589x § 2 CCP states that it is not possible to issue an EIO if the Polish law does not allow to carry out a specific investigative measure or obtain given evidence. Therefore, it should not be possible to apply for an EIO in a situation where the Polish procedure provides for the existence of rules of exclusion: e.g. in order to carry out an investigative measure aiming at disclosing the circumstances of taking a Crown witness to personal protection or assistance; to interview a witness who is a priest as to facts he learned about in confession, or a defence lawyer about matters covered by the confidentiality principle; to obtain a statement using impermissible methods of interrogation (i.e., the use of coercion or unlawful threat); to apply for

Union of orders freezing property and evidence (Official Journal of the European Union L 196 of 2 August, 2003, p. 45), implemented to the Code of Criminal Procedure under the Act of 7 July 2005 amending the Act - Code of Criminal Procedure and the Act - Code of Procedure in Misdemeanor Cases (Journal of Laws 2005, No. 143, item 1230), which introduced the provisions of the Framework Decision in Chapter 62a and 62b of the Code of Criminal Procedure.

sources of evidence other than witnesses in order to make use of his/her statements concerning the alleged act made against an expert or a doctor providing him/her medical assistance. It should not be possible to bypass the bans established in the Polish criminal procedure through the use of this instrument. It should also be acknowledged that it is also unacceptable to bypass the existing so called "relative rules of exclusion", for example in order to interview as a witness a person who has exercised the right to refuse to testify in Poland, if in a different Member State such rights are not granted to him/her[28]. The exclusionary rules do not exhaust all the rules on legality of evidence: the second level of assessment constitute the rules of admissibility resulting from more general provisions of conventional or constitutional level that define the notion of a fair trial. Therefore, another question should be the assessment of the required piece of evidence in the light of the general rules of admissibility as regulated in these sources and in Article 170 § 1 CPP: whether the evidence will be admissible, relevant or possible to acquire.

4. ADMISSIBILITY OF FOREIGN EVIDENCE IN A POLISH CRIMINAL TRIAL

This chapter will show some problems resulting from unclear provisions regulating the method of dealing with evidence obtained abroad in the Polish legal order – that is also with evidence transferred from other Member States on the basis of provisions implementing the EIO Directive. In every state existing rules of evidence decide the premises which must be fulfilled by a piece of data in order to "become" evidence. The use of evidence from another state is based on the assumption that data, documents and objects become evidence only after they have been admitted to the trial by the court before which the proceedings are conducted[29]. Collected and transferred, as a result of the issuing of an EIO by the Polish authority, "data and documents" will become "evidence"

[28] Kuczyńska, "Commentary," 1598.

[29] See: Sabine Gless, "Mutual recognition, judicial inquires, due process and fundamental rights," in *European Evidence Warrant: Transnational Judicial Inquiries in the EU*, ed. John A.E. Vervaele (Antwerpen-Oxford: Intersentia, 2005), 123.

only after its admission at trial as evidence by a procedural authority. The key question for the issue raised in this text is the question on what principles this authority should base the decision on admissibility of evidence. There are two regimes of admissibility of evidence in the Polish criminal trial:

1. Domestic regime;
2. Regime applicable to evidence obtained abroad (art. 587 CCP).

The regime of admissibility of evidence applicable to evidence obtained abroad is based on the provision of Article 587 CCP, which reads as follows: "The official records of inspections, interviews of the suspects and accused persons, witnesses or experts, or records of other investigative measures prepared upon a request from a Polish court or state prosecutor, by the courts or state prosecutors of foreign states or by organs under their supervision, may be read aloud at the hearing according to the principles prescribed in Articles 389, 391 and 393" (these are the general rules of admission of indirect evidence at trial). Admission of evidence gathered abroad may take place provided that "the manner of performing these actions, does not conflict with the principles of the legal order in the Republic of Poland".

This solution equally has advantages and disadvantages. Among the first positive elements, the most important is the limited scope as to the level of formal requirements. It is agreed in the Polish jurisprudence and doctrine that the notion of "principles of the legal order" cannot be understood as a requirement to follow detailed provisions regarding the conduct of procedural acts (formally). It is a type of "*clause d'ordre public*" – a clause of a general nature. According to the opinion expressed by the Polish Supreme Court, the provisions governing the performance of particular investigative measures concern only the manner of conducting them in proceedings pending in Poland, and it cannot be required that foreign authorities should follow them when conducting an investigative measure. The legality of telephone wiretapping carried out by the authorities of a foreign state, even if they are to be incorporated into a Polish trial, as part of pending proceedings, should be assessed in accordance with Article 587 CCP, if the manner in which they are carried out does not contradict the principles of the legal order in the Republic of Poland. Thus, the expression "principles of the legal order of the Republic of Po-

land" cannot be understood as the preservation of detailed provisions regarding the conduct of procedural actions. By referring to the "principles of the legal order" it was clearly indicated that these are rules of a more general nature, such as the rights of the defense, the right to refuse to provide explanations, or the prohibition of obtaining evidence under conditions excluding freedom of expression[30]. Moreover, by introducing this general clause it allows for admission of evidence obtained according to *locus regit actum* principle and makes it unnecessary to refer to *forum regit actum* principle[31] - that it is not necessary to oblige the executing state to apply certain formalities and conditions while carrying out the required investigative measure.

The most serious disadvantage is, however, the limited scope of application of Article 578 CCP: only evidence in the form of "official records" can be admitted on the basis of this provision and only according to the principles prescribed in Articles 389, 391 and 393 CCP.

Having established that there is a special regime for admitting evidence gathered abroad, a question must be posed: how then should the Polish authorities issuing an EIO deal with the evidentiary material transferred from the executing Member State? There is no provision that could answer this question – neither in the Polish CCP nor the Directive. As it is a new mechanism of cooperation the literature or jurisprudence offers no answer either[32]. The hierarchy of legal acts (and Article 615 § 2 of the Code of Criminal Procedure) is not helpful here either, because the Directive itself is not hierarchically superior to the Polish law (the supremacy of EU law can be discussed as regards national laws, but this is not the place for such considerations), and secondly, it says nothing on the subject of how to admit evidence from other Member States.

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[30] See: Polish Supreme Court, Judgment of 19 September 2000, Ref. No. V KKN 331/00, published LEX no. 50992 and Polish Supreme Court, Decision of 8 February 2006, Ref. No. III KK 370/04, published LEX no. 176060 – similarly: Piotr Hofmański, Elżbieta Sadzik, and Kazimierz Zgryzek, *Kodeks postępowania karnego. Komentarz* (Warsaw: C.H. Beck, 2012), 475.

[31] Barwina, *Zasada wzajemnego uznawania*, 274.

[32] Although see: Armada, *The European*, 8, who proposes the most flexible rule of admitting evidence if they pass the fundamental rights compliance test.

There are three possible solutions (theoretically), that can be derived from the existing legal order:

1. Apply Article 587 CCP only to "official records" – the rest of the evidence may be admitted on the basis of national regime;
2. Apply national regime – to all types of evidence gathered in other Member State as a result of an EIO;
3. Apply Article 587 CCP *per analogiam* - also to other types of evidence as "official records" – this provision would become the basis for admitting all trans-border evidence from other EU Member States.

Regarding the first solution, one should keep in mind that it would allow applying Article 587 CCP only to "official records". This solution could result in the existence of two regimes of admissibility of evidence in the same proceedings. Outside the scope of Article 587 CCP evidence other than "official records" would be left out, as with e.g. all the official documents and statements, results of monitoring bank accounts, or even an expert opinion. In consequence, this "double regime" of rules of admissibility of foreign evidence would lead to an unclear scope of the above-mentioned provision, and most of all – in a lack of predictability for other Member States. Moreover, this solution leads to such a result that the admissibility only of some evidence gathered abroad and on the territory of Poland is much wider than others. However, given the present state of national rules of admissibility of evidence, it is hard to say which one has a wider scope. Moreover, it is also claimed that the applicability of Article 578 CCP depends also on conditions as set out in the above-mentioned Articles: 389, 391 and 393 CCP – the rules of admitting indirect evidence which apply in certain situations, only when the direct evidence (witness) are not available[33]. The third condition, as defined in this Article, is that the records must be "prepared upon a request from a Polish court or state prosecutor". Therefore, there are opinions, according to which this expression cannot be identified with "obtained upon a request"[34], as evi-

[33] Nita-Światłowska and Światłowski, "Odczytanie w postępowaniu karnym," 7.

[34] Michał Płachta, "Komentarz do art. 578," in *Kodeks postępowania karnego. Komentarz*, eds. Jan Grajewski, Lech K. Paprzycki, and Michał Płachta (Kraków: Zakamycze, 2003), 494–495; differently: Arkadiusz Lach, *Europejska pomoc prawna w sprawach karnych* (Toruń: TNOiK, 2007), 296–298.

dence already existing and only transferred upon an issuance of an EIO is not "prepared" upon request – but only "obtained". Thus, the formulation of this provisions would narrow down the possible application of Article 578 CCP to results of EIOs that were not existing at the moment of issuing an EIO. However, the last condition was rightly rejected in the jurisprudence of the Polish Supreme Court – it concluded that this provision should be understood as applicable also to records "obtained on request"[35]. From all the above mentioned reasons this solution does not seem to be the right one.

As to the second solution, that is applying the domestic regime equally to all types of evidence also to these obtained abroad, it must be said that in the present moment the rules of admissibility of national evidence are a "source of constant confusion of both doctrine and courts"[36]. According to Article 168a CCP "Evidence cannot be considered inadmissible only on the grounds that it was obtained in violation of the provisions of the proceedings or by means of an offense referred to in Article 1 § 1 of the Criminal Code, unless the evidence was obtained in connection with the performance of official duties by a state functionary as a result of: murder, deliberate damage to health or imprisonment". There are at least 3 different interpretations of Article 168a CCP in the literature[37]. One has to bear in mind the total irrationality of the most obvious and literal interpretation of Article 168a CCP – it indicates the prohibition of deciding that evidence is not admissible only because it is illegal, i.e. was obtained by means of a prohibited act. As a result of this interpretation there would be no procedural sanctions for violating the procedural rules of collecting evidence, thus the rules set out in the CCP could be considered to be unnecessary. It is to be assumed that courts should not apply this provision if the method of gathering or presenting evidence violates Article 7 of the Constitution of the Republic of Poland and Article 6 of the ECHR. Also it is possible to apply other norms of the Code

[35] Polish Supreme Court, Ref. No. V KKN 126/99, published Lex no. 51664; see also: Sławomir Steinborn, *Komentarz do artykułu 578 kodeksu postępowania karnego*, thesis 8, Lex.

[36] This issue is discussed extensively by: Dagmara Gruszecka, "W kwestii interpretacji znowelizowanego przepisu art. 168a," *Palestra*, no. 1–2 (2017): 1.

[37] Presented i.a. by Gruszecka, "W kwestii interpretacji," 2.

- Article 170 § 1(1) CCP which stipulates "An application for evidence is denied if the taking of evidence is inadmissible" - in order to exclude the possibility to admit illegal evidence[38]. The Supreme Court concluded that this provision may not constitute the legal basis to admit evidence obtained in breach of procedural provisions or by means of a prohibited act, if admitting of such evidence would render the process unfair within the meaning of Art. 6 of the Convention – and this interpretation should be considered to be valid[39]. At the same time it must be stressed that in the opinion of the Court not all evidence obtained in breach of the ECHR (for example, breach of privacy or protection of the private home) is automatically excluded from the criminal proceedings. From the ECtHR case law it results that only evidence, the use of which could violate the integrity of the trial or the rule of law, must be excluded[40].

The consequence of this concept would be the admission of evidence on the basis of general rules regarding admissibility of indirectly presented evidence: Articles 389, 391 and 393 CCP. The last provision is particularly important as it allows the reading aloud at trial of records on inspections, searches and retaining objects, as well as the opinions of experts, scientific institutes, establishments or institutions, criminal records of persons, outcomes of inquiry in the community, and any official documents, submitted in the course of preparatory or judicial proceedings as well as any private documents prepared outside the criminal proceedings, particularly statements, publications, letters and notes. Using this solution makes Article 578 dispensable in the EIO procedure[41]. It should be also remembered, that rules of admitting of indirect evidence should be

[38] Used in jurisprudence of the Appellate Court in Wrocław, Judgment of 27 April 2017, Ref. No II AKa 213/16, published in: OSA 2017/4/3–63.

[39] Polish Supreme Court, Decision of 26 June 2019, Ref. No. IV KK 328/18, published OSNKW 2019/8, pos. 46.

[40] Judgment of ECHtR of 1 June 2010, Case *Gäfgen v. Germany*, application no. 22978/05, paras 98–99, hudoc.int; Judgment of ECHtR of 26 April 2007, Case *Popescu v Romania*, application nos. 49234/99 and 71525/01, para 106, hudic.int; Judgment of ECHtR of 9 June 1998, Case *Teixeira de Castro v Portugal*, application no. 25829/94, hudoc.int. Cases discussed in: Garamvölgyi, "Admissibility of Evidence," 204.

[41] See: Sławomir Steinborn, *Komentarz do artykułu 578 kodeksu postępowania karnego*, thesis 9, Lex.

in compliance with the jurisprudence of the European Court of Human Rights – especially established in the case *Jakubczyk v. Poland*[42]. So far, the second solution seems to be the most suitable.

The third solution, applying Article 587 CCP *per analogiam* leads to the rejection of a simple interpretation based solely on language interpretation. As a result, these provisions could be used to a unified approach to all the evidence gathered in the other Member States. Moreover, a systemic interpretation could be used – both sets of provisions, implementing the EIO and Article 587 CCP are situated in the same chapter XIII CCP dealing with international cooperation in criminal matters. However, there are serious doubts as to the possibility of applying procedural provisions *per analogiam* – even though this solution operates not strictly to the detriment of the accused, it would still allow for such a possibility for the accusation[43]. Besides, it is sometimes hard to say before conducting an investigative measure whether its results will be in favour of or against the accused. Therefore, also this solution should be rejected.

As it has been shown above, there is a lacuna – there should be a provision regarding the proper basis for the admission of the evidentiary material obtained in result of issuing an EIO – but there is currently none available in the Polish legal order. None of the above-mentioned solutions can be adopted without any doubts. The most natural model at the time being would be to use national rules of admissibility, as lack of fulfilling technical formalities does not render evidence automatically inadmissible in Polish criminal procedure – with a reservation made below. As a result, it will be a task for the Polish courts to assess the admissibility of evidence gathered through the issuance of an EIO. At the moment, they can use all of the concepts presented above. In fact, they apply the simplest option – they disclose all documents and evidence acquired from another Member State as are included in the file of the case, without providing a legal basis. The functional practice of the EIO Directive shows that state authorities do not hesitate to admit evidence obtained as the result of issuing an EIO on the basis of national rules of admissibility of evidence.

[42] Judgment of ECHtR of 10 May 2011, Case *Jakubczyk v. Poland*, application no. 17354/04, hudoc.int.

[43] See: Lach, *Europejska pomoc prawna*, 298.

This does not mean that it is done "ruthlessly" – authorities use the rule that allows the requesting authority to determine the formalities and procedures that may contribute to allowing evidence sought admissible before its courts – as provided in Article 9(2) of the EIO Directive. When completing the form of an EOI, it should also be remembered that in Part I of Form A, which describes "Formalities and procedures requested for the execution", the issuing authority could indicate which formalities it is requesting to be complied with. The most common "formality" that is requested by Polish prosecutors is reading out "instructions" (pouczenie) for a suspect or a witness that contain a list of procedural rights. When such a document is signed by an interviewee it signifies that s/he has knowledge of these procedural rights. As a matter of fact, this formality is automatic in every case where a Polish prosecutor issues an EIO in order to obtain depositions. The Polish authorities produce a list of formalities that should be followed during the investigative activity – but only those that they see as the most important for the procedural guarantees. In the end they admit the results of the EIO without further questions. This interpretation is admissible in the light of the requirements of Article 14(7) of the EIO Directive: it allows for admitting evidence in most cases, where only the violation of the right of the defence and the fairness of the proceedings prohibit the admissibility of evidence. Also the present jurisprudence of the Supreme Court confirms this attitude. Therefore, the basic rule of admissibility of the EIO results applied by the Polish issuing authorities could be based both on the national rules on admissibility read in the light of Article 14(7) and the test of Article 6 of the Convention – which requires taking into consideration the present jurisprudence of the Court.

5. CONCLUSIONS

As it has been shown the EIO Directive provides only a limited scope of mutual recognition: evidence demanded by one Member State are automatically obtained from any other Member State which will carry out necessary investigative measures in order to obtain such evidence, or will transfer evidence already in its possession. This is only stage one of the mutual recognition of evidence in criminal matters on the basis of the prin-

ciple of mutual recognition. It must also be borne in mind that applying the principle of mutual recognition to the "free flow of evidence" between Member States does not in fact mean the "admission" of evidence, but only the "recognition of an EIO" issued in another Member State.

However, at present, the European Union legal acts cannot ensure that the evidence will actually be admitted at trial. The purpose of the EIO Directive was not to unify or harmonize European legislation in the area of investigative activities or rules of evidence – nor in the area of admissibility of evidence[44]. Indeed, the EIO Directive does not provide for any mechanism to ensure the admission of evidence transferred on its basis. Should it provide for such a mechanism? The answer is not obvious. The Directive cannot require a judge to admit evidence at trial, nor indicate what evidential value and relevance the evidence has. Each time, the admission of evidence depends on an independent decision by a national judge under national law. Therefore, according to the Polish procedure, after completing the evidentiary proceedings, evidence "imported" from other Member States will be subject to the rules proper for assessing first the admissibility of evidence stipulated in Article 17 § 1 CCP and then the value of evidence as provided in Articles: 4 CCP, 5 § 2 CCP, 7 CCP and 410 CCP, equally with all other evidence. All rules of exclusion of evidence should also be applied. However, although the EU law cannot force the judge to admit evidence, it should give clear premises on which the judge could base that decision, that would allow for a coherent application of rules of admissibility in all the Member States.

The basic guarantee of compliance with certain standards is the principle according to which the authority collecting evidence at the request of another state should collect this evidence only in accordance with the national law. Another guarantee that can be used is expressed in Article 9(2) of the Directive, which obliges the executing authority to comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of

[44] Marcello Daniele, "Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles," *New Journal of European Criminal Law*, no. 1 (June 2015): 179–194.

law of the executing State[45] (such as affixing a document with an official seal, the presence of a representative of the requesting State, or recording the date and time to obtain continuity of documentary evidence) and Article 14(7) of the Directive. The executing State is obliged under the Directive to the fullest extent possible, to take claims into account when carrying out the investigative measure. This constitutes an exception as a departure from the principle of *locus regit actum* for *forum regit actum* principle[46]. Also, the Directive regulates the manner of performing particular types of investigative activities, which are characterized by increased interference in the rights of an individual, or constitute a special facilitation of the performed activity. Regulating the specific form and course of such investigative measures is intended to allow states, if not to harmonize the provisions governing these operations, to at least interpret a common standard relating to the execution of the European Investigation Order in this respect. The Directive provides a standardized course for such investigative measures, including the minimum guarantees of their participants (see Annex A of the Directive, section H4 to H7)[47]. Moreover, the present state of affairs can be also seen as conferring an element of flexibility that allows the EIO to function without obstacles and the need for any further harmonization. Not only in Poland may state authorities claim that there are no serious problems with admissibility of evidence.

As regards the issue of implementation of the EIO in Poland, the crucial problem is that there are currently two systems of admissibility of evidence: "domestic" and "foreign", where "foreign" has a limited scope of application. The legislator's attention should be drawn to the fact that it is necessary to clarify the situation of evidence obtained by issuing an European Investigation Order, because at the moment this situation is unclear. One can only propose ways to solve this situation on the grounds of doctrine, based on incomplete statutory solutions.

[45] See earlier (than the EIO Directive) proposals of Aleksandra Sołtysińska, in: Gwidon Jaworski and Aleksandra Sołtysińska, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz* (Warsaw: Wolters Kluwer, 2010), 51.

[46] Barwina, *Zasada wzajemnego uznawania*, 274.

[47] Kuczyńska, "Commentary," 1594.

De lege ferenda it should be postulated to introduce clear and precise regulation, which would indicate on what terms the evidence gathered as a result of issuing the EIO should be admitted. A uniform system is needed, predictable and clear, setting the rules of admissibility of evidence obtained as a result of the issuing of an EIO – both in the Polish CCP and/or in a EU Directive. It is clear that the present provision of Article 587 CCP is outdated and maladjusted to the present needs of international cooperation in criminal matters – especially in the area of the EU. Such provisions should decide that evidence obtained as the result of issuing an EIO should be admissible if the EIO was issued in accordance with Polish law and the investigative measure was conducted in accordance with the executing state law. It is clear at the same time, that the rules of admissibility must remain at a certain level of generality, and the main test of admissibility should be in compliance both with national rules and Article 6 of the ECHR. It cannot be either forgotten that the rules of admissibility of national evidence in Member States are far from clear and precise.

For the time being, most authors assume that "essentially relations between the requesting State and the executing State in the Directive are based on "blind recognition", founded on the identical trust of the States without any possibility to "contradict" the selection of the procedural form of collection of the evidence according to discretion of the executing State"[48]. At the same time, it is worth mentioning that there are proposals to adopt a directive regarding the admissibility of evidence in the territory of the European Union. There are voices in the literature in favour of a new legislative proposal based on Art. 82(2), subsection 2 TFEU laying down common rules for admissibility of evidence in criminal proceedings. Such a proposal needs to acknowledge the case law of the CJEU as to the in-

[48] See: Raimundas Jurka and Jolanta Zajančkauskienė, "Movement of Evidence in the European Union: Challenges for the European Investigation Order," *Baltic Journal of Law* & *Politics*, A Journal of Vytautas Magnus University, no. 2(9) (2016): 75 and also the cited article by: Lorena Bachmaier Winter, "European Investigation Order for obtaining evidence in the criminal proceedings. Study of the proposal for European Directive," *Zeitschrift für Internationale Strafrechtsdogmatik*, http://www.zis-online.com/dat/artikel/2010_9_490.pdf, accessed December 21, 2020, p. 586.

dependence of judicial authorities and as to respect for the rule of law [49]. It would regulate the rules for the admission of evidence obtained in other Member States - whether in a general form or just requiring compliance with certain minimum standards - for example, that evidence obtained in an illegal manner would always be inadmissible. The basic problem that would have to be resolved by such a directive is the difference between two families of law – in which opposing principles govern the admissibility of evidence: the general admissibility of evidence in continental states and the admissibility of specific types of evidence only in the common law states. However, given the considerations presented above, it seems that such a directive would be perceived as limiting the powers of national judges to admit evidence.

REFERENCES

Armada, Inés. "The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?." *New Journal of European Criminal Law*, no. 1 (March 2015): 8–31.

Bachmaier Winter, Lorena. "European Investigation Order for obtaining evidence in the criminal proceedings. Study of the proposal for European Directive." *Zeitschrift für Internationale Strafrechtsdogmatik*. Accessed December 21, 2020. http://www.zis-online.com/dat/artikel/2010_9_490.pdf.

Barwina, Zbigniew. *Zasada wzajemnego uznawania w sprawach karnych (The principle of mutual recognition in criminal matters).* Warsaw: Wolters Kluwer, 2012.

Benedict, Jerome. *Le sort des preuves illegales dans le procés* pénal. Lausanne: Editions Pro Schola, 1994.

Damaška, Mirjan. "Evidentiary barriers to conviction and two models of criminal procedure: a comparative study." *University of Pennsylvania Law Review*, no. 121 (1973): 506–589.

Damaška, Mirjan. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. Yale: Yale University Press, 1996.

[49] See: Andrea Ryan, *Towards a System of European Criminal Justice. The problem of admissibility of evidence* (London and New York: Routledge, 2014), 249; Garamvölgyi, "Admissibility of Evidence," 204.

Daniele, Marcello. "Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles." *New Journal of European Criminal Law*, no. 1 (June 2015): 179–194.

Delmas-Marty, Mireille, and John. R. Spencer, eds. *European Criminal Procedures*. Cambridge: Cambridge University Press, 2004.

Garamvölgyi, Balázs, Katalin Ligeti, Anna Ondrejová, and Margarete von Galen. "Admissibility of Evidence in Criminal Proceedings in the EU." *Eucrim*, no. 3 (2020): 201–208.

Gless, Sabine. "Mutual recognition, judicial inquires, due process and fundamental rights." In *European Evidence Warrant: Transnational Judicial Inquiries in the EU*, edited by John A.E. Vervaele, 121–29. Antwerpen-Oxford: Intersentia, 2005.

Gruszecka, Dagmara. "W kwestii interpretacji znowelizowanego przepisu art. 168a (Regarding the interpretation of the revised provision of art. 168a)." *Palestra*, no. 1–2 (2017): 60–78.

Hannibal, Martin, and Lisa Mountford. *The Law of Criminal and Civil Evidence. Principles and Practice*. University of Staffordshire: Longman, 2002.

Hofmański, Piotr, Elżbieta Sadzik, and Kazimierz Zgryzek. *Kodeks postępowania karnego. Komentarz (Code of Criminal Procedure. Commentary)*. Warsaw: C.H. Beck, 2012.

Jaworski, Gwidon, and Aleksandra Sołtysińska. *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz (Criminal proceedings in international relations. Commentary)*. Warsaw: Wolters Kluwer, 2010.

Jurka, Raimundas, and Jolanta Zajančkauskienė. "Movement of Evidence in the European Union: Challenges for the European Investigation Order." *Baltic Journal of Law & Politics*, A Journal of Vytautas Magnus University, no. 2(9) (2016): 56–84.

Kern, Eduard, and Claus Roxin. *Strafverfahrensrecht: ein Studienbuch*. München: C.H. Beck Verlag, 1987.

Kleinknecht, Theodor. "Die Beweisverbote im Strafprozess." *Neue Juristische Wochenschrift*, no. 19 (1966): 1537–1546.

Krysztofiuk, Grzegorz. "Europejski nakaz dochodzeniowy (European Investigation Order)." *Prokuratura i Prawo*, no. 2 (2012): 81–106.

Kuczyńska, Hanna. "Zagadnienia dopuszczalności materiału dowodowego w sprawach karnych na obszarze Unii Europejskiej (Issues of admissibility of evidence in criminal matters in the area of the European Union)." *Przegląd Prawa Europejskiego i Międzynarodowego*, no. 1(28) (2012): 23–52.

Kuczyńska, Hanna. "Commentary on Article 589x § 2 CCP." In *Kodeks postępowania karnego. Komentarz (Code of Criminal Procedure. Commentary)*, edited by Jerzy Skorupka, 1578–1658. Warsaw: C.H. Beck, 2020.

Kusak, Martyna. *Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search*. Antwerpen–Apeldoorn–Portland: Maklu, 2016.

Kusak, Martyna. *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami*. Warsaw: Wolters Kluwer, 2019.

Kusak, Martyna. "Mutual admissibility of evidence and the European investigation order: aspirations lost in reality." *ERA Forum*, no. 19 (2019): 391–400.

Lach, Arkadiusz. *Europejska pomoc prawna w sprawach karnych (European mutual assistance in criminal matters)*. Toruń: TNOiK, 2007.

Murphy, Paul. *Murphy on Evidence*. Oxford: Oxford University Press, 2008.

Nita-Światłowska, Barbara, and Andrzej Światłowski. "Odczytanie w postępowaniu karnym protokołu czynności dowodowej przeprowadzonej przed obcym organem (Incorporating in criminal proceedings official records taken before a foreign authority)." *Europejski Przegląd Sądowy*, no. 2 (2013): 4–11.

Płachta, Michał. "Komentarz do art. 578." In *Kodeks postępowania karnego. Komentarz (Code of Criminal Procedure. Commentary)*, edited by Jan Grajewski, Lech K. Paprzycki, and Michał Płachta. Kraków: Zakamycze, 2003.

Rogall, Klaus. "Grundsatzfragen der Beweisverbote." In *Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen*, edited by Frank Höpfel, and Barbara Huber, 119–148. Freiburg in Breisgau: Edition Iuscrim, 1999.

Roberts, Paul, and Adrian Zuckerman. *Criminal Evidence*. Oxford: Oxford University Press, 2012.

Ryan, Andrea. *Towards a System of European Criminal Justice. The problem of admissibility of evidence*. London and New York: Routledge, 2014.

Steinborn, Sławomir. "Komentarz do art. 589w." In *Kodeks postępowania karnego. Komentarz (Code of Criminal Procedure. Commentary)*, Vol. II, edited by Jan Grajewski, Lech K. Paprzycki, and Sławomir Steinborn. Warsaw: Wolters Kluwer, 2010.

Thayer, James B. *Preliminary Treatise on Evidence at the Common Law*. Boston: Little, Brown and Company, 1898.

Waine, Lydia, Robert May, and Steven Powles. *May on criminal evidence.* U.K.: Sweet & Maxwel, 2015.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 93–107
DOI: https://doi.org/10.31743/recl.12330

PRO-CONSTITUTIONAL INTERPRETATION OF STATUTES. A FEW REMARKS RELATED TO THE DISPUTE ABOUT JUDICIAL ACTIVISM

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ABSTRACT

The article presents an opinion in the discussion on the limits of judicial activism. The active attitude of judges in the law-making process according to the so-called concept of 'pro-constitutional interpretation of the law' can be observed more and more often. While we may agree with the view that the role of a judge is to pronounce a fair verdict based on the applicable law and judges may give meaning to statutory provisions supplemented with an axiology of the Constitution, the problem appears with particular sharpness when such a pro-constitutional interpretation leads to a specific application of the provisions *contra legem*.

Keywords: judicial activism, limits of legal interpretation, pro-constitutional interpretation of statutes

1. INTRODUCTION. OUTLINE OF THE ISSUES OF JUDICIAL ACTIVISM

The dispute related to the role of the judge in the process of interpretation of the law has a long tradition. It has been observed an increase in interest in judicature and its enormous impact on a democratic society for

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several decades. At present, the approval of judicial activism can be found within the derivative category of the theory of interpretation of law, which means that the act itself is only a legal text, and therefore it is a semi-product which only after processing of interpretation (interpretation) by a lawyer and creation of derived rules of proper behavior becomes the law[1]. In practice, judicial activism has been inseparably linked with the judge as a representative of the judiciary from the very beginning. With the passing of time and the victory of the positive law ideology, activism was limited but never lost its importance. Courts have been still forced to evaluate, assign normative content to general clauses and take into account in their jurisprudence - especially in the case of constitutional tribunals - political expectations.

The term 'judicial activism' appeared for the first time in the literature in 1947 and from the very beginning it has a pejorative character given by Arthur Schlesinger Jr. in his work, criticizing the attitude of some judges of the US Supreme Court in relation to the interference of the Supreme Court in economic reforms in the frame of the so-called New Deal (a legislative agenda initiated by President Franklin Delano Roosevelt)[2]. The Supreme Court was criticized again when it was headed by Judge Earl Warren (1953–1969). It was then accused of introducing social reforms in violation of previous precedents and of changing the judicial interpretation of the constitution and statutes. This attitude met with strong opposition and caused public interest to such an extent that Richard Nixon, as the candidate of the opposition in the presidential elections, announced the fight against activism as the main goal of his presidency and propagated the slogan: 'judicial activism - a strict interpretation of the constitution' as his election slogan[3].

[1] More information on derivative concept of interpretation: Maciej Zieliński and Marek Zirk-Sadowski, "Klaryfikacyjność i derywacyjność w integrowaniu polskich teorii wykładni prawa," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2 (2011): 99–111 and Maciej Zieliński, "Derywacyjna koncepcja wykładni jako koncepcja zintegrowana," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 3 (2006): 93–101.

[2] See: Arthur M. Schlesinger Jr., "The Supreme Court," *XXXV Fortune* 73 (January 1947).

[3] Paweł Kuczma, "O aktywizmie sędziowskim," *Zeszyty Naukowe Uczelni Jana Wyżykowskiego. Studia z Nauk Społecznych* 9 (2016): 188.

Lech Morawski defines judicial activism as a situation in which a judge makes a decision not determined by legal provisions, and makes his own choice, and this choice is not made by the legislator. In other words, it can be said that an 'activist' judge is the one who, by returning verdict begins to replace the legislator[4]. On the other hand, the activism of the supreme court or the Constitutional Tribunal is understood by Bogusław Banaszak as going this judicial authority beyond the adjudication in specific cases and participation in the broadly understood solving of social problems or shaping the concept of the state. He thinks that judicial activism is one of the factors which has impact on the frequency of constitutional amendments. In the situation where the court which interprets the norms of the constitution is more active, it is easier to avoid constitutional amendments, because instead of introducing a formal amendment, it is possible, through judicature to give the provisions of the Constitution new meaning[5].

The problem of judicial activism can also be analyzed from the perspective of civil disobedience (in this case, judicial disobedience, as Jerzy Zajadło describes in his article, *judicial disobedience*)[6]. Of course, Jerzy Zajadło thinks, that there is a very important difference between civil and judicial disobedience. In the first case, it is a deliberate breach of the law in the broadly understood sense of the public interest and a simultaneous readiness to bear responsibility for the breach of law. In the second case, the judge must seek a solution for the situation under the applicable law - either by appropriate interpretation of the law to take an equitable decision (individual dimension), or by direct reference to the Constitution to defend a constitutional axiology including the principle of separation of powers (institutional dimension). There is, however, a certain paradox here - while civil disobedience is, in the very nature of things, an attitude which is inconsistent with the law, but judicial disobedience is a strictly legalistic attitude which aim is the protection of the axiology of the Constitution[7].

[4] Lech Morawski, "Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski," *Przegląd Sejmowy* 4 (93) (2009): 65.

[5] Bogusław Banaszak, "Aktywizm orzeczniczy Trybunału Konstytucyjnego," *Przegląd Sejmowy* 4 (93) (2009): 75.

[6] Jerzy Zajadło, "Nieposłuszeństwo sędziowskie," *Państwo i Prawo* 1 (2016): 18–39.

[7] Zajadło, "Nieposłuszeństwo sędziowskie," 36–37.

While law and order makes social life predictable and provides certainty as to the possibility of meeting common expectations, the answer to the question related to the above-mentioned doubts about the independence of judges, namely what is the social function of the separation of legislation and judicature is less obvious. In other words, what problem does this chapter solve? This differentiation causes a fundamental limitation and, at the same time, a decision-making criterion for both parties: the judge and the legislator: 'The judge applies acts and follows the legislator's instructions. On the other hand, the legislator «would have disappeared into the wide blue yonder« (Esser) if he had not taken into account that (and how) the new acts can be integrated into the overall decision-making premises of the courts'[8]. However, it is worth to notice a certain paradox and a threat in the formalistic or, in other words, positivist conception of the judge, who is only 'the mouth of the law', following the legislator's instructions. In fact, adoption of such attitude causes that a judge becomes only a state official and applicable legal order gives him the opportunity to make decisions concerning the choice of legal consequences indicated by a legal provision, because even in such case it is difficult to assume that these consequences are indicated by legal norms, since the norm is the result of interpretation not only of provisions, but also principles and adoption of an appropriate axiological perspective. In such a model of discretion, the judge, and as a consequence, the court, are deprived of the possibility of meting out justice. It should be expressed and understood in this way, because a judge has no opportunity to reconcile law and justice in all those cases where the law clearly comes into conflict with justice.

Andrzej Gomułowicz thinks similarly, stating that a judge must ponder over the uncritical adoption of the principle *dura lex sed lex* to prevent 'thoughtless and mechanical application of the law'[9]. In the opinion of Gomułowicz, the exercising of the judicial powers by a judge is fascinating and responsible because in certain special and exceptional circumstances a judge can - during the process of applying law – 'im-

[8] Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt A. M.: Suhrkamp, 1993), 302.

[9] Andrzej Gomułowicz, "Sędzia a 'poprawianie' prawa – zasadnicze dylematy," *Zeszyty Naukowe Sądownictwa administracyjnego* 1 (2012): 14.

prove' the law. And this option provokes reflection, what arguments justify the judge's ability to 'correct' the law and how important is this 'improvement' of the law?

First of all, it should be noted that the judge has the power to administer the law, and in consequence, a judge gives the law a proper meaning in the process of its application, and thus the judge is responsible for the way in which the law is applied. The law must be an impassable borderline of taken actions by a judge of action, but is the law the same borderline for the judge if it is affected by qualified errors or defects due to the legislator's fault? Because of the essence and character of the exercised function, a judge has independent power, and in consequence he is free in his choices. Both the judge's independence and judge's intellect decides whether and how such a 'defective and imperfect law' will be applied by a judge. These features allow the judge to remain faithful to the 'idea of the law', even though in a given specific case the judge exceeds the 'borderline' of enacted law. A judge who 'corrects' the law is aware that he refers to those universal axiological values that must create an ethical order which is the foundation of the existence of the state. This is a difficult but responsible manner of activity of a judge, and this manner can also be derived from the functions that the judge performs.

An 'activated' judge assumes that universal axiological values (e.g. constitutionally protected values and goods) enable to create axioms that give an opportunity to deduce a coherent, rational set of rules of conduct in the interpretation process. Therefore, during the process of interpretation which aim is the development of law, a judge looks for a specific 'code of interpretation'. The Polish Constitutional Tribunal indicates that this code of interpretation may be the Constitution, as the Constitution in its entirety expresses a certain objective system of values, and the implementation of these values should be achieved by the process of interpretation and application of individual constitutional provisions, and during the process of interpretation of these provisions, you should strive to determine interpreted provisions in accordance with the axiology of our political system and legal system. As Gomułowicz rightly indicated, 'in principle, a judge faces the need to' correct 'the law when the legislator violates the standards of political and legal culture during the legislative process. In that case, the law posses qualified

weaknesses, and therefore the judge helps to create the law, rather than to apply it'[10].

2. DIRECT APPLICATION OF THE CONSTITUTION IN THE CONTEXT OF THE SO-CALLED PRO-CONSTITUTIONAL INTERPRETATION OF STATUTES. THE PROBLEM OF CO-APPLICATION OF THE CONSTITUTION

At present, the so-called pro-constitutional interpretation of acts appears more and more often in Polish jurisprudence, which is a special type of judicial activism, which striving to implementation of constitutional values, not only omits a literal interpretation of the provisions (it is not anything special yet) but modifies the content of the norm in such a way that, in fact, the norm created in the process of interpretation is the opposite of a norm created in the legislative process.

The problem of the pro-constitutional interpretation of statutes by the courts is a consequence of Article 8 in the Constitution of the Republic of Poland, which introduces the possibility of direct application of the Constitution. Provisions of Art. 8 sec. 2 of the Constitution of the Republic of Poland of April 2, 1997, are a constitutional novelty, as none of the previous Polish constitutions has contained a provision of a similar content. However, its absence did not prevent the doctrine and the judicature from formulating theses about the direct application of some constitutional provisions. However, entering the provision in the text of the basic law, requiring its direct application is purposeful, because it unequivocally excludes the thesis that the Constitution is not a normative act and that the provisions of the Constitution are addressed only to the legislator.

The principle of direct application of the Constitution is interpreted in such a way that "each body of public authority is obliged to take into account the content of the provisions of the Constitution, if it makes decisions (legislative, administrative, court judgments). They can, if they are sufficiently unambiguous, constitute an independent basis for such a decision"[11].

[10] Gomułowicz, "Sędzia a 'poprawianie' prawa," 16.

[11] Piotr Winczorek, *Komentarz do Konstytucji Rzeczpospolitej Polskiej z dnia 2 kwietnia 1997 r.* (Warsaw: LIBER, 2000), 20.

The Supreme Court stated, that Art. 8 sec. 2 'obliges to apply the provisions of the Constitution directly, and the term 'application' must be primarily understood as judicial application of the law'[12]. The Constitutional Tribunal stated that pursuant to Art. 8 sec. 2 it is 'not only the obligation addressed, inter alia, to all bodies of public authority - to apply directly of the Constitution, but also the assumption of the possibility of such direct application, because such application is excluded only if the Constitution itself provides so. Therefore, there are no obstacles to the direct application of the Constitution by courts, but it should also be assumed that courts should use such direct application in all these situations, when it is necessary and possible'[13].

In the context of these considerations, it is important to discuss the so-called co-application of the Constitution because the basic forms of direct application of the Constitution are: the autonomous application of the Constitution (also called 'direct application') and the co-application of the Constitution together with statutes (also called 'not autonomous application'). The autonomous application of the Constitution means that the legal norm resulting from the Constitution is the only and sufficient basis for taking a decision by a court. It refers to the application of the Constitution in the form of individual and specific decisions (in particular court judgments), but also in abstract legal acts (laws, resolutions and other acts of public authorities). The only condition is that the provisions of the Constitution must be exact and unambiguous.

Co-application of the Constitution is a weaker version of 'direct application', but it is also the form most often used by courts. The Constitutional Tribunal thinks that 'wherever a legal matter is regulated at the same time by the Constitution and ordinary statutes, it is necessary to take these regulations into account'. It is about when the legal matter is regulated simultaneously, partly in the Constitution, and partly in an ordinary act. Co-application means the establishment of the proper sense of a norm on the basis of the Constitution, but giving priority to the ordinary act. The Constitution is then particularly important for the proper (pro-constitutional) interpretation of statutes. There are the fol-

[12] PCT, Judgment of 7 April 1998, 90/98, OSNP 2000, no. 1, item 6.

[13] PCT, Ruling of 22 March 2000, P 12/98, OTK ZU 2000, no. 2, item 97.

lowing forms of application (co-application): ornamental (the court refers to a provision of the Constitution, despite the fact that the act provides a sufficient basis for solution of the legal matter); interpretative (establishes a legal norm taking into account both the norm of the act and the relevant norm of the Constitution; however, the Constitution may "co-create" a legal norm here); modifying (if it appears a conflict between the constitutional norm and statutory norms, the court eliminates it by interpretation using the conformity techniques to the Constitution, giving the legal norm a meaning justified by the supremacy of the constitutional norm.

Judicial activism, which is based on Art. 178 sec. 1 of the Constitution of the Republic of Poland, authorizes the judge, pursuant to Art. 8 sec. 2 of the Constitution, to make a pro-constitutional interpretation of both the act and the regulation. It is one of the forms of direct application of the Constitution. Pursuant to Art. 178 of the Constitution, the framework of free judicial decisions is determined by the Constitution and statutes. Because judges are bound by the Constitution, they are also bound by its values. The idea of an equitable decision in the field of judicial application of the law is coherent with the ethos of the function of a judge and can be derived from the Constitution. In this context, it appears an obvious question about the limits of such a pro-constitutional interpretation.

The strongest reduction of judicial activism exists in the area of criminal law. The Supreme Court has repeatedly emphasized that 'relying on a pro-constitutional interpretation (...), especially in the area of criminal law, may not lead to such modification of the normative content of a given legal regulation, which would go beyond the possible, even the broadest, results of interpretation achieved on the linguistic level. Otherwise, the pro-constitutional interpretation would in fact replace the constitutional review of statutes, which is reserved for the Constitutional Tribunal under the Constitution'[14]. Therefore, the Supreme Court, by creation of such a view, refuses to apply non-linguistic methods to interpret an autonomous meaning, de facto recognizing that the pro-constitutional interpretation does not include the application of an extended interpretation. At the same time the Supreme Court, by formulating the objection to exceed-

[14] Polish Supreme Court, Judgment of the of 5 December 2012, ref no. III KK 137/12 (LEX no. 1252713).

ing the limits of the admissible interpretation clearly refers to the concentrated nature of the constitutional review of law in Poland.

The view of the Supreme Court may raise doubts, if this understanding of the pro-constitutional interpretation concerns only the interpretation of the criminal law or other branches of law, because if the Supreme Court uses the phrase 'in particular in the area of criminal law', it also allows for such interpretation in other areas of law. Another problem should be added to the above doubts. May a court, which recognizes any provision as inconsistent with the values resulting from the constitution, not apply such provision or should the provision be interpreted in such a way that it is consistent with the Constitution. It seems obvious that the courts takes the other view, which is confirmed by numerous jurisprudence of the Supreme Court[15]. According to the Supreme Court, 'The Court of Appeal is not authorized to adjudicate on the unconstitutionality of a given provision of the act. Only the Constitutional Tribunal has proper competence and only this Tribunal may consider removing provisions that are inconsistent with the Constitution from the legal system. Therefore, the court of general jurisdiction does not have the possibility to refrain from applying the binding provisions of the Act, invoking unconstitutionality of such provisions. The principle of direct application expressed in art. 8 sec. 2 of the Constitution means the court's obligation to adjudicate in accordance with the priorities established in the Constitution. Therefore, courts are obliged to provide a pro-constitutional interpretation, but are not competent to adjudicate on the unconstitutionality of a provision and remove it from the legal system. In case of objections as to the compliance of a provision of the act with the Constitution, there is a special procedure under Art. 188 of the Constitution, which allows for removing of such a provision from the legal system. Any provision, which the Constitutional Tribunal has judged to be in conformity to the Constitution, can be applied and may constitute the basis for substantive court decisions'. Theoretically there is no problem up to this point. The problem begins when the court makes such a 'pro-constitutional' interpretation that is in direct contradiction to the wording of the provisions and turns its understanding 'upside

[15] Polish Supreme Court, Judgment of the of 2 April 2009, ref no. IV CSK 485/08 (LEX no. 550930).

down'. The problem exists because the court applies the provision theoretically, but at the same time you can have the impression that the provision is repealed, since it is not applied as the legislator directly assumed.

3. PRO-CONSTITUTIONAL INTERPRETATION IN THE PRACTICE OF COMMON COURTS ON THE EXAMPLE OF THE APPLICATION OF THE PROVISIONS INTRODUCING THE ACT ON THE NATIONAL REVENUE ADMINISTRATION

In this context, I would like to discuss the final judgment of the regional court in Legnica in a case related to the rearrangement of the National Revenue Administration[16]. The Act - the act introducing the Act on the National Revenue Administration[17], hereinafter referred to as the 'r.i. NRA' took effect on November 16, 2016. On March 1, 2017, the Act of November 16, 2016 on the National Revenue Administration, entered into force[18], hereinafter referred to as the 'Act on NRA'.

The provisions introducing the Act on the National Revenue Administration introduced three types of legal solutions concerning the change of the service relationship of the former Customs Service officers into a service relationship or an employment relationship in the Customs and Tax Service established in order to perform a reform of the whole tax administration.

The first solution can be defined as the continuation of the service relationship. The service relationship is continued when the competent authority submits a proposal to perform this service under new terms, in accordance with Art. 165 sec. 7 in connection with art. 169 sec. 4 sentence 1 of r.i. NRA. However, the legislator clearly stipulates in the latter provision that the proposal to perform service in the Customs and Tax

[16] Regional Court IV Labour Law and Social Security Department in Legnica, Judgment of 10 March 2020, ref. no. IV P 105/19, which was upheld by the District Court in Legnica, V Department of Labor and Social Security, judgment of October 14, 2020, ref. no. V Pa 28/20.

[17] Act on introducing the Act on the National Revenue Administration of 16 November 2016, Journal of Laws, no. 1948 as amended.

[18] Act on National Revenue Administration of 16 November 2016, Journal of Laws 2020, item 505.

Service has the form of an administrative decision determining the terms of the service.

The second solution assumes the expiration of the current service relationship. It expires as a result of not submitting an offer of further employment to the officer or non-acceptance of the offer of employment or service within the period specified by law (in accordance with Article 170 (1) (1) and (2) of the NRA). In such case, it takes place the expiration of the service relationship, which is treated as a dismissal from service. The basis of a decision concerning a dismissal from service is Art. 170 sec. 1 and 3 r.i. NRA in connection with Art. 276 sec. 1 and 2 of the Act on NRA. Pursuant to that article, an administrative decision is taken out only in cases of transfer of an officer, the assignment of duties on another position, transfer to another position, suspension in performing official duties or dismissal from service. It should be added that the content of the above-mentioned provisions includes a closed list of the circumstances of the expiration of an officer's service relationship.

The third solution is the transformation of the current service relationship into an employment relationship as a result of submitting an employment offer to the current officer on the basis of an employment contract and its acceptance. The judgment under discussion concerned the third solution called 'giving civil status for the officers'.

According to Art. 167 paragraph. 7 r.i. NRA, the Director of the National Fiscal Information, the director of the Chamber of Tax Administration and the director of The Tax and Customs Academy, submit a written proposal specifying new terms of employment or service, which takes into account the qualifications and the course of previous work, or services, as well as the current place of residence to employees and officers, respectively, by May 31, 2017. This provision, therefore, describes the selection criteria under which competent authorities must take into account the qualifications of officers / employees and the course of previous work or service, as well as their current place of residence.

In this case, the court made several notices that may seem justified in light of the previous considerations about the role of the courts. The regional court emphasized that the settlement of each dispute by the court forces the judge to ask a series of questions: 'what provisions should be applied in the case', 'Where the provisions on which the decision was based

were applied correctly', 'Was the interpretation of these provisions correct'. If the idea of the admissibility of verification of the correctness of the legislator's actions by a judge (by assessing, in the light of the Constitution or international law, the product of his work that we intend to apply *in concreto*) is approved - the list of questions that the judge must put to himself increases. You must also ask - at the moment when the following conclusion is reached: 'this provision so understood, is the basis for a decision' - whether the legislator, when issuing a provision of this content, could have done so, due to constitutional requirements and restrictions imposed on the norm-maker by international law, and also ask, whether he did it correctly, for example due to the axiological coherence of the system of sources of law (especially taking into consideration 'newer' sources and containing norms more representative for the axiology of the present, especially when they are included in acts being higher in the hierarchy of sources of law).

Therefore, courts are obliged (under the Article 178 of the Constitution in conjunction with Article 8 of the Constitution) to apply the Constitution (apart from statutes directly regulating the subject of the dispute), as well as international law which is legally binding in Poland. This type of perspective allows us to hope to increase judges' awareness that not only the 'regulation' which is the direct basis for resolving a specific dispute is 'important', but also the Constitution as a structural and axiological keystone of the legal system. Thus, in the court's opinion, narrowing the basis for a decision only to the provision on termination of the service relationship was constitutionally unacceptable.

According to the Regional Court in Legnica, 'finally, the problem is not direct application of the Constitution in a specific dispute as the basis of a decision, but encouraging to seek in it interpretative inspiration, code of understanding' of ordinary legislation by the Court, to change the concept of 'statute', which so far is interpreted by courts as a 'concrete basis for adjudication', beyond which the judge's power does not exist and the legality of a statute is not 'considered' by the judge, into the concept of 'statute' which is correct component of the legal system, consistent with and understood in accordance with the Constitution. Therefore, the reference in Art. 8 and art. 178 of the Constitution saying about subordination of courts to statutes and the Constitution and that they must 'remem-

ber' about the existence of the fundamental statute, is an indication of the sources of judicial inspiration for legal interpretation. It is clearly indicated that the narrowly understood positivist idea of looking for the 'basis' of a decision is outdated, and the methods of understanding the text cannot ignore the systemic and axiological issues related to the Constitution'.

In the opinion of the Regional Court in Legnica, the act on NRA and the provisions introducing it must be assessed not only in the formal and linguistic level, but in the light of the substantial effects of this interpretation. The analysis of the effects of the act in the frame of the assessment whether the rules constructing legislative activities has not been infringed, indicates a breach of the principle of equality and leads to discrimination and unequal treatment of officers in a situation such as the plaintiffs. According to the court, the legal act (Act on NRA and r.i. NRA), actually performed goals other than those declared by the act, and thus the court restored the officers to service, recognizing that statutory provisions may not infringe constitutional values and should be understood in such a way to be consistent with these values.

Very interesting in the case is the fact that the regional court was totally committed to the intellectual legal discourse on judicial activism and, in justification of the sentence, it encouraged other courts to peculiar 'courage', hoping that the courts would abandon the positivist approach and base their judgments on the axiology of the Constitution. Instead, it is not easy to answer the question whether the 'pro-constitutional interpretation' of the act is still an ideology of a decision bound by law or an ideology of a free decision, or is it rather a search for a 'third way', assuming that court decisions should be based on the applicable law, but such attitude does not preclude valuation and evaluation within the limits set by the legislator, in this case the constitutional legislator.

4. FINAL CONCLUSIONS

Pursuant to Art. 8 sec. 2 of the Constitution of the Republic of Poland, provisions of the Constitution are applied directly, unless the Constitution provides otherwise. The essence of this regulation is the fact that a court or other body applying the law may take its decision directly on

the basis of a specific provision of the Constitution, which will constitute the legal basis for a decision in an individual case. However, this does not mean a general right of courts to constitutional control of the legally binding acts, which, pursuant to Art. 188 of the Polish Constitution is the exclusive competence of the Constitutional Tribunal. At the same time, it is commonly believed that the presumptive compliance of a statute with the Constitution may be invalidated not only by the judgment of the Tribunal but also in the frame of the direct application of the Constitution by the courts. It does not mean that courts and other bodies have been granted the right to pronounce that some statutes are unconstitutional and to decide on this basis that they lost their binding force. It means only a control in exceptional circumstances, *adcasum* and effective *inter partes*, which results may be a refusal of application of law recognized by court as an unconstitutional regulation. Sometimes, however, the direct application of the Constitution leads to questions, whether the practice of the pro-constitutional interpretation of statutes applied by courts does not become a *praeter legem* practice, especially when the courts, despite a clear request of the party, decide not to submit a legal question to the Constitutional Tribunal.

REFERENCES

Banaszak, Bogusław. "Aktywizm orzeczniczy Trybunału Konstytucyjnego." *Przegląd Sejmowy* 4 (93) (2009): 69–74.

Gomułowicz, Andrzej. "Sędzia a „poprawianie" prawa – zasadnicze dylematy." *Zeszyty Naukowe Sądownictwa administracyjnego* 1 (2012): 9–17.

Kuczma, Paweł. "O aktywizmie sędziowskim." *Zeszyty Naukowe Uczelni Jana Wyżykowskiego. Studia z Nauk Społecznych* 9 (2016): 187–197.

Luhmann, Niklas. *Das Recht der Gesellschaft*. Frankfurt A. M.: Suhrkamp, 1993.

Morawski, Lech. "Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski." *Przegląd Sejmowy* 4 (93) (2009): 59–74.

Schlesinger, Arthur M., Jr. "The Supreme Court." *XXXV Fortune* 73 (January 1947): 73–79.

Winczorek, Piotr. *Komentarz do Konstytucji Rzeczpospolitej Polskiej z dnia 2 kwietnia 1997 r*. Warsaw: LIBER, 2000.

Zajadło, Jerzy. "Nieposłuszeństwo sędziowskie." *Państwo i Prawo* 1 (2016): 18–39.

Zieliński, Maciej. "Derywacyjna koncepcja wykładni jako koncepcja zintegrowana." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 3 (2006): 93–101.

Zieliński, Maciej, and Marek Zirk-Sadowski. "Klaryfikacyjność i derywacyjność w integrowaniu polskich teorii wykładni prawa." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2 (2011): 99–111.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 109–143
DOI: https://doi.org/10.31743/recl.11955

PROTECTION OF SOCIAL RIGHTS AS A PERMAMENT CHALLENGE FOR THE EUROPEAN UNION

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ABSTRACT

Social rights protection in the European Union has undergone significant development. Currently their protection is regulated by relevant treaty provisions and the Charter of Fundamental Rights (Charter), both of a primary law nature, as well as by the non-binding European Pillar of Social Rights (Pillar). The aim of the paper is the assessment of the social rights protection in the EU, and whether all social rights provided in the CFR have their counterparts in the EPSR, hence whether and in what way the EPSR assists the actual exercise of social rights provided by the CFR. Comparing the content of the above-mentioned legal instruments makes it possible to answer the question whether all social rights provided in the Charter have their counterparts in the Pillar. This can help determine whether the latter affects the implementation of the former. If the answer is in the affirmative, it can further allow for determining in what way the principles of the Pillar assist in the actual exercise of social rights provided by the Charter. This is very important taking into account the need for an ongoing response to unforeseen threats, like for example COVID-19. The social aspects of EU integration thus are and will remain a subject of interest in the nearest future.

Keywords: Charter of Fundamental Rights, Social Pillar, social rights, European Labour Authority, Social Scoreboard

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The research for this paper has been supported by the Polish National Science Centre (decision no. 2015/17/B/HS5/00419).

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1. INTRODUCTION

The main goal of the former European Communities was to create a common market, including the free movement of products (goods and services) and factors of production (labour and capital). Other issues, such as social ones, were to remain within the scope of regulation of individual countries[1]. Gradually however they also became a matter of cooperation at the Community level, and later at the European Union (EU) level. Apart from many non-binding documents that highlighted the importance of the 'social dimension of the internal market'[2], one should primarily focus on the relevant treaty regulations. Pursuant to the Treaty of Amsterdam, the Social Protocol was incorporated into the treaty provisions as a separate title – today's Title X: Social policy.

An unquestionable factor in the strengthening of the significance of fundamental rights, including those of a social character, is the binding legal force of the Charter of Fundamental Rights of the European Union (CFR or Charter)[3], as provided by Article 6 TEU. The CFR's provisions can be treated as an attempt to correct the 'social deficit' by eliminating uncertainty about the status and position of social rights in the EU legal order[4]. Its provisions take the form of rights, freedoms, and principles. Most of the social rights which are provided for in the CFR can be classified as provisions containing elements of both rights and principles. This

[1] Catherine Barnard, "Regulating Competitive Federalism in the European Union? The case of EU Social Policy," in *Social Law and Policy in an Evolving European Union*, ed. Jo Shaw (Oxford-Portland: Hurt Publishing, 2000), 53.

[2] See Economic and Social Committee opinion on the social aspects of the internal market (European social area) (O.J.E.C. C365, 11 February, 2011); Green Paper on European Social Policy, COM(93) 551 final; White Paper on European Social Policy – A way forward for the Union, COM(94) 333 final; Council resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union (O.J.E.C. C368, 23 December, 1994).

[3] Charter of Fundamental Rights of the European Union, 2012/C 326/391, 26 October 2012.

[4] Miguel Poiares Maduro, "The Double Constitutional Life of the Charter," in *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, ed. Tamara Hervey and Jeff Kenner (Oxford-Portland Oregon: Hurt Publishing, 2003), 284–286.

is unfortunately not conducive to ensure an adequate level of legal certainty for the participants in the internal market. Rights and freedoms are the basis for individual claims, while principles can only be relied upon to interpret and control the legality of legal acts. One can ask the question whether additional legal measures are needed to improve this situation. If the answer is in the affirmative, should the European Pillar of Social Rights (EPSR or Pillar) be assessed in such a way? Its programmatic nature distinguishes it as more than just a duplication of the social rights contained in the CFR[5]. The Pillar 'is to serve as a guide towards (…) ensuring better enactment and implementation of social rights'[6]. It reaffirms rights already present in the EU and in the international legal acquis and complements them by taking account of new realities. It seeks to render them more visible, more understandable, and more explicit for citizens[7].

The aim of the paper is the assessment of the social rights protection in the EU, and whether all social rights provided in the CFR have their counterparts in the EPSR, hence whether and in what way the EPSR assists the actual exercise of social rights provided by the CFR. The Pillar as such has already been a subject of very interesting research both in a general way and on specific issues[8]. None of them had however explicitly or

[5] Sacha Garben, "The European Pillar of Social Rights and the European Social Charter," *Europe des droits & libertés/Europe of Rights & Liberties*, no. 1 (2020): 65–78.

[6] Interinstitutional Proclamation on the European Pillar of Social Rights, (O.J.E.C. C428, 13 December, 2017).

[7] Communication from the Commission to the Parliament, Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Pillar of Social Rights, COM (2017) 250 final, para 6.

[8] Look especially at: Klaus Lörcher and Isabelle Schömann, *The European pillar of social rights: critical legal analysis and proposals* (Brussels: ETUI, The European Trade Union Institute, 2016); Sacha Garben, Clarie Kilpatrik and Elise Muir, "Towards a European Pillar of Social Rights: upgrading the EU social acquis," *College of Europe Policy Brief* 1 (2017); Clarie Kilpatrick, Elise Muir and Sacha Garben, "From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy EU Law Analysis Blogpost," (20 March 2017), assessed April 21, 2020, https://eulawanalysis.blogspot.com/2017/03/from-austerity-back-to-legitimacy.html; Olivier De Schutter, "The European Pillar of Social Rights and the Role of the European Social Charter in the EU legal order," (14 November 2018), accessed September 2, 2020, https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132; Sacha Garben, "The European Pillar of Social Rights: Effectively Addressing Displacement?" *European Constitu-*

completely devoted its attention to the relationship between the CFR and the EPSR. One can put a hypothesis that social rights are indeed protected in the EU and the EPSR is much broader in the scope of rights than the CHR, considering in particular that most of the provisions on social rights provided for in the CFR are classified as principles in a rather general way. The level of its protection depends however on the scope of division of competences between the EU and its Member States, what can be seen in the content of the above-mentioned legal acts and other related documents. Those documents (of both binding and non-binding nature, like relevant Treaty provisions, directives, regulations and communications) have been the basis of the analyses carried out in this article, therefore the formal and dogmatic research method has been largely used. To determine whether all social rights provided in the CFR have their counterparts in the EPSR the different categories of social rights protected in the EU legal order had to be analysed. Carrying out this analysis has been possible thanks to the use of the deductive research method, which allowed for further attempts to answer whether and in what way the EPSR assists the actual exercise of social rights provided by the CFR. It was also necessary to conduct theoretical and legal research aimed at gaining knowledge on the mechanisms guaranteeing the protection of social rights in the EU legal order.

This is why the main aims of the EPSR, together with its twenty principles, are discussed at the beginning of this text (in Part 2). This is necessary in order to make a comparison between them and the social rights protected under the CFR's provisions (Part 3). This comparison will make it possible to answer the question whether all social rights provided in the CFR have their counterparts in the Pillar, and further assess whether the latter affect the implementation of the former, and if so to what extent? An appropriate assessment of social rights protection in the EU requires an examination of various initiatives that have been taken so far. This is why not only the European Labour Authority and the European Social Fund, but also the European Semester and the Social Scoreboard will be

tional Law Review 14, no. 1 (2018); Sacha Garben, "The European Pillar of Social Rights: An Assessment of its Meaning and Significance," *Cambridge Yearbook of European Legal Studies* 21 (2019); Garben, "The European Pillar of Social Rights and the European,".

discussed (Part 4). In Part 5 concluding remarks are offered, together with a summary of the previous analyses.

2. THE EUROPEAN PILLAR OF SOCIAL RIGHTS AND REAL ECONOMIC UNION

In September 2015, the former President of the European Commission Jean Claude Junker announced the development of the EPSR, which was to 'take account of the changing realities of Europe's societies and the world of work'[9]. This initiative was aimed at complementing what has already been achieved when it comes to the protection of social rights in the EU. There are close interlinkages between the EU Member States' economies and labour markets and therefore policy choices in one Member State often spill-over into others[10]. The EPSR draft outlines were presented by the European Commission on 8 March 2016, leaving it for extensive public consultations, which lasted until the end of 2016[11]. As a result of these consultations, its final version was presented by the Commission on 26 April 2017 and was jointly signed by the European Parliament, the Council and the Commission on 17 November 2017 at the Social Summit for Fair Jobs and Growth in Gothenburg, Sweden. It should be stressed that the new European Commission President – Ursula Von der Leyen – has pledged in her political guidelines to keep the implementation of the EPSR as one of the Commission's priorities[12].

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[9] Speech of the President of the European Commission Jean Claude-Junker delivered on 9 September 2015 in the European Parliament on 'State of the Union 2015: Time for Honesty, Unity and Solidarity', accessed January 7, 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5614.

[10] European Pillar of Social Rights – Business Europe Contribution to the debate, points 10, 15 and 17 and CEEP Opinion on the European Pillar of Social Rights, para 4.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final.

[12] A Union that strives for more. My agenda for Europe: political guidelines for the next European Commission 2019–2024, accessed May 5, 2020, https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1–11e9–9c4e-01aa75ed71a1.

According to the Commission Recommendation[13], the EPSR has been addressed mainly to the euro area, but the Interinstitutional Proclamation extends it to all Member States[14]. There should be no doubt that entitlement to social assistance should not depend on whether a Member State uses the Euro and such approach should be assessed positively[15]. The Pillar's scope includes social rights that are already protected at the EU level, while adding some new rules to meet the challenges of social, technological, and economic development[16]. It does not however entail an extension of the Union's powers as defined by the Treaties. The main purpose of the Pillar is to assess the EU acquis and clarify the rules that may contribute to greater convergence, while respecting the competences of the Member States[17].

The Pillar comprises three basic chapters, which provide twenty principles for its implementation:

I. *Equal opportunities and access to employment*: 1) education, training and lifelong learning; 2) gender equality; 3) equal opportunities; 4) active support for employment;
II. *Fair working conditions*: 5) safe and flexible employment; 6) remuneration; 7) information on employment conditions and protection in the event of dismissals; 8) social dialogue and employee involvement; 9) balance between work and private life; 10) healthy, safe and well-adapted work environment and data protection;
III. *Social protection and social inclusion*: 11) childcare and support for children; 12) social protection; 13) unemployment benefits; 14) minimum income; 15) income from old age and old-age pension; 16) health care;

[13] Commission recommendation of 26th April 2017 on the European Pillar of Social Rights, C(2017) 2600 final, recital 13.

[14] Interinstitutional Proclamation on the European Pillar of Social Rights (n 6), recital 13.

[15] Garben, "The European Pillar of Social Rights: An Assessment," 110.

[16] The entire EU acquis on social issues has been precisely defined in the Commission Staff working document – The EU social acquis. Accompanying document. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on an European Pillar of Social Rights, SWD(2016) 50 final.

[17] COM(2016) 127 final (n 10) para 3.2.

17) inclusion of people with disabilities; 18) long-term care; 19) housing policy and assistance for the homeless; 20) access to basic services.

Taking into account the above-mentioned principles, there should be no doubt that many of them are important for real economic union and internal market freedoms. This will mainly concern the freedom of establishment and the freedom to provide services, under which employers exercise their cross-border rights according to the appropriate Treaty provisions. Its efficient implementation often requires reconciliation of divergent interests of employees and employers. For example, the need to provide employers with flexibility in adapting to economic changes (e.g. new open forms of employment), and ensuring the appropriate quality of working conditions. Enterprises need a predictable business environment characterised by legal certainty, while employees in turn are interested in employment and income security[18]. It is however true that 'the Pillar has neither been conceived, nor designed, to resolve the clashes between social and market values that have arisen in the area of the internal market' (or economic governance)[19]. It can however in many ways strengthen the awareness of the social rights that are guaranteed by EU law.

3. CATALOGUE OF SOCIAL RIGHTS PROTECTED AT THE EUROPEAN UNION LEVEL

3.1. Introductory remarks

Because the EPSR is the second EU initiative concerning the protection of human rights since the entry into force of the CFR, it is understandable that one should focus its analysis on the provisions of the latter. The scope of its regulations are wide and cover not only political and civil rights, but also social and economic ones. The CFR has the rank of primary law and must be respected by both the EU Member States and its institutions. When identifying the catalogue of social rights in EU law, it

[18] Ibid para 2.3.

[19] Sacha Garben, "The Constitutional (Im)balance between "the Market" and "the Social" in the European Union," *European Constitutional Law Review* 13, no. 1 (2016).

seems that the main attention should be focused on Title IV of the CFR, entitled "Solidarity". Deeper analysis of its content allows, however, for identifying a number of other provisions related to the protection of social rights. They can therefore be basically divided into those that are related to the performance of work and those which do not show such a connection (Table 1 below). The inspiration for such a division was the definition of labour law provided in Article 1 of Directive 2006/123/EC[20]. According to its content labour law includes legal provisions or contractual provisions regarding employment and working conditions, together with health and safety at work and the relationship between employers and employees, remuneration, working time, and holidays[21].

Table 1: Catalogue of social rights in the CFR and the EFSR

Rights related to taking up and carrying out work		**Rights not related to taking up and carrying out work**	
Freedom of assembly and association		Right to education	
Article 12 CFR	principle 8 EPSR	Article 14 CFR	principles 1, 11 EPSR
Freedom to choose an occupation and right to engage in work		Rights of the elderly	
Article 15 CFR	principle 8 EPSR	Article 25 CFR	principles 15, 18 EPSR
Equality between women and men		Family and professional life	
Article 23 CFR	principles 2 and 3 EPSR	Article 33 CFR	principles 2, 9 EFSR
Integration of persons with disabilities		Social security and social assistance	
Article 26 CFR	principle 17 EFSR	Article 34 CFR	principles 12, 13, 15, 19, 20 EPSR

[20] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (O.J.E.C. L276, 27 December, 2006).

[21] *Handbook on the implementation of the services directive* (Luxembourg: Office for Official Publications of the European Communities 2007), 15. See also Philip Harvey, "Why is the right to work so hard to secure," in *The state of economic and social human rights*, ed. Lanse Minkler (Cambridge: Cambridge University Press, 2013), 135–170.

Rights related to taking up and carrying out work		**Rights not related to taking up and carrying out work**	
Workers' right to information and consultation within the undertaking		Health care rights	
Article 27 CFR	principles 7, 8 EPSR	Article 35 CFR	principle 16 EPSR
Right of collective bargaining and action			
Article 28 CFR	principle 8 EFSR		
Right of access to placement services			
Article 29 CFR	principle 8 EFSR		
Protection in the event of unjustified dismissal			
Article 30 CFR	principle 7 EFSR		
Fair and just working conditions			
Article 31 CFR	principles 5, 6, 7, 10, 14 EFSR		
Prohibition of child labour and protection of young people at work			
Article 32 CFR	principle 4 EFSR		

Source: Own study based on the provisions of the CFR and the EPSR

Each social right protected under the CFR and presented in the Table above has been compared with the principles of the EPSR in order to find its counterparts. This is an outcome of the analytical findings provided in the following sub-part of the text (Point 2 and 3 below).

3.2. Rights related to taking up and carrying out work

Rights related to taking up and carrying out work are very important to workers just from the moment of seeking employment, throughout the performance of work, until its ending. According to the CFR they entail: freedom of assembly and association, freedom to choose an occupation and the right to engage in work, equality between women and men, integration of persons with disabilities, workers' right to information and

consultation within the undertaking, right of collective bargaining and action, right of access to placement of services, protection in the event of unjustified dismissal, fair and just working conditions and prohibition of child labour and protection of young people at work. All those rights have their counterparts, in direct or indirect manner, in the EPSR. The question is if and how they relate to, and compliment, each other (they will be assessed bellow in the above-mentioned sequence). Trying to compare the relationship between the CFR and the EPSR its main characteristics have to be taken into account. While the former offers a baseline of principles and rights that at least in part represent judiciable rights that are applicable when Member States are implementing or acting within the scope of EU law, the later one is more concerned with coordination, informing, and enforcing of those rights.

In accordance with Article 12 CFR, everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, together with the right to form and to join trade unions. It is worth emphasizing that even before the CFR became legally binding, the CJEU recognized the right to free and peaceful assembly as a fundamental right and a general principle of EU law[22]. Freedom of assembly and association is indirectly provided in paragraph first of principle eight of the EPSR, which in fact basically corresponds to the provisions of Articles 152 and 154–155 TFEU. The EPSR does not thus mention freedom of assembly and association as such but rather focuses on its subjects, i.e. social partners representing interests of employers and employees, affirming the powers conferred on them by the TFUE.

According to Article 15 CFR everyone has the right to engage in work and to pursue a freely chosen or accepted occupation[23]. This means the freedom to seek employment, to work, to exercise the right of establishment, and to provide services in any Member State. There is no straightforward

[22] CJEU Judgment of 12 June 2003, Eugen Schmidberger, Internationale Transporte und Planzüge przeciwko Republik Österreich, Case C-112/00, ECLI:EU:C:2003:333.

[23] Even before the CFR came into force this right was referred to by the CJEU, for example the CJEU Judgment of 11 January 1977, J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft, case 4/73, ECLI:EU:C:1975:114 or the CJEU Judgment of 13 December 1979, Liselotte Hauer v Land Rheinland-Pfalz, case 44/79, ECLI:EU:C:1979:290.

principle provided in the EPSR that addresses the above-mentioned issues, which are however indirectly affected by the content of its principle four, concerning active support for employment. There is no doubt that without such a support one could not be able to exercise her/his right to engage in work or change both employment or self-employment if necessary. In this case the EPSR serves rather as a source of information to workers, encouraging Member States to take appropriate action.

Equality between women and men under Article 23 CFR is to be ensured in all areas, including employment, work, and pay. When we look at the EPSR one can see that the above-mentioned rights are generally covered by its second principle on gender equality in all areas, including participation in the labour market, terms and conditions of employment, and career progression. The EPSR's third principle touches however upon one more important aspect of equality between women and men. It stands for equal opportunities regardless of gender when it comes to social protection, education, and access to goods and services available to the public. It is to be achieved, *inter alia,* by a proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures[24]. Other initiatives that are planned to be brought forward in this area include the European Commission's activity in the framework of the Gender Equality Strategy 2020–2025[25], and a proposal for a directive on the gender pay gap – transparency in pay for man and woman[26]. As one can notice, the issue of equality between women and men is important for both the CFR and the EPSR, which however is much broader and specific in the scope of rights. It covers equality in many areas like e.g. labour market, employment conditions together with equal pay, career progression, social protection or education. Taking into account the above-mentioned legal steps that are to be taken in order to implement the Pillar one can have an impression that we still need more

[24] COM(2012) 614 final.

[25] Communication from the Commission - A Union of Equality: Gender Equality Strategy 2020–2025, COM(2020) 152 final.

[26] Inception impact assessment – Ares(2020)40391, accessed April 24, 2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Strengthening-the-principle-of-equal-pay-between-men-and-women-through-pay-transparency.

legal activity to ensure that women and men are equally treated especially in areas related to remuneration[27].

According to Article 26 CFR the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community. The EPSR in its principle seventeen is much broader and specific in its scope than the CHR. It provides rights (not principles) concerning income support that ensures living in dignity, services enabling participation in the labour market and in society, together with a work environment adapted to needs of people with disabilities. One of the measures aimed to implement principle seventeen of the EPSR is Directive 2019/882 providing an environment where products and services are more accessible for persons with disabilities, therefore allowing for a more inclusive society (especially its Article 4.4 and 13.2)[28]. Not only accessibility or participation but also other areas like employment, education and training, social protection, health or external action still need more attention for persons with disabilities. They have been identified by the European Disability Strategy 2010–2020[29] which is currently evaluated by the European Commission, due to the fact that persons with disabilities are still facing difficulties and discrimination in everyday life.

According to Article 27 CFR workers or their representatives must be guaranteed information and consultation in cases related to working conditions. As regards the implementation of this right, the judgment of the CJEU in case C-176/12 *Association de mediation sociale* deserves special attention[30]. It concerned the determination whether Article 27 CFR may be applied directly between individuals to refrain from applying nation-

[27] Compare especially Report from the Commission on the application of Directive 2006/54/EC, COM(2013) 0861 final, p. 2 and 6–11.

[28] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (O.J.E.C. L151, 7 Jun, 2019).

[29] Text on the European Disability Strategy 2010–2020, accessed April 4, 2020, https://ec.europa.eu/social/main.jsp?catId=1484.

[30] CJEU Judgment of 15 January 2014, Association de médiation sociale v. Union locale des syndicats CGT and others, Case C-176/12, ECLI:EU:C:2014:2.

al law which incorrectly transposed Directive 2002/14/EC[31]. The CJEU pointed out that this Article must be clarified, by EU or national law, as regards when it is to exert its fully-intended legal effects. It cannot therefore, as such, be invoked in a dispute and by itself does not suffice to confer on individuals a right which they may invoke[32]. Workers' right to information and consultation is also provided in the second paragraph of the EPSR's principle eight and first paragraph of its principle seven. As to employer's obligation to inform its employees about their employment conditions the EPSR extends this obligation also to those on probation. This principle has been implemented by Articles 4 and 5 of the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[33]. It not only complements and modernises the existing obligations of employers, but also ensures more predictability and clarity for workers, including those on atypical contracts. Its provisions address the risks of variable work schedules, such as on-demand work, platform work, or zero-hours contracts[34]. It is worth mentioning that Directive 2019/1152 also contributes to the implementation of principle five of the EPSR concerning secure and adaptable employment, which is analysed later in the following part of the text.

The right of collective bargaining and action under Article 28 CFR authorizes workers and employers, or their respective organisations, to negotiate and conclude collective agreements, together with collective actions, including strike actions[35]. One should recall here Article 153.5 TFEU,

[31] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation (O.J.E.C. L80, 23 March, 2002).

[32] Case C-176/12 Association de médiation sociale (n 30) paras 45–49.

[33] (O.J.E.C. L186, 11 July, 2019).

[34] For more details, see for example Bartłomiej Bednarowicz, "Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union," *Industrial Law Journal* 48, no. 4 (2019): 604–623.

[35] Brian Bercusson, "The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level," *TRANSFER* 2 (2003): 216. According to AG Trstenjak, the provisions of Art. 28 CFR (just like its Articles 29 and 31) grant subjective rights, generally because they state that holders of fundamental rights have a 'right'. Opin-

which states that its provisions shall not *inter alia* apply to the right to strike. The CJEU, in the famous cases C-341/05 *Laval* and C-348/05 *Viking* stated however that it does not mean that the right to strike is totally excluded from EU law[36]. It is therefore a legitimate interest which can justify a restriction of the internal market freedoms, if the proportionality test is passed[37]. The need to fulfil the above-mentioned conditions creates the impression that the CJEU's understanding of the right to strike as a fundamental right is more a theoretical than a real one[38]. This interpretation turned out to be different from the one presented by international control bodies relevant for ensuring compliance with social rights, such as the European Court of Human Rights, the International Labour Organisation Committee of Experts, and the European Committee of Social Rights. They understand the right to strike as a fundamental one which may be restricted only in specific situations, and because of the autonomy of social partners such restrictions should not be assessed according to the principle of proportionality[39]. The right of

ion of Advocate General Trstenjak delivered on 8 September 2011, ECLI:EU:C:2011:559, para 79; CJEU Judgment of 24 January 2012, Maribel Dominguez przeciwko Centre informatique du Centre Ouest Atlantique i Préfet de la région Centre, Case C-282/10, ECLI:EU:C:2012:33.

[36] CJEU Judgment of 18 December 2007, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan i Svenska Elektrikerförbundet, Case C-341/05, ECLI:EU:C:2007:809 and CJEU Judgment of 11 December 2007, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-348/05, ECLI:EU:C:2006:386.

[37] Case C-348/05 Viking (n 36), paras 77 and 90; case C-341/05 Laval (n 36), paras 103 and 107–110.

[38] The European Economic and Social Committee: The Social Dimension of the Internal Market (O.J.E.C. C44, 11 February, 2011), para 3.4.5.1.

[39] ECtHR Judgment of 12 November 2008, Case Demir and Baykara v. Turkey, application no. 34503/97, hudoc.int; ECtHR Judgment of 21 April 2009, Case Enerji Yapi-Yol Sen v. Turkey, application no. 68959/01, hudoc.int; Report III (1A) Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 99th Session 2010424, para 208; the International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), ILC.102/III(1A), pp. 176–179; the European Committee of Social Rights decision of 3 June 2013, Swedish Trade Union Con-

collective bargaining and action is also provided for in the EPSR. Its principle eight states that social partners have the right to collective action. It however does not resolve (and – what is important – was not intended to do so) the above-mentioned interpretational discrepancy. Currently the task of balancing competing rights of the same value, like the right to strike and internal market freedoms, still lies with the CJEU jurisprudence. According to Article 29 CFR everyone has the right of access to a free placement service, which is the task of the Member States. Active support for employment is also provided in principle four of the EPSR, but in much broader and specific scope than the CHR. It pays therefore special attention also to young people, unemployed persons and the long-term unemployed and includes employment services, such as job-search counselling and guidance, training, hiring subsidies and re-insertion support. It is unquestionable that all the above-mentioned are very important for everyone who wishes to find employment or to lead a dignified life in the event of a job loss. This is one of the reasons why the Commission announced its intention to put forward a proposal for the European Unemployment Reinsurance Scheme (EUBRS), which aims to support those at work and protect those who have lost their jobs because of external shocks[40]. It should safeguard the ability of national unemployment schemes to pay out sufficient unemployment benefits in times of unexpected economic shocks. It seems that the coronavirus pandemic across the EU is accelerating this initiative, taking into account Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak[41]. This can be seen as a kind of emergency operationalisation of the EUBRS, designed to respond immediately to different challenges, including currently fighting the effects of COVID-19.

federation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Case 85/2012, paras 72–74 and 107.

[40] Communication from the Commission – Work Programme 2020: A Union that strives for more, COM(2020) 37 final, para 5.

[41] (O.J.E.C. L159, 20 May, 2020).

Protection in the event of unjustified dismissal is provided for in Article 30 CFR. Unjustified or unfair dismissal of employees contradicts the European social model implemented within the EU, and protection therefrom deserves to be called a fundamental right[42]. The EPSR, in the second paragraph of its principle seven, provides in more detailed way that prior to any dismissal workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access effective and impartial dispute resolution and, in cases of unjustified dismissal, a right to redress, including adequate compensation. The EPSR is therefore broader and more specific in its scope than the CHR, which generally refers to Union law and national law and practices. It has been implemented by Article 16 and 18 of Directive 2019/1152 which, in the same way as the EPSR, provides for effective and impartial dispute resolution and a right to redress in the case of infringements of workers' rights. This is the employer who have to provide in writing duly substantiated grounds for the dismissal if workers consider that they have been dismissed because they exercised the rights provided for in Directive 2019/1152. It is also for the employer to prove that the dismissal was based on other grounds. It covers all workers, what should be assessed positively taking into account the quite large number of different regulations, that are currently applied to workers in the event of unjustified dismissal. Here some examples are illustrative, like the transfers of undertakings,[43] insolvency of employers[44], collective redundancies[45], non-discrimination in the context of termination of em-

[42] Niklas Bruun, "Protection against unjustified dismissal (Article 30)," in *European Labour Law and the EU Charter of Fundamental Rights*, ed. Brian Bercusson (Baden-Baden: Nomos Publisher, 2006), 339.

[43] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (O.J.E.C L82, 22 March, 2001).

[44] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (O.J.E.C. L283, 28 October, 2008).

[45] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (O.J.E.C. L225, 28 October, 1998).

ployment[46], or atypical forms of employment[47]. The above-mentioned regulations do not however cover new forms of employment, which vary significantly from traditional employment relationships. One can mention here for example new forms of work such as zero-hour contracts, casual work, domestic work, voucher-based work or platform work.

According to Article 31 CFR, every worker has the right to working conditions which respect his or her health, safety and dignity. They also have the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave. Fair and just working conditions are therefore available to all workers, i.e. those of a Member State's own nationality, citizens of other Member States, and third-country nationals (who have a work permit) – working in the territory of the Member States. It should be stressed that the annual paid leave had been classified as a fundamental right by AG Trstenjak even before the entry into force of the CFR[48]. It has also been recognized as both mandatory and unconditional in nature, so sufficient in itself to confer on workers a right that they may actually rely on in disputes also between private parties[49]. As to the EPSR, its whole second chapter is generally devoted to fair working conditions. In particular this issue has been pro-

[46] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (O.J.E.C. L204, 26 July, 2006).

[47] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICEF, CEEP and the ETUC (O. J.E.C. L14, 20 January, 1998) and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICEF and CEEP (O.J.E.C. L175, 10 July, 1999).

[48] Opinion of Advocate General Trstenjak delivered on 24 January 2008, ECLI:EU:C:2008:37, para 38. Compare also the CJEU Judgment in case C-282/10 Maribel Dominguez (n 35) together with Opinion of Advocate General Trstenjak delivered on 8 September 2011, ECLI:EU:C:2011:559, paras 75–76 and the CJEU Judgment of 26 June 2001, The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), Case C-173/99, ECLI:EU:C:2001:356 together with the Opinion of Advocate General Tizzano delivered on 8 February 2001, ECLI:EU:C:2001:81.

[49] CJEU Judgment of Joined of 6 November 2018, Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn, Joint cases 569 & 570/16, ECLI:EU:C:2018:871, para 85.

vided for in the first and fourth paragraphs of principle five, as well as in principles six and ten. What could be surprising the Pillar is silent about the right to a maximum weekly working time, adequate rest periods, and paid annual leave, as laid down in Article 31.2 CFR. On the other hand, as for the rest of the matter, it seems to be broader in the scope of rights than the CHR, covering also such aspects as adequate minimum income benefits, adequate minimum wages or reasonable accommodation to each individual worker's needs. The fair working conditions provided by the EPSR have been implemented by the above-mentioned Directive 2019/1152. Its Article 8 clearly states about the 'reasonable duration' of probation periods leaving details to be decided by the Member States, but indicating that it should not last longer than six months. The importance of flexibility for employers, innovative form of work and prohibition of abusing of atypical contracts have also been underlined[50]. As has been mentioned above, the Pillar also calls for wages which should provide for a decent standard of living. It is a novelty which is not provided in the CFR. Decent standard of living is sought to be attained by a proposal for a minimum income directive and a proposal on minimum pay via the European Semester. There should be no doubt that both minimum wages and income are very important for all those living and working in the EU, especially because the attainment of such pay will enhance the protection of workers' dignity[51]. The European Commission has already proposed some planned initiatives such as fair minimum wages for workers in the EU[52] and opened cooperation between the European Commission and social partners on this issue[53]. We should however remember about division of competences

[50] Very interesting on 'flexicurity' policy look at Anne Davies, "How has the Court of Justice changed its management and approach towards the social *acquis*," *European Constitutional Law Review* 14 (2018): 155–157; Lörcher and Schömann, "The European pillar," 5.

[51] Kilpatrick, Muir and Garben, "From Austerity," 8.

[52] Communication from the Commission – A strong social Europe for just transitions, COM(2020) 14 final.

[53] The European Commission consultation document - First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges related to fair minimum wages COM(2020) 83 final. See also Enrique Fernández-Marcias and Carlos Vacas-Soriano, "A coordinated European Union minimum wage policy?" *European Journal of Industrial Relations* 22, no. 2 (2016).

between Member States and the EU when it comes to wages. Taking into account the content of Article 153(5) TFEU wage setting (pay) is located outside the scope of the EU competence with some exceptions like rules on equality of pay between men and women provided in Article 157 TFEU, non-discrimination in the field of free movement of workers and posted workers as a consequence of free movement rules and non-discrimination based on nationality. It seems thus clear that implementation of the EPSR's principle six on fair wages will not be easy or even possible without appropriate changes in the EU Treaties. At the moment it could hardly take the form of binding provisions like e.g. directives. It would rather to be attained gradually by soft-law instruments working in the framework of the European Semester.

Regarding children and young people at work, Article 32 CFR provides that the employment of children is prohibited and the minimum age of admission to employment may not be lower than the minimum school-leaving age. The EPSR, in the second paragraph of its principle four, states that young people have the right to continued education, apprenticeship, traineeship or a job offer of good standing within four months of becoming unemployed or leaving education. Equal treatment should therefore be guaranteed also outside employment – including in the area of education. Another important measure in this area is also the Youth Guarantee, under which the EU Member States have pledged to ensure that all young people under the age of 25 receive a good offer of employment, continued education, apprenticeship, or traineeship within a period of four months of becoming unemployed or leaving formal education[54]. Since its establishment the performance of the young people's labour market has improved significantly, because it has created opportunities for them and acted as a powerful driver for structural reforms and innovation[55]. The EU activities related to children and young people at work seems to aim at complex regulation of this matter. Not only working rules and conditions are therefore important but also equal treatment in

[54] Council Recommendation of 22 April 2013 on establishing a Youth Guarantee (O.J.E.C. C120, 26 April, 2013).

[55] For statistics and figures see https://ec.europa.eu/social/main.jsp?catId=1079&langId=en, accessed April 30, 2020.

the area of education, relevant youth employment reforms and measures of its financing.

3.3. Rights not related to taking up and carrying out work

The Charter's social rights not related to taking up and carrying out work are sometimes connected with those activities but are also to provide people (not only workers) with life with dignity and security. They entail: right to education, rights of the elderly, rights regarding family and professional life, social security rights, health care rights. Also in this case all above mentioned rights have their counterparts, in direct or indirect manner, in the EPSR. The assessment of how they relate to, and compliment, each other will be provided below in the above-mentioned sequence.

In accordance with Article 14 CFR, everyone has the right to an education and access to vocational and continuing training, together with the possibility to receive a free compulsory education. Education, training and life-long learning is provided for by principle one and eleven of the EPSR, presenting a much broader scope of rights than the CFR by including quality and inclusiveness. Maintaining and acquiring skills is thus one of the best measures enabling people to participate fully in society and successfully manage transitions in the labour market. Children have also the right to affordable early childhood education and care of good quality. It should be unquestionable that these principles will be better achieved with appropriate financial support. Therefore, European Commission President Ursula Von der Leyen has expressed her commitment to further elaborating the Child Guarantee, which was called for in 2015 by the European Parliament[56].

According to Article 25 CFR the elderly are to lead a life with dignity and independence and to participate in social and cultural life. Similar rights are provided in principle fifteen of the EPSR concerning old age income and pensions, especially when it refers to the right of everyone in old age to have resources that ensure living in dignity. There is however one more principle which should be taken into account when talking about the living conditions of the elderly. This is principle eighteen

[56] Communication from the Commission (n 40).

providing the right to affordable long-term care services of good quality for persons who are reliant on care, what is not provided in the CFR. All the above-mentioned initiatives are very important for the elderly. They take however a form of principles and cannot be invoked directly before courts. They have to be thus concretized on national level depending on the capacities (especially financial one) of each individual Member State.

Family and professional life, as regulated in Article 33 CFR, provides legal, economic and social protection for families. The reconciliation of family and professional life generally requires 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. When we look at the EPSR, work-life balance is directly provided for in principle nine and indirectly in its second principle with broader personal scope covering not only parents but also those who care for elderly or disabled family members. These two principles of the EPSR have been implemented by Directive 2019/1158 on work-life balance[57]. It complements them by strengthening existing rights and introducing some new ones. Its provisions apply to all workers who have employment contracts or other employment relationships. Its scope thus entails contracts relating to employment or the employment relationships of part-time workers, fixed-term contract workers, or persons with a contract of employment or employment relationship with a temporary agency[58]. Apart from personal also its material scope has been extended in several elements, like paternity leave of ten working weeks, paid at sick pay level (Article 4), no possibility of transferring two months of parental leave between parents (Article 5.2), workers' right to take their parental leave in a flexible way, which is to be paid at sick pay level (Article 5.6 and Article 8) and workers' right to carer's

[57] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188, 12 July, 2019). It replaced its predecessors: Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

[58] See also Garben, Kilpatrik and Muir, 'Towards' (n 8).

leave of five working days per year (Article 6). The scope of the Directive 2019/1158 implementing the EPSR is therefore wider and more detailed than the CFR provisions on family and professional life, which should undoubtedly be assessed positively.

Pursuant to the provisions of Article 34 CFR, social security rights should include issues related to social security and social assistance. When we look at the EPSR we can see that social security rights are generally a part of its third chapter, called social protection and inclusion, which entails principle twelve on social protection, principle thirteen on unemployment benefits, principle fifteen on old age income and pensions, principle nineteen on housing and assistance for the homeless and principle twenty on access to essential services. As regards coverage, not only workers but also the self-employed have the right to adequate social protection, regardless of the type and duration of their employment relationship. The personal scope of this right has thus been extended, also to self-employed workers. What is interesting, this right is stricter than the one provided by the CFR by indicating that it affects everyone and specifying in detail what exactly those essential services cover, especially referring to the provision of housing support in-kind. In order to implement the EPSR (especially its principle twelve), the Council adopted the Recommendation on access to social protection for workers and the self-employed[59]. Member States have been encouraged to allow those subjects to access social security schemes and to increase transparency regarding social security systems and rights. This should be attained via the European Commission's support through dialogue and mutual learning activities. Member States are encouraged to implement the principles set out in the Recommendation as soon as possible and submit a plan setting out the corresponding measures to be taken at the national level by 15 May 2021. An attempt to extend the personal scope of the above-mentioned social benefits should be assessed positively. Both the CFR's and the EPSR's provisions on social security rights take however the form of rules that prevent their addressees from directly relying on them before courts. It is thus for each of the Member States to make these rights more concrete taking into account its own capabilities.

[59] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (O.J.E.C. C387, 15 November, 2019).

There is no doubt that health care is a key objective of the Member States' social protection systems. Because it falls within the competences of the Member States, the EU only promotes cooperation between them through 'soft law' instruments and intergovernmental policy making, like the open method of coordination. It focuses in particular on access, quality, and sustainability, which is also visible in the provisions of the CFR. Pursuant to its Article 35, everyone should have the right of access to preventive healthcare and the right to benefit from medical treatment. In its principle sixteen, the EPSR provides in the same way that everyone has the right to timely access to affordable, preventive, and curative health care of good quality. The EU is therefore to complement national policies aimed at improving public health, disease prevention, and removing sources of risk to physical and mental health. Progress towards this principle is currently monitored by the EPSR's Social Scoreboard indicator on 'self-reported unmet needs for medical care'. Member States' health systems have also received increasing attention in the European Semester process (discussed below) through the Country-Specific Recommendations and the Commission's Country Reports. The right to health protection is also interpreted as including the right to a clean environment, which is provided in Article 37 CFR[60]. There is however no specific principle provided in the EPSR that focuses on the right to a clean environment, what should be assessed negatively, given the increasing climate change.

3.4. The legal protection mechanism for the infringement of social rights

The legal protection mechanism for the infringement of social rights provided in different instruments of EU law depends on the type of instrument, which is a source of a given social right. According to above mentioned considerations it can be the Treaty provision, the CFR, the EPSR, relevant secondary law of binding (generally directives)

[60] Florence Benoít-Rohmer, "The impact of the European Convention of Human Rights on the juridictionalisation of the European Committee of Social Rights," in *Social rights – Challenges at European, Regional and International Level*, ed. Nikitas Aliprantis and Ioannis Papageorgiou (Bruxelles: Editions juridiques Bruylant, 2010), 237; Nicolas de Sadeller, *EU Environmental Law and the Internal Market* (Oxford: Oxford University Press, 2014).

and non-binding nature (recommendations, shames or guaranties). The rights and principles enshrined by the EPSR are not, by its virtue, enforceable against either the EU Institutions or the Member States. This is especially due to the fact, that the Pillar is a source of interpretation of the rights and principles as laid down in other instruments, especially where they refer to it[61]. The EPSR as such, is unfortunately of little importance in the area of direct horizontal applicability, because although it is a useful guidance it does not create legal guaranties enforceable before courts. Its rights and principles are not directly enforceable, and it requires 'a translation into dedicated action and/or separate pieces of legislation, at the appropriate level'[62]. The above-mentioned enforceability can however be attained through relevant primary or secondary law of binding character which already is or will be adopted in order to implement its principles. One should also consider what is the importance of the CFR in this area.

It should be emphasized at the outset that the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law[63]. Taking into account the applicability of the Charter provisions one should mainly focus on its Article 51 indicating, that it binds both the EU institutions, bodies, offices and agencies with due regard for the principle of subsidiarity and its Member States when they are implementing Union law. Fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls „within the scope of EU law"[64]. Its Article 51 is silent about private parties. Does it therefore mean that that they are not allowed to rely on any of the Charter provisions as such directly before a court? In joined Cases 569 & 570/16, *Bauer and Willermoth* the CJEU stated that the Charter cannot be interpreted as meaning that it would systematically pre-

[61] Garben, "The European Pillar of Social Rights: An Assessment," 4–5.

[62] European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, p. 3.

[63] CJEU Judgment in Case C-176/12 Association de médiation sociale, (n 30) para 42.

[64] CJEU Judgment of 26 February 2013, Åklagaren v Hans Åkerber Franssonow, Case C-617/10, ECLI:EU:C:2013:105, para 21.

clude such a possibility[65]. Individuals are thus able to invoke Charter provisions before courts if they are sufficient in itself to confer individual rights and may be relied on as such in disputes between them in a field covered by EU law[66]. Taking into account rights of a social character, the CJEU confirmed it according to Article 21 (non-discrimination) and 31.2 (right to an annual period of paid leave) of the CFR, but refused in relation to its Article 27 (workers' right to information and consultation within the undertaking). As to the later, in case C-176/12 *Association de médiation sociale* the CJEU indicated that "to be fully effective, it must be given specific expression in European Union or national law" as a source of conditions under which the right existed[67]. Horizontal direct effect of Article 21 of the CFR was the subject of the case C-414/16 *Ergenberger*. The CJEU explicitly stated that the prohibition of all discrimination laid down in this Article (in this case discrimination on grounds of religion or belief) is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law[68]. The same conclusions were reached by the CJEU in relation to Article 31.2 of the CFR in joined cases 569 & 570/16 *Bauer and Willmeroth*. The right to a period of paid annual leave, affirmed for every worker by this Article, is thus both mandatory and unconditional in nature. This provision is also sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within

[65] CJEU Judgment in joined cases 569 & 570/16 Bauer and Willmeroth (n 49), para 87. The Court confirmed it in Judgment of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimiz, Case C-684/16, ECLI:EU:C:2018:874, para 76. Very interesting on the essence of fundamental rights and the question of horizontal direct effect Koen Lenaerts, "Limits on Limitations: The Essence of Fundamental Rights in the EU," *German Law Journal* 20 (2019): 788.

[66] CJEU Judgment of 17 April 2018, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV, Case C-414/16, ECLI:EU:C:2018:257, para 76 – concerning non-discrimination on grounds of religion or belief, or an earlier CJEU Judgment in case C-176/12 Association de médiation sociale (n 30) para 47 – concerning non-discrimination on grounds of age.

[67] CJEU Judgment in case C-176/12 Association de médiation sociale (n 30), para 45.

[68] CJEU Judgment in Case C-414/16 Vera Ergenberger (n 66) para. 76.

the scope of the Charter[69]. As to the social rights provided by the Charter one can notice a marked change in their perception by the CJEU starting from case C-176/12 *Association de médiation sociale* – by indicating that some Charter's provisions do not have 'rights conferring' nature, to case C-569/16 *Bauer* – by social rights inclusion in a 'written constitution' together with its horizontality[70]. The Court pointed to the conditions under which specific provisions might be applied horizontally, which is to be fulfilled when Charter provisions are mandatory and unconditional ('every worker has the right' without referring to 'national law and practices')[71]. There is however a set of its provisions (especially Solidarity chapter) that are conditional upon national laws and practices, being a hurdle for its horizontal effect. It would even be easier to point Solidarity provisions that do not include such a statement, namely the above-mentioned Article 31, Article 29 on access to a placement service, Article 37 on environmental protection and Article 38 on consumer protection[72]. One can therefore see a light in the tunnel on the possibility of the CFR provisions horizontal enforceability, but it is too early now to treat it as 'independent source of private parties' duties that become activated whenever private conduct or a contract between two private parties falls within the scope of EU law'[73].

[69] CJEU Judgment in joined cases 569 & 570/16 Bauer and Willmeroth (n 49), para. 85. Look also at the CJEU Judgment in Case C-684/16 Max-Planck-Gesellschaft (n 65) paras. 76–79.

[70] Eleni Frantziou, "(Most of) the Charter of Fundamental Rights is Horizontally Applicable. ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et al," *European Constitutional Law Review* 15, no. 2 (2019): 9.

[71] CJEU Judgment in Joined Cases C-569/16 and C-570/16 Bauer and Willmeroth (n 69) para 84.

[72] For further, very interesting findings on the Charter's provisions horizontal applicability especially look at: Frantziou, "(Most)," 15–19 and Eleni Frantziou, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality," *European law Journal* 21, no. 5 (2015).

[73] Dorota Leczykiewicz, "The Judgment in Bauer and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations," *European Review of Contract Law* 16, no. 2 (2020): 10–11.

4. DELIVERING ON SOCIAL PROTECTION FROM INSTITUTIONAL AND STATISTICAL POINT OF VIEW

4.1. The European Labour Authority and the European Social Fund Plus

In order to bring an operational dimension to the EPSR, a new EU agency – the European Labour Authority (Authority) – has been established[74]. It is related to the EPSR principles concerning active support for employment, secure and adaptable employment, and social protection thereof. It was announced in September 2017 by the former President of the European Commission Jean-Claude Junker as an instrument of assistance to both Member States and the Commission in matters related to cross-border labour mobility and the coordination of social security systems within the Union[75]. In order to ensure fair labour mobility in the internal market, the Authority is to: 1) facilitate access for individuals and employers to information on their rights and obligations as well as to relevant services; 2) facilitate and enhance cooperation between Member States, including joint inspections; 3) mediate and facilitate a solution in cases of cross-border disputes between Member States; and 4) support cooperation between Member States in tackling undeclared work (Article 2 of the Regulation 2019/1149). Taking into account that the EPSR is one of the sources of workers' rights, the Authority's task on information concerning labour mobility provisions is of special importance. It concerns the availability, quality, and accessibility of information available to individuals, employers and social partners' organisations regarding the rights and obligations deriving from the specific EU law provisions listed in Article 1.4 of Regulation 2019/1149. Appropriate knowledge of rights and obligations in the area of labour mobility, the free movement of services, and social security coordination is essential to allow participants of the internal market to benefit from its full potential. Those participants include

[74] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority (O.J.E.C. L186, 11 July, 2019).

[75] President Jean-Claude Junker's State of the Union, 13 September 2017, accessed February 25, 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165.

workers, self-employed persons and jobseekers, together with citizens of the Union and third-country nationals who are legally resident in the Union, such as posted workers, intra-corporate transferees, or long-term residents, as well as their family members[76].

Obviously, the achievement of various goals is often impossible, and undoubtedly difficult without adequate financial means. This also applies to the implementation of the EPSR principles. Thus, a new European Social Fund Plus (ESF+), as a part of the EU budget 2021–2027, is designed to help in developing not only the skills needed to deal with challenges and changes on the labour market, but also employment and social actions in line with those principles[77]. Its provisional budget entails €101 billion. It is planned to be a more flexible and simpler version of the current European Social Fund by merging a number of existing funds and programmes, such as: the European Social Fund, the Youth Employment Initiative, the Fund for European Aid to the Most Deprived, the EU programme for Employment and Social Innovation and the Programme for the Union's action in the field of health. It should make access to funding easier, together with combining different types of measures and simplifying the management of funding. This merger also aims to enhance coherence and synergies between complementary EU instruments, increase flexibility, allow funds to be more responsive to the challenges, and to simplify its programming and management. One of the main features of the ESF+ is to put citizens' concerns and key priorities at the centre, together with youth unemployment and social inclusion. Its programmes will thus concentrate in particular on the challenges identified under the European Semester and the EPSR. Merging the different instruments under the ESF+ will make it possible to pool appropriate resources for the implementation of the principles of the Pillar. It should therefore support investments in people and systems in the policy areas of employment, education, and social inclusion, and thereby support economic, territorial and social cohesion in accordance with Article 174 TFEU.

[76] Regulation 2019/1149, motive 7 and 13 of the preamble.

[77] Proposal for a regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+), COM(2018) 382 final.

4.2. The European Semester and Social Scoreboard

The European Semester was introduced in 2010 as an annual cycle of policy coordination between the European Commission and EU Member States. Its aim is to attain the following four goals: ensuring sound public finances; preventing excessive macroeconomic imbalances in the EU; supporting structural reforms; and creating more jobs and growth and boosting investments. As can be seen, these aims are not only of an economic but also of a social nature, in the latter case generally by promoting progress in the implementation of the EPSR. The European Semester process is based on three key documents which are published each year. One is the Annual Sustainable Growth Strategy, establishing the basis for building a common understanding about the objectives and rules agreed upon at the EU level; the second is the National Reform Programmes submitted by the Member States regarding how these targets have been taken into account; and the final document consists of Country-Specific Recommendations for actions to be taken according to each country's economic and social performance during the previous year[78]. The watchword of the Annual Sustainable Growth Strategy 2020 is "an economy that works for people & the planet" – focusing on four main aims, e.g. environment, productivity, stability, and fairness. The latter aim is especially important for people and provides for implementing the EPSR by investing in skills and health, fighting poverty, gender equality, social cohesion and job quality[79]. To strengthen its economic and social performance, the EU must fully deliver on the principles of the EPSR. Special actions are needed to ensure the enjoyment of social rights and to counter the risks posed by a growing social divide. The above mentioned Annual Sustainable Growth Strategy clearly underlines the importance of the EPSR's principles. It provides, for example, for fair working conditions (involuntary part-time work, atypical forms of work, a fair wage for each worker, and open-ended full-time contracts); ending discrimination against women in the labour

[78] These documents for 2020 are available at https://ec.europa.eu/info/publications/2020-european-semester-country-reports-and-communication_en, accessed April 20, 2020.

[79] COM (2019) 650 final.

market (closing the gap between men in terms of employment rate and pay); investments in skills; adequate and sustainable social protection systems; and fighting against exclusion (promoting inclusiveness, the quality of education and training systems, reducing early school leaving, and investing in healthcare and long-term care). The European Semester is therefore one of the measures for implementation of the EPSR, especially its principles on minimum wages, minimum income and social housing, through the country-specific recommendations, as 'a particularly coercive form of soft law', to introduce or improve their minimum wage and income schemes[80]. It is very important to pay equal attention to economic and social issues, because economic governance can have unquestionable social consequences, especially in times of an economic crisis, like the current global COVID-19 pandemic[81].

The Social Scoreboard is an instrument which aims to monitor implementation of the EPSR in the European Semester. It was first presented in April 2017 and is a kind of 'screening device' that allows for assessment of the 'social' situation in each Member State[82]. Its main task is tracking trends and performances across Member States in the following twelve areas, grouped into three social dimensions:

I. Equal opportunities and access to the labour market: 1) Education, skills, and lifelong learning; 2) Gender equality in the labour market; 3) Inequality and upward mobility; 4) Living conditions and poverty; 5) Youth.

[80] Garben, "The European Pillar of Social Rights: Effectively," 8.

[81] See the very interesting conversation with Professor Sacha Garben: A FEPS Podcast on Social Europe in times of COVID-19 crisis, accessed May 6, 2020, https://podcasts.apple.com/be/podcast/24-feps-talks-advancing-social-europe-in-times-covid/id1490408965?i=1000469586081. As to the European Semester. compare also: Jonathan Zeitlin and Bart Vanhercke, "Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020," *Swedish Institute for European Policy Studies* 7 (2014).

[82] Commission Staff Working Document on Social Scoreboard, SWD(2017) 200 final. A special website has been created to carry out its activities: https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/, accessed March 1, 2020.

II. *Dynamic labour markets and fair working conditions*: 6) Labour force structure; 7) Labour market dynamics; 8) Income, including employment-related.
III. *Public support/Social protection and inclusion*: 9) Impact of public policies on reducing poverty; 10) Early childhood care; 11) Healthcare; 12) Digital access.

The Social Scoreboard allows one to look in on Member States' activities on social issues over time, monitor convergence between them and general trends, and compare the performance of each of them at a given moment of time. As mentioned above, its main aim is both the implementation of the Pillar by tracking trends and performances across EU countries and feeding into the European Semester of economic policy coordination. It does not cover all 20 principles of the EPSR and practice shows that more work is needed in defining how the relevant indicators can be used to adequately monitor them in order to ensure upward social convergence.[83] Despite the above mentioned shortcomings, it is however still a key tool for informing and reinforcing the social dimension of the European Semester process, mainly by providing clear social indicators and data. The analyses provided by the Social Scoreboard feed into the preparation of the Country Reports prepared in the context of the European Semester and in the dialogue with Member States throughout the year. It complements the more qualitative assessment of economic and social challenges across the EU. It also allows one to look at EU Member States' performances on social issues over time, measure and monitor their progress in achieving convergence towards better working and living conditions in Europe, compare the performance of each of the 27 Member States at a given moment in time, and create one's own graphs, tables and maps. Data for the majority of the indicators is provided by Eurostat and come from different sources, mainly social statistics such as the EU Labour Force Survey (LFS) or the EU Statistics on Income and Living Conditions (EU SILC).

[83] Agnieszka Piasna, *The Social Scoreboard Revisited* (Brussels: ETUI European Trade Union Institute Background Analysis, 2017).

5. CONCLUSION

Social rights are indeed protected at the EU level and have their legal source not only in the CFR, but also in relevant treaty and secondary law provisions. They can be generally divided into those related with taking up and carrying out work and those which do not show such a linkage. The principles of the EPSR indeed help with the actual exercise of these rights by supplementing and sometimes even adopting or planning to adopt new instruments. A comparison of the above-mentioned documents shows that all social rights provided for in the Charter have their counterparts in the Pillar.

Analysis shows however also that in many instances the latter is much broader in the scope of rights than the former, like e.g. in case of persons with disabilities and their right to live in dignity thanks to income support, participation in society and the labour market with an appropriate work environment. The same conclusion can be drawn with regard to extension of worker's right to information on employment conditions also to probation period or their right to fair wages, minimum income and workplace accommodation appropriate to their occupational needs in area of fair and just working conditions. The EPSR adds a new content to the CFR also by quality and inclusiveness when it comes to the right to education, the right to a free placement service including employment services, such as job-search counselling and guidance, training, hiring subsidies and re-insertion support and housing support in-kind, when it comes to the right to housing assistance. In some instances the EPSR is also broader in the personal scope of rights than the CHR, like e.g. social security rights entailing both workers and self-employed or work-life balance not only for parents but also carers of disabled or elderly family members.

In many instances the Pillar affects the implementation of the CFR, even if the actions proposed do not take a legally binding form. Here one can just take the example of the proposal for the European Unemployment Reinsurance Scheme, with its actual importance for the fighting the effects of the COVID-19 pandemic by its emergency operation to mitigate unemployment risks in an emergency. In some instances the EPSR simply confirms the social rights of the Charter without (so far) any proposed initiatives, like for example the freedom to choose an occupation and right

to engage in work. There are also legal instruments adopted in order to implement specific principles of the EPSR which at the same time strengthen or extend the protection provided by the provisions of the Charter, like the Work-life Balance Directive and the right to a family and professional life. The financial aspects of social rights implementation seems also to be of unquestionable importance, like the European Social Fund+, the Youth Guarantee, or the one planned for children.

The EPSR indeed develops existing social rights, that are already part of the EU legal order, but the level of its protection still depends on the scope of division of competences between the EU and its Member States. The words of O. De Schutter deserve attention here, that 'on the one hand, the EPSR (…) could lead to identify the need for new legislative initiatives of the EU. On the other hand, the EPSR could encourage the EU Member States to take action, in their own field of competences, implementing the commitments of the EPSR, thus contributing to a convergence in the fulfilment of fundamental social rights'[84]. It is generally noticeable in the form of legal acts adopted by EU institutions to implement the principles of the EPSR. In areas where the EU can act, like e.g. equality between men and women, integration of persons with disabilities or fair and just working conditions binding secondary law in a form of directives or to a lesser extent regulation has been provided. In other cases, like e.g. right of access to placement of services, right to education, some social security or health care rights, Member States have been encouraged to activity by recommendations, financial schemes and guarantees as well as Social Scoreboard indicators aiming to monitor implementation of the EPSR in the European Semester.

In January 2020 the European Commission proposed some planned initiatives that will contribute to the implementation of the EPSR, such as a European Gender Equality Strategy, an updated Skills Agenda for Europe, a Platform Work Summit, a Green paper on Ageing or a Strategy for persons with disabilities[85] – to mention just a few examples. A strict Action plan to implement the EPSR is to be presented in early 2021. This

[84] De Schutter, "The European Pillar," 3.

[85] Communication from the Commission – A strong social Europe for just transitions, COM(2020) 14 final.

shows that the social aspects of EU integration are and will remain a subject of interest for the foreseeable future, additionally taking into account the economic and social consequences of the COVID-19 pandemic and constantly present problem of an aging European society.

REFERENCES

Barnard, Catherine. "Regulating Competitive Federalism in the European Union? The case of EU Social Policy." In *Social Law and Policy in an Evolving European Union*, edited by Jo Shaw, 49–70. Oxford-Portland: Hurt Publishing, 2000.

Bednarowicz, Bartłomiej. "Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union." *Industrial Law Journal* 48, no. 4 (2019): 604–623.

Benoít-Rohmer, Florence. "The impact of the European Convention of Human Rights on the juridictionalisation of the European Committee of Social Rights." In *Social rights – Challenges at European, Regional and International Level*, edited by Nikitas Aliprantis, and Ioannis Papageorgiou, 233–251. Bruxelles: Editions juridiques Bruylant, 2010.

Bercusson, Brian. "The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level." *TRANSFER* 9, no. 2 (2003): 209–229.

Bruun, Niklas. "Protection against unjustified dismissal (Article 30)." In *European Labour Law and the EU Charter of Fundamental Rights*, edited by Brian Bercusson, 63–69. Baden-Baden: Nomos Publisher, 2006.

De Sadeller, Nicolas. *EU Environmental Law and the Internal Market*. Oxford: Oxford University Press, 2014.

De Schutter, Olivier. "The European Pillar of Social Rights and the Role of the European Social Charter in the EU legal order" (14 November 2018). https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132.

Frantziou, Eleni. "(Most of) the Charter of Fundamental Rights is Horizontally Applicable. ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et al." *European Constitutional Law Review* 15, no. 2 (2019): 1–18.

Frantziou, Eleni. "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality." *European law Journal* 21, no. 5 (2015): 657–679.

Garben, Sacha. "The Constitutional (Im)balance between "the Market" and "the Social" in the European Union." *European Constitutional Law Review* 13, no. 1 (2016): 23–61.

Garben, Sacha. 'The European Pillar of Social Rights and the European Social Charter." *Europe des droits* & *libertés/Europe of Rights* & *Liberties* 1 (2020): 65–78.

Garben, Sacha. "The European Pillar of Social Rights: An Assessment of its Meaning and Significance." *Cambridge Yearbook of European Legal Studies* 21 (2019): 101–127.

Garben, Sacha. "The European Pillar of Social Rights: Effectively Addressing Displacement?" *European Constitutional Law Review* 14, no. 1 (2018): 210–230.

Garben, Sacha, Clarie Kilpatrik, and Elise Muir. "Towards a European Pillar of Social Rights: upgrading the EU social acquis." *College of Europe Policy Brief* 1 (2017): 1–7.

Harvey, Philip. "Why is the right to work so hard to secure." In *The state of economic and social human rights*, edited by Lanse Minkler, 135–170. Cambridge: Cambridge University Press, 2013.

Kilpatrick, Clarie, Elise Muir, and Sacha Garben. "From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy Brief." *EU Law Analysis Blogpost* (20 March 2017). https://eulawanalysis.blogspot.com/2017/03/from-austerity-back-to-legitimacy.html.

Leczykiewicz, Dorota. "The Judgment in Bauer and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations." *European Review of Contract Law* 16, no. 2 (2020): 323–333.

Lenaerts, Koen. "Limits on Limitations: The Essence of Fundamental Rights in the EU." *German Law Journal* 20 (2019): 779–793.

Lörcher, Klaus, and Isabelle Schömann. *The European pillar of social rights: critical legal analysis and proposals*. Brussels: ETUI, The European Trade Union Institute, 2016.

Maduro, Miguel Poiares. "The Double Constitutional Life of the Charter." In *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, edited by Tamara Hervey, and Jeff Kenner, 270–299. Oxford-Portland-Oregon: Hart Publishing, 2003.

Piasna, Agnieszka. *The Social Scoreboard Revisited*. Brussels: ETUI European Trade Union Institute Background Analysis, 2017.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 145–164
DOI: https://doi.org/10.31743/recl.12359

EUROPEAN INVESTIGATION ORDER – SELECTED PROBLEMS ON POLISH IMPLEMENTATION

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ABSTRACT

The paper presents selected key problems of Directive 2014/41/EU regarding the European Investigation Order in criminal matters within the context of its Polish implementation in 2018. The paper focuses on the concept of investigative measures, administration of justice and exclusionary evidence rules as a limitation of issuing a Polish EIO. Additionally, the study attempts to approximate the reduced procedural mechanism in the context of issuing the ECI.

Keywords: European Investigative Order, investigative measures, evidence, Polish criminal procedure

1. INTRODUCTION

On February 8, 2018, another amendment to the Code of Criminal Procedure of 1997 entered into force, introducing the institution of the so-called European Investigation Order. The amendment implemented Directive 2014/41/EU of the European Parliament of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Adding another ample, albeit necessary, legal instrument of evi-

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dence to Chapter XIII of Polish Code of Criminal Procedure once again prompts us to consider the need to introduce a separate act on international cooperation in criminal matters[1].

The substantive goal of the implementation was - as stated by the Polish legislator - to ensure an efficient and effective system of mutual legal assistance in criminal matters between EU Member States in the field of evidentiary activities by introducing the possibility of issuing a European Investigation Order. In addition, it was pointed out that the Directive creates a mechanism for the efficient transmission of requests for taking evidence and the return of the results of these activities, without imposing on the Polish authorities the obligation to take evidence unknown to the act or inadmissible in domestic cases.

The implementation of the solutions adopted in the Directive allows Polish courts or authorities conducting preparatory proceedings to submit applications to other EU countries for the taking of evidence located in that country, and to EU countries to apply to Poland for the taking of evidence located in the territory of the Republic of Poland[2]. The adopted provisions of Art. 589w - 589zs k.p.k. introduce into Polish procedural criminal law a new instrument of evidence law in the form of the European Investigation Order, which, in the light of the classification of procedural acts adopted in Poland, will constitute a procedural decision in the form of an order to issue an EIO, on the one hand, in the event of a Polish procedural authority, and a decision on execution of the EIO issued by the Polish procedural authority at the request of the authorized procedural

[1] See art. 1 pkt 8 the Act of 10 January 2018 amending the Act - Code of Criminal Procedure and some other acts (Journal of Laws 2018, item 201). Sławomir Steinborn, "O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych," in *Reforma prawa karnego. Propozycje i Komentarze. Księga pamiątkowa prof. Barbary Kunickiej – Michalskie*j, eds. Jolanta Jakubowska-Hara, Jan Skupiński, and Celina Nowak (Warsaw: Wydawnictwo Naukowe Scholar, 2008), 436 and next; Arkadiusz Lach, "Europejski Nakaz Dochodzeniowy," in *Proces karny w dobie przemian. Przebieg postępowania*, eds. Sławomir Steinborn and Krzysztof Woźniewski (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2018), 509.

[2] See: Rządowy projekt ustawy o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw, Druk Sejmowy nr 1931 (Sejm VIII Kadencji), Governmental draft amendment to the code of criminal procedure of June 1, 1997, https://orka.sejm.gov.pl/Druki8ka.nsf/0/A9ED16CA28149400C12581BD00426457/%24File/1931.pdf.

authority of the EU Member State for the execution of the EIO issued by the authorized authority of the issuing State on the other[3].

The EIO is one of the forms of international cooperation (legal assistance) in criminal matters aimed at obtaining evidence. The Council of Europe was the first international organization to lay the legal basis of a modern mechanism for providing legal aid in Europe[4] and the European Union. The most important (also from the practical perspective) legal instrument is the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted on May 29, 2000 in Brussels.

Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility is essential for the genesis of the discussed legal instrument. The Introduction of this document rightly notes that the key to the effectiveness of the ongoing criminal investigations is closer cooperation in this field[5]. However, despite significant progress in the introduction of international sources and means of evidence instruments, in particular such as the EEW, there were still restrictions on the acquisition of certain relevant means of evidence[6]. Following an analysis of the usefulness of existing legal instruments for

[3] Krzysztof Woźniewski, "Europäische Ermittlungsanordnung als Chance?," in *Die grenzüberschreitende Informationsgewinnung und -verwertung am Beispiel der Zusammenarbeit der deutschen und polnischen Strafverfolgungsbehörden*, eds. Aleksandra Ligocka, Maciej Małolepszy, and Michael Soiné (Berlin: Logos Verlag, 2018), 95.

[4] European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and the Additional Protocol of March 17, 1978 (Journal of Laws 1999, No. 76, item 854; this Convention was amended by the Second Additional Protocol (Journal of Laws 2004, No. 139, item 1476), which entered into force for Poland on February 1, 2004).

[5] GREEN PAPER on obtaining evidence in criminal matters from one Member State to another and securing its admissibility Brussels, 11.11.2009, COM(2009) 624 final, 2.

[6] See: Green Paper, footnote 10, *Because of this limited scope of application, a European Evidence Warrant cannot be issued for the purpose of for example interviewing suspects or witnesses or obtaining information in real time, such as interception of communications or monitoring of bank accounts, as these types of evidence – although directly available – do not already exist. Nor can a European Evidence Warrant be issued for the purpose of for example conducting analyses of existing objects documents or data or obtaining bodily material, such as DNA samples or fingerprints, as these types of evidence – although already existing – are not directly available without further investigation or examination.*

obtaining evidence, the European Commission has asked Member States detailed questions on the future new legal tool for evidence.

Even though there has been a shift of the emphasis from the type of evidence obtained as part of international cooperation in criminal matters to the importance of the method of obtaining evidence as a criterion distinguishing ECI from a traditional application for legal aid, it should not be forgotten that this does not mean introducing such a significant change in international cooperation[7].

In the dissenting ambiguous position submitted by Poland, it was stated that Poland generally supported the proposal to simplify and accelerate mutual cooperation in criminal matters, even by replacing existing evidence-gathering solutions with one instrument based on this principle, noting that further work should be preceded[8]. In addition, according to Poland, the need to start work on the new legal instrument is premature as not resulting from the practice of judicial cooperation but from the *a priori* assumptions. Moreover, Poland argued that in the case of further works on a new instrument, it should cover all types of evidence, including real-time evidence, such as the capture of information in information and communication systems and the monitoring of bank accounts. At the same time Poland raised doubts as to the option of developing one catalog of standards for all types of evidence without exception, irrespective of their specific characteristics and proposed to include two levels of catalogues. Level one would represent an overall set of standards common to all types of evidence, covering fundamental issues relating to human rights. Lev-

[7] Compare: Anthony Farries, "The European Investigation Order: Stepping Forward with Care," *New Journal of European Criminal Law*, no. 4 (2010): 432. However, despite the fairly wide range of legal possibilities for investigating activities covered by the Directive, the main purpose of which was to find a way to organize and standardize the existing *ad unum* evidence gathering system, as aptly noted by Fabrizzio Siracusano, this objective does not seem to have been pursued. See: Fabrizio Siracusano, "The European Investigation Order for Evidence Gathering Abroad," in *EU Criminal Justice. EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, eds. Tommaso Rafaraci and Rosanna Belfiore (Berlin/Heidelberg: Springer International Publishing, 2019), Kindle Edition, https://doi.org/10.1007/978–3-319–97319–7_6.

[8] Sławomir S. Buczma and Rafał Kierzynka, *Europejski Nakaz Dochodzeniowy. Nowy model współpracy w sprawach karnych w unii europejskie*j (Warsaw: C.H. Beck, 2018), 152.

el two would include common standards for specific groups of evidence. Level detail of the principle of obtaining evidence should be correlated with the depth and severity of interference with the civil rights sphere.

2. THE CONCEPT OF INVESTIGATIVE MEASURES

The discussed European directive on the European Investigation Order (hereinafter EIO) was implemented by provisions of chapters 62c and 62d of the Code of Criminal Procedure of 1997, which regulated respectively the Polish request to a Member State of the European Union for the execution of an investigative measure pursuant to European investigation order (62c) and request of a member EU state of the European Union for the execution of an investigative measure pursuant to EIO (62d)[9].

The importance of evidence for court proceedings is best reflected by the famous statement of the classic of the theory of evidence law, *Jeremy Bentham, that "The art of procedure is in reality nothing but the art of administering evidence"*[10]. This statement should, of course, be regarded as somewhat exaggerated. The taking of evidence must be integrated into every model of the criminal trial, because the main goal of the criminal procedure is to implement the norms of substantive criminal law. The latter, requires, inter alia, establishing the fact of committing a crime, the perpetrator and other circumstances that may affect their scope of responsibility. The observation of Bentham is still relevant in the preparatory proceedings, the results of which - at least in Polish practice - affect to a large extent the results of the court proceedings. The emergence of an additional legal instrument in the field of evidentiary proceedings applicable throughout all the EU MS should generally be assessed positively, however, few detailed theoretical and legal problems of significant practical importance should be analyzed.

[9] Polish provisions of the Code of Criminal Procedure cited in the study use the translation made by Joanna Ewa Adamczyk, *Code of Criminal Procedure. The Code of Criminal Procedure* (Warsaw: C.H. Beck, 2018).

[10] Etienne Dumont, ed., *A Treatise on Judicial Evidence Extracted from the Manuscripts of Jeremy Bentham, Esq.*, 1st ed. (London: Messrs. Baldwin, Cradock, and Joy, Paternoster-Row, 1825), 2, Book I, chap. 1.

The first issue that should be noted is the subject of this specific evidence decision. If it is necessary to examine or obtain evidence, which is located or may be examined in the territory of another Member State of the European Union, the Polish court before which the case is pending or the public prosecutor conducting preparatory proceedings may issue EIO ex officio.

The subject of that specific evidence decision, irrespective of the country of origin, is, in essence, a request for a specific 'investigative action' necessary to obtain evidence. It can be either new evidence or evidence which the competent authorities of the executing State already have at their disposal. Another important issue is the notion of investigative action, especially that the legislators apply the term in a broad sense. The central legal term of both the directive and its Polish implementation in Code of Criminal Proceedings (CCP) is the investigative measure, therefore it is necessary to clarify the legal meaning of this term.

The Directive in its glossary (Article 2) does not introduce a legal definition of investigative measure, neither does the CCP, yet there is no doubt as to its core meaning. The first meaning that comes to mind for a lawyer dealing with Polish criminal procedure is the concept of an action by an authority authorized to investigate certain facts related to a legal issue. In the context of criminal law, the question of criminal responsibility for the act committed is to be decided during the criminal proceedings (inquiry and judicial).

As mentioned above the investigative measures referred to in the Directive relate to preparatory and judicial proceedings, which means that there are no grounds to limit them only to investigations or inquiries.

In order to decode the legal meaning of the notion "investigative measures", the most important is the purpose of the Directive, which is to gather evidence. This means that it covers all the activities of the procedural authorities including collecting, securing, consolidating the sources and the resulting evidence, and finally carrying out the evidence. Moreover, Chapter IV of the Directive, entitled "specific provisions on certain investigative measures", enumerates a broad catalogue of permissible investigative measures of a primarily evidential nature (i.e. temporary transfer to the issuing or executing State of persons held in custody to carry out an investigative measure, hear by videoconference or other audiovisual

transmissions, hearing by telephone conference, information on bank and other financial accounts). Chapter V of the Directive also indicates certain acts of a strong evidentiary nature, such as interception of telecommunications with technical assistance or without the assistance of another Member State.

Similarly, the provisions of the CCP regulating the EIO indicate at the evidential nature of the grounds for the request to a MS of EU for the execution of an investigative measure. Provisions of Article 589w § 1 CCP defines that the substantive premise of issuing EIO is the need to examine or obtain evidence, which is located or may be examined in the territory of another MS of the EU. Therefore, acquiring of (reliable) information about the evidence, which can be carried out means that the evidence can be obtained or carried out[11]. However, there is also additional grounds for EIO i.e. the need to protect traces and evidence of an offence from disappearing, distortion or destruction (paragraph 3 of article 589w CCP). This is a self-standing and sufficient substantial grounds for the adoption of the procedural decision in question. Article 589y § 1(3) of the CCP, contains obligation for the issuing authority of the ECI to include a description of an investigative measure requested or the evidence to be obtained or the facts to be established as a result of the investigative measure. The subject of an EIO can be also telephone wiretapping by technical means and recording the content of other conversations or communications, including correspondence sent by e-mail. All this indicates the importance of evidential character of the subject of the EIO. According to Article 589w § 4 of the CPP, the order for the issue of an EIO on the control and recording of the content of discussions with similar substance is legally equivalent to the standard "Polish" provision on so-called procedural eavesdropping issued pursuant to Article 237 § 1 CPP.

The introduction into Polish criminal procedure the EIO means equipping state authorities with another international legal instrument aimed to facilitate to prosecute criminal offences, when the evidence is or may be examined on the territory of another EU Member State. However,

[11] By obtaining the evidence it can be meant to take possession of evidence in kind for the purpose of inspecting or taking information on the personal evidence for the purpose of carrying out the interview.

the procedural benefits stemming from using the tool for the adequate authorities should be considered. The implemented instrument is also useful in the light of prosecution function of the criminal proceeding. This function refers to the procedural activity aimed at detecting and punishing a person guilty of a crime, including, inter alia, examination of evidence and establishing facts.

The first question to consider is whether the proposed material scope of the investigative measures, especially in terms of evidence, is adequate to the needs of law enforcement agencies? As mentioned above, the EIO allows to obtain and take evidence, secure traces and evidence against their loss, distortion or destruction. It can be achieved by conducting such activities as searches, control of correspondence, the transmission of information and parcels, control and recording conversations and even operational and reconnaissance measures.

3. INADMISSIBILITY OF THE EIO

3.1. Administration of justice

Taking into account the admissibility point of view, a crucial provision is art. 589x of the CPP imposing legal limitations on issuing ECIs by Polish procedural bodies i.e. firstly, if it is not in the interest of the administration of justice, secondly, the examination or obtaining of evidence is not permissible under Polish law.

Article 589x point 1 contains a general clause "administration of justice" in order to limit the situations when the order can be issued. This provision implements art. 6 sec. 1 lit. a of the Directive 2014/41/EU, which requires the application of the principle of proportionality when issuing the EIO[12]. As a consequence, the authorities issuing the EIO are obliged to consider and weigh the benefits of issuing the order and the consequences of its execution. In this way the rule of "restrained application" related to

[12] Hanna Kuczyńska, "Komentarz do art. 589x k.p.k.," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (SIP LEGALIS).

the EAW is also implemented in case of EIO[13]. In practice, at the moment the general cause can also be applied in order to "evade" proper justification of the decision. With time, it is up to the jurisprudence to specify and explain the core meaning of the notion "administration of justice".

The explanatory memorandum to the Polish implementation of the EIO did not refer at all to the interpretation of the notion "administration of justice", which would exclude applicability of the EIO in petty cases (as was the case with the European Arrest Warrant). The practice of issuing such orders should be based on the principle of proportionality, because it is not profitable to initiate international cooperation in matters of less importance. Nevertheless, the current wording of the Polish provision does not justify the narrow interpretation, which has been criticized by Academia[14]. The literature indicates that the premise of the "administration of justice" remains "undefined" by the legislator[15] and each time the authority must take into account the principle of proportionality balance the benefits of issuing an EIO and the consequences of its implementation[16].

At this point it is not possible to formulate a full list of factors that may help to assess whether such negative premise to issue EIO as the lack of interest of the administration of justice exists. One of them could be whether given investigative measure is useful to fulfil the prosecution function of the criminal proceedings. In the context of the tasks of the preparatory proceedings (investigation or inquiry), it would mean assessment whether the requested evidence will significantly contribute to the clarification of the circumstances of the case and in consequence to determine whether a prohibited act has been committed and whether there are grounds for bringing an indictment. In case of court proceedings, this will involve

[13] See: Barbara Nita-Światłowska, "Komentarz do art. 607b," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, 2018), 1505.

[14] Moreover, the jurisprudence explicitly assumes that the clause of the interest of the judiciary with regard to the EIO should be interpreted similarly to the European arrest warrant (see: Appellate Court in Kraków, Judgment of 14 August 2018, Ref. No. II AKz 403/18, KZS 2018, No. 9, item 42).

[15] Nita-Światłowska, "Komentarz do art. 607b," 1505.

[16] Similarly: Gwidon Jaworski and Aleksandra Sołtysińska, *Postępowanie w sprawach karnych ze stosunków międzynarodowych Komentarz* (Warsaw: Wolters Kluwer, 2010), 236–237.

an assessment whether the evidence or action is useful from the point of view of the jurisdictional function i.e. in order to judge if the accused is guilty of the offence charged to him. Of course, in both cases, procedural authorities should bear in mind the barriers related to a priori evaluation of evidence[17]. It follows from the doctrine of European law that it is also necessary to take into account the fact that the action requested by the Polish authority should be proportional to the gravity of the act, which may justify the application for coercive and more painful measures[18]. As a result, each authority has to decode this general clause on their own, which may lead to multiple interpretations and different decisions as the same act can be assessed differently in the light of administration of justice clause by the given authority. However, the interests of the judiciary cannot be equated with the objectives of criminal proceedings[19].

Therefore, the obligation of the judicial authority to establish the substantive truth in criminal proceedings will not be decisive for the assessment of this premise[20].

[17] In the justification of the proposal, the legislator also indicates the circumstances which, in its opinion, the authority should take into account when assessing the existence of the interest of the justice system (e.g. the possibility of establishing the factual circumstances with the help of evidence available in the country, possible extension of the proceedings related to the issuance and execution of the EIO, application for the issuing of an EIO by a party to the proceedings, as well as the possible possibility of charging the State Treasury with part of the costs of execution of the EIO (which is allowed by Art. 2 and 3 of Directive 2014/41 / EU).

[18] Silvia Allegrezza, "Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality," in *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, ed. Stefano Ruggeri (Berlin/Heidelberg: Springer, 2016), 62; see: Ariel Falkiewicz, "Interes wymiaru sprawiedliwości jako przesłanka pozytywna w międzynarodowej współpracy w sprawach karnych," *Europejski Przegląd Sądowy*, no. 5 (2018): 11.

[19] See: Tomasz Ostropolski, in Sławomir Buczma, Michał Hara, Rafał Kierzynka, Paweł Kołodziejski, Andrzej Milewski, and Tomaz Ostropolski, *Postępowanie w sprawach karnych ze stosunków międzynarodowych* (Warsaw: C.H. Beck, 2016), 780.

[20] Kuczyńska, "Komentarz do art. 589x".

3.2. Evidence exclusionary rules

The second procedural negative premise for issuing the European Investigation Order by the Polish procedural body is related to evidence exclusionary rules i.e. legal norms that under certain conditions prohibit the examination of evidence or restrict obtaining evidence. The Polish literature indicates three types of inadmissible evidence:

– rules that prohibit proving certain facts,
– rules that prohibit using certain types of evidence,
– rules that prohibit using of specific methods of obtaining evidence (tortures)[21].

It seems that in practice it is primarily about the evidence prohibitions falling into the second and third groups because they are most closely related to the rationale for the EIO Directive. However, it should be remembered that there are two types of the evidence exclusions belonging to the second group. Firstly, the ones unconditional in their nature, that cannot be rescinded (e.g. the prohibition of interrogating as a witness a defense counsel, lawyer or legal advisor who provides assistance to the detained, as to the facts which he found out while providing legal advice; interrogation of a clergyman as to the facts which he found out at confession; the prohibition of appointing certain people as experts, etc.). The second group of evidence exclusions are the conditional ones, depending on the will of the personal source of evidence (e.g. prohibition of questioning relatives as a witness, unless they agree to do it).

[21] Our attention should not escape the fact that the Directive does not in any way regulate the rules and conditions for the admissibility of using evidence obtained under the EIO in domestic proceedings. This is the exclusive field of national law. However, it is intended to facilitate this admissibility by focusing on the method of obtaining evidence based on the warrant. But it must be admitted that thanks to the EIO it is not only easier for the Member States to obtain evidence in the other Member States, but also to allow it to a greater extent in their criminal proceedings (cf: Grzegorz Krysztofiuk, "Europejski Nakaz Dochodzeniowy," *Prokuratura i Prawo*, no. 12 (2015): 76; Stefano Ruggeri, "Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues," in *Transnational Evidence and Multicultural Inquiries in Europe Developments in EU Legislation and New Challenges for Human Rights – Oriented Criminal Investigation in Cross–border Ca*ses, ed. Stefano Ruggeri (Berlin/Heidelberg: Springer, 2014), 10.

The third group of evidence prohibitions that prevent issuing an EIO by the Polish procedural authority includes evidence obtained by means of a crime; explanations, testimonies or statements made in conditions excluding freedom of expression; hypnosis; chemical or technical agents affecting mental processes or aimed at controlling unconscious reactions of the body due to the questioning[22].

Therefore, it is not possible to request the European Investigation Order in a situation of absolute evidentiary prohibition in Polish procedure (e.g. for the purpose of taking evidence in order to reveal the circumstances of providing a crown witness with personal protection or assistance). Similarly, questioning of clergymen as a witness residing in another EU member state as to the facts about which he learned during confession is inadmissible. Another example is related to obtaining of witness statement of evidence with the use of unacceptable interrogation methods (i.e., for example, statements obtained through the use of coercion or an unlawful threat against the interrogated person[23]). The evidentiary exclusion also concerns the use in one country of the accused's statements concerning the alleged offense if the statement was made before an expert or a doctor providing him with medical assistance - in another Member State. In this matter, one should share the view of H. Kuczyńska, who states that firstly, it should be unacceptable to evade the evidentiary exclusions established in the Polish criminal procedure by means of the EIO, and secondly, it should

[22] An attempt by law enforcement agencies to apply the provision of art. 168a of the Code of Criminal Procedure, the current wording of which does not preclude the use of the results of e.g. illegal search or illegal wiretapping as evidence. However, it should be assumed that the request to carry out an investigative measure within the limits of Art. 168a of the Code of Criminal Procedure it will simply not be taken into account by the EU Member State to which such a request would be addressed by way of an EIO, but I assume that such an EIO will not simply be issued in Poland.

[23] In accordance with art. 170 § 5 sec. 1–2 of CCP it is prohibited to: influence the statements of the testifying person by means of force or illicit threat, use hypnosis, chemical substances or technical means in order to influence psychical processes in the body of the testifying person or allow control of the unconscious reactions of the body in connection with the examination. Explanations, testimonies and statements made in circumstances precluding freedom of speech or obtained against the prohibitions mentioned in § 5, may not constitute evidence. Therefore it is unthinkable to issue EIO concerning the evidence collected with infringement the above provisions.

be also unacceptable to circumvent the bans, e.g. in order to interrogate as a witness of a person who exercised the right to refuse to testify in Poland, in a situation where he has no such right in another Member State. Even if the order was issued in such a situation, the court should declare the evidence thus obtained inadmissible[24]. However, it must not be forgotten that even if the evidence gathered under the EIO is also validated on the basis of Art. 587 of the Code of Criminal Procedure, according to which reports of inspections and interrogations prepared at the request of a Polish court or persons as accused, witnesses, experts or reports of other evidentiary activities carried out by courts or prosecutors of foreign countries or bodies acting under their supervision, may be read at the hearing on the terms specified in art. 389, 391 and 393, if the manner of carrying out the activities is not contrary to the principles of the legal order in the Republic of Poland[25]. It is permissible to read at the trial to an appropriate extent, under the principles laid down in Article 391 of the Code of Criminal Procedure, minutes of witness testimony given by the witness in preparatory proceedings conducted by a prosecutor of a foreign State or an authority acting under his supervision or before a court of a foreign State, if the manner of conducting these actions is not contrary to the principles of the legal order in the Republic of Poland, even though these actions were not undertaken at the request of a Polish court or prosecutor (Article 587 of the Code of Criminal Procedure) or before taking over the prosecution (Article 590 § 4 of the Code of Criminal Procedure)[26]. Therefore it must be all the more permissible to read the evidence obtained under the ECI.

4. REDUCED PROCEDURAL MECHANISM

The second characteristic feature of the regulations implementing the EIO Directive is related to the procedural mechanism of issuing a spe-

[24] Kuczyńska, "Komentarz do art. 589x".

[25] Martyna Kusak, "Obrońca a europejski nakaz dochodzeniowy," *Palestra*, no. 3 (2019): 36.

[26] Cf Polish Supreme Court, Statement of 28 March 2002, Ref. No. V KKN 122/00, OSNKW 2002, no. 7–8, item 60.

cific procedural decision on the EIO. This mechanism consists of the procedural bodies authorized to issue the decision and the procedure for initiating the action.

The authorities authorized by law to issue an EIO include the court before which the case is pending, the public prosecutor conducting preparatory proceedings and the Police, as well as the authorities of the Border Guard, the Internal Security Agency, the National Revenue Administration, the Central Anticorruption Bureau, the Military Police (in scope of their competence) and other authorities enumerated in special provisions. The EIO in this case will require the approval of the prosecutor (art. 589w § 2 of the CCProcedure[27]) issued after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1.

Noteworthy are solutions reducing the formalism relating to evidence activities that may be the subject of an EIO. For example, according to the Art. 589w § 4 of the CCP the EIO can be issued instead of the court's consent (normally obtained on the basis of Art. 237 § 1 of the CCP) to control and record the content of telephone conversations and recording, using technical means, the content of other conversations or transmissions of information, including correspondence sent by e-mail. However, this provision also contains a reference to the provisions of Chapter 26 of the Code of Criminal Procedure, which means that the Polish authority may issue a European Investigation Order for the purpose of applying in the state of control and recording only the content of telephone conversation, i.e. the order must concern only the prosecution of

[27] Cf. art. 2 lit.c (ii) EIO Directive 2014/41. Polish regulation concerning that issue is fully compatible with the meaning of this provision (see: CJEU Judgment of 8 December 2020 (Grand Chamber) according to: Article 1(1) and Article 2(c) of Directive 2014/41/EU regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

the crimes described in this chapter and the persons referred to in art. 237 § 4 CCP. An interesting competence problem arises concerning the provisions of Chapter 26 CCP, as to the authority who decides on the use of wiretapping in the so-called urgent cases. So, according to art. 237 § 2 CCP in urgent cases, the surveillance and telephone tapping may be ordered by the public prosecutor who is obliged to request the approval of the court within three days. In the context of EIO Directive and Article 237 § 2 CCP, two interpretations have emerged concerning the question whether the EIO issued by prosecutor must be validated by the court or the prosecutor is fully empowered to issue such a decision itself.

According to the first, neither the EIO Directive nor the Polish law provides for the possibility of subsequent approval of the investigative order issued by the prosecutor, because it will not apply in international cooperation conducted on the basis of the EIO. The subsequent approval within the EIO procedure is not required even if it could be applied within the proceedings on Polish territory, it would be a foreign order should be issued only after its "subsequent approval" by the court, and thus de facto issued by the court[28].

The second possible interpretation is the following: since the decision to issue an EIO replaces the decision of the court referred to in Art. 237 § 1 of the CPP, it may mean that the prosecutor is competent to issue EIO in urgent cases without consecutive court authorizations. This interpretation is based on the correct assumption, that since the communication control order is subject to appropriate regulations in the executing state, and at the same time it is assumed that there is mutual trust in the guarantee procedures, the participation of the Polish court in issuing such an EIO is unnecessary[29]. In my opinion, the second interpretation, is more practi-

[28] See: Buczma and Kierzynka, *Europejski*, 218.

[29] Such an interpretation would be consistent with the assumptions of the concept of mutual recognition of judgments in the European Union: Buczma and Kierzynka, *Europejski*, 219. However, the indicated authors rightly point out the doubts arising from the guarantees contained in the Polish constitution regarding the right to the protection of private life (Article 47 of the Constitution of the Republic of Poland (Journal of Laws 1997, No. 78, item 483, as amended). Moreover, they propose an intermediate solution, according to which the EIO in question would be issued by a Polish prosecutor and addressed directly to the competent authority of the executing State (without the partici-

cal and should be applied without violating the axiology of the EIO Directive and the guarantee functions of the relevant provisions.

Another manifestation of the reduced formalism of intra-EU cooperation in criminal proceedings is normative equivalence, because under the provision of Art. 589w § 5 CCP the decision to issue the EIO concerning evidence, in case of which admission, obtaining or examination requires the issue of a decision, replaces that decision. A. Sakowicz aptly points out that the provisions on the EIO break the practice of issuing two decisions: "substantive" related to procedural action at national level and "technical" related to applying for the execution of a "substantive" decision to a Member State of the Union. Article 589w § 5 of the Code of Criminal Procedure is the exemption from the rule to issue two separate decisions, as the decision to issue an EIO replaces the decision to take evidence[30].

The instrument devoted to investigative measures must not fail to regulate operational activities. It should be noted that the Polish implementation (art. 599w § 7 CPP) takes into account two modes of taking decisions regarding classified evidence. The first – an autonomous mode i.e. issued by the authorities of preparatory proceedings (and without the participation of judicial authorities[31]) The second mode includes the decisive participation of court when the decision on operational control is issued by a competent court at the request of a competent police authority previously approved by a public prosecutor. The second mode is applied in case of operational control of covert measures such as: the content of interviews conducted with the use of technical means, including using telecommunications networks; recording images or sound of people in interiors, means of transport or places other than public places; obtaining and recording the content of correspondence, including correspondence carried out by means of electronic communication; obtaining and recording data

pation of a Polish court). At the same time, the prosecutor would include in the warrant a request that the request for control and recording of communication be examined by the court of the executing state (ibidem).

[30] Andrzej Sakowicz, "Komentarz do art. 589w k.p.k.," in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (LEGALIS, 2020).

[31] It regards to such under cover measure as covert acquisition, sale or seizure of objects from crime, forfeited, or whose production, possession, transport or trade are prohibited, accepting or giving financial benefits.

contained in IT data carriers, telecommunications terminal devices, IT and tele-information systems; gaining access and controlling the content of shipments.

Both described modes fall within the scope of regulation of Art. 589w § 7, which stipulates that the EIO requires the approval of the public prosecutor competent according to separate provisions, unless the admission or obtaining of the evidence is reserved for the court. In that case, the issuance of the END requires the approval of a court competent on the basis of separate provisions.

However, there is also another possibility: an agreement between respective procedural bodies in MSs on the conditions for the execution of the order and the duration of the actions requested. The CPC does not specify the form of such arrangements, so it should be assumed that they can be concluded in any form, e.g. by exchanging letters, also by electronic means, without the need to conclude formal agreements, cooperation agreements, etc[32].

The formal side of the decision on the EIO does not seem complicated and the key element of this decision is to identify the requested investigative measure subject to the EIO or the evidence to be obtained, or the circumstances to be established as a result of the investigative measure, together with a description of the facts of the case. The EIO may be issued both ex officio and at the request of a party, defense attorney or representative. This means that the parties are granted significant evidentiary right, and taking into account the subject of a possible request in the light of the provisions on the EIO, we are practically dealing here with a quasi-evidence application. However, it seems that the grounds for refusing to issue an EIO in this case will be, not based on Art. 170 of the Code of Criminal Procedure (specifying the grounds for dismissing an evidentiary application), but the previously indicated prohibitions of evidence and the interest of the administration of justice, which, in a way, consume the grounds for dismissing an evidentiary application. From a theoretical point of view, allowing the parties to show an evidence initiative in this regard should be assessed positively, hoping that the requests coming from the parties would

[32] Buczma and Kierzynka, *Europejski*, 222.

not be perceived by the procedural authorities as "worse" and as a result the authority will refuse to take them into account.

5. CONCLUSION

1. After the entry into force of the amendment to the Code of Criminal Procedure, implementing the ECI Directive in the Polish evidence law, there appeared a procedural solution that significantly facilitates taking evidence in the framework of intra-EU international cooperation.
2. The broad scope of the investigative measures with prevailing element of evidentiary activities will enable the authorities in preparatory proceedings to effectively carry out their statutory tasks in the field of collecting, securing and, if necessary, preserving evidence for the court.
3. The above will be achieved on the basis of formal decision-making mechanism adequate to the needs of the process and guarantee functions of the criminal procedure.[33]
4. The effective system of evidence exclusions in the Polish criminal procedural law certainly cannot be considered as a factor that limits the opportunities created by the evidence instrument discussed here.

REFERENCES

Adamczyk, Joanna Ewa. *Code of Criminal Procedure. The Code of Criminal Procedure*. Warsaw: C.H. Beck, 2018.

Allegrezza, Silvia. "Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality." In *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, edited by Stefano Ruggeri, 51–67. Berlin/Heidelberg: Springer, 2016.

[33] On this point, I do not share the too strict assessment of the EIO formal mechanism expressed by Grzegorz Krysztofiuk, "Europejski Nakaz Dochodzeniowy," 97.

Buczma, Sławomir S., and Rafał Kierzynka. *Europejski Nakaz Dochodzeniowy. Nowy model współpracy w sprawach karnych w unii europejskie*j. Warsaw: C.H. Beck, 2018.

Buczma, Sławomir, Michał Hara, Rafał Kierzynka, Paweł Kołodziejski, Andrzej Milewski, and Tomasz Ostropolski. *Postępowanie w sprawach karnych ze stosunków międzynarodowych*. Warsaw: C.H. Beck, 2016.

Dumont, Etienne, ed. *A Treatise on Judicial Evidence Extracted from the Manuscripts of Jeremy Bentham, Esq.* 1st ed. London: Messrs. Baldwin, Cradock, and Joy, Paternoster-Row, 1825.

Falkiewicz, Ariel. "Interes wymiaru sprawiedliwości jako przesłanka pozytywna w międzynarodowej współpracy w sprawach karnych." *Europejski Przegląd Sądowy*, no. 5 (2018): 4–12.

Farries, Anthony. "The European Investigation Order: Stepping Forwardwith Care." *New Journal of European Criminal Law*, no. 4 (2010): 425–432.

Jaworski, Gwidon, and Aleksandra Sołtysińska. *Postępowanie w sprawach karnych ze stosunków międzynarodowych Komentarz*. Warsaw: Wolters Kluwer, 2010.

Krysztofiuk, Grzegorz. "Europejski Nakaz Dochodzeniowy." *Prokuratura i Prawo*, no. 12 (2015): 74–98.

Kuczyńska, Hanna. "Komentarz do art. 589x k.p.k." In *Kodeks postępowania karnego. Komentarz*, edited by Jerzy Skorupka. SIP LEGALIS.

Kusak, Martyna. "Obrońca a europejski nakaz dochodzeniowy." *Palestra*, no. 3 (2019): 29–38.

Lach, Arkadiusz. "Europejski Nakaz Dochodzeniowy." In *Proces karny w dobie przemian. Przebieg postępowania*, edited by Sławomir Steinborn, and Krzysztof Woźniewski, 507–516. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2018.

Nita-Światłowska, Barbara. "Komentarz do art. 607b." In *Kodeks postępowania karnego. Komentarz*, edited by Jerzy Skorupka, 1504–1506. Warsaw: C.H. Beck, 2018.

Ruggeri, Stefano. "Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues." In *Transnational Evidence and Multicultural Inquiries in Europe Developments in EU Legislation and New Challenges for Human Rights – Oriented Criminal Investigation in Cross–border Cases*, edited by Stefano Ruggeri, 3–25. Berlin/Heidelberg: Springer, 2014.

Sakowicz, Andrzej. "Komentarz do art. 589w k.p.k." In *Kodeks postępowania karnego. Komentarz*, edited by Andrzej Sakowicz. LEGALIS, 2020.

Siracusano, Fabrizzio. "The European Investigation Order for Evidence Gathering Abroad." In *EU Criminal Justice. EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, edited

by Tommaso Rafaraci, and Rosanna Belfiore, 85–101. Berlin/Heidelberg: Springer International Publishing, 2019. Kindle Edition. https://doi.org/10.1007/978–3-319–97319–7_6.

Steinborn, Sławomir. "O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych." In *Reforma prawa karnego. Propozycje i Komentarze. Księga pamiątkowa prof. Barbary Kunickiej – Michalskie*j, edited by Jolanta Jakubowska-Hara, Jan Skupiński, and Celina Nowak, 436–450. Warsaw: Wydawnictwo Naukowe Scholar, 2008.

Woźniewski, Krzysztof. "Europäische Ermittlungsanordnung als Chance?." In *Die grenzüberschreitende Informationsgewinnung und -verwertung am Beispiel der Zusammenarbeit der deutschen und polnischen Strafverfolgungsbehörden*, edited by Aleksandra Ligocka, Maciej Małolepszy, and Michael Soiné, 91–104. Berlin: Logos Verlag, 2018.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 165–176
DOI: https://doi.org/10.31743/recl.12428

UNIVERSALISM OF HUMAN RIGHTS: NOTION OF GLOBAL CONSENSUS OR REGIONAL IDEA

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ABSTRACT

This article deals with the universal nature of human rights recognised by all civilisations and legal systems. The important thing is that the actions of the state are consistent with the content of these rights is justified by the fact that they protect the dignity of every human being and enable cooperation between people. Universal treaties impose the same international legal obligations in the field of human rights on as many states as possible. Regional treaties perform this function in relation to a group of states. It seems, however, that for the full protection of an individual's rights, the ideas of universalism and regionalism of human rights need to complement each other. No regional system can exist if it is inconsistent with the norms and principles of the Universal Declaration of Human Rights.

Keywords: universalism, regionalism, human rights, human dignity

1. INTRODUCTION

The universal nature of human rights has been recognised by all civilisations and legal systems, as evidenced by the universal acceptance of the Universal Declaration of Human Rights[1]. The authors often focus on

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presenting the universality of geography, history, culture and political diversity. It is also possible to study universalism in three aspects: territorial, subjective and functional. Territorial approach means that human rights apply globally, both inside and outside planet earth. Subjective approach means that human rights apply to all people equally, without any subjective exclusions. The functional approach requires the creation of universal means of protection that can be used by all people. Universalism does not mean, however, that there cannot be certain differences in local and regional approaches to human rights[2].

However, universalism raises questions about the definition of the concept of universality. When answering this question, particular attention should be paid to whether the content of provisions contained in treaties and its acceptance is universal. The function of universal treaties is to impose the same international legal obligations in the field of human rights on the largest possible number of countries in the world. Regional treaties fulfil a similar function in relation to a given group of states. This gives rise to the question of the possibility of implementing the ideas of universalism and regionalism of human rights and their mutual complementation. It is emphasised that no regional system can exist if it is inconsistent with the norms and principles of the Universal Declaration of Human Rights[3]. The universality of these rights is justified by the fact that they protect the dignity of every human being and enable cooperation between people.

2. UNIVERSALISM IN THE PROTECTION OF HUMAN RIGHTS

The principle of the universalism of human rights presupposes that everyone is entitled to these rights because of their humanity and so they apply wherever there is a human being. The universality of human rights is justified by reference to the dignity of the human person. It is the value

[1] Anna Michalska, *Prawa człowieka w systemie norm międzynarodowych* (Warszawa & Poznań: Państwowe Wydawnictwo Naukowe, 1982), 292.

[2] Arnold Rainer, "Reflections on the Universality of Human Rights," *Ius Gentium*: *Comparative Perspectives on Law and Justice*, no. 1 (2013): 1–12.

[3] Arthur Henry Robertson, *Human Rights in the World* (Manchester: Manchester University Press, 1972), 158–160.

of dignity that underlies the concept of human rights[4]. Universalism in the protection of human rights means basing this protection on international legal instruments of universal application. In practice, these are international instruments that have been developed within the framework of the United Nations (UN)[5]. In fact, the universalism of human rights implies the assumption of their universality and applicability as a concept everywhere in the world and for everyone. Universalism is not an attempt to impose a description of a reality in which human rights are universally respected[6].

Human rights treaties have been adopted under the auspices of the UN, which is the most universal international organisation. It has even been joined by entities such as the Holy See, which has ratified the Convention on the Rights of the Child[7], and some territories such as Hong Kong, now a special administrative region of the People's Republic of China, which has recognised the rights contained in the International Covenant on Civil and Political Rights[8]. Moreover, although China is not bound by this treaty, it has accepted its obligations. Hence, it is assumed that even if no agreement has been reached on the axiological justification of individual provisions, there is agreement as to the practical goals to be achieved. From a purely legal perspective, it is assumed that the consolidation of the universal nature of human rights in international documents, such as the Universal Declaration of Human Rights[9], the Charter

[4] Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *Prawo międzynarodowe praw człowieka* (Warszawa: C.H. Beck, 2020), 20.

[5] Maciej Lubiszewski, "Kodyfikacja ochrony praw człowieka w systemach regionalnych," in *Prawa człowieka i ich ochrona*, ed. Bożena Gronowska *et al.* (Toruń: Wydawnictwo Dom Organizatora, 2010), 78–79.

[6] Michał Balcerzak, *Podstawy międzynarodowej ochrony praw człowieka* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2017), 42.

[7] UN, Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20, UN Doc. No. 27531 November 1989.

[8] UN, International Covenant on Civil and Political Rights (ICCPR) (adopted on 16 December 1966; entered into force on 23 March 1976), UNTS 999:171.

[9] UN, Universal Declaration of Human Rights adopted 10 December 1948, G.A. Res. 217A(III), U.N.Doc. A/810 at 71 (1948).

of the United Nations[10] and international treaties, is sufficient to state that human rights are universal in a normative or juridical sense[11]. It is recognised that the catalogue of human rights contained in the documents of international law includes certain material and spiritual needs that are universal and permanent, which implies the universal nature of human rights[12]. Each individual has equal and inalienable rights resulting from their inherent dignity[13].

The universalist tendency is reinforced by the jurisprudence and interpretation adopted by the Human Rights Committee in Geneva, which has recognised that in the case of state succession, a new state resulting from the division of a former state is bound by the human rights treaties adopted by the former state and succession is automatic[14]. Moreover, the committee has found that a human rights treaty cannot be terminated as no termination clause has been foreseen. This interpretation is based on a common principle: human rights treaties are not made for states, but for people. Since a state has committed itself to protecting them, no other action must lead to questioning it. This is a correct but quite progressive thesis which, in borderline situations, may actually even lead to a derogation of the general public international law[15].

If we consider international documents in the field of human rights and the number of their ratifications, we will notice that the International Convention on the Rights of the Child is the most frequently ratified document. Namely, it has been ratified by 196 countries (except the United States and Somalia). It is followed by the Convention on the Elimination

[10] UN, Charter and Statute of the International Court of Justice, signed on 26 June 1945 at the San Francisco Conference.

[11] Balcerzak, *Podstawy*, 42.

[12] Michalska, *Prawa człowieka*, 294.

[13] Orzeszyna, Skwarzyński, and Tabaszewski, *Prawo międzynarodowe*, 22.

[14] HRC General Comment No. 6, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1of 1997.

[15] Jean Dhommeaux, "Universalisme et régionalisme(s)," in *Dictionnaire des Droits de l'Homme*, dir. Joël Andriantsimbazovina, Hélène Gaudin, Jean-Pierre Marguénaud, Stéphane Rials, and Frédéric Sudre (Paris: Quadrige/PUF, 2008), 959. Maciej Lubiszewski, "Kodyfikacja ochrony praw człowieka w systemach regionalnych," in *Prawa człowieka i ich ochrona*, ed. Bożena Gronowska *et al.* (Toruń: Wydawnictwo Dom Organizatora, 2010), 78–79.

of All Forms of Discrimination against Women, ratified by 180 states (except the United States and Iran, among others). Next are the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights that have been ratified by 174 and 170 states, respectively. However, it should be emphasised that China has not ratified the former and the United States has not ratified the latter[16]. However, the numbers indicated should be approached with some caution. Some countries are more important in the international arena, while China's failure to ratify the International Covenant on Civil and Political Rights is solely due to the country's special interest.

It is also known that the ratifications of individual international instruments do not have the same weight and importance. Moreover, it is also assumed that in addition to the visible element of non-universality, elements of universality are also formed[17]. For example, a country that does not practice torture may not be willing to ratify the 1984 Convention against Torture. It may assume that since there is no torture or inhuman or degrading treatment or punishment on the territory of his country, such a situation is universal, and torture is not a problem for other countries, especially for the same system[18]. The important thing is that the actions of the state are consistent with the content of this instrument. Moreover, it seems unnecessary to multiply the ratifications of documents with similar content as this may ultimately harm one of these instruments. It is more important for the state to respect human rights than to ratify further conventions with similar content. It seems that the purpose of subsequent conventions - especially those ensuring effective means of controlling their observance - is to strengthen the protection of an individual as compared to that resulting from the existing provisions[19].

Paying attention to the apparent universalism of conventional law, one cannot ignore the issue of reservations to treaties. Two attitudes to this

[16] UN, International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted on 16 December 1966; entered into force 3 January 1976), UNTS 993:3.

[17] Dhommeaux, "Universalisme," 959.

[18] In practice, this concerned Sweden, whose representatives visited nursing homes in Bulgaria under the CAT mechanism.

[19] It is clearly visible in the example of the EU and the relationship of the EU system to the system of the Council of Europe and the constitution of the its Member States.

problem can be adopted: prohibiting the raising of objections and privileging the content and normativity of an instrument by limiting its universality, or accepting the objections raised and privileging universality by limiting normativity. Is it more important that fewer countries commit more or that more countries commit less? It is impossible to have the attributes of universality and normativity at the same time. International human rights law is also in favour of universality. The reservations are numerous and limit the involvement of states when implemented, in some cases because of their general nature[20]. This is the case for some Islamic countries when it comes to the Convention on the Rights of the Child. The solution to this problem is not facilitated by the Vienna Convention on the Law of Treaties[21], the provisions of which provide for a solution in the form of an objection leading to the actual failure to respond to the reaction of states due to their lack of interest, interest or insufficient resources[22].

The protection of universalism is based on arguments related to the dignity of the human person, as well as cultural values such as justice, mutual respect, fraternity and social cooperation[23]. The argument for the principle of universalism is the reference to human needs – identical regardless of cultural or political differences[24]. An essential aspect in justifying the principle of universalism may be recognition of human rights as a supra-cultural civilisation achievement resulting from efforts taken to tame barbarism, oppression, brutality and disrespect for human life and so on[25]. The universalism of human rights facilitates the introduction and implementation of the principle of sustainable development[26].

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[20] Robert Tabaszewski, "The Permissibility Of Limiting Rights And Freedoms In The Europe-an And National Legal System Due To Health Protection," *Review of European and Comparative Law* 3 (2020): 53–89, https://doi.org/10.31743/recl.6100.

[21] UN, Vienna Convention on the Law of Treaties, May 23, 1969, Vienna, 1155 U.N.T.S.331, 8I.L.M. 679.

[22] Dhommeaux, "Universalisme," 960.

[23] Wiktor Osiatyński, *Prawa człowieka i ich granice* (Kraków: Znak, 2011), 252.

[24] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2010), 28.

[25] Osiatyński, *Prawa człowieka*, 253.

[26] See: Krzysztof Orzeszyna and Robert Tabaszewski, "The legal activities taken by local authorities to promote sustainable development goals: Do the Polish local authorities need to adopt new local strategies?," *Lex Localis - Journal of Local Self-Government* 4 (2021);

However, it should be noted that despite civilised nations having recognised universality, the universal system is still largely imperfect at this stage. This is confirmed by the statistics of submitted declarations. Currently, 116 states have accepted the jurisdiction of the Human Rights Committee, and an increasing number of states have also accepted the jurisdiction of the Committee against Torture and the Committee on the Elimination of Racial Discrimination. Moreover, the use of comments leaves much to be desired as they are not always considered obligatory due to the nature of the committees themselves[27].

3. PLURALISM OF THE REGIONAL SYSTEMS OF HUMAN RIGHTS PROTECTION AS A PRACTICAL EXPRESSION OF PARTICIPATION IN UNIVERSALITY

Among the main arguments for creating regional systems of human rights protection is the diversity of the modern world. Therefore, it is emphasised that it is currently impossible to guarantee equal rights and freedoms by all states to the extent and at the level set out by the Covenants. Article 52 of the Charter of the United Nations is interpreted in the considerations on human rights as the recognition and acceptance of regional treaties subject to their compliance with universal treaties[28]. Therefore, it is believed that regional treaties may be a stage in reaching full agreement on a universal scale, not only as to the catalogue of rights, but also on the methods of their implementation. When work began on the development of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1949[29], the bodies of the Council of Europe decided

Robert Tabaszewski, "Achieving the Sustainable Development Goals in Europe and East Asia: role of region-al organizations in monitoring right to good health and well-being," *Ius Novum* 2 (2019): 250–269, https://doi.org/10.26399/iusnovum.v13.2.2019.25/r.k.tabaszewski.

[27] Dhommeaux, "Universalisme," 962.

[28] Thomas Buergenthal, "International and Regional Human Rights Institutions: Some Exemples of their Interaction," *Texas International Law Journal* 12 (1977): 323.

[29] Council of Europe, European Convention of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplement-

that it should take into account the existing UN acquis in the field of international protection of human rights[30]. Hence, it is noted that most regional instruments refer to universal instruments such as the Universal Declaration of Human Rights. This is the case with the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that:

"Considering that this Declaration [the Universal Declaration of Human Rights – K.O.] aims at securing the universal and effective recognition and observance of the Rights therein declared… as the governments of European countries… Have agreed… to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration(…)".

The American Convention on Human Rights emphasises the Universal Declaration of Human Rights, as does the Protocol of San Salvador of 17 November 1988. Considering the possibility of conflicts between the proposed American Convention and the Covenants, in 1967, the Council of the Organization of American States turned to its member states, which expressed an almost universal intention to ratify the Covenants. However, these states postulated that the former regional convention should be compatible with them in its basic assumptions[31]. The African Charter on Human and Peoples' Rights refers to the Charter of the United Nations and to the Universal Declaration of Human Rights. The African Charter on the Rights and Welfare of the Child refers in a synthetic manner to the instruments of the Organisation of African Unity, the UN, in particular to the International Convention on the Rights of the Child[32].

In its advisory opinion of 24 September 1982, the Inter-American Court of Human Rights affirmed that: 'A certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived.' The preamble recognises that the principles underlying the American Convention on Human Rights are also those promulgated

ed by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

[30] Arthur Henry Robertson, *Human Rights in Europe* (Manchester: Manchester University Press, 1963), 6–16.

[31] OEA/ser. G/IV C 2/787, Rev. 3.

[32] Dhommeaux, "Universalisme," 961.

in the Universal Declaration of Human Rights[33]. On numerous occasions, the court invokes general observations of the Human Rights Committee[34], decisions of the Human Rights Committee, rulings of the European Court of Human Rights, and even decisions of the African Commission on Human and Peoples' Rights[35].

This jurisprudence is complementary to reinforcing, for example, a universal tendency towards the abolition of the death penalty[36]. Similarly, there is a regional tendency to universalise one or the other norm. This is the case of the Inter-American Court of Human Rights, among others, which has recognised that 'in the present state of evolution of international law, the fundamental principle of equality and non-discrimination has entered into the domain of *ius cogens*'[37].

The relations between these systems show the pluralism of the forms expressed, *inter alia*, in autonomy with regard to the interpretation of rules, by each instrument and also a firm will not to confuse controls. Thus, the Human Rights Committee did not approve the interpretation of the International Covenant on Civil and Political Rights in the light of the provisions of the European Convention on Human Rights on freedom of expression, as was requested by many states which raised objections or made interpretative declarations in this regard. Therefore, the covenant has its own interpretation of the law. The autonomous concepts of 'civic' rights and 'similar matters' are the evidence of this autonomy[38].

There are many similarities between the covenants and regional conventions, so emphasising the differences is unjustified. The criterion for creating regional systems should be identical or similar political, social,

[33] Opinion, Par. 41, see: Robert Tabaszewski, "Międzyamerykański Trybunał Praw Człowieka jako panamerykański organ sądowniczy," in Katarzyna Krzywicka and Joanna Kaczyńska, *Oblicza Ameryki Łacińskiej* (Lublin: Wydawnictwo UMCS, 2010), 89–90.

[34] Opinion of 1 October 1999, Par. 113–115.

[35] Inter-American Court of Human Rights, Opinion of 17 September 2003, § 90–95, Par. 90–95.

[36] ECtHR Judgement of 12 May 2005, Case Öcalan v. Turkey, application no. 46221/99, hu-doc.int; Human Rights Committee, the judge's comment against Canada of 5 August 2003; Inter-American Court of Human Rights, Opinion of September 1983.

[37] Inter-American Court of Human Rights, Opinion of 17 September 2003, § 90–95.

[38] Dhommeaux, "Universalisme," 960.

economic and cultural elements. It would therefore be unjustified to give different meanings to identical or similar phrases only because they appear in different international instruments, the more so as the covenants and regional conventions were not inspired by different concepts of human rights[39].

General instruments and some special instruments sometimes exist in the form of two documents. In addition to the two covenants of 1966, in Europe, there are the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter. In America, on the other hand, there are the Pact of San Jose, Costa Rica and the Protocol of San Salvador. The abolition of the death penalty is provided for in the Protocol of the International Covenant on Civil and Political Rights, two protocols (6 and 13) to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocol to the American Convention. Despite the fact that there is the International Convention on the Rights of the Child, a different convention has been developed in the African system. This competitiveness is only important for those states which wish to ratify both of these documents. This situation leads either to a refusal to ratify or to duplication of ratified documents[40]. However, it should be emphasised that it seems pointless to sign regional treaties, the content of which will be a faithful repetition of universal treaties, unless it is done in order to activate a control mechanism[41]. Both universal and regional treaties should be applied complementarily. The principle of complementary application of universal and regional treaties means that an individual may rely on this international instrument which gives them fuller and more effective protection of their rights. Only by adopting such an interpretation is it possible to apply the regional covenants and treaties simultaneously in a way that will guarantee the fullest protection of human rights.

[39] Michalska, *Prawa człowieka*, 297.
[40] Dhommeaux, "Universalisme," 961.
[41] Michalska, *Prawa człowieka*, 306.

4. CONCLUSIONS

The universal nature of human rights has been recognised by all civilisations and legal systems despite the questions of universality. The rationale for the universality of these rights is that they protect the dignity of every human being and enable cooperation between people. Universal treaties impose the same international legal obligations in the field of human rights on as many states as possible. Regional treaties, on the other hand, perform this function in relation to a group of states. They may be a stage in reaching full agreement on a universal scale, not only as to the catalogue of rights, but also the methods of their implementation. The pluralism of regional systems in some way also indicates the participation of these systems in universality. Therefore, it seems that both universal and regional treaties should be applied complementarily, because only then can an individual effectively rely on this international instrument, which gives them a more complete and effective protection of their rights. Only an interpretation of the complementary application of the treaties will guarantee the fullest protection of human rights.

REFERENCES

Balcerzak, Michał. *Podstawy międzynarodowej ochrony praw człowieka*. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2017.

Buergenthal, Thomas. "International and Regional Human Rights Institutions: Some Exemples of their Interaction." *Texas International Law Journal* 12 (1977): 321–326.

Dhommeaux, Jean. "Universalisme et régionalisme(s)." In *Dictionnaire des Droits de l'Homme*, dir. Joël Andriantsimbazovina, Hélène Gaudin, Jean-Pierre Marguénaud, Stéphane Rials, and Frédéric Sudre, 959. Paris: Quadrige/PUF, 2008.

Kälin, Walter, and Jörg Künzli. *The Law of International Human Rights Protection*. Oxford: Oxford University Press, 2010.

Lubiszewski, Maciej. "Kodyfikacja ochrony praw człowieka w systemach regionalnych." In *Prawa człowieka i ich ochrona*, edited by Bożena Gronowska, Tadeusz Jasudowicz, Michał Balcerzak, Maciej Lubiszewski, and Rafał Mizerski, 78–79. Toruń: Wydawnictwo Dom Organizatora, 2010.

Michalska, Anna. *Prawa człowieka w systemie norm międzynarodowych*. Warszawa & Poznań: Państwowe Wydawnictwo Naukowe, 1982.

Orzeszyna, Krzysztof, Michał Skwarzyński, and Robert Tabaszewski. *Prawo międzynarodowe praw człowieka*. Warszawa: C.H. Beck, 2020.

Orzeszyna, Krzysztof, and Robert Tabaszewski. "The legal activities taken by local authorities to promote sustainable development goals: Do the Polish local authorities need to adopt new local strategies?." *Lex Localis - Journal of Local Self-Government* 4 (2021).

Osiatyński, Wiktor. *Prawa człowieka i ich granice*. Kraków: Znak, 2011.

Rainer, Arnold. "Reflections on the Universality of Human Rights." *Ius Gentium*: *Comparative Perspectives on Law and Justice*, no. 1 (2013): 1–12.

Robertson, Arthur Henry. *Human Rights in Europe*. Manchester: Manchester University Press, 1963.

Robertson, Arthur Henry. *Human Rights in the World*. Manchester: Manchester University Press, 1972.

Tabaszewski, Robert. "Achieving the Sustainable Development Goals in Europe and East Asia: role of region-al organizations in monitoring right to good health and well-being." *Ius Novum* 2 (2019): 250–269. https://doi.org/10.26399/iusnovum.v13.2.2019.25/r.k.tabaszewski.

Tabaszewski, Robert. "Międzyamerykański Trybunał Praw Człowieka jako panamerykański organ sądowniczy." In Krzywicka, Katarzyna, and Joanna Kaczyńska. *Oblicza Ameryki Łacińskiej*. Lublin: Wydawnictwo UMCS, 2010.

Tabaszewski, Robert. "The Permissibility Of Limiting Rights And Freedoms In The European And National Legal System Due To Health Protection." *Review of European and Comparative Law* 3 (2020): 53–89. https://doi.org/10.31743/recl.6100.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 177–188
DOI: https://doi.org/10.31743/recl.11915

THE INTER-AMERICAN COURT OF HUMAN RIGHTS ADVISORY OPINION OC-23/17 ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT

*Przemysław Siwior**

ABSTRACT

On 15 November 2017, the Inter-American Court of Human Rights issued an advisory opinion OC-23/17 on the relationship between human rights and the environment. The opinion responded to a request made by Colombia pursuant to Article 64(1) of the American Convention on Human Rights regarding extraterritorial jurisdiction of state parties to the Convention resulting from mega-infrastructure projects in the Greater Caribbean region.
The purpose of this article is to discuss the general issues dealt with by the Court, concentrating on the significance of this Advisory Opinion for international law. The opinion contains two main interesting aspects. First, in the light of the opinion, states are responsible for the environmental damage they cause, regardless of whether it occurs within their borders or beyond them. Second, the Advisory Opinion recognizes that the right to a healthy environment is an autonomous, fundamental human right that shall be protected.

Keywords: advisory opinion, IACtHR, human rights, environment, extraterritorial jurisdiction

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1. INTRODUCTION

On 15 November 2017, the Inter-American Court of Human Rights (Court) rendered an advisory opinion OC-23/17 on the relationship between human rights and the environment (Advisory Opinion). The opinion responded to a request made by Colombia on 14 March 2016 pursuant to Article 64(1) of the American Convention on Human Rights (ACHR)[1] resulting from extraterritorial jurisdiction of state parties to the ACHR arising from the construction and operation of mega-infrastructure projects in the Greater Caribbean region.

The Advisory Opinion concentrates on obligations of states under international environmental law and human rights law in the transboundary context. It concerns mega-infrastructure projects such as offshore platforms, cross-border pipelines and dams.

The Court's landmark Advisory Opinion includes two main interesting aspects. First, it recognizes that states are responsible for the environmental damage they cause, regardless of whether it occurs within their borders or beyond them. Second, it recognizes that the right to a healthy environment is an autonomous (right in itself), fundamental human right, which must be protected. I will attempt to demonstrate that the Advisory Opinion will have important consequences for international law.

2. THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE BINDING NATURE OF THE ADVISORY OPINION

The Court began operating in 1979. Twenty states have recognized the jurisdiction of the Court[2]. The Court is composed of seven judges chosen by states parties to the ACHR to six-year, once-renewable terms.

[1] Organization of American States, American Convention on Human Rights, San José, Costa, Rica, 22 November 1969, United Nations, Treaty Series, vol 1144, 123, Compilation, vol II.

[2] Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras,Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.

Only states parties and the Commission have the right to bring cases before the court, which has both contentious and advisory jurisdiction[3].

The Court is authorized to interpret the ACHR and other Inter-American treaties. Organization of American States (OAS) Member States, the IACHR and other organs of the OAS can request an advisory opinion in their respective spheres of competence. The main aim of advisory opinions is to obtain a judicial interpretation of provisions of the ACHR or other treaties. The opinions of the Court are binding. The content of the Court's advisory opinions shall be taken into account, in addition to Court's case judgements. Advisory opinions have a significant preventative role. They act as a guide for states to respect and guarantee human rights in the matters in which the Court has issued an opinion[4]. Advisory jurisdiction varies from contentious jurisdiction to the extent that there is no dispute to be settled.

Since its founding, the Court has rendered 24 advisory opinions. In the past the Court has recognized the existence of a relationship between environmental protection and the enjoyment of other human rights, however only with regard to territorial rights of indigenous and tribal peoples[5].

[3] https://ijrcenter.org/regional/inter-american-system/, accessed February 4, 2021.

[4] See Jerzy Jaskiernia, *Amerykański system ochrony praw człowieka* (Toruń: Wydawnictwo Adam Marszałek, 2015); Janusz Symonides, "Międzyamerykański Trybunał Praw Człowieka," in *Historia. Stosunki międzynarodowe. Amerykanistyka. Księga Jubileuszowa na 65-lecie Profesora Wiesława Dobrzyckiego*, ed. Stanisław Bieleń (Warsaw: ASPRA-JR, 2001), 541; Robert Tabaszewski, "Międzyamerykański Trybunał Praw Człowieka jako panamerykański organ sądowniczy," in *Oblicza Ameryki Łacińskiej*, ed. Katarzyna Krzywicka and Joanna Kaczyńska (Lublin: Wydawnictwo UMCS, 2010), 89–90.

[5] Jose Felix Pinto-Bazurco, "The Inter-American Court of Human Rights Recognizes a Right to a Healthy Environment in Recent Advisory Opinion," 2018, /http://blogs.law.columbia.edu/climatechange/2018/02/23/the-inter-american-court-of-human-rights-recognizes-a-right-to-a-healthy-environment-in-recent-advisory-opinion/, accessed February 4, 2021.

3. TWO MAIN ISSUES ADDRESSED BY THE COURT

In the Advisory Opinion, the Court addressed two main issues:

1) the application of extraterritorial jurisdiction to environmental obligations and
2) the relationship between human rights and environmental harm.

It is important to point out that the Advisory Opinion was much awaited[6].

3.1. The application of extraterritorial jurisdiction to environmental obligations

Colombia sought clarification on the interpretation of the term "jurisdiction" in Article 1(1)[7] of the ACHR, in the context of compliance with environmental obligations, especially in relation to conduct outside the national territory of a state, or with effects that go beyond the national territory of a state.

The Court pointed out that the states parties to the ACHR have the obligation to respect and guarantee the rights outlined in this convention to all persons subject to their jurisdiction (para. 77). The Court explained that, the object and aim of the ACHR are not limited to the concept of the national territory, but encompass circumstances in which the extraterritorial conduct of a state constitutes an exercise of its jurisdiction (para. 78). A person is under the jurisdiction of the state of origin if there is a causal nexus between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory (para. 104).

The Court pointed out that international human rights law (ECHR) has recognized various situations in which the extraterritorial conduct of a state entails the exercise of its jurisdiction (para. 79). However, the Court determined that the exercise of jurisdiction under Article 1(1) of the ACHR outside of a state's territory is an exceptional case that shall be examined

[6] https://www.corteidh.or.cr/sitios/libros/todos/docs/infografia-eng.pdf, accessed February 4, 2021.

[7] Pursuant to Article 1(1) of the ACHR: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination […]".

by following the factual and juridical circumstances of each concrete case and applied in a restrictive manner (para. 81). The Court held that effective control over the source of environmental harm (activities that caused the damage) alone may be sufficient to give rise to state responsibility if there is a relation of causality (if there is a causal nexus) between the act that originated in its territory and the violation of the human rights of persons outside its territory (paras. 101–102).

The Advisory Opinion could result in human rights claims in circumstances wider than those that have been held admissible under the ACHR so far. The Court's interpretation comes from the due diligence rule and is supported by the Trail Smelter Case[8].

3.2. The relationship between human rights and environmental harm

The Court had already linked the right to life with the environment in cases concerning indigenous communities and their living conditions, however the Court had so far kept these two topics separate[9].

The Court identified a close link between a number of substantive human rights[10], procedural rights and the right to a healthy environment. With reference to the negative obligation to respect human rights, the Court pointed out that states should refrain from:

1) any activity that denies or restricts access to a decent life; and
2) illegal pollution of the environment.

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[8] Decision of April 16 1938, and 11 March 1941, Case Trail Smelter Case (United States v. Canada), 1965; see Ricardo Abello-Galvis and Walter Arevalo-Ramirez, "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, procedural and substantive implications of human rights duties in the context of environmental protection," *Review of European, Comparative & International Environmental Law* 28, Issue 2 (2019): 217–218.

[9] IACrtHR Judgment of 17 June 2005, Case Yakye Axa Indigenous Community v. Paraguay, Inter-American Court of Human Rights Series C No 125, para. 137; IACrtHR Judgment of 29 March 2006, Case Sawhoyamaxa Indigenous Community v. Paraguay, Inter-American Court of Human Rights Series C No 146, para. 118; see Abello-Galvis and Arevalo-Ramirez, "Inter-American Court," 217.

[10] Right to life, right to housing, right not to be forcefully displaced, right to personal integrity, right to participate in cultural life, right to health, right to water, right to food, property rights.

Positive obligations apply when:

1) the authorities of the state knew or should have known that there is a real and imminent danger for the life of a specific individual or group of individuals and failed to take the necessary measures within their area of responsibility, which could reasonably be expected to prevent or to avoid that danger; and
2) there is a causal nexus between the violation and the significant damage to the environment (para. 120).

The Court found that states have to respect the following specific obligations:

1) the obligation of prevention (para. 127–174) – states have to prevent significant environmental damages within and outside their territory in circumstances that could be considered under the jurisdiction of that state. Obligation of prevention encompasses:
   (i) the duty to regulate (derived from Article 2 of the ACHR) – activities, which might induce significant damage to the environment;
   (ii) the duty to supervise and monitor – states have to implement adequate and independent monitoring and accountability mechanisms that include preventive measures, as well as measures needed to investigate, punish and repair potential abuses;
   (iii) the duty to require and approve environmental impact assessment in case of risk of significant damage to the environment. In accordance with the due diligence rule, an environmental impact assessment must be done before the proposed activity by independent bodies. An environmental impact assessment has to address cumulative impacts, allow public participation and respect the traditions and culture of indigenous peoples;[11]
   (iv) the duty to establish a contingency plan (an obligation which is also included in some environmental treaties[12]);

[11] Para. 163.

[12] See, e.g., United Nations, Convention on the Law of the Non-navigational Uses of International Watercourses, New York 21 May 1997 as amended, UN Doc. A/51/869, reprinted in 36 I.L.M. 700, Article 28.

(v) the obligation to mitigate – states have to mitigate significant environmental damage, even in case when it has appeared despite preventive measures.

2) obligation to act in line with the precautionary principle in case of possible serious and irreversible damage to the environment, even if there is a lack of scientific certainty. It should be noted that the Court went beyond the established case law in cases such as Case Pulp Mills on the River Uruguay[13] and concluded that, even in case of absence of scientific evidence, states have to take any measure necessary to prevent infringements of the right to life (paras. 175–180).
3) obligation to cooperate (paras. 181–210) – states when they become aware that activity planned under their jurisdiction may cause a risk of significant transboundary damage and in cases of environmental emergencies should notify other states and consult, negotiate with the states potentially influenced by significant transboundary harm.
4) Procedural obligations (paras. 211–241) – states must ensure:
   (i) the right of access to information established by Principle 10 of the Rio Declaration on Environment and Development[14] and Article 13 of the ACHR in relation to possible damage to the environment without need to prove a personal or direct interest (paras. 213–225);
   (ii) the right to public participation of the persons subject to their jurisdiction as granted under the terms of Article 23(1)(a) of the ACHR, in any decision-making process and in the issuing of policies, which could influence the environment (paras. 226–232);
   (iii) proper and effective access to justice through national courts (paras. 233–240)[15].

The obligations described above have been developed in relation to the general obligations to respect and ensure the rights to life and personal

[13] ICJ Judgment of 20 April 2010, Case Pulp Mills on the River Uruguay (Argentina v. Uruguay).

[14] United Nations, Rio Declaration on Environment and Development, Rio de Janeiro, 12 August 1992, UN Doc A/CONF.151/26 (vol I).

[15] Abello-Galvis and Arevalo-Ramirez, "Inter-American Court," 221.

integrity. However, the Court pointed out that this did not mean that the same duties did not apply to other human rights (para. 243).

The Court indicated that environmental obligations are usually based on the duty of due diligence rule – understood as a duty of behavior rather than of result (para. 124).

4. AUTONOMOUS RIGHT TO A HEALTHY ENVIRONMENT

Another substantial and commendable aspect of the Advisory Opinion is the Court's affirmation of an autonomous right to a healthy environment (para. 62) under Article 26 of the ACHR. The Court declared an autonomous right to a healthy environment (right in itself). According to the Court, the right to a healthy environment is encompassed by Article 26 of the ACHR which provides for the progressive realization of economic, social, and cultural rights (progressive development) and finds reflection in states' constitutions as well as international instruments (para. 57). In the view of the Court, the right to a healthy environment is an autonomous right [derecho autónomo] which protects elements of the environment, such as forests, rivers, seas, and other such elements, even in the absence of certainty or evidence of risk to individual persons and is a fundamental right for the existence of humankind. The reason is the environment's importance for the other living organisms (para. 62). The Court stressed the undisputed relationship between the protection of the environment and the protection of "other human rights" owing to the fact that the infringement of this autonomous right to a healthy environment could influence other human rights, in particular the right to life and personal integrity and many other rights including health, water, housing, and procedural rights (e.g. right to information, association, participation, and expression).

The Court's declaration that the right to a healthy environment is an autonomous right signifies that there can now be claims solely for environmental harm, meaning that harm to human rights is not needed.

According to the Court, the right to a healthy environment is a right with individual and collective associations (para. 47). As an individual right, it is inseparably interlinked with other fundamental rights (e.g. right

to life, personal integrity, right to health). As a collective right, it is a subject of interest of the humankind and of the future generations[16].[17]

It should be pointed out that this finding of a legal ground under Article 26 for an autonomous right to a healthy environment generated much discussion and debate among the Court's members, issuing two concurring opinions[18].

5. CONCLUSIONS

The Court delivered a groundbreaking interpretation of states' duties in relation to the exercise of jurisdiction in cases of environmental damage that goes beyond traditional international legal doctrines on state jurisdiction[19]. For the first time in history, an international human rights court examined thoroughly environmental law separately from single cases of environmental harm (e.g. Case López Ostra v. Spain[20] in the ECHR[21]).

It seems that, the Advisory Opinion's reasoning could be used in air pollution, chemicals and climate change cases. Given that international

[16] Domenico Giannino, "The Ground-Breaking Advisory Opinion OC-23/17of the Inter-American Court of Human Rights: Healthy Environment and Human Rights, Int'l J.Const. L. Blog," 2018, http://www.iconnectblog.com/2018/12/the-ground-breaking-advisory-opinion-oc-23–17-of-the-inter-american-court-of-human-rights-healthy-environment-and-human-rights/, accessed February 4, 2021.

[17] See Roman Kuźniar, *Prawa Człowieka. Prawo, Instytucje, Stosunki Międzynarodowe* (Warsaw: Wydawnictwo naukowe Scholar, 2004), 209–221; Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *Prawo międzynarodowe praw człowieka* (Warsaw: C.H. Beck, 2020), 168.

[18] See Angeliki Papantoniou, "Advisory Opinion on the Environment and Human Rights," *American Journal of International Law* 112, Issue 3 (2018): 460–466.

[19] Abello-Galvis and Arevalo-Ramirez, "Inter-American Court," 217.

[20] ECtHR Judgement of 09 December 1994, Case López Ostra v. Spain, application no. 16798/90, hudoc.int.

[21] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

rulings are frequently followed by other international courts and tribunals, it should be expected that the Advisory Opinion may influence jurisprudence worldwide. It may constitute the practice of other human rights tribunals (e.g. the ECtHR) and national courts. For decades, the Court's rulings have advanced progressive jurisprudence at international bodies across the world. The Advisory Opinion is likely to have significant consequences for states, businesses and civil society. It confirms the increasing need to take into account fast developments in human rights and environmental law. The key importance of the Advisory Opinion is that it theoretically enables human rights claims in cases that have been held inadmissable under the ACHR so far[22].

The Advisory Opinion indicates the growing significance of human rights and environmental matters in international law and the possibilities they offer for international dispute settlement. It gives rise to cross-border human rights claims resulting from transboundary environmental harm. It also does not limit such claims to damages induced by states' agents but says that in such cases, state's jurisdiction encompasses activities over which a state has 'effective control'[23].

The Court's affirmation of an autonomous right to a healthy environment means that in cases before the Court, applicants may directly claim that their right to a healthy environment is infringed, instead of claiming that their right to life, personal integrity or another related right is violated by environmental harm.

Now it is time for applicants to examine the potential and limits of the progressive jurisprudence. Many key aspects of the Advisory Opinion, including the causal nexus, requires a level of due diligence and the scope of extraterritorial obligations, will have to be explained in the near future by the Court.

[22] Monica Feria-Tinta and Simon Milnes, "The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights," *Yearbook of International Environmental Law* 27, no. 1 (2016): 75.

[23] Ibid.

REFERENCES

Abello-Galvis, Ricardo, and Walter Arevalo-Ramirez. "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, procedural and substantive implications of human rights duties in the context of environmental protection." *Review of European, Comparative & International Environmental Law* 28, Issue 2 (2019): 217–222.

Berkes, Antal. "A New Extraterritorial Jurisdictional Link Recognised by the IACtHR." 2018. https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/. Accessed February 4, 2021.

Feria-Tinta, Monica, and Simon Milnes. "The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights." *Yearbook of International Environmental Law* 27, no. 1 (2016): 64–81.

Giannino, Domenico. "The Ground-Breaking Advisory Opinion OC-23/17of the Inter-American Court of Human Rights: Healthy Environment and Human Rights, Int'l J.Const. L. Blog." 2018. http://www.iconnectblog.com/2018/12/the-ground-breaking-advisory-opinion-oc-23–17-of-the-inter-american-court-of-human-rights-healthy-environment-and-human-rights/. Accessed February 4, 2021.

Jaskiernia, Jerzy. *Amerykański system ochrony praw człowieka*. Toruń: Wydawnictwo Adam Marszałek, 2015.

Kuźniar, Roman. *Prawa Człowieka. Prawo, Instytucje, Stosunki Międzynarodowe*. Warsaw: Wydawnictwo naukowe Scholar, 2004.

Orzeszyna, Krzysztof, Michał Skwarzyński, and Robert Tabaszewski. *Prawo międzynarodowe praw człowieka*. Warsaw: C.H. Beck, 2020.

Papantoniou, Angeliki. "Advisory Opinion on the Environment and Human Rights." *American Journal of International Law* 112, Issue 3 (2018): 460–466.

Pinto-Bazurco, Jose Felix. "The Inter-American Court of Human Rights Recognizes a Right to a Healthy Environment in Recent Advisory Opinion." 2018. http://blogs.law.columbia.edu/climatechange/2018/02/23/the-inter-american-court-of-human-rights-recognizes-a-right-to-a-healthy-environment-in-recent-advisory-opinion/. Accessed February 4, 2021.

Symonides, Janusz. "Międzyamerykański Trybunał Praw Człowieka." In *Historia. Stosunki międzynarodowe. Amerykanistyka. Księga Jubileuszowa na 65-lecie Profesora Wiesława Dobrzyckiego*, edited by Stanisław Bieleń, 537–552. Warsaw: ASPRA-JR, 2001.

Tabaszewski, Robert. "Międzyamerykański Trybunał Praw Człowieka jako panamerykański organ sądowniczy." In *Oblicza Ameryki Łacińskiej*, edited by Katarzyna Krzywicka, and Joanna Kaczyńska, 83–94. Lublin: Wydawnictwo UMCS, 2010.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 189–218
DOI: https://doi.org/10.31743/recl.12340

PROHIBITION OF DISCRIMINATION ON GROUNDS OF NATIONALITY IN THE FREEDOM OF MOVEMENT OF PERSONS WITHIN THE EU IN THE LIGHT OF CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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ABSTRACT

The subject of this article is to analyze the meaning of the prohibition of discrimination on grounds of nationality in the light of the provisions of primary and secondary European Union law and the case law of the Court of Justice of the European Union, which is inherent to the functioning of the internal market and EU citizenship.

The prohibition of discrimination on grounds of nationality is undoubtedly one of the main goals of the European Union[1] in the social and economic context, which was reflected in the localization of the matter in question in the primary law of the European Union[2], in secondary law and in the jurisprudence of the Court of Justice of the European Union (CJEU). The Treaty on European Union (TEU)[3]

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[1] Cf. Olivier De Schutter, *Links between migration and discrimination. A legal analysis of the situation in EU Member States* (Brussels: European Commission, 2016), 102 and next; See also Brita Sundberg-Weitman, *Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under the EEC Treaty* (Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977).

[2] Erica Szyszczak, "Antidiscrimination Law in the European Union," *Fordham International Law Journal*, no. 32 (2008): 635.

[3] The Treaty on European Union (consolidated version) OJ of the EU 2012, No. C 326/01.

and the Treaty on the Functioning of the European Union (TFEU)[4] indicate equality as one of the EU values (Article 2 TEU), require it to be promoted and combat all discrimination (Articles 8 and 10 TFEU) and prohibit discrimination due to the criteria indicated therein (Articles 18 and 19 TFEU). In secondary law, this principle was expressed primarily in the Regulation of the European Parliament and of the Council No. 492/2011 on the free movement of workers within the Union and in art. 24 of Directive 2004/38/EC 2004 on the right of citizens of the Union and their relatives to move freely[5].

A special role in this area is played by the case law of the Court of Justice of the European Union (CJEU), which stated that all authorities of the Member States are obliged to refuse to apply a provision of national law that is contrary to the prohibition of discrimination on the grounds of citizenship (Article 18 TFEU)[6]. Moreover, national measures may be examined in the light of art. 18 TFEU, but only to the extent that they apply to situations not covered by specific non-discrimination provisions included in the Treaty[7].

The author puts forward the thesis that the analysis of CJEU jurisprudence reveals a visible dissonance between the application of national regulations of the Member States and the provisions of EU law in this matter, which significantly hinders the implementation of the principle of non-discrimination in practice. Discrepancies mainly occur in domestic legal acts due to the improper drafting of national legal provisions and / or their misinterpretation by national judicial or administrative authorities. It should be emphasized that the Member States are obliged to comply with EU law, which is not tantamount only to the obligation of state authorities to respect directly applicable acts, or to implement required regulations into internal law, but also the obligation to interpret and apply internal law in a manner that does not violate the requirement resulting from EU law[8]. Judicial

[4] The Treaty on the Functioning of the European Union (consolidated version) OJ of the EU 2012, No. C 326/01.

[5] Directive of the European Parliament and of the Council No. 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (O.J.E.C. L 158, 30 April 2004).

[6] CJEU Judgement of 7 May 1998, Clean Car Autoservice GmbH p. Landeshauptmann von Wien, Case C-350/96, ECLI:EU:C:1998:205.

[7] CJEU Judgement of 18 June 2019, Republic of Austria v Federal Republic of Germany, Case C-591/17, ECLI:EU:C:2019:504, pt 41.

[8] Marek Górski, "Wpływ orzecznictwa Europejskiego Trybunału Sprawiedliwości na interpretację i stosowanie przepisów o ochronie środowiska," in *Wspólnotowe prawo ochrony*

and administrative authorities of the Member States should therefore interpret national law as far as possible, in line with EU law, because the limits of the pro-EU interpretation will be determined by the powers conferred by domestic law[9].
The study uses the legal-comparative method, consisting in a comparative analysis of the legal systems of the Member States and the European Union in the field of non-discrimination on the basis of nationality, rights and restrictions on the freedom of movement of authorized entities. Comparative verification of EU acts with the internal standards of individual EU Member States allows to reveal the degree of advancement of the implementation process of EU law provisions under the free movement of EU citizens and their family members in the discussed area in the legal systems of European Union Member States. The purpose of this analysis is to, inter alia, diagnose areas in which these countries have not implemented or improperly implemented EU regulations, or have misinterpreted them.
The second method used is the method of analyzing the jurisprudence of the Court of Justice of the European Union - the rulings of the CJEU constitute a significant part of the study. The case law in question covers the period from the establishment of the Treaties of Rome to the present day. The use of the latter obligated the author to apply the comparative method of judgments based on same or similar legal bases in similar circumstances from different stages of the evolution of the free movement of citizens of the European Union and their family members under the prohibition of discrimination on the basis of nationality.

Keywords: prohibition, discrimination, nationality, European Union

1. THE ESSENCE OF THE PROHIBITION OF DISCRIMINATION ON GROUNDS OF NATIONALITY

The prohibition of discrimination on the basis of nationality is one of the fundamental concepts of freedom of movement[10]. It consists in equalizing the rights of citizens of the Member States who undertake any type

środowiska i jego implementacja w Polsce trzy lata po akcesji, ed. Jerzy Jendrośka and Magdalena Bar (Wrocław: Centrum Prawa Ekologicznego Press, 2008), 31.

[9] Monika Niedźwiedź, "Stosowanie prawa wspólnotowego przez organy administracyjne," *Casus*, no. 32 (October 2004): 6.

[10] Cf. Anne van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," *Maastricht Journal of European and Comparative Law* 18, Issue 1–2 (March 2011): 63 and next.

of professional activity in the territory of another Member State. In the EU legal system, equality was introduced on the basis of treaty provisions prohibiting discrimination, and therefore differently than in most constitutional legal systems of the Member States. In fact, the Court of Justice has stated in a number of judgments that the prohibitions of discrimination in the Treaty are only a specific expression of the general principle of equality, which is one of the fundamental principles of EU law[11]. It should be emphasized that the Court of Justice of the EU uses interchangeably the concepts of "the principle of equal treatment" and "the principle of non-discrimination", which was confirmed, inter alia, in the judgment of case C-422/02[12]. We are dealing here with two terms of the same general principle of EU law, which, on the one hand, forbids different treatment of similar situations, and on the other hand, to treat different situations in the same way, unless there are objective reasons justifying such diverse treatment[13].

The prohibition of discrimination on grounds of nationality applies in particular to the right to free movement and stay in the territory of a Member State, in particular with regard to remuneration, taxation, social affairs, education and all other spheres affecting the legal status of EU citizens and members of their families[14]. The comprehensive application of this principle in many areas of life has obliged the legislators of the Member States to include it in national acts of statutory rank.

It should be emphasized that the principle of non-discrimination does not mean that it is impossible to impose specific requirements on foreigners[15]. The authorities of individual states cannot place conditions only

[11] Justyna Maliszewska-Nienartowicz, "Rola zasady równości w prawie Wspólnoty/Unii Europejskiej," *Studia Europejskie*, no. 4 (2011): 73.

[12] CJEU Judgement of 27 January 2005, Europe Chemi-Con (Deutschland) GmbH v Council of the European Union, Case C-422/02, ECLI:EU:C:2005:56.

[13] Justyna Maliszewska-Nienartowicz, "Rola zasady równości w prawie Wspólnoty/Unii Europejskiej," *Studia Europejskie*, no. 4 (2011): 74.

[14] Władysław Czapliński, *Zarys prawa europejskiego* (Warsaw: Hesińska Fundacja Praw Człowieka, 1999), 57; see CJEU Judgement of 25 October 2012, *Déborah Prete v Office national de l'emploi*, Case C-367/11, ECLI:EU:C:2012:668.

[15] Leszek Mitrus, "Ewolucja prawa unijnego w dziedzinie swobody przemieszczania pracowników," in *Prawo pracy w świetle procesów integracji europejskiej. Księga jubileuszowa*

discriminatory on grounds of nationality in relation to the requirements applicable to the nationals performing the same type of work. Anyone who holds the nationality of a Member State is an EU citizen, while the status of Union citizen is the fundamental status of nationals of the Member States[16]. Moreover, it allows the same treatment to be enjoyed from a legal point of view, irrespective of nationality and without prejudice to exceptions expressly provided for in that regard[17].

2. LEGAL BASIS OF DISCRIMINATION ON GROUNDS OF NATIONALITY

Among the treaty provisions relating directly to the prohibition of discrimination on grounds of nationality, the most important is the non-discriminatory clause, currently provided for in Art. 18 TFEU, referring to the criterion of nationality. And so, in the light of Art. 18 TFEU *within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*.

The legal basis of this principle has been regulated both in primary and secondary law of the European Union. Article 18 TFEU is a general prohibition of discrimination on grounds of nationality[18],

Profesor Marii Matey-Tyrowicz, ed. Jerzy Wratny and Magdalena Barbara Rycak (Warsaw: Wolters Kluwer, 2011), 138.

[16] CJEU Judgement of 17 September 2002, Baumbast and R v Secretary of State for the Home Department, Case C-413/99, ECLI:EU:C:2002:493, pt 82; Aleksandra Czekaj, "Glosa do orzeczenia ETS z dnia 17.09.2002r. w sprawie C-413/99, Baumbast i R. v Secretary of State for the Home Department," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 2 (2004): 186–195.

[17] CJEU Judgement of 20 September 2001, Rudy Grzelczyk v Centre public d'aide socjale d'Ottignies- Louvain- la- Neuve, Case C-184/99, ECLI:EU:C:2001:458, pt 30 and 31; CJEU Judgement of 2 October 2003, Carlos Garcia Apellov Belgian State, Case C-148/02, ECLI:EU:C:2003:539, pt. 22 and 23.

[18] See also Evelien Brouwer and Karin de Vries, "Third-country nationals and discrimination on the ground of nationality:article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach," in *Equality and human rights*: *nothing but trouble*?, eds. Marjolein Van den Brink, Susanne Burri, and Jenny Goldschmidt (Utrecht: SIM, 2015), 123 and next; Thomas Cottier and Matthias Oesch, "Direct and Indirect

while Art. 45 sec. 2 TFEU covers the elimination of discrimination on grounds of nationality between workers from the Member States as regards to employment, remuneration and other working conditions. While Art. 18 TFEU is general in nature and applies in cases where there are no specific provisions prohibiting discrimination on the basis of nationality, Art. 45 sec. 2 TFEU is a *lex specialis* with reference to Art. 18 TFEU. In this regard, it should be recalled that Art. 18 TFEU, which establishes the general principle of non-discrimination on grounds of nationality, can be applied alone only in situations governed by EU law for which the Treaty does not contain specific non-discrimination provisions[19].

The Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights) has also become a source of non-discrimination[20], regulating equality before the law and regulating the catalog of forbidden grounds for discrimination. The EU Charter was made binding on the basis of the Lisbon Treaty[21], which significantly strengthened the rights of the individual in the field of equality before the law and non-discrimination.

Article 21 paragraph. 1 of the Charter states that "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*". Article catalog 21 of the Charter contains an open list

Discrimination in WTO Law and EU Law," *Working Paper*, no. 2011/16 (April 2011): 12; Sonia Morano-Foadi, "Third Country Nationals Versus EU Citizens: Discrimination Based on Nationality and the Equality Directives," *Oxford Brookes University - School of Social Sciences and Law* (December 2010).

[19] CJEU Judgement of 18 June 2019, Republic of Austria v Federal Republic of Germany, Case C-591/17, ECLI:EU:C:2019:504, pt 39; CJEU Judgement of 18 July 2017, Konrad Erzberger v TUI AG., Case C-566/15, ECLI:EU:C:2017:562, pt 25; CJEU Judgement of 4 September 2014, Schiebel Aircraft GmbH v Bundesminister für Wirtschaft, Familie und Jugend, Case C-474/12, ECLI:EU:C:2014:2139, pt 20.

[20] EU (2000) Charter of Fundamental Rights of the European Union, 2000/C 361/01, 7 December 2000.

[21] The Treaty of Lisbon, 2007/C O.J. 306, 17 December 2007.

of prohibited discriminatory grounds, contrary to Art. 19 TFEU[22], which is an exhaustive list of anti-discrimination bans.

It should be emphasized that the Charter guarantees protection only against violations of the principles of equality and non-discrimination resulting from the actions of the institutions, bodies, offices and agencies of the Union and the Member States to the extent that they apply EU law (Article 51 of the Charter), because its purpose was not to create new rights, but to confirm the rights recognized by EU law.

In secondary law, this principle was expressed, inter alia, in Regulation No. 492/2011 of the European Parliament and of the Council[23] and in Art. 24 of Directive 2004/38/EC on the right of citizens of the Union and their relatives to move freely [24]. The former states that it is not possible to apply laws, regulations, administrative acts or administrative practices limiting the right to apply for employment or submit job offers. Moreover, the EU law imposes compliance with prohibition of discrimination on the grounds of nationality by every national entity that applies or establishes the law. Unfortunately, the verification of the selected case law of the CJEU shows a visible dissonance between the norms of EU law and the regulations of individual Member States.

An important right of employees moving within the EU is the right to work in the host country, specified in Art. 7–9 of Regulation 492/11. The Treaty on the Functioning of the European Union itself, in Art. 45 sec. 2 defines indirectly, through the wording "the abolition of any discrimination based on nationality between workers of the Member

[22] Art. 19 sec. 1 TFEU is a provision of competence which authorizes the EU to adopt legal acts that implement the treaty guidelines in the field of combating discrimination. On the basis of this provision there were issued, inter alia, so-called. EU equality directives. The Treaty on the Functioning of the European Union (consolidated version), 2012/C O.J. 326, 26 October 2012.

[23] Regulation of the European Parliament and of the Council No. 492/2011 on the free movement of workers within the Union (O.J.E.C L141, 5 April 2011).

[24] Directive of the European Parliament and of the Council No. 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (O.J.E.C. L 158, 30 April 2004).

States as regards employment, remuneration and other conditions of work and employment", the right to work in another Member State. It seems that the terms of national law, applicable regardless of nationality, will be considered indirectly discriminatory if they primarily affect migrant workers[25] or the great majority of migrant workers[26]. The attribute of indirect discrimination will also be achieved by criteria that will be more easily met by domestic workers than by migrants[27] or requirements that may affect the latter[28]. The CJEU emphasized that the national regulation should be objectively justified and proportionate to the aim pursued, in order to exclude its discriminatory character. Moreover, it does not have to affect a specific group of entities. It is enough that it can have such an effect[29].

[25] "Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers-CJEU Judgement of 15 January 1986, Pinna v Caisse d' Allocations Familiales de la Savoie, ECLI:EU:C:1986:1, pt 24; CJEU Judgement of 30 May 1989, Alluè and Another v Universitá degli Studi di Venezia, Case C-33/88, ECLI:EU:C:1989:222, pt 12; CJEU Judgement of 21 November 1991, Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir SARL, Case C-27/91, ECLI:EU:C:1991:441, pt 11.

[26] CJEU Judgement of 17 November 1992, Commission v United Kingdom, Case C-279/89, ECLI:EU:C:1992:439, pt 42; CJEU Judgement of 20 October 1993, Spotti v Freistaat Bayern, Case C-272/92, ECLI:EU:C:1993:848, pt 18.

[27] "…where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers" - CJEU Judgement of 10 March 1993, Case C-111/91, Commission of the European Communities v Grand Duchy of Luxembourg, ECLI:EU:C:1993:92, pt 10; CJEU Judgement of 4 October 1991, Elissavet Paraschi v Landesversicherungsanstalt Württemberg, Case C-349/87, ECLI:EU:C:1991:372, pt 23. Such a situation will be the case for a residence requirement which will be easier for national workers than for nationals of other Member States – see CJEU Judgement of 8 June 1999, C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep, Case C-337/97, ECLI:EU:C:1999:284, pt 23 and 24.

[28] "…where there is a risk that they may operate to the particular detriment of migrant workers" - CJEU Judgement of 8 May 1990, Klaus Biehl v Administration des contributions du grand-duché de Luxembourg, Case C-175/88, ECLI:EU:C:1990:186, pt 14; CJEU Judgement of 28 January 1992, Hanns-Martin Bachmann v Belgian State, C-204/90, ECLI:EU:C:1992:35, pt 9.

[29] CJEU Judgement of 23 May 1996, John O'Flynn v Adjudication Officer, Case C-237/94, ECLI:EU:C:1996:206, pt 19–21; CJEU Judgement of 21 September 2000, Carl Borawitz v Landesversicherungsanstalt Westfalen, Case C-124/99, ECLI:EU:C:2000:485,

The prohibition of discrimination against nationals of the Member States is the subject of many regulations of EU law. Art. 7 sec. 1 of Regulation 492/2011 of 5 April 2011 regulates the status of an employee with the citizenship of a Member State, who, due to their nationality, should be treated on the territory of the host country on an equal basis with the nationals in terms of employment and work conditions[30], mainly with regard to remuneration and termination, and in the event of becoming unemployed, reinstatement or re-employment. The principle of equality also covers social benefits and tax relief (Article 7 sec. 2)[31], access to training in vocational schools and in-service training centers (Article 7 sec. 3). The prohibition of discrimination on the basis of nationality also applies in the area of the social security system[32]. The migrant worker is therefore entitled to the same social rights and tax benefits as a domestic worker[33]. The concept of social and tax benefits contained in Art. 7 sec. 2 of the above-mentioned regulation, is in close relation to all rights related to the employment relationship, as evidenced by the location of the provision in the chapter "Employment and equality of treatment"[34].

The Treaty on the Functioning of the European Union creates a top-down prohibition of discrimination against nationals of other Member States in the field of social rights. The essence of EU provisions on social security law is the guarantee of the acquisition and retention of certain benefits by people who enjoy the freedom of movement in other Member States.

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pt 26–27; CJEU Judgement of 28 April 2004, Sakir Öztürk v Pensionsversicherungsanstalt der Arbiter, Case C-373/02, ECLI:EU:C:2004:232, pt 57.

[30] CJEU Judgement of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH v Land Salzburg*, Case C-514/12, ECLI:EU:C:2013:799, pt 45.

[31] CJEU Judgement of 21 February 2013, *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* C-46/12, ECLI:EU:C:2013:97, pt 49–51.

[32] See also Frans Pennings, "Non-Discrimination on the Ground of Nationality in Social Security:What are the Consequences of the Accession of the EU to the ECHR?," *Utrecht Law Review* 9, Issue 1 (January 2013): 118.

[33] Evelyn Ellis, "Social advantages: a new lease of life?," *Common Market Law Review* 40 (2003): 639.

[34] Francesco Rossi Dal Pozzo, *Citizenship rights and freedom of movement in the European Union* (the Netherlands: Kluwer Law International Press, 2013), 109.

In light of Art. 1 of Regulation 492/2011, every EU citizen has the right to start employment in the territory of another Member State. They have the right to access the labor market under the same conditions as nationals. In the case of *Union nationale des entraineurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, the CJEU recognized freedom of access to employment as a fundamental element for every worker[35]. This is ensured primarily by the principle of equal treatment established in Art. 18 TFEU and the European Convention for the Protection of Human Rights and Fundamental Freedoms[36]. However, Article 18 TFEU, as R. Babayev argued, goes beyond the mere prohibition of discrimination on the basis of nationality[37].

Proper implementation of the right to move within the territory of the European Union obliges a state to apply the prohibition of discrimination in relation to EU citizens and their family members who use the right to migrate. A. Zawidzka-Łojek rightly argues that ensuring the general principle of equality should not be limited to the elimination of measures leading to unjustified, unequal treatment, but should also mean taking affirmative actions, resulting in equalizing the situation of entities treated less favorably with the best applied standard[38]. The CJEU confirmed that internal regulations, which put citizens of a given state in a worse position only because they exercised the right to migrate and stay in another Member State, constitute an obstacle to the freedoms guaranteed by Art. 18 TFEU to every EU citizen[39].

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[35] CJEU Judgement of 15 October 1987, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others, Case C-222/86, ECLI:EU:C:1987:442.

[36] Christopher McCrudden and Sacha Prechal, *The concepts of Equality and non-discrimination in Europe. A practical Approach* (Brussels: European Network of Legal Experts in the Field of Gender Equality, 2009), 2.

[37] See Rufat Babayev, *Choice of the applicable law and equal treatment in the European Union* (Durham: Durham University, 2012), 93.

[38] Anna Zawidzka – Łojek, *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej* (Warsaw: Instytut Wydawniczy EuroPrawo, 2013), 40.

[39] CJEU Judgement of 11 July 2002, Marie-Nathalie D'Hoop v. Office national de l'emploi, Case C-224/98, ECLI: ECLI:EU:C:2002:432, pt 31; CJEU Judgement of 29 April 2004, Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, Case C-224/02, ECLI:EU:C:2004:273, pt 19.

3. EMPLOYMENT IN PUBLIC ADMINISTRATION

An important category of derogation from the prohibition of discrimination on grounds of nationality, justifying the application of restrictions on the grounds of protection of the interests of a Member State, is employment in public administration. The issue of "employment in public administration" is regulated by Art. 45 sec. 4 of the Treaty on the Functioning of the European Union, but not specifying its scope[40]. It is true that Art. 45 sec. 2 TFEU states that the free movement of workers includes the elimination of all discrimination on grounds of nationality between workers of the Member States as regards to employment, remuneration and other conditions of work, however, Art. 45 sec. 4 TFEU emphasizes that the provisions of this article do not apply to employment in the public administration. This means that Member States may restrict access to certain posts in public administration in a situation where their national interests need to be protected.

There is no doubt that the interpretation of the above concept should be made on the basis of EU law due to the need for uniform implementation in the Member States. It would be irrational to be allowed to work in a certain position in the civil service in a given country, while there is no such possibility for the same position in another country. This means that it is impossible to base its scope solely on the norms of national law[41]. It is certain that one of the purposes of such an interpretation is the full implementation of the provisions of the Treaty, avoiding a restrictive application of the term 'public administration', created by the regulations of national law[42]. M.K. Kolasiński emphasizes that the competence to define the concept of employment in public administration rests with the EU courts and not with the Member States[43]. The literature rightly emphasizes

[40] Francesco Rossi Dal Pozzo, *Citizenship rights and freedom of movement in the European Union* (the Netherlands: Kluwer Law International Press, 2013), 116.

[41] CJEU Judgement of 30 September 2003, Albert Anker, Klaas Ras and Albertus Snoek v. Bundesrepublik Deutschland, Case C-47/02, ECLI:EU:C:2003:516, pt 57.

[42] Ludwik Florek, *Europejskie prawo pracy* (Warsaw: LexisNexis Press, 2010), 55.

[43] Marek Krzysztof Kolasiński, "Odmienności związane z zatrudnieniem w administracji publicznej," in *Zarys prawa swobód rynku wewnętrznego Unii Europejskiej*, ed. Marek Krzysztof Kolasiński (Toruń: Dom Organizatora Press, 2013), 165.

the differentiation between the concept of 'employment in the public service' and the concept used in the Polish version of the TFEU 'employment in public administration'[44].

Some case-law, in particular the judgment in the case *The Commission of the European Communities v Kingdom of Belgium*[45], is relevant in this respect. In this case, the EC Commission accused the Belgian authorities of introducing a Belgian nationality requirement for positions not covered by Art. 39 sec. 4 of the EC Treaty (Article 45 (4) TFEU), due to the lack of links between the latter and actual participation in the exercise of official authority or national interests, especially in the field of security. There is no doubt that the scope of application of the first three paragraphs is mutually exclusive with the fourth paragraph of Art. 45 TFEU. The last paragraph includes particularly sensitive positions due to the specific type of bond and loyalty of a citizen to their own state. Moreover, the CJEU has repeatedly emphasized in its jurisprudence the attribute of the primacy of EU law in relation to national standards, because the opposite situation would allow freedom in the application of EU regulations by the Member States. In response to the arguments of the Belgian authorities, referring, inter alia, to art. 8 of Regulation 1612/68/EEC (currently Regulation No 492/2011 of 5 April 2011) that the derogation provided for in par. 4 of the above-mentioned provision was general and covered all positions in the administration of a given member state, it should be emphasized that the above standard does not impose an obligation, but gives the possibility of excluding from participation in the management board of public law institutions and from holding offices regulated by public law. On the other hand, it seems unacceptable to refer to national regulations aimed at any limitation of the norms of Community law, because the limits and scope of Art. 45 sec. 4 TFEU is determined by the provisions at the EU level, taking into account the interest of the Member State in the form of reserving a specific group of positions related to the exercise of official authority

[44] Monika Smusz-Kulesza, "Ograniczenia swobody przepływu pracowników," in *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, ed. Zbigniew Hajn (Warsaw: EuroPrawo Press, 2010), 119.

[45] CJEU Judgement of 17 December 1980, The Commission of the European Communities v Kingdom of Belgium, Case C-149/79, ECLI:EU:C:1982:195.

for their own citizens. In the discussed dispute, the CJEU did not issue an unequivocal decision, because it did not specify the actual nature of the tasks falling within the scope of the positions of the cases under review and did not determine which of them were not covered by Art. 39 sec. 4 of the EC Treaty (Article 45 (4) TFEU). As it was not possible to find any failure on the part of the Belgian authorities, the CJEU referred the case for reconsideration. On the other hand, the breach of obligations under Art. 39 sec. 4 was confirmed in the case *The Commission of the European Communities v French Republic*[46]. The breach of the latter was based on the acceptance in national legislation a requirement of French nationality in relation to the positions of captains and officers, flying the French flag. Similar circumstances occurred in *The Commission of the European Communities v Italian Republic case*[47]. The Commission's complaint concerned Italian legislation which made the performance of the duties of captain and deputy captain on all Italian-flagged vessels subject to the condition of having Italian nationality[48]. In this case, the Court ruled on the inadmissibility of the implementation of national provisions that negate the fundamental civil liberties granted by the EC Treaty[49]. It should be remembered that the protection of fundamental rights is a fundamental principle of the Union, which is a necessary condition for the legality of all activities undertaken within the framework of EU law. This creates on the part of the Member States both an individual and collective obligation to protect, act and cooperate in this matter[50].

Specification of the material scope of Art. 45 sec. 4 TFEU causes particular difficulties in certain situations, as the Member States do not have

[46] CJEU Judgement of 11 March 2008, The Commission of the European Communities v French Republic, Case C-89/07, ECLI:EU:C:2008:154.

[47] CJEU Judgement of 11 September 2008, The Commission of the European Communities v Italian Republic, Case C-447/07, ECLI:EU:C:2008:502.

[48] CJEU Judgement of 30 September 2003, Colegio de Oficiales de la Marina Mercante Española v Administración del Estado, Case C-405/01, ECLI:EU:C:2003:515.

[49] CJEU Judgement of 10 December 2009, Commission of the European Communities v Hellenic Republic, Case C-460/08, ECLI:EU:C:2009:774.

[50] Guy S. Goodwin-Gill, "Migration: International Law and Human Rights," in *Managing Migration: Time for a New International Regime?*, ed. Bimal Gosh (Oxford: Oxford University Press, 2000), 196.

the same state administrative structure. Determining whether a given position is related to the exercise of public authority should be based on unambiguous criteria, qualifying it or disqualifying it as those related to the exercise of power in public authorities. The lack of a uniform interpretation of the above-mentioned issues often results in an incorrect understanding of the scope of the positions covered by paragraph 4 of Art. 45 TFEU and the functioning of defective or inconsistent regulations of national law inconsistent with EU law.

As L. Mikrus rightly emphasized, although the CJEU recognized the competence of the Member States to independently define internal administrative structure, it did not leave them any freedom to specify the scope of employment in public administration. Moreover, Art. 45 sec. 4 TFEU covers only those positions which are directly or indirectly related to the exercise of state power[51]. The criterion for the application of the said provision is therefore the condition of direct or indirect participation in the exercise of power and the protection of the general interests of the state or public authorities[52]. Only in the event of the occurrence of both conditions jointly, there is a basis for reserving employment in public administration for a state's own citizens. Moreover, the Tribunal emphasized the impossibility of limiting access to employment in the administration in the event that public powers are exercised sporadically or constitute an insignificant element of the general activity performed under a given position[53].

As evidenced by settled case law, the difficulties are not caused by the determination and classification of positions consisting in direct exercise of power, but by the question of indirect participation in it, because the latter poses a threat in the form of implementation of individual national regulations, extending the scope of Art. 45 sec. 4 TFEU. Therefore, the Court seeks a restrictive interpretation of this concept. There are many

[51] Leszek Mitrus, *Swoboda przemieszczania się pracowników po przystąpieniu Polski do Unii Europejskiej* (Cracow: LexisNexis Press, 2003), 243.

[52] CJEU Judgement of 17 December 1980, The Commission of the European Communities v Kingdom of Belgium, Case C-149/79, ECLI:EU:C:1982:195, pt 10.

[53] CJEU Judgement of 30 September 2003, Colegio de Oficiales de la Marina Mercante Española v Administración del Estado, Case C-405/01, ECLI:EU:C:2003:515, pt 44–45.

positions in the field of public service that are not directly related to the exercise of national sovereignty. Therefore, it is not necessary to reserve them solely for the benefit of the citizens of the host country. The restriction of exclusive access to the public service should be applied to the necessary minimum.

The analysis of the CJEU jurisprudence leads to the conclusion that the concept of "indirect participation in the exercise of public authority" is not precisely defined, therefore the possible classification of administrative powers within the scope of 45 sec. 4 TFEU creates many difficulties for the competent national authorities. In this situation, it seems necessary to assess each case individually, taking into account the type of activities performed and the nature of the position.

There is also no doubt that the unjustified application of Art. 45 sec. 4 TFEU by the authorities of the Member States will constitute a breach of the prohibition of discrimination on grounds of nationality.

4. CASE LAW OF THE CJEU

4.1. Case James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions

The jurisprudence of the Court of Justice of the EU plays an important role in the implementation of the prohibition of discrimination on grounds of nationality. In the case of *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* (guarantee fund for victims of terrorist activities and other crimes)[54] there was a different treatment, based solely on nationality criterion, because an entity was excluded from the circle of persons entitled to compensation solely because of the citizenship of another Member State. A British citizen concerned was denied, based on Article. 706 paragraph 3 code de procédure pénale

[54] CJEU Judgement of 5 June 2008, James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions, Case C-164/07, ECLI:EU:C:2008:321.

(French Code of Criminal Procedure)[55], compensation for the loss of his daughter, despite the fulfillment of financial claims in this regard to his concubine, holding French citizenship. The provision in question introduced the requirement of French nationality in order to obtain compensation on the fulfillment of the French nationality condition. The CJEU confirmed, that community law precludes legislation of a Member State which excludes nationals of other Member States who live and work in its territory from the grant of compensation intended to make good losses resulting from offences against the person where the crime in question was not committed in the territory of that State, on the sole ground that they do not have the nationality of that State.

A particular expression of compliance with the principle of equal treatment is Art. 45 sec. 2 TFEU, which requires the application of the above rule in the area of employment, remuneration and other working conditions in relation to employees of the Member States[56]. The essence of the aforementioned rule is the same treatment of entities in comparable situations, because otherwise, as mentioned, except for the existence of objective premises, discrimination occurs. Therefore, in conflict with EU law are the provisions of a Member State that exclude nationals of other Member States from the circle of persons entitled to compensation for personal injury and compensation for harm caused by an offense not committed on its territory solely because of their nationality[57] or national regulations allowing for refusal to recognize rights acquired from the date of first employment with consequences in terms of remuneration, length of service and payment of social security contributions by the employer, if a national worker in a comparable situation would be entitled to such recognition[58].

[55] The article modified by Act No. 2004–204 of 9 March 2004, art.169 Official Journal of 10 March 2004, in force 1 January 2005.

[56] CJEU Judgement of 2 August 1993, Beatrice Sellinger, RosalbaDel Maestro, Gillian Mansfield v Università degli Studi di Parma, Case C-332/91, ECLI:EU:C:1993:333.

[57] CJEU Judgement of 5 June 2008, James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions, Case C-164/07, ECLI:EU:C:2008:321, pt 17.

[58] CJEU Judgement of 15 May 2008, Nancy Delay v Universitá degli studi di Firenze and others, Case 276/07, ECLI:EU:C:2008:282, pt 31.

4.2. Case Dany Bidar v London Borough of Ealing

Not only employees have the opportunity to invoke the prohibition of discrimination. In the case of *Dana Bidar v London Borough of Ealing* The CJEU ruled that in terms of social benefits, an inactive EU citizen may invoke Art. 12 of the Treaty (Art. 18 TFEU), providing legal residence in a Member State for a certain period of time. The situation of a student legally residing in another Member State therefore falls within the scope of the Treaty within the meaning of Art. 12, first paragraph EC in the context of the eligibility for a maintenance grant[59]. However, national legislation requiring the status of an entity that has settled in the host state in order to receive support for subsistence costs in a situation of legal residence and effective integration into the host country's society is contrary to Art. 12 of the EC Treaty. Pursuant to Art. 4 of Student Support Regulations (British Education Regulation 2001)[60], a student loan for certain studies may be used by a person who has settled in the United Kingdom under the Immigration Act 1971. It is apparent from the case that, under British legislation, a national of another Member State cannot, as a student, obtain the status of a person who has settled in the United Kingdom.

It should be emphasized that national standards make it impossible for citizens of other Member States to obtain the above status, thus precluding the possibility of obtaining the aid in question. This type of differentiation of the situation of own citizens and citizens of other countries has discriminatory features toward the latter group. It should be remembered that in the light of settled case law, the implementation of the principle of non-discrimination prohibits treating comparable situations differently[61]. Nevertheless, the ruling on *Dana Bidar v London Borough of Ealing* and the ruling on *Ruda Grzelczyk v Centre public d'aide*

[59] CJEU Judgement of 15 March 2005, Dany Bidar v London Borough of Ealing, Case C-209/03, ECLI:EU:C:2005:169, pt 37 and 42.

[60] The Act on Education (Student Support) Regulations of 4 April 2001, Journal of Laws 2001, No. 174 as amended.

[61] CJEU Judgement of 3 May 2007, Advocaten voor de Wereld VZW v Leden van de Ministerraad, Case C-303/05, ECLI:EU:C:2007:261, pt 56.

socjale d'Ottignies- Louvain- la- Neuve[62] confirm the significant limitation in the competence of the Member States to grant cash benefits to migrant students[63].

4.3. Case European Commission v Republic of Austria

In the case of *European Commission v Republic of Austria*[64], many students who were nationals of Member States other than the Republic of Austria and wished to use public transport had to pay more than those paid by Austrian students. In some of the federated states, students within the meaning of §§ 3 and 4 of Studienförderungsgesetz 1992[65] in the version applicable at the time of the dispute, could benefit from concessionary fees only when their place of residence or the place of study was located on the premises of the public transport company concerned and when family allowances were received therein pursuant to Art. 2 of Familienlastenausgleichsgesetz (Law of 1967 on the equalization of the costs of maintaining the family through benefits, BGBl. No. 376/1967)[66].

After analyzing the Commission's allegations against the Republic of Austria and the Austrian legal bases[67] in relation to EU regulations[68] The Court ruled that by reserving, in principle, the possibility of benefiting from the reduced fares only for students whose parents receive Austrian

[62] CJEU Judgement of 20 September 2001, Rudy Grzelczyk v Centre public d'aide socjale d'Ottignies- Louvain- la- Neuve, Case C-184/99, ECLI:EU:C:2001:458.

[63] See Aleksandra Czekaj-Dancewicz, "Rola orzecznictwa ETS w kształtowaniu wspólnotowego prawa do świadczeń finansowych na pokrycie kosztów kształcenia studentów," in *Przepływ osób i świadczenie usług w Unii Europejskiej. Nowe zjawiska i tendencje*, ed. Stanisław Biernat, Sławomir Dudzik (Warsaw: Wolters Kluwer Press, 2009), 142.

[64] CJEU Judgement of 4 October 2012, European Commission v Republic of Austria, Case C-75/11, ECLI:EU:C:2012:605.

[65] Student Support Act ("Studienförderungsgesetz"), Journal of Laws 1992, No. 305/1992 (Austrian Federal Gazette BGBl.) as amended.

[66] Act on the equalization of the costs of maintaining the family through benefits of 24 October 1967 (Familienlastenausgleichsgesetz), Journal of Laws 1967, No. 376/1967 (Austrian Federal Gazette BGBl.) as amended.

[67] § 3 and 4 of Student Support Act ("Studienförderungsgesetz"), Journal of Laws 1992, No. 305/1992 (Austrian Federal Gazette BGBl.) as amended.

[68] Articles 18, 20, 21 TFEU and Art. 24 of Directive 2004/38/EC.

family allowances, the Republic of Austria has failed to fulfill its obligations under Art. 18 TFEU in conjunction with Art. 20 TFEU and 21 TFEU and Art. 24 of Directive 2004/38/EC[69]. In fact, linking the toll reduction with the fact of receiving family allowances in the host Member State has the effect of discriminating against students from other Member States against national students. Such national legislation therefore remains in contradiction to the principles, which are the mainstay of EU citizenship.

In conflict with EU law[70] remain also national standards[71], refusing to grant support for living costs during their studies to a national of another EU country studying in the host country and performing concurrently concrete and actual employment[72]. It is unfounded to say that the issue of benefits to cover the cost of living of migrant students does not fall within the scope of the Treaty. National provisions which make the granting of financial aid for higher education studies conditional on the fulfillment of a residence condition in the host country and differentiate treatment of residents of that country and non-residents who are children of frontier workers pursuing an activity in that country should also be viewed as discrimination in that Member State[73].

4.4. Case Commission of the European Communities v Republic of Austria

In the case of *Commission of the European Communities v Republic of Austria*[74] The Commission accused the Republic of Austria of lacking access to higher or university education for holders of a secondary education

[69] CJEU Judgement of 4 October 2012, European Commission v Republic of Austria, Case C-75/11, ECLI:EU:C:2012:605, pt 67.

[70] Art. 7 sec. 1 letter c) and Art. 24 sec. 2 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.

[71] Article 2a (2) and 4 of the Danish Consolidated Act No. 661 of 29 June 2009 on public aid for education (L 95, Folketingstidende 2005/2006, appendix A, p. 2854).

[72] CJEU Judgement of 21 February 2013, *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* C-46/12, ECLI:EU:C:2013:97, pt 52.

[73] CJEU Judgement of 20 June 2013, Elodie Giersch and others v État du Grand-Duché de Luxembourg, Case C-20/12, ECLI:EU:C:2013:411, pt 84.

[74] CJEU Judgement of 7 July 2005, Commission of the European Communities v Republic of Austria, Case C-147/03, ECLI:EU:C:2005:427.

diploma obtained in another Member State on the same terms as persons who receive this kind of diploma in Austria. Paragraph 36 of the Universitäts Studiengesetz (Law on University Studies)[75], entitled "Special Diploma for University Training" ("Besondere Universitätsreife"), states that it is not sufficient to present a high school diploma, but also to demonstrate that the conditions for access to university education have been met, competent for the given field of study, which means, inter alia, demonstrating the right of immediate admission to studies in the country that issued the certificate giving general right to access education during studies.

Thus, according to the Commission, Austria has failed to fulfill its obligations under Art. 12 of the EC Treaty (Article 18 TFEU)[76]. In the opinion of the CJEU, Austrian regulations differentiate the situation of people obtaining a diploma in Austria and abroad, because entities holding a secondary school diploma obtained in other Member States, in addition to the obligation to meet the general criteria for access to education, are obliged to prove that they meet the specific conditions for admission to the chosen field of study, established by the country that issued the diploma and allowing direct admission to these studies. Restricting access to education with additional conditions undoubtedly constitutes discrimination, even against Austrian citizens who hold a school diploma obtained in another Member State, although it will certainly more often apply to citizens of other Member States.

Undoubtedly, in accordance with settled case law, the principle of equal treatment prohibits not only overt discrimination on the basis of nationality but also hidden discrimination[77]. It should be considered that

[75] Act on University Studies of 9 August 2002, Journal of Laws 2002, No. 121 as amended.

[76] CJEU Judgement of 1 July 2004, Commission of the European Communities v Kingdom of Belgium, Case C-65/03, ECLI:EU:C:2004:402.

[77] CJEU Judgement of 12 February 1974, Giovanni Maria Sotgiu v Deutsche Bundespost, Case C-152/73, ECLI:EU:C:1974:13, pt 11; CJEU Judgement of 1 July 2004, Commission of the European Communities v Kingdom of Belgium, Case C-65/03, ECLI:EU:C:2004:402, pt 28; CJEU Judgement of 15 March 2005, Dany Bidar v London Borough of Ealing, Case C-209/03, ECLI:EU:C:2005:169, pt 51; CJEU Judgement of 16 January 2003, Commission of the European Communities v Italian Republic, Case C-388/01, ECLI:EU:C:2003:30, pt 13; CJEU Judgement of 27 November 1997, H. Meints v Minister van Landbouw, Natuurbeheer en Visserij, Case C-57/96,

the differentiation of the situation of persons in the above circumstances constitutes discrimination within the meaning of Art. 18 TFEU.

It follows from the jurisprudence of the CJEU that the application of a discriminatory measure is justified only in the exceptions listed in Art. 27 sec. 1 of Directive 2004/38/EC or in Art. 45 sec. 3 TFEU (Art. 39 (3) of the EC Treaty)[78]. Moreover, the implementation of restrictive measures obliges a member state to take steps in compliance with the principle of proportionality and relevance and to provide data confirming the state's arguments[79]. The Republic of Austria failed to meet the above conditions and did not guarantee equal access to the higher or university education system for nationals with a secondary education diploma obtained in an-

ECLI:EU:C:1997:564, pt 44; CJEU Judgement of 26 June 2001, Commission of the European Communities v Italian Republic, Case C-212/99, ECLI:EU:C:2001:357, pt 24; CJEU Judgement of 28 February 2013, Katja Ettwein v Finanzamt Konstanz, Case C-425/11, ECLI:EU:C:2013:121, pt 26; CJEU Judgement of 23 May 1996, John O'Flynn v Adjudication Officer, Case C-237/94, ECLI:EU:C:1996:206, pt 17, cit: "… the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result", see also: CJEU Judgement of 21 November 1991, Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir SARL, Case C-27/91, ECLI:EU:C:1991:441, pt 10; CJEU Judgement of 10 March 1993, Case C-111/91, Commission of the European Communities v Grand Duchy of Luxembourg, ECLI:EU:C:1993:92, pkt 9; CJEU Judgement of 18 January 2007, Aldo Celozzi v Innungskrankenkasse Baden-Württemberg, Case C-332/05, ECLI:EU:C:2007:35, pt 22–23; CJEU Judgement of 25 June 1997, Carlos Mora Romero v Landesversicherungsanstalt Rheinprovinz, Case C-131/96, ECLI:EU:C:1997:317, pt 29; CJEU Judgement of 21 September 2000, Carl Borawitz v Landesversicherungsanstalt Westfalen, Case C-124/99, ECLI:EU:C:2000:485, pt 23; Justyna Maliszewska-Nienartowicz, "Zakaz dyskryminacji ze względu na płeć na rynku pracy- orzecznictwo Trybunału Sprawiedliwości WE," *Studia Europejskie, Warsaw University Centre*, no. 1 (2008): 78.

[78] CJEU Judgement of 15 October 1969, Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola, Case C-15/69, ECLI:EU:C:1969:46; CJEU Judgement of 14 November 1995, *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme*, Case C-484/93, ECLI:EU:C:1995:379.

[79] CJEU Judgement of 13 November 2003, Diana Elisabeth Lindman, Case C-42/02, ECLI:EU:C:2003:613, pt 25; CJEU Judgement of 18 March 2004, Ludwig Leichtle v Bundesanstalt für Arbeit, Case C-8/02, ECLI:EU:C:2004:161, pt 45.

other Member State, and therefore failed to comply with the provisions of Art. 12 of the EC Treaty (Article 18 TFEU). Such an infringement will not, however, constitute a requirement of five years' prior residence in the territory of the host state in relation to nationals of other Member States who migrate to the latter to study and receive a grant for living expenses[80], since the host country has the right to refuse to grant subsistence aid to students who are not integrated into the host society[81]. However, it will not be able to do so if the student performs specific and actual work at the same time[82].

In the social sphere, the prohibition of discrimination is contained in Art. 7 sec. 2 of Regulation 492/2011. This standard prohibits discrimination in social and tax areas[83]. In light of the previous jurisprudence of the CJEU, social privileges should not be interpreted restrictively[84] because they contain in their content all the benefits granted to domestic workers due to the attribute of possessing employee status or due to the fact of residing in the territory of a given state. On the other hand, extending them to employees with citizenship of other Member States is aimed at supporting their mobility within the European Union[85]. In some Member States there are systemic obstacles, which are instances of unlawful

[80] CJEU Judgement of 18 November 2008, Jacqueline Förster Hoofddirectie van Informatie Beheer Groep, Case C-158/07, ECLI:EU:C:2008:630, pt 72.

[81] Undoubtedly, the condition of prior residence differentiates the situation of students from other countries in relation to a country's own students. However, in the opinion of the CJEU, the above circumstances do not constitute discrimination, and the requirement of a five-year stay cannot be considered too burdensome or disproportionate.

[82] Cf. CJEU Judgement of 21 February 2013, *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* C-46/12, ECLI:EU:C:2013:97.

[83] Jo Carby-Hall, *The treatment of Polish and other A8 economic migrants in the European Union Member States: a research programme prepared for Commisioner for Civil Right Protection of the Republic of Poland* (Hull: University of Hull, 2008), 41.

[84] CJEU Judgement of 27 November 1997, H. Meints v Minister van Landbouw, Natuurbeheer en Visserij, Case C-57/96, ECLI:EU:C:1997:564, pt 39.

[85] CJEU Judgement of 14 January 1982, Francesco Rein, Letizia Rein v Landeskreditbank Baden-Württemberg, Case C-65/81, ECLI:EU:C:1982:6, pt 12; CJEU Judgement of 12 May 1998, Maria Martinez Sala v Freistaat Bayern, Case C-85/96, ECLI:EU:C:1998:217, pt 25; CJEU Judgement of 18 July 2007, Wendy Geven v Land Nordhein-Westfalen, Case C-213/05, ECLI:EU:C:2007:438, pt 12.

discrimination. Most of them result from indirect discrimination or unjustified restrictions on the exercise of the right to free movement, for example, the requirement to reside in the host state, which is a condition for enjoying certain social or tax advantages[86].

4.5. Case Wendy Geven v Land Nordhein-Westfalen

In the case of *Wendy Geven v Land Nordhein-Westfalen*[87], The CJEU ruled that the German Government had the right to refuse to grant a social advantage in the form of a childcare allowance under a national law, due to the applicant's lack of permanent or habitual residence in Germany. A national provision (section 1 (4) of the Bundeserziehungsgeldgesetz (Act on Childcare Benefits and Leave))[88] provided for the right to childcare allowance for nationals of Member States and frontier workers from countries directly adjacent to Germany if they pursue in Germany a professional activity that does not constitute an additional occupation. In the presented case, the main question raised in the request for a preliminary ruling from the Bundessozialgericht is whether the additional occupation requirement, as defined in the national law, is compatible with Art. 7 sec. 2 of Regulation (EEC) No 1612/68[89], which guarantees equal treatment of migrant and national workers as regards the right to benefits.

The judgment of the CJEU seems to be fully justified, because it would be absurd to allow a frontier worker living and working in two different Member States, performing an additional activity, to use and combine the social benefits of both countries, especially since Regulation 1612/68/EEC, unlike Regulation 492/2011, did not regulate the rules of coordination in the situation of overlapping cash benefits.

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[86] Stanisław Biernat, "Glosa do wyroku WSA w Warszawie z 20.11.2006r., I SA/Wa 1569/06, dotycząca wymogu zamieszkania i przebywania na terytorium Polski w celu uzyskania świadczeń na rzecz rodziny zastępczej," *Orzecznictwo Sądów Polskich*, no. 7/8 (2008).

[87] CJEU Judgement of 18 July 2007, Wendy Geven v Land Nordhein-Westfalen, Case C-213/05, ECLI:EU:C:2007:438.

[88] Act on Childcare Benefits and Leave of 4 February 2004, Journal of Laws 2004, No. 206 as amended.

[89] Regulation (EC) of the Council No. 1612/68 on the free movement of workers within the Community (O.J.E.C. L 257, 15 October, 1968).

4.6. Case Gertraud Hartmann v Freistaat Bayern

In the light of the ruling of the Court of Justice in the case of *Jürgen Ritter-Coulais and Monique Ritter-Coulais v Finanzamt Germersheim*[90] any EU citizen, regardless of place of residence or nationality, who exercises the right to free movement of workers and pursues a professional activity in a Member State other than their country of residence, falls under the scope of application of Art. 45 TFEU[91]. The question arises which rights granted by EU law can be exercised by an EU citizen if he or she moves to another Member State while remaining employed in the state of his or her previous residence. This issue was raised in the case of *Gertraud Hartmann v Freistaat Bayern*[92]. The claimant, who is an Austrian national and the wife of a German national working in Germany, was refused a childcare allowance, arguing that she is not domiciled and does not pursue a professional activity in Germany. Bayerische Landessozialgericht (Bavarian National Social Security Court) found that both Mrs. Hartmann and her spouse were outside the scope of Regulation 1408/71/EEC of 14 June 1971, because pursuant to § 1 sec. 4 Bundeserziehungsgeldgesetz[93], citizens of the European Union Member States and frontier workers from a country with a border with Germany are entitled to a childcare allowance, provided that they carry out professional activities in that Member State in excess of the minimum employment requirement.

It seems justified to say that the right of free movement of workers means migration to another country in order to perform professional activity there. However, the settlement of an entity in another Member State for purposes other than professional ones does not negate the attribute of a migrant worker and does not question being subject to the provisions of

[90] CJEU Judgement of 21 February 2006, Jürgen Ritter-Coulais and Monique Ritter-Coulais v Finanzamt Germersheim, Case C-152/03, ECLI:EU:C:2006:123, pt 31–32.

[91] CJEU Judgement of 7 July 2005, A. J. van Pommeren-Bourgondiën v Raad van bestuur van de Sociale verzekeringsbank, Case C-227/03, ECLI:EU:C:2005:431, pt 19,44 and 45.

[92] CJEU Judgement of 18 July 2007, Gertraud Hartmann v Freistaat Bayern, C-212/05, ECLI:EU:C:2007:437.

[93] Act on Childcare Benefits and Leave of 4 February 2004, Journal of Laws 2004, No. 206 as amended.

the Treaty and Regulation 1612/68/EEC. The immediate beneficiary of the rights is Mr. Hartmann, while his spouse may receive the allowance as long as it constitutes a social advantage for her husband. The German childcare allowance in the case of the Hartmann family is undoubtedly a social benefit in light of Art. 7 sec. 2 of Regulation 1612/68/EEC, regardless of the party requesting it[94]. However, the German legislature made the granting of this type of allowance subject to the requirement of residence in Germany, with the exception of frontier workers whose professional activity exceeds the minimum level of employment. Due to the fact that the condition relating to working time is met, the CJEU ruled on the entitlement to a childcare allowance in the presented case.

4.7. Case Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH v EurothermenResort Bad Schallerbach GmbH

In the this cases proceedings, the question whether Art. 45 TFEU and Art. 7 sec. 1 of Regulation No 492/2011 should be interpreted in the way that they are contrary to Art. 3 Urlaubsgesetz, which, in order to determine whether an employee who has worked for a total of 25 years is entitled to an increase in annual paid leave from five to six weeks, provides that the length of service acquired under one or more employment relationships preceding the employment relationship between him or her with his or her current employer can only be counted up to a maximum of five years, even if the actual length of service is more than five years.

Article 3 of Urlaubsgesetz[95] limits to five years to take into account earlier periods of employment with other employers established in other Member States, which, according to the complainant, constitutes a restriction on the free movement of workers guaranteed by Art. 45 TFEU. The Court stated that Art. 45 sec. 2 TFEU prohibits any discrimination on grounds of nationality between workers of the Member States as regards to employment, remuneration and other working conditions. Article 7 sec. 1 of Regulation No 492/2011 is only a specific expression of the principle of

[94] See also CJEU Judgement of 26 February 1992, M. J. E. Bernini v. Minister van Onderwijs en Wetenschappen, Case C-3/90, ECLI:EU:C:1992:89, pt 25–26.

[95] Act on Austrian Holiday of 7 July 1976, Journal of Laws 1976, No. 390 as amended.

non-discrimination guaranteed in Art. 45 sec. 2 TFEU in the specific area of employment and working conditions, and therefore it should be interpreted in the same way as the latter provision[96]. The right to annual paid leave under Austrian law is, after 25 years of service, six weeks for the period of employment with the current employer. If the employee was previously employed by another or several other employers, only the period of employment with the latter of a maximum of five years in total may be taken into account. Thus, in order to be entitled to six weeks of paid annual leave, an employee must either work 25 years with the current employer or have worked for 25 years in total, including at least 20 years with the current employer. According to the settled case-law of Oberster Gerichtshof (Supreme Court) and the unanimous view of the doctrine, Article 3 of Urlaubsgesetz must be interpreted as meaning that periods of prior employment of a given employee with other employers are taken into account in the same way, that is to say, for a maximum of five years in total, irrespective of the fact whether they took place on the territory of the country or in another Member State. Given that such a rule applies without exception to all workers who have worked for at least 25 years, irrespective of their nationality, it does not constitute a source of discrimination based directly on nationality.

5. CONCLUSIONS

As shown by the numerous decisions of the CJEU, the transposition of EU regulations and the decision-making by competent authorities at the level of a given Member State are unsatisfactory. The problem is largely restrictive misinterpretation of the powers of EU citizens and their family members and the lack of appropriate mechanisms to facilitate the implementation of these rights. This thesis is even more confirmed by the activ-

[96] CJEU Judgement of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH v Land Salzburg*, Case C-514/12, ECLI:EU:C:2013:799, pt 23; CJEU Judgement of 26 October 2006, Commission of the European Communities v Italian Republic, Case C-371/04, ECLI:EU:C:2006:668, pt 17.

ities of the European Commission, in particular in preventing discrimination on the basis of nationality of mobile EU workers[97].

The concept aimed at optimizing the model was to be adjusted by the successive implementation of the regulations[98], aimed at strengthening the protection of the rights and interests of citizens of the Member States, among others, by introducing the institution of EU citizenship, eliminating all forms of discrimination in terms of employment and working conditions, or eliminating internal border controls.

Exploration of CJEU jurisprudence confirms the application and implementation of national provisions in the field of the principle of equal treatment in a manner that demonstrates their disproportion with the norms of EU law. An important factor causing the dissonance in question is, first of all, the creation of national regulations inconsistent with EU law. This poses a high risk of using them in practice, in a serial way for a large number of recipients. The rulings of the CJEU are largely the result of preliminary questions from judicial and administrative authorities applying national law. All the more significant seems to be their role in the matter under discussion. An additional difficulty in the implementation of the principle of equal treatment is reflected in the fact that it covers many spheres of life. This makes it practically impossible to verify, in terms of compliance with EU regulations, administrative acts relating in some part to the issue of non-discrimination. This, in turn, gives rise to conclusions in the form of an opinion, balancing on the verge of certainty, that principle in question is mostly implemented in a manner inconsistent with the TFEU and secondary law. The most accurate determinant of this theory is the scale of the CJEU jurisprudence.

Following the jurisprudence of the CJEU, it should be stated that the differences and discrepancies in the manner of application and en-

[97] In April 2013, the Commission presented a proposal for a Directive of the European Parliament and of the Council on measures to facilitate the exercise of the rights granted to workers in the context of the free movement of workers, COM (2013) 236. The directive itself entered into force on 20 May 2014, Journal of Laws No. L 128, p. 8, 30/04/2014.

[98] On the evolution of legal regulations in the field of freedom of migration, see Chapter I, point 1- The legal basis of the free movement of workers within the Community and the directions of changes in the development of the free movement of workers in the European Union.

forcement of the provisions of EU law, occurring in the national legal systems of the Member States, have a negative impact on the proper functioning of the principle of non-discrimination in their territories. It is undoubtedly very difficult to ensure equal opportunities and treatment for EU citizens when exercising their right to free movement, but all the more the standard of legal clarity and certainty in this area should be achieved at the EU level.

The jurisprudence of the Court implies an obligation for courts and other authorities of the Member States to interpret domestic law in accordance with EU law, its content and purpose, and therefore they are obliged, as far as possible, to interpret national law in the light of the provisions of EU law in order to guarantee the result envisaged therein. As the analysis of the CJEU's decisions shows, the authorities and courts of the Member States do not play this role, which results in violations of subjective rights in the matter in question.

To sum up, undoubtedly the analysis of the decisions of the Court of Justice of the European Union in conjunction with the supervision of the process of transposition of EU provisions into national legal orders leads to the conclusion that permanent revision of legislative acts and administrative practices, contrary to EU law and CJEU jurisprudence in the field of non-discrimination principle due to nationality is fully justified.

REFERENCES

Babayev, Rufat. *Choice of the applicable law and equal treatment in the European Union.* Durham: Durham University, 2012.

Biernat, Stanisław. "Glosa do wyroku WSA w Warszawie z 20.11.2006r., I SA/Wa 1569/06, dotycząca wymogu zamieszkania i przebywania na terytorium Polski w celu uzyskania świadczeń na rzecz rodziny zastępczej." *Orzecznictwo Sądów Polskich*, no. 7/8 (2008): 581–585.

Brouwer, Evelien, and Karin de Vries. "Third-country nationals and discrimination on the ground of nationality:article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach." In *Equality*

and human rights: *nothing but trouble*?, edited by Marjolein Van den Brink, Susanne Burri, and Jenny Goldschmidt, 123–146. Utrecht: SIM, 2015.

Carby-Hall, Jo. *The treatment of Polish and other A8 economic migrants in the European Union Member States: a research programme prepared for Commisioner for Civil Right Protection of the Republic of Poland*. Hull: University of Hull, 2008.

Cottier, Thomas, and Matthias Oesc. "Direct and Indirect Discrimination in WTO Law and EU Law." *Working Paper*, no. 2011/16 (April 2011): 1–25.

Czapliński, Władysław. *Zarys prawa europejskiego*. Warsaw: Hesińska Fundacja Praw Człowieka, 1999.

Czekaj, Aleksandra. "Glosa do orzeczenia ETS z dnia 17.09.2002r. w sprawie C-413/99, Baumbast i R. v Secretary of State for the Home Department." *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 2 (2004): 186–202.

Czekaj-Dancewicz, Aleksandra. "Rola orzecznictwa ETS w kształtowaniu wspólnotowego prawa do świadczeń finansowych na pokrycie kosztów kształcenia studentów." In *Przepływ osób i świadczenie usług w Unii Europejskiej. Nowe zjawiska i tendencje*, edited by Stanisław Biernat, and Sławomir Dudzik, 132–153.Warsaw: Wolters Kluwer, 2009.

Ellis, Evelyn. "Social advantages: a new lease of life?." *Common Market Law Review* 40 (2003): 639–659.

Florek, Ludwik. *Europejskie prawo pracy*. Warsaw: LexisNexis Press, 2010.

Goodwin-Gill, Guy S. "Migration: International Law and Human Rights." In *Managing Migration: Time for a New International Regime?*, edited by Bimal Gosh, 160–189. Oxford: Oxford University Press, 2000.

Górski, Marek. "Wpływ orzecznictwa Europejskiego Trybunału Sprawiedliwości na interpretację i stosowanie przepisów o ochronie środowiska." In *Wspólnotowe prawo ochrony środowiska i jego implementacja w Polsce trzy lata po akcesji*, edited by Jerzy Jendrośka, and Magdalena Bar, 31–46. Wrocław: Centrum Prawa Ekologicznego Press, 2008.

Kolasiński, Marek Krzysztof. "Odmienności związane z zatrudnieniem w administracji publicznej." In *Zarys prawa swobód rynku wewnętrznego Unii Europejskiej*, edited by Marek Krzysztof Kolasiński, 213–234. Toruń: Dom Organizatora Press, 2013.

Maliszewska-Nienartowicz, Justyna. "Rola zasady równości w prawie Wspólnoty/Unii Europejskiej." *Studia Europejskie*, no. 4 (2011): 73–94.

Maliszewska-Nienartowicz, Justyna. "Zakaz dyskryminacji ze względu na płeć na rynku pracy- orzecznictwo Trybunału Sprawiedliwości WE." *Studia Europejskie, Warsaw University Centre*, no. 1 (2008): 75–94.

McCrudden, Christopher, and Sacha Prechal. *The concepts of Equality and non-discrimination in Europe. A practical Approach*. Brussels: European Network of Legal Experts in the Field of Gender Equality, 2009.

Mitrus, Leszek. "Ewolucja prawa unijnego w dziedzinie swobody przemieszczania pracowników." In *Prawo pracy w świetle procesów integracji europejskiej. Księga jubileuszowa Profesor Marii Matey-Tyrowicz*, edited by Jerzy Wratny, and Magdalena Barbara Rycak, 125–141. Warsaw: Wolters Kluwer, 2011.

Mitrus, Leszek. *Swoboda przemieszczania się pracowników po przystąpieniu Polski do Unii Europejskiej*. Cracow: LexisNexis Press, 2003.

Morano-Foadi, Sonia. "Third Country Nationals Versus EU Citizens: Discrimination Based on Nationality and the Equality Directives." *Oxford Brookes University - School of Social Sciences and Law* (December 2010): 1–26.

Niedźwiedź, Monika. "Stosowanie prawa wspólnotowego przez organy administracyjne." *Casus*, no. 32 (October 2004): 6–11.

Pennings, Frans. "Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?." *Utrecht Law Review* 9, Issue 1 (January 2013): 118–134.

Rossi Dal Pozzo, Francesco. *Citizenship rights and freedom of movement in the European Union*. the Netherlands: Kluwer Law International Press, 2013.

Schutter, Olivier. *Links between migration and discrimination. A legal analysis of the situation in EU Member States*. Brussels: European Commission, 2016.

Smusz-Kulesza, Monika. "Ograniczenia swobody przepływu pracowników." In *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, edited by Zbigniew Hajn, 98–127. Warsaw: Instytut Wydawniczy EuroPrawo Press, 2010.

Sundberg-Weitman, Brita. *Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under the EEC Treaty.* Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977.

Szyszczak, Erica. "Antidiscrimination Law in the European Union." *Fordham International Law Journal*, no. 32 (2008): 531–550.

Van der Mei, Anne. "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship." *Maastricht Journal of European and Comparative Law* 18, Issue 1–2 (March 2011): 62–85.

Zawidzka – Łojek, Anna. *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej*. Warsaw: Instytut Wydawniczy EuroPrawo, 2013.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 219–235
DOI: https://doi.org/10.31743/recl.12645

THE EVOLUTION OF CYBERSECURITY REGULATION IN THE EUROPEAN UNION LAW AND ITS IMPLEMENTATION IN POLAND

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ABSTRACT

The 2013 European Union Cybersecurity Strategy, the 2016 Directive, and the 2019 Regulation mark the next steps in strengthening the protection of cybersecurity by European Union bodies, linked to changes in member states' laws. The rapid increase in threats, referred to as the "cyberpandemic", requires prompt adaptation of legal instruments to new needs, but at the same time complicates ensuring consistency of multi-level regulation. The analysis of changes in the legal status in Poland shows that this concerns terminology, subject matter scope and the structure of cyber security systems. In order to reduce difficulties, it is worth considering introducing immediate amendments to those provisions in force which were negatively assessed during works on drafting new acts. Such a conclusion is prompted by the evolution of the definition of cybersecurity, which, according to the 2019 Regulation as well as the draft amendments to the Polish Act on National Cyber Security System and the draft of the new Directive, is to be understood as activities necessary to protect networks and information systems, users of such systems and other persons against cyber threats such as any potential circumstance, event or action that may cause damage, disruption or otherwise adversely affect networks and information systems. Another example is the maintenance of the distinction between key service operators and digital service providers in the 2019 EU Regulation and the 2021 draft amendment to the Polish law,

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although the 2020 NIS 2 directive draft recognizes that it has become irrelevant and replaces it with a distinction between essential and relevant entities. Also, other changes currently proposed are justified by the blurring of the boundaries between virtual and real space.

Keywords: cybersecurity, cyberspace, legislation, NIS Directive, ENISA

1. INTRODUCTION

Cybersecurity is currently the subject of intense legislative regulation in international, EU and domestic law. This paper seeks to verify the claim that the conceptual network, scope and structure of this regulation have a number of shortcomings that ought to be mitigated in order not to compromise its effectiveness. The achievement of this goal requires the application of legal research methods, primarily the dogmatic and comparative methods, as well as big data analysis.

2. LEGAL INSTRUMENTS CONCERNING CYBERSECURITY

Over the past quarter of a century, efforts have been made to provide a legal framework for the security of electronic network communication, and by now the regulatory landscape contains instruments of multiple levels, but they are assessed critically[1].

Since the second half of the 20th century, the United Nations General Assembly has adopted a number of resolutions and other soft law acts, but the ambition to regulate the issue in question by way of a global convention have never materialized. Relating general acts to cyberspace encounters difficulties, including those related to the attribution of cyber-

[1] Cf. Ansgar Baumgarten and Christian Calliess, "Cybersecurity in the EU the Example of the Financial Sector: A Legal Perspective," *German Law Journal* 21, no. 6 (2020): 1149–1179; Kamil Czaplicki, Agnieszka Gryszczyńska, and Grażyna Szpor, eds., *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz* (Warsaw: Wolters Kluwer Polska, 2019); Jeff Kosseff, "Hamiltonian Cyversecurity," *Wake Forest Law Review* 54, no. 1 (2019): 155–206; H. P. Singh and Tareq S. Alshammari, "An Institutional Theory Perspective on Developing a Cyber Security Legal Framework: A Case of Saudi Arabia," *Beijing Law Review* 11, no. 3 (2020): 637–650.

space to states. Dynamic interpretation and case law assist in overcoming these problems[2]. In international law, the principal legally binding act, but with regional reach, is the Council of Europe Convention on Cybercrime, made on 23.11.2011 in Budapest, to which a draft Second Additional Protocol has been in preparation since 2017[3].

In European Union law, the two principal instruments are Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (NIS Directive)[4], and Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act)[5]. Work on NIS 2 was still ongoing in 2021[6].

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[2] Przemysław Roguski, "Przesłanki przypisania cyberoperacji państwu," in *Internet. Cyberpandemia*, ed. Agnieszka Gryszczyńska and Grażyna Szpor (Warsaw: C.H. Beck, 2020), 91–101; Joanna Worona, *Cyberprzestrzeń a prawo międzynarodowe. Status quo i perspektywy* (Warsaw: Wolters Kluwer Polska, 2020).

[3] Andrzej Adamski, "Europejskie standardy prawno-karnej ochrony sieci i informacji oraz ich implementacja do prawa polskiego," in *Internet. Strategie bezpieczeństwa*, ed. Agnieszka Gryszczyńska and Grażyna Szpor (Warsaw: C.H. Beck, 2017), 23–46; Information on a proposition of a draft Second Additional Protocol to the Convention on Cybercrime (ETS 185); https://www.coe.int/en/web/cybercrime/t-cy-drafting-group.

[4] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (NIS Directive) (OJ L 194 of 19.07.2016, p. 1). It was created in implementation of the provisions adopted on 7.02.2013. "Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace". Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions /* Join/2013/01 Final */.

[5] OJ L 2019/L151/15.

[6] Proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (COM/2020/823 final); Cf. The EU's Cybersecurity Strategy for the Digital Decade. Joint Communication to the European Parliament and the Council Brussels of 16.12.2020 (COM/2021/118 final).

In Polish domestic law, the Act on the National Cybersecurity System[7] of 5 July 2018 implements the NIS Directive, but its scope actually exceeds the requirements of this directive. Works on the amendment of this act began in 2020[8].

Efforts to improve the regulation of cybersecurity undertaken in 2021 in international, European and domestic law, encompassed the amendment of existing laws and the drafting of new ones[9]. This intensification was a result of the "cyber pandemic". This term refers to the similarities between cyber-attacks and any pandemic (not only COVID-19), including the results of their global and rapid spread that are devastating to people and the economy. The massive and sudden shift from the virus-ridden reality to cyberspace has heightened the awareness of opportunities associated with this digital transformation, especially as regards healthcare. It has also revealed the insufficient preparation for safe use of cyberspace, increased the activity of cybercriminals, and made higher cybersecurity a key task for public authorities, businesses and citizens, confirming the validity of theoretical observations on valorization of deficits[10]. The increasingly intrusive cyber-attacks prompt 'active defence' and 'pre-emptive defence' by public authorities, but these are also becoming attractive to global corporations active on the Internet. Achieving acceptable regulatory effectiveness is important to avoid 'companies starting a war'[11].

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[7] Act of 5 July 2018 on the National Cybersecurity System (consolidated text: Journal of Laws of 2020, item 1369).

[8] Draft act amending the Act on the National Cybersecurity System and of the Act on Public Procurement of 7 September 2020, as well as a separate draft Act on Electronic Communication of 29 July 2020; next draft act amending the Act on the National Cybersecurity System and of the Act on Telecommunications of 20 January 2021; https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-zamowien-publicznych.html.

[9] The EU is working on two legislative proposals to address current and future online and offline risks: an updated directive to better protect network and information systems a new directive on the resilience of critical entities, https://www.consilium.europa.eu/en/policies/cybersecurity/.

[10] Agnieszka Gryszczyńska and Grażyna Szpor, eds., *Internet. Cyberpandemia* (Warsaw: C.H. Beck, 2020).

[11] Brian Corcoran, "A Comparative Study of Domestic Laws Constraining Private Sector Active Defense Measures in Cyberspace," *Harvard National Security Journal* 11, no. 1 (2020): 2.

3. THE TERM 'CYBERSECURITY' AND ITS DEFINITIONS

Brian Corcoran, while admitting that 'cyber' is a notoriously unclear term, adopts that "it simply means 'pertaining to the Internet'". The terms 'cyberattack' and 'cyberwar' are even more vague[12].

In 2021, the 'cyber-' prefix could be found in a few hundred Wikipedia entries, and it generated ca. 1.76 billion search results in Google[13], and so it is important for the clarity of law to agree on the definitions of those terms that contain said prefix.

The term 'cybersecurity' was included in the title of the 2013 EU strategy. However, it was missing from the 2016 NIS Directive which embodied the provisions of this strategy, as a definition consensus could not be reached. Two years later, in 2018, it was once again used in the title of the Polish act implementing this directive, in which it was defined. Nevertheless, in 2019 cybersecurity was introduced into the abbreviated title of the Regulation of the European Parliament and Council (EU) 2019/881, in which it was defined differently than in the Polish act. In December 2020, it once again appeared in the subsequent EU's Cybersecurity Strategy for the Digital Decade[14].

In the Polish Act of 5 July 2018 on National Cybersecurity System (Art. 2(4)), cybersecurity is defined as the resilience of information systems against any action that compromises the confidentiality, integrity, availability and authenticity of the data processed or of the related services

[12] Corcoran, "A Comparative Study of Domestic Laws," 5.

[13] Search result of 28 March 2021.

[14] Joint Communication to the European Parliament and the Council, Brussels, 16.12.2020 (COM/2021/118 final), https://www.consilium.europa.eu/en/policies/cybersecurity/: "In December 2020, the European Commission and the European External Action Service (EEAS) presented a new EU cybersecurity strategy. The aim of this strategy is to strengthen Europe's resilience against cyber threats and ensure that all citizens and businesses can fully benefit from trustworthy and reliable services and digital tools. The new strategy contains concrete proposals for deploying regulatory, investment and policy instruments. On 22 March 2021, the Council adopted conclusions on the cybersecurity strategy, underlining that cybersecurity is essential for building a resilient, green and digital Europe. EU ministers set as a key objective achieving strategic autonomy while preserving an open economy. This includes reinforcing the ability to make autonomous choices in the area of cybersecurity, with the aim to strengthen the EU's digital leadership and strategic capacities".

offered by those information systems. This is similar to the definition of networks and systems security in the implemented NIS Directive, but not identical[15].

In a later EU Regulation 2019/881, which is directly applicable in the national legal order, 'cybersecurity' is defined as activities necessary to protect network and information systems, the users of such systems, and other persons affected by cyber threats. A 'cyber threat' means any potential circumstance, event or action that could damage, disrupt or otherwise adversely impact network and information systems, the users of such systems and other persons.

There are significant differences between these definitions. Pursuant to the Act on the National Cybersecurity System, cybersecurity is a goal to be achieved (resilience), and pursuant to Resolution 2019/881, cybersecurity comprises activities. Resilience applies only to information systems and activities apply to networks and information systems, but also separately to their users and others. Resilience is concerned with breaches and activities are concerned with protection against cyber threats, covering potential circumstances, an event or an action. Pursuant to the Polish act, the confidentiality, integrity, availability and authenticity of the processed data or related services offered by information systems may be breached, while the regulation more generally indicates the risk of damage, disruptions or other adverse effects on networks, systems and persons, also those who are not users of networks and systems[16].

The postulate of ensuring coherence of multi-level regulation by way of disambiguation of the term 'cybersecurity' was not accounted for in the original draft amendment of the Act on the National Cybersecurity System of 7 September 2020. It was, however, included in the draft amendment of 20 January 2021, where Art. 2(4) of the Act on the National Cybersecurity System was given the following wording: "(4) cybersecurity - measures necessary to protect information systems, users of such

[15] Grażyna Szpor, "Komentarz do art. 2," in *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*, ed. Kamil Czaplicki, Agnieszka Gryszczyńska, and Grażyna Szpor (Warsaw: Wolters Kluwer Polska, 2019).

[16] Grażyna Szpor, "Nowelizacja siatki pojęciowej cyberbezpieczeństwa," *Monitor Prawniczy*, no. 22 (2020): 1189.

systems and other persons from cyber threats". Also, the following point 4a has been added: "(4a) information systems security - the resilience of information systems to actions that compromise the confidentiality, integrity, availability and authenticity of the data processed or the related services offered by those systems". It seems as though the definition of cybersecurity from Regulation (EU) 2019/881 might be consolidated in this respect in the NIS 2 Directive[17], which may facilitate distinguishing cybersecurity in statistics as a separate sector of the economy[18].

Some words, however, have been translated incorrectly in the Official Journal of the European Union. For example, cybersecurity has been translated as *bezpieczeństwo cybernetyczne* instead of *cyberbezpieczeństwo*, and information systems have been translated as *systemy informatyczne* instead of *systemy informacyjne*. A corrigendum procedure must be urgently implemented to fix these errors, not only because of the Act on the National Cybersecurity System[19]. The weight of translation problems is also confirmed by a proposal of a new approach to them set forth in the draft Second Additional Protocol to the Budapest Convention[20].

'Cybersecurity' is a commonly used term in scholarly publications, education, names or organizational units and in colloquial language: in

[17] Art. 4(3) of the proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (COM/2020/823 final); https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52020PC0823&qid=16178372001 defines 'cybersecurity' as cybersecurity within the meaning of Art. 2(1) of Regulation (EU) 2019/881, while pursuant to Art. 4(7), A 'cyber threat' is a cyber threat within the meaning of Art. 2(8) of Regulation (EU) 2019/881.

[18] Consolidated text: Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1893–20190726&qid=1620666649813.

[19] Changing the statutory Polish definitions of *system informatyczny* and *system teleinformatyczny* could be an alternative to the corrigendum regarding systems. Cf. Szpor, "Nowelizacja siatki pojęciowej cyberbezpieczeństwa," 1191.

[20] Information on a proposition of a draft Second Additional Protocol to the Convention on Cybercrime (ETS 185); https://www.coe.int/en/web/cybercrime/t-cy-drafting-group.

2021, it rendered about 137 million Google search results[21]. Although its introduction to the legal language raised some doubts, in 2021 EUR-LEX search engine turned up ca. 1300 documents that contain this word. This confirms the thesis that we need a short collective term, and that alternatives are unattractive. We also need disambiguation and coherence of other terms with the cyber- component, such as cyber threat, cyber-attack, cyberoperations, cybercrime, cyberspace, etc. Initial works on a cybersecurity lexicon have also revealed that these terms are used inconsistently in legal instruments, official documents and normalization, and it is a problem that needs addressing.

4. AIM, SCOPE AND REMEDIES IN CYBERSECURITY

Art. 1 of the NIS Directive specifies its aim to be the achievement of a high common level of security of network and information systems (par. 1), as well as five means to this end (par. 2, a-e).

In the Polish Act on the National Cybersecurity System of 5 July 2018, which implements the NIS Directive into the Polish legal order, the aim may only be deduced from the definition of cybersecurity as provided in Art. 2. Art. 1(1) of the Polish act succinctly lays down its subject matter as concerning the "organisation of a national cybersecurity system and the tasks and duties of entities forming part of this system" (p. 1), as well control and oversight (p. 2) and strategy (p. 3), which does not reflect the act's structure. The draft amendment of 2021 broadens the subject matter and scope to include the organisation of the national cybersecurity certification system and the rules and procedures for the certification of an ICT product, ICT service or ICT process for cybersecurity as defined in Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019[22].

[21] Cybersecurity – ca.137,000,000 results; *cyberbezpieczeństwo* – ca.1,500,000 results; Search performed on 28.03.2021.

[22] "The following amendments are introduced to the Act of 5 July 2018 on the National Cybersecurity System (Journal of Laws of 2020, item 1369): 1) In Art. 1: a) point 1a in the following wording is added after point 1 of par. 1: "(1a) the organisation of the national cybersecurity certification system and the rules and procedures for the cer-

The subjective scope of the NIS Directive is narrower than its drafts had envisaged[23]. However, since the Directive was based on the principle of minimum harmonisation, under Article 3 Member States may, without prejudice to Article 16(10) and to their obligations under EU law, adopt or maintain provisions aimed at achieving a higher level of security of networks and information systems. In Poland, this option was used to broaden the subjective scope. In addition to 6 sectors of the economy considered crucial for the socio-economic security of the state, i.e.: Energy, Transport, Health, Banking and Financial Markets Infrastructure, Water Supply and Digital Infrastructure, also most entities of the public finance sector were included in the scope of the original version of the Act on the National Cybersecurity System. The 2021 amendment draft has introduced some exceptions to the earlier exclusion of telecommunications and trust service providers from the scope of the act[24].

The NIS 2 proposal, however, ushers in further-reaching changes. The impact assessment of the existing directive found it to be too limited

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tification of an ICT product, ICT service or ICT process in the field of cybersecurity as defined in Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (European Union Agency for Cybersecurity) and on information and communication technology cybersecurity certification and repealing Regulation (EU) 526/2013 (Cybersecurity Act) (OJ L 151 of 07.06.2019, p. 15), hereinafter referred to as "Regulation 2019/881".

[23] Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union COM/2013/048 final 2013/0027.

[24] "Par. 2(1) is given the following wording: "1) telecommunications entrepreneurs referred to in the Act of 16 July 2004 - Telecommunications Law (Journal of Laws of 2019, item 2460 and of 2020, item 374, 695 and 875), with regard to security requirements and incident reporting with the exception of Articles 66a-66c, Articles 67a-67b and Articles 73–74", in par. 2, point 2 is given the following wording: "2) trust service providers who are subject to the requirements of Article 19 of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257 of 28.08.2014, p. 73) with the exception of Articles 67a-67b and Articles 73–74"; Draft of 20 January 2021 of the Act on amending the Act on the National Cybersecurity System and the Act on Telecommunications, https://www.gov.pl/web/krmc/projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-telekomunikacyjne.

mainly due to increased digitisation in recent years and a higher degree of interconnectedness[25]. The new directive is to apply to certain public and private "essential entities" operating in sectors listed in Annex I (energy; transport; banking; financial markets infrastructure; health care; drinking water; waste water; digital infrastructure; public administration and space), as well as to certain "important entities" operating in the sectors listed in Annex II (postal and courier services; waste management; manufacture, production and distribution of chemicals; production, processing and distribution of food; digital providers). The proposal excludes micro and small entities within the meaning of the Commission Recommendation of 6 May 2003 2003/361/EC from the Directive scope, with the exception of providers of electronic communications networks or of publicly available electronic communications services, trust service providers, Top-level domain name (TLD) name registries and public administration, and certain other entities, such as the sole provider of a service in a Member State. Recital 7 of the preamble states that the sectors covered by the directive should be extended to provide a comprehensive coverage of the sectors and services of vital importance. Moreover, the rules should not be different according to whether the entities are operators of essential services or digital service providers, as this differentiation has proven obsolete, since it does not reflect the actual importance of the sectors or services for the societal and economic activities in the internal market.

In a bid to increase the consistency of imposing directive obligations in individual Member States, it was decided that uniform criterion should be established that determines the entities falling within the scope of application of this Directive based on their size. Specifically, all medium and large enterprises, as defined by Commission Recommendation 2003/361/EC 15, that operate within the sectors or provide the type of services covered by this directive, fall within its scope, with no additional actions required on the part of Member States. On the other hand, it has been left up to Member States to establish lists of micro and small entities with a key role

[25] Impact assessment 7, which was submitted to the Regulatory Scrutiny Board (RSB) on 23 October 2020 and received a positive opinion with comments by the RSB on 20 November 2020; Cf. https://digital-strategy.ec.europa.eu/en/library/proposal-directive-measures-high-common-level-cybersecurity-across-union.

for the economies or societies of Member States or for specific sectors or types of services, which should be covered by the directive, and to submit such lists to the Commission[26].

The analysis of the evolution of cybersecurity regulation shows that it is expanding rapidly both in terms of its objective and subjective scope, and that efforts are under way to achieve uniform cybersecurity obligations for companies across the European Union. However, the quickly changing cyber landscape makes it difficult to achieve consistency between European and domestic laws and defers the achievement of uniformity between Member States' national regulations. In Poland, the amendment of the 2018 Act to align with the 2019 EU Regulation will likely be ready shortly before the repeal of the NIS Directive that it implemented into national law, followed by the adoption of the new NIS 2 Directive, the transposition of which will force further changes to domestic law[27]. Problems in trans-border relations may also be triggered by the fact that the NIS 2 Directive will be transposed at different times in the Member States, as the proposal for this directive provides for a time limit of 18 months following its adoption for this procedure to be completed.

5. CYBERSECURITY SYSTEM STRUCTURE

The NIS Directive has designated the following entities tasked with ensuring EU-wide cooperation in the area of network and information systems security: The Cooperation Group (composed of representatives of Member States, the Commission and the European Union Agency for Cybersecurity (ENISA)) and a computer security incident response team (CSIRT) network, for which ENISA is to provide the secretariat

[26] Cf. recitals 8 and 9 of the preamble of the Proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (COM/2020/823 final).

[27] Pursuant to the proposal, the Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive 2016/1148, enters into force on the twentieth day following that of its publication in the Official Journal of the European Union (Art. 42), and Member States have 18 months for its transposition, upon the lapse of which the NIS Directive ceases to have effect.

(Chapter 3). The 2019 ENISA regulation brought about a strengthening of cooperation, and NIS 2 introduces new solutions in this regard, meant in particular to strengthen ties with the institutional environment. The entities of cooperation according to the draft NIS 2 are the Cooperation Group (CG) with an expanded composition[28], the CSIRTs network[29] and a new entity: a European Cyber Crises Liaison Organisation Network (EU - CyCLONe), composed of representatives of Member States crisis management authorities, the Commission and ENISA[30].

Simultaneously with the proposal on NIS 2, on 16.12.2020 the Commission submitted a proposal for a directive on the resilience of critical entities[31]. It is emphasized that this proposal is consistent and establishes close synergies with the proposed NIS 2 Directive, which will replace the NIS Directive in order to address the increased interconnectedness between the physical and digital world through a legislative framework

[28] Pursuant to Art. 12 of the Proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (ENISA) 2016/1148 (COM/2020/823 final), the Cooperation Group is to be composed of representatives of Member States, the Commission and ENISA. The European External Action Service is to participate in the activities of the Cooperation Group as an observer. Pursuant to proposal for a regulation on the digital operational resilience for the financial sector, also the European Supervisory Authorities may participate in the activities of the Cooperation Group. The Cooperation Group is to meet at least once a year with the Critical Entities Resilience Group established under directive on the resilience of critical entities.

[29] Pursuant to Art. 13 of the Proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (COM/2020/823 final), the CSIRTs network will be composed of representatives of the Member States' CSIRTs and CERT–EU. The Commission is to participate in CSIRTs network work as an observer. ENISA is to provide the secretariat.

[30] Pursuant to Art. 14 of the Proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (COM/2020/823 final); EU-CyCLONe will have the following tasks: (a)increasing the level of preparedness of the management of large scale incidents and crises; (b)developing a shared situational awareness of relevant cybersecurity events; (c) coordinating large scale incidents and crisis management and supporting decision-making at political level in relation to such incidents and crisis; EU-CyCLONe will cooperate with the CSIRTs network. ENISA, among others, is to provide the secretariat.

[31] Cf. Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities (COM/2020/829 final).

with robust resilience measures, both for cyber and physical aspects as set out in the Security Union Strategy"[32].

In 2016, the NIS Directive indicated the following national entities to be designated: one or more national competent authorities on the sectors and services covered by the scope of the directive, a national single point of contact acting as a liaison to ensure cross-border cooperation[33], and one or more CSIRTs. It also imposed specific obligations concerning network and systems security on two categories of entities: 'operators of essential services' and 'digital service providers'.

The 2018 Act on the National Cybersecurity System contains a 20-point enumeration of the types of entities covered by this system (Art. 4), but they are not structured in any way. Commentaries to the Act, departing from the statutory definition of cybersecurity as the goal to be achieved, distinguish three categories of these entities: administration bodies responsible for the cybersecurity of other entities within the system (including competent authorities and CSIRTs); entities obliged to protect their own cybersecurity in the public interest (including operators of essential services, digital services providers and public entities), as well as entities specializing in providing services in support of cybersecurity[34].

After two years since its entry into force, the Act has been assessed critically in Poland. Some critics have pointed out that, with the exception of the financial sector, the statutory option to designate sector-wide cybersecurity teams supporting operators of essential services has not been taken, even though some such operators have difficulties meeting the technical

[32] Cf. Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities (COM/2020/829 final).

[33] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (NIS Directive) (OJ L 194 of 19.07.2016, p. 1).

[34] Grażyna Szpor, "Komentarz do art. 4," in *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*, ed. Kamil Czaplicki, Agnieszka Gryszczyńska, and Grażyna Szpor (Warsaw: Wolters Kluwer Polska, 2019); Cf. Agnieszka Besiekierska, ed., *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz* (Warsaw: C.H. Beck, 2019); Waldemar Kitler, Joanna Taczkowska-Olszewska, and Filip Radoniewicz, eds., *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz* (Warsaw: C.H. Beck, 2019); Cezary Banasiński and Marcin Rojszczak, eds., *Cyberbezpieczeństwo* (Warsaw: Wolters Kluwer, 2020).

requirements of internal cybersecurity structures. In the public sector, uncompetitive salaries made it difficult to recruit specialists, and provincial authorities failed to ensure adequate response to incidents in municipalities and coordination of information security activities. Only one ISAC (Information Sharing and Analysis Center) was established (Rail ISAC). The Government Commissioner for Cybersecurity lacked effective means to influence the actors of the national cybersecurity system[35].

The draft amendment of the Act on the National Cybersecurity System, adjusting its provisions to the requirements of the ENISA regulation, provided for the mandatory establishment of sectoral CSIRTs, the inclusion in the system of 16 local government administration bodies - provincial governors, mandatory support for operators of essential services by operational security centres (OSCs, which decide on the implementation of security measures based on risk assessment), and the provision of expert support by several dozen registered ISACs (centres for exchange and analysis of information on vulnerabilities, cyber threats and incidents). Moreover, types of entities covered by the national cybersecurity system, especially operators of essential services, digital services providers and telecommunications entrepreneurs (who are large companies) will have to withdraw given equipment or software from use within 7 years of a relevant risk assessment decision issued by the minister responsible for informatization (high-risk providers)[36]. Failure to comply with the obligation to withdraw ICT products, services and processes of a high-risk provider, as well as failure to comply with the obligation to perform a certain action specified in the security order is to be subject to a fine of up to 3% of the total annual worldwide turnover from the preceding financial year. Other MS were also still working on the transposition of Regulation

[35] Draft act amending the Act on the National Cybersecurity System and of the Act on Telecommunications of 20 January 2021; https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-zamowien-publicznych.html, p. 90–91.

[36] Telecommunications entrepreneurs who have or use the types of ICT products, types of ICT services, specific ICT processes indicated in the decision and specified in the list of categories of critical functions for network and service security in Annex No. 3 to the Act will have to withdraw them within 5 years from the announcement of the decision.

2019/881 in 2021. The draft laws contained different detailed solutions. The level of their progress varied[37].

The proposed amendment to the Polish Act introduces new instruments of mitigating dysfunctions identified in the impact assessment of the existing regulation. However, its amended version may be in force soon, while draft NIS 2 Directive eliminates the categories of operators of essential services and digital service providers, instead adopting the distinction between 'essential entities' and 'important entities'[38] based on how critical the sector or type of service is, and accounting for how heavily other sectors and services rely on them[39]. The NIS 2 Directive also stipulates that public authorities will be able to order the withdrawal of products and services of IT operators qualified as high-risk providers, and it too provides for high penalties for the failure to oblige. The dynamics of change increases the importance of confronting national legislative work with the prospect of changes to European law. Strengthening the role of specialised services in the sphere of cybersecurity, understood as a type of activity, also underlies the postulate to separate cybersecurity in statistical classifications of economic activity[40].

[37] Draft Act of 20 January 2021 amending the Act on the National Cybersecurity System and the Act on Telecommunications, Regulatory Impact Assessment (pp. 89–91), https://www.gov.pl/web/krmc/projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-telekomunikacyjne.

[38] Pursuant to Art. 4(25) of the Proposal for a Directive of the European Parliament and Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (COM/2020/823 final); an 'essential entity' means any entity of a type referred to as an essential entity in Annex I. Pursuant to Art. 4(26), an 'important entity' means any entity of a type referred to as an important entity in Annex II. The division criterion is clarified in recital 11 of the preamble.

[39] Cf. Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities (COM/2020/829 final).

[40] Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (OJ L of 2006, No. 393, p. 1 as amended); Cf. Szpor, "Nowelizacja siatki pojęciowej cyberbezpieczeństwa," 1190.

6. CONCLUSIONS

The 2016 NIS Directive ushered in a period of intensified work in the area of regulating cybersecurity, with a host of new laws and amendments of existing ones, both on the EU and domestic level. The changes, those already made and those proposed, enhance terminological integrity, as well as broaden and unify the subject and entity scope of cybersecurity systems across EU Member States. They also increase the obligations to reduce cyber threats and strengthen the instruments that public authorities have at their disposal to enforce these obligations.

Reconciling demands for rapid adaptation of regulations to new needs with the principles of stability, consistency and transparency of law as conditions for its effectiveness requires breaking the separation and improving the coordination of parallel legislative processes.

REFERENCES

Adamski, Andrzej. "Europejskie standardy prawno-karnej ochrony sieci i informacji oraz ich implementacja do prawa polskiego." In *Internet. Strategie bezpieczeństwa*, edited by Agnieszka Gryszczyńska and Grażyna Szpor, 23–46. Warsaw: C.H. Beck, 2017.

Banasiński, Cezary, and Marcin Rojszczak, eds. *Cyberbezpieczeństwo*. Warsaw: Wolters Kluwer, 2020.

Baumgarten, Ansgar, and Christian Calliess. "Cybersecurity in the EU the Example of the Financial Sector: A Legal Perspective." *German Law Journal* 21, no. 6 (2020): 1149–1179.

Besiekierska, Agnieszka, ed. *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*. Warsaw: C.H. Beck, 2019.

Corcoran, Brian. "A Comparative Study of Domestic Laws Constraining Private Sector Active Defense Measures in Cyberspace." *Harvard National Security Journal* 11, no. 1 (2020): 1–ix.

Czaplicki, Kamil, Agnieszka Gryszczyńska, and Grażyna Szpor, eds. *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*. Warsaw: Wolters Kluwer Polska, 2019.

Gryszczyńska, Agnieszka, and Grażyna Szpor, eds. *Internet. Cyberpandemia*. Warsaw: C.H. Beck, 2020.

Kitler, Waldemar, Joanna Taczkowska-Olszewska, and Filip Radoniewicz, eds. *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*. Warsaw: C.H. Beck, 2019.

Kosseff, Jeff. "Hamiltonian Cybersecurity." *Wake Forest Law Review* 54, no. 1 (2019): 155–206.

Singh, H. P., and Tareq S. Alshammari. "An Institutional Theory Perspective on Developing a Cyber Security Legal Framework: A Case of Saudi Arabia." *Wake Forest Law Review* 11, no. 3 (2020): 637–650.

Szpor, Grażyna. "Nowelizacja siatki pojęciowej cyberbezpieczeństwa." *Monitor Prawniczy* 22 (2020): 1189–1192.

Roguski, Przemysław. "Przesłanki przypisania cyberoperacji państwu." In *Internet. Cyberpandemia*, edited by Agnieszka Gryszczyńska and Grażyna Szpor, 91–101. Warsaw: C.H. Beck, 2020.

Worona, Joanna. *Cyberprzestrzeń a prawo międzynarodowe. Status quo i perspektywy*. Warsaw: Wolters Kluwer Polska, 2020.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 237–261
DOI: https://doi.org/10.31743/recl.12707

UNITED STATES SUPREME COURT APPROACH TO FIRST AMENDMENT FREEDOM OF RELIGION IN RESPONSE TO THE COVID PANDEMIC

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ABSTRACT

The 2020–21 Covid 19 Pandemic has raised many legal challenges as governments world-wide have struggled to deal with the public health and safety challenges of Covid. At the center of many of these decisions is the need to balance public health protections against other rights that have been infringed by legislation related to Covid Pandemic restrictions. One of the most important rights that have been implicated by Covid restrictions in the United States has been in the area of restrictions on religious worship which implicates the right to freedom of religion as enshrined in the United States Constitution. During the time of the Pandemic the United States Supreme Court, as the final arbiter of the United States Constitution has had to work to balance the interests of the government in protecting public health and safety with the right to freedom of religion. The Supreme Court's approach to these cases reflects the difficulties inherent in balancing two such important interests in difficult circumstances and also represents the reality of the shifting majority in the Court as a result of new Justices appointed under the administration of Donald Trump. The Court has transitioned from a majority that opposed restrictions on governmental action during COVID to a majority that is more willing to stop governmental action that is deemed to be in violation of the Free Exercise of Religion Clause of the First Amendment.

Keywords: US Constitution, Freedom of Religion, COVID 19, Free Exercise Clause, US Supreme Court

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1. FREE EXERCISE OF RELIGION

The First Amendment to the United States Constitution contains the language that sets forth the basis for freedom of religion claims under US Constitutional law. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[1]. Freedom of Religion in American jurisprudence traditionally contains two elements that are obvious from the language of the First Amendment. The first regulates the establishment of religion and deals with the need to separate church and state and the second deals with prohibitions on the free exercise of religion and deals with government restrictions on religion. It is the free exercise clause that is implicated by regulations that restrict religious worship due to the Covid pandemic[2].

The Supreme Court case that is often cited in determining when a government regulation infringes on the free exercise clause of the First Amendment is a 1993 case entitled *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[3]. In this case a church that practiced the Santeria religion attempted to establish themselves in the City of Hialeah, Florida. The Santeria religion uses animal sacrifice as one of its principal forms of worship, the animals are killed during religious ceremonies by cutting their carotid arteries and are cooked and eaten except during healing and death rites. After the church leased land in Hialeah the city council held an emergency public session and then passed a number of resolutions and ordinances making ritual slaughter illegal in city limits. The clear purpose of this legislation was to prevent the establishment of the Santeria Religion within city limits due to opposition to their religious practices. The Supreme Court found that "The ordinances' texts and operation demonstrate that they … have as their object the suppression of Santeria's central element, animal sacrifice"[4].

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[1] United States Constitution, Amendment 1.

[2] "Constitutional Constraints on Free Exercise Analogies," *Harvard Law Review* 134, no. 5 (2021): 1782.

[3] *Church of Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520 (1993).

[4] *Church of Lukumi*, IBID at 521.

First, the Court confirmed in this case the rule that a law that burdens religious practice that is neutral and of general applicability should not be subjected to an increased standard of review[5].[6] However, they also emphasized that when the law under consideration is not neutral or not of general application, it must then comply with the strict scrutiny standard[7]. The strict scrutiny standard is a form of judicial review that the Court uses to determine the constitutionality of laws that impact on fundamental rights and is the highest form of review[8]. Freedom of Religion is a fundamental right under the United States Constitution so any law that is not neutral or of general applicability requires the application of the strict scrutiny standard.

The *Church of Lukumi* case also emphasized some additional principles important in considerations concerning government regulation that infringes on the right to the free exercise of religion. First, is the idea that it is not the job of the government to determine whether a particular religion or religious belief or practice is legitimate or not. That is a decision left to the individual believer. "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"[9]. Secondly, the Court emphasizes that "a law targeting religious beliefs as such is never permissible"[10], however if the object of the law is to infringe upon or restrict practices because of their religious motivation then the law is not neutral and the strict scrutiny standard applies. When examining the question of the neutrality of the law being reviewed the Court first looks at the text of the law since at a minimum the law must not discriminate on its face. In this case although the city

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[5] See *Employment div., Dept. Of Human Resources of Ore. v. Smith*, 494 U.S. 872, (1990) where the Court found that a state could deny unemployment benefits to a person fired for violating a state prohibition on the use of the drug peyote, even though the use of the drug was part of a native American religious ritual.

[6] But see discussion about the Religious Freedom Restoration Act below.

[7] *Church of Lukumi*, IBID at 521.

[8] Roy G. Spece, Jr. and David Yokum, "Scrutinizing Strict Scrutiny," *Vermont Law Review* 40 (2015): 285.

[9] *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 714(1981).

[10] *Church of Lukami*, IBID at 533.

ordinances in issue here used terms like "ritual" and "sacrifice" the court found that on its face the text remained neutral. However, the Court further found that textual (facial) neutrality by itself is not sufficient, the free exercise clause extends beyond facial discrimination and requires examination of the governmental motivation behind those actions. "The Free Exercise Clause protects against governmental hostility which is masked as well as overt"[11]. In determining the neutrality of a particular piece of legislation the Court should consider the whole record of the case before the Court including the legislative history which includes the statements of legislators at the time the law was passed[12].

The Court then looked at the whole record before it in the *Lukami* case. While the ordinances passed by the City of Hileah were neutral on their face, the court found that the motivation behind them were clearly designed to prevent a religious practice that the City felt was inappropriate, mainly animal sacrifice. And while the City attempted to state clearly secular purposes for the legislation including goals of protection of public health and safety and prevention of cruelty to animals the Court did not accept these reasons. First, the legislation outlawed the "unnecessary" killing of any animal and found killing for certain secular reasons to be necessary but stated that killing for religious reasons was unnecessary. This was not a neutral application of the law. Secondly the Court found that the laws were overbroad and therefore not "narrowly tailored" to advance the compelling governmental interest involved because they outlawed more practices that were necessary to meet the Cities health and safety and animal cruelty interests. In the end the Court's conclusion is clear: "In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion"[13].

The Court then turned to the second requirement of the Free Exercise Clause, that a rule that burdens religious practice must be of general ap-

[11] *Church of Lukami*, IBID at 534.

[12] For example see *Wallace v. Jaffree*, 472 U.S. 38 (1985) where a legislator's statements that the purpose of passing a law mandating a minute of silence each day in Alabama's public schools was intended to re-introduce school prayer in violation of the Establishment clause resulted in the law being struck down by the Court for lacking a secular purpose.

[13] *Church of Lukami*, IBID at 542.

plicability[14]. The Free Exercise Clause protects religious observers against unequal treatment by the government[15]. This means at a minimum that government cannot impose burdens only on conduct motivated by religious belief. In this case the Court found that the City failed to meet this standard because they selected only those acts that were of a religious nature for regulation. For example, under the guise of regulation of cruelty to animals the city ordinances outlawed animal sacrifice in religious practice but continued to allow animal extermination (rats and mice); euthanasia of stray, neglected, abandoned or unwanted animals, use of poison against animal pests and using animals in hunting other animals. The City of Hialeah failed to explain why the religious sacrifice of an animal was somehow more cruel than any of the other approved methods of killing animals. The City further failed to justify the ordinance based on public health and safety as other instances of slaughter of animals were allowed by the ordinances while those involved in a religious ceremony were not[16].

Having found that Hialeah's ordinances were neither neutral nor of general applicability, the Court then applied the strict scrutiny standard of judicial review. The strict scrutiny test which was established in the *Sherbert* case is a two-part test. In order for a challenged law to be constitutional the government had to demonstrate a *compelling governmental interest* behind the law in question as well as show that the law was *narrowly tailored* to meet that interest[17]. The first part of the *Sherbert* test looks at the reasons behind the government regulation. Strict scrutiny requires a compelling governmental interest, in contrast to intermediate scrutiny which requires an important governmental interest and the lowest review standard, the rational basis standard which requires only that the law be based on a legitimate governmental interest. A compelling government interest has been described as "interests of the highest order"[18], and a law under this test will survive strict scrutiny only in rare cases. The Court accepts that there may be compelling interests in this case, but finds that

[14] *Employment Div. v. Smith*, IBID at 879–881.
[15] *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).
[16] *Church of Lukami*, IBID at 545.
[17] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[18] *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

they are irrelevant because the City has not met it's burden with regard to the second part of the *Sherbert* test.

The second part of the *Sherbert* test looks at the way the law has been drafted to ensure that it was narrowly tailored (carefully written) to ensure that it is does not encompass too much behavior (overbroad) or fails to address the compelling governmental interest. This is in contrast to the intermediate scrutiny standard that requires that the law be substantially related to the government interest and the rational basis standard that requires only that the law be rationally related to the governmental interest[19]. In this case the Court found that the laws that were challenged were not narrowly tailored by the city as they were both too broad by excluding what should have been legal activity and too narrow because they excluded too much behavior that undermined the stated compelling interests that they were supposed to protect. In short, this legislation did not pass the strict scrutiny standard for violation of the Free Exercise Clause.

The concluding words of the majority opinion are an instructive summary of the case that we can use later while considering COVID restrictions that have an impact on the Free Exercise of religious practices.

> "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void"[20].

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[19] "Levels of Scrutiny Under the Equal Protection Clause," accessed April 2021, law2.umkc.edu; and see R. Randall Kelso, "Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice," *Journal of Constitutional Law* 4, Issue 2 (2002): 225.

[20] *Church of Lukami*, IBID at 547.

2. COVID RESTRICTIONS ON RELIGIOUS PRACTICE

As of April 2, 2021 there have been over 30.6 million Coronavirus (Covid) 19 infections in the United States of America and over 553,000 deaths[21]. In response government in the United States has had to pass and enforce regulations designed to slow the spread of the disease and protect public health and safety. These regulations have had a direct effect on the practice of religion in the United States. However, like many areas of US law it is difficult to clearly state what the legal regulation of Covid 19 is in the United States. This is due to the United States adoption of a system based on the concept of federalism. The American Constitution was written with the idea of limited government, in particular with the concept of separation of power, both horizontal and vertical. Horizontal separation of power is common in modern democracies and normally involves separating government power into three branches, the executive, the legislative and the judicial. Vertical separation of power splits power between various levels of government, in the case of the United States, government power is separated between the Federal (U.S. Government), the 50 States, and local governments. As the original 13 colonies enjoyed substantial independence at the moment the US Constitution was designed and adopted the US Constitutional system prioritizes the exclusive rights of each level of government to regulate areas in their control. For example, the Federal government enjoys powers over foreign affairs, interstate commerce, weights and measures, coining of money, and intellectual property[22]. However, each state retains the power to regulate in most areas of American's daily lives, including the important area that is commonly known as "police powers". The source of the states police powers lies in the 10th Amendment to the U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"[23]. Police powers is the capacity of the states to regulate behavior for the betterment of health,

[21] https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html, accessed April 2, 2021.

[22] United States Constitution, Article 3, Section 8.

[23] United States Constitution, Amendment 10.

safety, morals and the general welfare[24]. This means that regulation related to Covid 19 restrictions are the responsibility of state and local governments and not the Federal government.

With 50 states and thousands of local jurisdictions there are many different responses to the Covid pandemic and hundreds of different approaches to Covid restrictions that impact on the free exercise of religion. In an effort to slow the spread of Covid, every state and many local governments have issued either guidelines or orders limiting social interaction. It is the impact of these guidelines and regulations on the practice of religion that is under consideration here. Such restrictions have limited both the form and function of religious worship in the United States, from outright bans on any gatherings, to limits on the number of worshipers, or other limits on the method of worship, for example bans on singing during services. One interesting snapshot of state regulation of social distancing and its impact on religious worship in the United States can be found in a Pew Research report on state regulation of religious worship from April of 2020[25]. In this report the Pew Research Center looked at existing state regulation of religion as it related to Covid restrictions. The conclusion of the report was that most states intentionally carved out exemptions to Covid rules for the practice of religion. At the time 10 states were preventing in-person religious meetings in any form, 22 states and the District of Columbia were allowing religious gatherings but limiting them to 10 or fewer people. A few states had higher limits, 25 and 50 and 15 states had no limits at all. Another significant point is that some states had determined that religious worship was "essential", and it was therefore put in the same category as food shopping and health care. There have been many instances of religious leaders resisting restrictions either by holding services in defiance of the restrictions, or by filing lawsuits to challenge the restrictions. In addition, many churches have gotten creative in the time of Covid either by livestreaming services online or television or holding "drive-in" services where people participate while self-isolating in their own car in a field of others in their cars.

[24] *Jacobson v. Massachusetts*, 197 U.S. 11, (1905).

[25] https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/, retrieved April 1, 2021.

In response to government regulations regarding Covid Americans have filed thousands of lawsuits under both state and federal law. These lawsuits have been based on a wide variety of claims including many related to federal Constitutional rights. Among these have been over 100 lawsuits under the Free Exercise Clause of the U.S. Constitution[26]. This is in part a reflection of the reality that Covid restrictions have drastically affected religious worship in the United States[27]. An early Court case involving a challenge to state Covid regulations occurred in Virginia in *Lighthouse Fellowship Church v. Northam*[28]. In this case the Lighthouse Fellowship Church challenged executive orders of the Governor of the State of Virginia that made it illegal for any public gatherings in excess or 10 individuals. The Church sought a preliminary injunction pending trial and later a permanent injunction against enforcement of the Governor's executive orders as it related to their church services as they argued that the orders violated the Church's Freedom of Exercise under the First Amendment. The Federal Court then analyzed Virginia's actions under the standard set forth in *Church of the Lukumi Babalu Aye* case, namely the requirements of neutrality and general applicability in laws that burden religious practice. First, the Court determined that the Executive Orders that were being challenged were neutral both on their face and upon closer examination since there was no evidence of bias against religion in their design or implementation. The Court next examined the second element, the requirement that the laws being challenged must be of general applicability. In this context the Churh asserted that the Governor's Executive orders were not of general applicability since they carved out an exception for "essential retail businesses" which included grocery stores, pharmacies, medical, laboratory, vision supply retailers, electronic retailers, automotive stores, building supply retailers and alcohol stores. An exception was also made for certain businesses that provided professional services even if the business was not considered essential. The Court found that the Executive

[26] https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_conronavirus_(COVID)_pandemic,_2020, retrieved April 1, 2021.

[27] Jiwoon Kong, "Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic," *Fordham Law Review* 89, Issue 4 (2021): 1589.

[28] *Lighthouse Fellowship Church v. Northam*, 458 F.Supp. 3d 418 (2020).

Orders were of general applicability as any exceptions pertaining to essential businesses and professional services were reasonable and designed to avoid harms equal to or greater than the spread of Covid. While the Court found that the practicing of one's religion and getting spiritual guidance are essential for some people, the Court found that the Church should still be able to provide this essential service with groups of 10 or less people or using alternative methods of contact. The Court therefore found no violation of the Freedom of Exercise Clause and the Church's request for an injunction was denied.

3. UNITED STATES SUPREME COURT RESPONSE TO FREE EXERCISE AND COVID RESTRICTIONS

Ultimately when it comes to the United States Constitution First Amendment Free Exercise of Religion Clause the final word rests with the highest court in the United States, the U.S. Supreme Court. Under the doctrine of Judicial Review the United States Supreme Court has final say in interpreting the United States Constitution[29]. To date the Supreme Court has issued several decisions that involved challenges to government regulation dealing with Covid that were challenged under the Free Exercise Clause of the First Amendment[30]. These came in the form of Opinions relating to Orders granting or denying injunctive relief from the state Covid actions involved. Injunctive relief, or an injunction, is a remedy available which restrains a party from doing certain acts and is issued before the primary case in chief has been heard and decided by the Court. Injunctive relief is usually only granted in extreme circumstances, as the party asking for injunctive relief has to prove a likelihood of winning the case on the merits and that irreparable harm will occur without the Court's intervention[31]. In these cases the plaintiffs were all religious organizations that filed suit against state Covid restrictions based on violation of the Con-

[29] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[30] Josh Blackman, "The "Essential" Free Exercise Clause," *Harvard Journal of Law & Public Policy* 4, no. 3 (2020): 637.

[31] *Federal Rules of Civil Procedure*, Rule 65. Injunctions and Restraining Orders.

stitution's provision on Free Speech, Freedom of Assembly and the Free Exercise Clause.

4. SOUTH BAY UNITED PENTECOSTAL CHURCH I

The first of these cases to be decided was *South Bay United Pentecostal Church, ET AL. v. Gavin Newsom, Governor of California, ET AL.*[32]. The Governor of California, Gavin Newsom enacted an Executive Order designed to limit the spread of Covid in part by restricting public gatherings including limiting attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. The Church objected because comparable secular businesses such as factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons and cannabis dispensaries were not subject to this limitation. They argued that these guidelines discriminated against places of worship and in favor of secular businesses in violation of the Free Exercise Clause.

The Court in a 5–4 vote rejected the request for injunctive relief. The four votes against the injunction consisted of the 4 more liberal members of the Court and Chief Justice Roberts, with the more conservative members of the Court voting in favor of granting an injunction and finding a Free Exercise violation[33]. Chief Justice Roberts writing a concurring opinion for the majority stated that the restrictions were not likely a violation of the Free Exercise clause because although there are restrictions on places of worship, there are similar or more severe restrictions on comparable secular gatherings where large groups of people gather in close prox-

[32] *South Bay United Pentecostal Church, ET AL. v. Gavin Newsom, Governor of California, ET AL.*, 590 U.S. ___ (2020).

[33] At the time of the *South Bay I* decision, Justices appointed by a Democratic President and considered more liberal included Justices Stephen Breyer, Sonia Sotomayor, Elena Kagan and Ruth Bader Ginsburg. Justices appointed by a Republican President and considered more conservative included Justices Samuel A. Alito, Neil M. Gorsuch, Brett Kavanaugh and Clarence Thomas. Chief Justice John G. Roberts, appointed by a Republican President, and generally considered more conservative, sometimes serves as a swing vote supporting the position of the liberal justices as he did in this case.

imity for extended periods of time. The order does treat other activities more leniently, but those are activities that are dissimilar because they are activities in which people do not congregate in large groups nor remain in close proximity for extended periods of time. Roberts thus creates a proximity and duration factor to determine whether Covid restrictions are similar or different to establish if they are compliant with the Free Exercises Clause. For example, the orders to similar businesses in terms of duration and proximity of human contact such as lectures, concerts, movies, and spectator sports are treated similarly to worship services. Whereas dissimilar activities in terms of duration and proximity are treated more leniently such as grocery stores, banks and laundromats. Roberts then emphasizes the need for the Courts to defer to the judgement of elected officials on issues such as this that involve a dynamic and fact-intensive matter subject to reasonable disagreement. "Our Constitution principally entrusts "the safety and the health of the people" to the politically accountable officials of the states "to guard and protect"[34]. He further states that where the elected officials act in areas full of medical and scientific uncertainties, the latitude given to them should be especially broad[35]. The Majority then defers to the discretion of the elected officials in the implementation of the Covid regulations under consideration in this case and refuses to grant the preliminary injunction requested by the Church.

Justice Kavanaugh wrote the dissent and was joined by Justices Thomas and Gorsuch. The minority would have granted the injunction to the Church because they felt the Covid guidelines discriminated against religion in favor of secular locations and this discrimination violated the First Amendment. Despite the fact that the Church in this case has agreed to comply with all the state rules that apply to secular businesses, including social distancing and hygiene requirements, California still chose to discriminate against religious practices. This discrimination is not allowed by the United States Constitution and as Kavanaugh points out discrimination against religion is "odious to our Constitution"[36]. In light

[34] *South Bay United*, IBID at 2, quoting from *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

[35] *Marshall v. United States*, 414 U.S. 417 (1974).

[36] *Trinity Lutheran Church of Columbia, inc. v. Comer*, 582 U.S. ___ (2017). (slip op., at 15).

of this discrimination Kavanaugh insists that the *Sherbert* strict scrutiny test as confirmed in *Church of Likami*[37] should be applied. First, California must assert a compelling governmental interest in the law that was passed. Kavanaugh concedes that California has a compelling interest in combating the spread of Covid and protecting the health of its citizens, but asks the deeper question as to whether California has a compelling justification for distinguishing between religious worship services and the other secular businesses that were not subject to an occupancy cap. In the opinion of the minority California provides no compelling basis for this disparate treatment and therefore California does not pass strict scrutiny review. Interestingly, the minority does not deal with Chief Justice Roberts proximity and duration arguments that he maintains distinguishes the secular exceptions from religious services. As for Robert's argument that the Court should give elected officials great deference in public health and safety matters, Kavanaugh agrees but points out one important limitation. "The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion[38].

5. CALVARY CHAPEL V. SISOLAK

The next of these cases to be decided was *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, ET AL.*[39]. Calvary Chapel is a Christian church located in rural Nevada that wished to hold religious services with a number of attendees equivalent to 50% of its fire code capacity during the time of Covid restrictions. Their intention to do so violated the terms of an Executive Directive from the Governor of Nevada that limited indoor worship services to no more than 50 persons, no matter the capacity of the church involved. This was in direct contrast to the regulation

[37] *Church of Lukami*, IBID at 531–532.

[38] *South Bay United*, Kavanaugh, J., dissenting, IBID at 3.

[39] *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, ET AL.* 591 U.S. ___ (2020).

of the state gaming industry[40] where for example Casinos were limited to 50% of their operating capacity, which in the case of many of the large casinos in Nevada would mean thousands of patrons. Calvary Chapel sued and argued that this constituted a violation of the Free Exercise Clause.

The same 5–4 majority-minority outcome as in the *South Bay United* case decided this case with the majority refusal of the injunction consisting only of a one sentence statement. It is the dissents filed by the conservative minority that are interesting in this case and a good indication of the thinking that would prevail in the next two cases when the membership of the Court underwent change. Justice Alito wrote a dissent in this case as did Justice Kavanaugh and Gorsuch. Much of the dissent's objections center around the contrast between the restrictions placed on religious services and those that were not placed on the gaming industry. "That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing"[41] and the following quote makes this clear: "The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or black-jack, to feed tokens into a slot machine, or to engage in any other game of chance"[42]. Justice Alito then finds that the Nevada regulation is neither neutral nor of general application due to its disparate treatment of Churches verses Casinos and several other privileged secular businesses. Alito then insists the Nevada regulation must pass the strict scrutiny test from *Sherbert*, and as in the *South Bay* dissent fails to find a compelling interest on the part of the State of Nevada to distinguish between casinos and churches. Interestingly, Alito does reference Chief Justice John Roberts findings in the *South Bay United* case by pointing out that the Chief Justice's references to proximity and duration of contact reasoning would not apply in this case as the average amount of contact time in a casino is over two hours (verses a 45- minute religious service) and the fact that Casino have multiple areas

[40] Nevada's gaming industry (gambling) is the biggest employer in Nevada and the most important sector in the state's economy, accounting for almost 40% of all state tax revenue and over 450,000 jobs. https://nevadabusiness.com/2020/nevada-gaming-industry-outlook/.

[41] *Calvary Chapel*, Alito J. Dissenting at 1.

[42] *Calvary Chapel*, Alito J. Dissenting at 1.

of close interaction between patrons, certainly more than a carefully run church service. Justice Kavanaugh re-enforces many of these points in his extensive dissent as well.

It is interesting that the Majority issued no written opinion to support their position that an injunction should not be issued in this case. Perhaps in part this a reflection of the difficulty of justifying allowing Casino's, movie theatres and bowling alleys to operate at 50% of capacity and religious services at a set number regardless of the size of the church. The minority effectively points out this inconsistency and rightfully asks how it can be justified by the State as well as the majority. Justice Gorsuch's dissent deserves to be quoted here in full as it is a good summation of the point made by the minority in this case, a position that went unchallenged by the majority.

> This is a simple case. Under the Governor's edict, a 10 screen "multiplex" may host 500 moviegoers at any time. A casino, too, may cater to hundreds at once, with perhaps six people huddled at each crap table here and similar number gathered around every roulette wheel there. Large numbers and close quarters are fine in such places. But churches, synagogues, and mosques are banned from admitting more than 50 worshippers-no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. In Nevada, it seems, it is better to be in entertainment than religion. Maybe this is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel[43].

6. ROMAN CATHOLIC DIOCESE OF BROOKLYN V. CUOMO

This case represents a significant shift in the jurisprudence of the Court in contrast to the two previous cases. This shift is due to two significant changes that occurred between the two decisions. The first of these was

[43] *Calvary Chapel*, Gorsuch J. Dissenting at 1.

the death of liberal Justice Ruth Bader Ginsberg on September 18, 2020[44]. This not only took a reliable liberal vote it also created a vacancy on the nine-person Supreme Court. Republican President Donald Trump and the Republican majority in the United States Senate acted fast to fill that vacancy[45]. On September 26, 2020 Donald Trump announced the nomination of Judge Amy Coney Barrett who was serving as a Judge on the United States Court of Appeals for the Seventh Circuit to the vacant position created by Justice Ginsburg's death. On October 26th the Republican controlled Senate with all but one member of the Republican Party voting in favor and most Democrats voting against, confirmed Barrett's nomination to the Supreme Court[46]. In judicial philosophy and practice Justice Barrett seems to be a reliable conservative shifting the balance on the Court further to the right. This may very well be one of the strongest lasting legacies of the Donald Trump presidency. President Trump appointed 234 Article III Judges, including three associate justices of the Supreme Court, 54 judges for the United States Court of Appeals, 174 District Court (Federal Trial Level) judges, and 3 judges for the United States Court of International Trade. In addition, he made 26 appointments under Article 1 of the US Constitution including judges to the US Court of Federal Claims, the US Tax Court, the US Court of Appeals for Veterans Claims, US Court of Appeal for the Armed Forces and the US Court of Military Commission Review[47]. Donald Trump was quite frank in his statements as a candidate and as President about his desire to appoint as many Federal Judges as possible who shared a conservative judicial philosophy. The United States

[44] Adam Liptak, "Justice Ruth Bader Ginsburg Dies at 87," *The New York Times*, https://eu.statesman.com/story/news/local/2020/09/18/justice-ruth-bader-ginsburg-dies-at-87/114083464/.

[45] Article III of the United States Constitution mandates that all Federal Judges, including Supreme Court Justices serve for a life term and are appointed by the US President and confirmed by the US Senate. The US House of Representatives has no role in the appointment of Federal Judges.

[46] 51 Republican Senators voted in favor, 1 voted no (Collins-ME), 47 Democratic Senators voted no and 1 did not vote (Harris-CA). https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00222.

[47] https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump, retrieved April 1, 2021.

Senate, controlled by his fellow Republicans shared this goal and as a result a substantial number of appointments were made. Some have argued that this constitutes the greatest lasting legacy of the Trump Presidency[48].

This legacy certainly became evident in the jurisprudence of the Court involving Covid Restrictions and the Free Exercise of Religion Clause. In *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*[49], and a companion case *Agudath Israel of America, et. Al. v. Cuomo*[50], the Supreme Court was again faced with a request for an injunction by religions institutions against an Executive Order that restricted their practice of religion as part of Covid restrictions, this time it was an order from the Governor of New York State. The Governor's executive orders divided New York into different zones depending on the state of Covid infections in that particular zone. If it was a red zone (the highest) then a synagogue or church could admit no more than 10 persons, no matter how big the building was. In an orange zone (second highest) attendance at houses of worship was limited to 25 persons, again without regard to the size of the building involved. This was in direct contrast to essential businesses who were allowed to admit as many people as they wished in the red zone and in the orange zone even non-essential businesses could decide how many people they wished to admit.

In this case the preliminary injunction was granted by the Court in a 5–4 decision. The 4 more conservative justices (the previous minority) were joined in this case by the newly appointed Justice Barrett who voted to grant the injunction. The three remaining liberal Justices and Chief Justice Roberts constituted the new minority. Applying the *Church of Lukami* criteria, the Majority first found that the Executive order was neither neutral nor of general application because of its discriminatory treatment of religious worship in comparison to similar secular businesses. For example, the Court pointed out that while a local church would be limited to 10 or 25 people at a worship service, a local large store next to

[48] Rebecca Ruiz, Robert Gebeloff, Steve Eder, and Ben Protess, "A Conservative Agenda Unleashed on the Federal Courts," *New York Times*, March 14, 2020.

[49] *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ___ (2020).

[50] *Agudath Israel of America, et. al. v. Cuomo*, Case No. 20A90 (2020).

the church could have hundreds of people shopping there on any given day. They also pointed out that both the churches and synagogues involved in the lawsuit had admirable safety records and that while there had been evidence of Covid infections from secular businesses there was none from these religious institutions[51].

Since the New York Executive orders were neither neutral nor of general applicability then the *Sherbert* strict scrutiny test had to be applied. The majority conceded again that the regulation of public health and safety as related to Covid was a compelling governmental interest in this case but found that the Executive Order was not narrowly tailored to achieve that interest. The majority pointed out that these Covid restrictions were the strictest to come before the Court to date, that they were more restrictive than many other jurisdictions hard hit by Covid and were more severe than necessary to prevent the harm, particularly given the churches and synagogues successful health and safety records. They also found that the State should use other less restrictive methods that could still advance the compelling state interest, for example by connecting the maximum attendance at a religious service to the size of the church or synagogue, pointing out that 26 Catholic churches could seat at least 500 people, 14 could accommodate at least 700 and 2 could seat over 1000. A similar situation existed with the synagogues. Under this analysis the strict scrutiny test was not passed in this case and the majority authorized the injunction. "Members of this Court are not public health experts, and we should respect the judgment of those with special experience and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten"[52].

Justice Gorsuch makes some important points in his concurring opinion. He points out that the Governor of New York has made the decision that certain businesses are essential and should therefore not be subject to Covid restrictions. Among these businesses are laundromats, banks, hardware stores and liquor shops. Justice Gorsuch goes on to write: "The only explanation for treating religious places differently seems to be a judgement that what happens there just isn't as essential as what happens in

[51] *Roman Catholic Diocese of Brooklyn*, IBID at 2,3.

[52] *Roman Catholic Diocese of Brooklyn*, IBID at 5.

secular places… *That* is exactly the kind of discrimination the First Amendment forbids"[53].

Chief Justice Roberts dissented from the majority in its decision to grant injunctive relief although he did it based on a technical standing issue and seemed to agree at least in part with the reasoning of the majority on the issue of violation of the Free Exercises Clause. Prior to the Court's decision the Governor of New York removed the churches and synagogues involved in the case to yellow zones of restriction, therefore no longer limiting them to the 10 or 25 attendance limits. Roberts found that because they were no longer subject to the limits a preliminary injunction was not warranted. The majority disagreed because there was a substantial likelihood that they could be moved back to those zones in the future. Chief Justice Roberts did break with the three more liberal justices on the substantive question of violation of the Free Exercise Clause, acknowledging that the facts in this case were different from the previous two cases and indicating that there may be a constitutional problem. "Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause"[54]. The three dissenting liberal justices argued a number of points in favor of their dissents. First, they, like Roberts, argued an injunction was not necessary since the involved churches were no longer subject to the restrictions. Secondly, they argued that the previous two cases where they were in the majority were decided correctly and should continue to govern these decisions. A great deal was also mentioned about the need of the Courts to defer to elected officials and medical professionals in a time of a health crisis. Judges should not substitute their judgement for those professionals.

7. SOUTH BAY UNITED PENTECOSTAL CHURCH II

In February of 2021 the United States Supreme Court once again heard a challenge to the Governor of California's Executive Orders dealing

[53] *Roman Catholic Diocese of Brooklyn*, IBID, concurring opinion of Gorsuch, J. at 2.
[54] *Roman Catholic Diocese of Brooklyn*, IBID dissenting opinion of Roberts, C.J at 1.

with limitations on religious worship in the time of COVID in *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.* 592 U.S. _____ (2021). (Hereafter referred to as South Bay II.) In this case we can see the effect of the change in the Court's majority as unlike the first case this time the request for injunctive relief was at least partially successful. This case primarily was focused on California's regulations that stated that religions in Tier 1 areas, which were most areas of the state, were banned completely from holding any indoor religious services. The Court did not grant an injunction based on capacity limits of 25% in those cases but did grant an injunction regarding the total ban on indoor services. The Court also looked at the interesting question of the banning of singing and chanting during religious services but ultimately did not issue an injunction on that ban.

Chief Justice Roberts reemphasizes some of the points that he made in the earlier decision although in this case he sides with the majority in granting the injunction on the total ban on indoor religious services. First he emphasizes that "the federal courts owe significant deference to politically accountable officials with the "background, competence, and expertise to assess public health[55]. This is part of his acknowledgement that the Constitution principally trusts the health and safety of the people to the politically accountable officials of the states. He finds however that although deference is owed to the politically accountable officials, the Courts do have a duty to ensure that Constitutional rights are protected and in this particular case the total ban on indoor religious services does not comply with the Constitution. By a six to three vote a majority agrees with him on the issue of the complete ban on indoor religious services.

The three liberal Justices dissent in an opinion authored by Justice Kagan. Justice Kagan essentially rejects the assertion of the majority that California is treating places of religious worship any differently than similar secular venues such as theatres where individuals may be subject to longer term exposure to COVID. She also emphasizes as did the Chief Justice the need of the Courts to defer to the decisions of elected officials

[55] *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 592 U.S. _____ (2021), at 2.

who are advised by medical and scientific experts. Justices Sotomayor and Breyer agree with her.

The Court in this case also considered the Governor's ban on singing or chanting during religious services. While acknowledging that singing could raise issues involving a threat to public health and safety beyond those recognized in the indoor ban on services, Justice Gorsuch would support an injunction on this ban (joined by Justices Thomas and Alito) as he argued that California has an exception to its ban on singing for the State's powerful and important entertainment industry and he raised the question whether a ban on a single singer in Church is any different from allowing a singer in an entertainment show to do the same. Justice Barrett and Kavanaugh did not accept this argument since they assert that the record in the case is not clear on this issue. They encouraged further filings in the case in order to determine if this ban is truly neutral or not. If the evidence proves it is not neutral then they would reconsider their decision regarding this ban.

8. TANDON V NEWSOM

In April of 2021 in the case of Tandon v. Newsom[56] the Supreme Court underlined their recent jurisprudence regarding the issue of COVID regulations in light of the Free Exercise Clause of the First Amendment. Through a *per curiam* opinion[57] the majority of the Court emphasized that recent First Amendment decisions make four points clear. First, government regulations cannot be considered neutral and generally applicable whenever they treat any comparable secular activity more favorably than religious exercise. Doing so invokes the strict scrutiny standard of constitutional review. Second, comparison of two activities for Free Exercise Clause purposes has to be judged against the asserted government interest that the state is using to justify the regulation at issue. This element should focus on the risks various

[56] *Ritesh Tandon, et al. v Gavin Newsom, Governor of California, et al.*, 593 U.S. _____ (2021).

[57] A *per curiam* opinion is a court opinion issued in the name of the court rather than being an opinion of particular judges.

activities pose, not the reason people are gathering. Third, the government has the burden to establish that any challenged law or regulation satisfies the strict scrutiny test. The narrow tailoring of the strict scrutiny test requires the government to show that measures less restrictive of the Constitutional activity could not address its interest in protecting against COVID. Precautions allowed for other activities must be allowed as well for religious activities. Fourth, governmental withdrawal or modification of a restriction is not sufficient to moot the case against the government when the applicants remain under a constant threat that governmental officials will use their power to reinstate challenged restrictions[58].

9. THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act (RFRA) has not played a significant role in the decisions of the Court regarding religious freedoms during the time of COVID although it remains an important piece of federal legislation in the area of the Free Exercise of Religion. Following the Supreme Court's 1990 decision in *Employment Division v. Smith*[59] where the Supreme Court found that laws that were of general applicability that effect religious freedom should not be subject to the strict scrutiny test of *Sherbert v. Verner*[60], there was a bipartisan consensus that a law of general applicability that burdens religion should be subject to the *Sherbert* strict scrutiny standards. This consensus led to the adoption of the *Religious Freedom Restoration Act of 1993*[61] which restored the practice of reviewing governmental actions effecting religious practice to the pre-*Employment Division v. Smith* standards. This law continues in effect today and has led to some Federal government actions being denied due to Free Exercises arguments.

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[58] *Tandon v. Newson*, IBID at 2,3.

[59] *Employment Division, Department of Human Resources of Oregon v Smith*, 494 U.S. 872 (1990).

[60] *Sherbert v. Verner*, IBID.

[61] Religious Freedom Restoration Act codified at 42 U.S.C §2000bb through 43 U.S.C. §2000bb-4.

The primary reason why the RFRA has not been involved in the COVID/Free Exercise debate is largely because in 1997 in *Boerne v. Flores*[62] the Supreme Court found that the federal government did not have the legal authority to pass such a law that would subsequently impact state and local governments. Therefore, any consideration of state or local government action regarding the Free Exercise clause could not be subject to the RFRA, only actions taken by the Federal government would be subject to the law. Since most health and safety regulations are mandated by state law most of the decisions regarding COVID restrictions are not subject to the RFRA. As a result of the *Boerne* decision 21 states have passed a state version of the RFRA that does limit state and local governments actions with regard to the Free Exercise Clause. These state laws provide another possible legal avenue for challenging COVID restrictions.

10. CONCLUSION

The Covid Pandemic has presented governments with many challenges including balancing the need for regulations and restrictions that promote public health and safety with human rights guarantees. One of the most controversial areas has been government regulations that inhibit the freedom of worship that is protected by the First Amendment's Freedom of Exercise clause. To date the United States Supreme Court decisions on these questions has not let to a substantial shift in the Court's jurisprudence for Free Exercise questions. The court has affirmed the principles enunciated in both the *Church of Lukumi* and *Sherbert* cases. First, laws and regulations that are passed by state or federal governments must be neutral toward religion and of general application. If they are not then the Court will apply the *Sherbert* strict scrutiny test, a test that is difficult for government to win. The jurisprudence in this area also offers a clear indication of the importance of a changing court majority to the application of these tests as we see the shift from a majority reluctant to limit governmental action in Free Exercise cases to a majority that is more mindful of Free Exercises limits and more willing to limit governmental action. This is

[62] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

a reflection of the changing court majority and an indication of the impact of the appointment of Judges by President Donald Trump. It is interesting to note that all of these Free Exercise cases involving Covid have been decided at the preliminary phase of the cases as requests for injunctive relief. It will be further instructional to see how the cases are finally resolved after the full review process has been completed and a more through legal and factual analysis, and corresponding legal opinions of the Court becomes available.

REFERENCES

"Constitutional Constraints on Free Exercise Analogies." *Harvard Law Review* 134, no. 5 (2021): 1782–1803.

"Levels of Scrutiny Under the Equal Protection Clause." Accessed April 2021. law2.umkc.edu.

"Religious Exemptions by state." Retrieved April 1, 2021. https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/.

Blackman, Josh. "The "Essential" Free Exercise Clause." *Harvard Journal of Law & Public Policy* 4, no. 3 (2020): 637–760.

Kelso, R. Randall. "Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice." *Journal of Constitutional Law* 4, Issue 2 (2002): 225–259.

Kong, Jiwoon. "Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic." *Fordham Law Review* 89, Issue 4 (2021): 1589–1633.

Liptak, Adam. "Justice Ruth Bader Ginsburg Dies at 87." *The New York Times*. https://eu.statesman.com/story/news/local/2020/09/18/justice-ruth-bader-ginsburg-dies-at-87/114083464/.

New York Times Corona Virus Cases. Accessed April 2, 2021. https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html.

Religious Freedom Restoration Act codified at 42 U.S.C §2000bb through 43 U.S.C. §2000bb-4.

Ruiz, Rebecca, Robert Gebeloff, Steve Eder, and Ben Protess. "A Conservative Agenda Unleashed on the Federal Courts." *New York Times*, March 14, 2020.

Spece, Roy G. Jr., and David Yokum. "Scrutinizing Strict Scrutiny." *Vermont Law Review* 40 (2015): 285–351.

State lawsuits about COVID. Retrieved April 1, 2021. https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_conrona-virus_(COVID)_pandemic,_2020.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 263–290
DOI: https://doi.org/10.31743/recl.12264

CAUSAL EFFECT RELATIONSHIP IN MEDICAL CASES. AN OLD PROBLEM IN A NEW SCENARIO. COMMENTARY TO CJEU JUDGMENT (SECOND CHAMBER) OF 21 JUNE 2017, N.W. & OTHERS V. SANOFI PASTEUR MSD & OTHERS, CASE C-621/15, EU:C:2017:484 *APPROBATIVE GLOSS*

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ABSTRACT

This commentary evaluates the problem in assessing the role of a causal connection between damage and the use of a defective medical product, specifically a vaccine. The judgment of the Court of Justice of the European Union (CJEU) in the Sanofi Pasteur Case, which allowed the possibility of recognizing damage claims, even in cases where the prevailing scientific theory claims that there is no scientific evidence of a causal link between a vaccination and the disease, became a base for consideration. Consequently, procedural solutions (such as the standard of proof required, the admissibility of *prima facie* evidence reasoning and other solutions in cases of an uncertain causation) remain to be decided by national law. The authors assessed two legal systems: the French and Polish legal systems in the context of how to resolve these dilemmas and to describe the impact of the above-mentioned

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judgment on the case-law of French and Polish courts as regards the application of Directive 85/374/EEC. As a result, they concluded that the most important interpretative motive has become the individual interest of the vaccination's victim as a consumer of medical services. It seems to be in accordance with Directive 85/374/EEC, which is motivated by the necessity of approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products. However, since the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property, in countries belonging to the European Union, the authors wonder how the commented judgment will affect the further development of consumers protection against defective vaccines.

Keywords: uncertain causation, standard of proof, vaccine, damage, defective medical product

1. INTRODUCTION

It is common knowledge that the paper by Andrew Wakefield and 11 other colleagues, then of the Royal Free Hospital in London, from 1998 published in the *Lancet* (now retracted)[1] which suggested that measles, mumps, and rubella (MMR) vaccine may predispose to autism spectrum disorders (ASD) and gastrointestinal problems in children, was not confirmed in other scientific studies[2]. Although, no epidemiological studies, published later in respected and recognised medical journals

[1] Andrew J. Wakefield et al., "Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children," *Lancet* 351 (1998): 637. Retracted: The Editors of The Lancet, "Retraction-Illeal-lymphoidnodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children," *Lancet* 375 (2010): 445.

[2] Kreesten Meldgaard Madsen et al., "A population-based study of measles, mumps, and rubella vaccination and autism," *New England Journal of Medicine* 347 (2002): 1477–82; Corri Black, James A. Kaye, and Hershel Jick, "Relation of childhood gastrointestinal disorders to autism: nested case control study using data from the UK General Practice Research Database," *British Medical Journal* 325 (2002): 419–421; Brent Taylor et al., "Measles, mumps, and rubella vaccination and bowel problems or developmental regression in children with autism: population study," *British Medical Journal* 324 (2002): 393–396.

(among others the BMJ, Lancet and the New England Journal of Medicine)[3] confirmed the existence of a causation between the vaccine and ASD[4], it is possible to indicate court decisions, in which the courts recognized the existence of this type of causal link[5].

Does this mean there is a conflict between law and science? Or do court decisions – as some authors note[6] - distort scientific knowledge and point out an improper indifference to the legitimate methods by which scientific knowledge is generated in the context of vaccines?

Undoubtedly, in the collective consciousness, the thoughts expressed in the jurisprudence are of great importance and their misinterpretation attracts the attention of the media, which may lead to a widespread fear of

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[3] Fiona Godlee, Jane Smith, and Harvey Marcovitch, "Wakefield's article linking MMR vaccine and autism was fraudulent," *British Medical Journal* 342 (2011): 64–65; T.S. Sathyanarayana Rao and Chittaranjan Andrade, "The MMR vaccine and autism: sensation, refutation, retraction, and fraud," *Indian Journal of Psychiatry* 53 (2011): 95–96; Brian Deer, "How the Case Against the MMR Vaccine Was Fixed," *British Medical Journal* 342 (2011): 77.

[4] Current knowledge on the etiology of ASD does not provide full insight into the issue. The academic literature suggests it can be caused by genetic factors or environmental factors (so called 'triggered factors'), which include: drugs taken by pregnant women, infections, inflammations and increased testosterone levels during pregnancy, as well as allergies and any severe reactions (including post-vaccination) observed in a child (see: Amy E. Kalkbrenner, Rebecca J. Schmidt, and Annie C. Penlesky, "Environmental chemical exposures and autism spectrum disorders: a review of the epidemiological evidence," *Current Problems in Pediatric Adolescent Health Care* 44 (2014): 277–318; Ousseny Zerbo, Ana-Maria Iosif, Cheryl Walker et al., "Is Maternal Influenza or Fever During Pregnancy Associated with Autism or Developmental Delays? Results from the CHARGE (Childhood Autism Risks from Genetics and Environment) study," *Journal of Autism Developmental Disorders* 43, no. 1 (2013): 25–33.

[5] So *e.g.* The Tribunale of Rimini, Judgment of the of 15 March 2012, ref. nº 148/2010. The similarly in the judgment of the Tribunale of Milano, of 23 Sept. 2014, ref. nº 14276/13. These judgments were made on the basis of Law nº 210 of 25 Feb.1992. However, it is important to bear in mind the inconsistency of Italian case law and the frequent disregard of claims, c.f. The Italian Supreme Court (sez. lavoro), Judgment of 23 Oct. 2017 (ordinanza n° 24959).

[6] Laura R. Smillie, Marc R. Eccleston-Turner, and Sarah L. Cooper, "C-621/15 – W. and others v Sanofi Pasteur: an exemple of judical distortion and indifference to science," *Medical Law Review* 26 (1) (2018): 134–145.

vaccination[7]. The truth is that such a phenomenon poses a very real and serious threat not only to those members of society who remain unvaccinated, but also in terms of undermining the confidence of those who, relying on scientifically proven advice, start to doubt mass immunisation.

On the other hand, the public has the right to expect the safety of the medicinal products placed on the market, so when an 'adverse event' occurs, a fair and impartial verdict is expected with regard to all the circumstances of the case.

The role of jurisprudence in society can by no means be ignored. Courts and their judgments are seen as merely a forum for resolving disputes but also an important social institution. Courts often shape the life of a community through their judgments or advisory opinions[8].

In this context, the ruling of the CJEU in the case of the N.W. and others v. Sanofi Pasteur on the relationship between hepatitis B vaccine and Multiple Sclerosis (MS), takes on great importance. It reveals the tension described above between, on the one hand, objective scientific evidence and, on the other hand, the need to deal with the case in its entire complex context. This ruling is described in numerous articles and comments[9]. Interestingly, in French legal doctrine it is perceived positively, in

[7] Philip J. Smith et al., "Parental delay or refusal of vaccine doses, childhood vaccination coverage at 24 months of age, and the Health Belief Model," *Public Health Reports* 126 (suppl 2) (2011): 135–146; Mariam Siddiqui, Daniel A. Salmon, and Saad B. Omer, "Epidemiology of vaccine hesitancy in the United States," *Human Vaccinesd & Immunotherapeutics* 9 (2013): 2643–8.

[8] Shimon Shetreet, "On Assessing the Role of Courts in Society," *Manitoba Law Journal* 10 (1980): 357–414.

[9] E.g.. Ruiz Cairó, "The Lack of Medical Research Does Not Prevent an Injured Person from Proving the Defect of a Product and the Causal Link between the Defect and the Damage," *European Journal of Risk Regulation* 4 (2017): 798–803; Estelle Brosset and Elsa Supiot, "Le vaccin contre l'hépatite B: l'autonomie de la preuve juridique en l'absence de consensus scientifique devant la Cour de justice de l'Union européenne," *Revue des contrats* 4 (2017): 662–668; Estelle Brosset, "Distinguishing between law and science in terms of causation and the hepatitis B vaccine: W. v. Sanofi Pasteur," *Common Market Law Review* 55 (2018): 1899–1916; Smillie, Eccleston-Turner, and Cooper, "C-621/15 – W. and others v Sanofi Pasteur," 134–145; Marco Rizzi, "A Dangerous Method: Correlations and Proof of Causation in Vaccine Related Injuries," *Journal of European Tort Law* 9 (2018): 289–307; Erdem Büyüksagis, "Arrêt "Sanofi": la responsabilité du fait

a foreign one rather negatively[10]. In the Polish legal literature it has not yet been commented on in detail, but as it seems in the context of current dilemmas related to the need to administer the vaccine to the largest possible number of people against COVID-19 with simultaneous concerns about its safety, it is worth recalling the motivation of the Sanofi Pasteur Case and describing its impact on national legal orders.

The purpose of this commentary is to address its main theses and also to show its broader context in relation to the settlement of cases of damage caused by medicinal products by civil courts. In particular, the reasoning of the courts is presented - how these bodies have examined the basic premise of the manufacturer's liability: the causal link between the use of the medicinal product and the patient's injury. Comparative information is contained in the judgments of French and Polish courts. In both cases, it is a matter of civil law systems, which makes it possible to overcome the difficulties linked to the differences in the systemic order: common law and civil law[11].

2. THE FACTUAL CONTEXT AND THE COURT'S RULING

On 21 June 2017, the Court of Justice of the European Union (CJEU) passed judgment (a preliminary ruling) in the case of *N.W. and others v. Sanofi-Pasteur* (C-621/15), a dispute in which the family of the deceased N.W., asked a French court for compensation. The patient was vaccinated against Hepatitis B with three injections of a vaccine produced by Sanofi Pasteur, administered on 26 December 1998, 29 January 1999 and 8 July 1999. From August 1999, N.W. began to display various symptoms which, in November 2000, led to the diagnosis of Multiple Sclerosis disease (MS). The patient died on 30 October 2011.

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des produits défectueux appliquée aux vaccins, une responsabilité objective basée sur des présomptions," *Journal de droit européen* 244 (2017): 395–397.

[10] Compare f.e.: Brosset, "Distinguishing between law and science," *passim* and Smillie, Eccleston-Turner, and Cooper, "C-621/15 – W. and others v Sanofi Pasteur," *passim*.

[11] In particular as regards the specificity of the legal solutions concerning the standard of proof adopted by the courts.

Referencing Article 4 of Council Directive 85/374/EEC of 24 July 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective product[12], the CJEU had to answer three questions put to it by the French Supreme Court:

1) Does the Article 4 Directive prevent a court from relying upon the evidence presented by W when determining liability, what constitutes 'serious, specific and consistent presumptions' to show a defect and causal relationship, notwithstanding that medical research does not establish a 'causal relationship' between a vaccine and the injury (i.e. there is no scientific consensus)?
2) Does the Directive prevent Member States from creating a system of 'presumptions' with respect to vaccine injuries, where, if certain 'indications of causation' are found, liability always follows (regardless of 'scientific consensus')?
3) Does the Directive require that a victim must adduce evidence that a 'causal relationship' between the vaccine and the injury is scientifically established?

The CJEU made rulings with respect to questions one and two and found it unnecessary to consider the third.

The sentence of the Court assumed that: "when a court ruling on the merits of an action involving the liability of the producer of a vaccine due to an alleged defect in that vaccine, in the exercise of its exclusive jurisdiction to appraise the facts, may consider that, notwithstanding the finding that medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence

[12] Article 4: "The injured person shall be required to prove the damage, the defect and the causal relationship between the defect and the damage", Article 1: "The producer shall be liable for the damage caused by a defect in his product", Article 2: "For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game, even when incorporated into another movable or into an immovable", Article 3: "'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part or any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer". O.J. 1985, L 210/29, modified by Directive 1999/34/EEC of 10 May 1999, O.J. 1999, L 141/20.

of the victim's disease, certain factual evidence relied on by the applicant constitutes serious, specific and consistent evidence enabling it to conclude that there is a defect in the vaccine and that there is a causal link between that defect and that disease. National courts must, however, ensure that their specific application of those evidentiary rules does not result in the burden of proof introduced by Article 4 being disregarded or the effectiveness of the system of liability introduced by that Directive being undermined"[13].

Certainly, the CJEU judgement is not a very revolutionary one, in regards to the legal interpretation of Article 4 of Directive 85/374 based on the formula that an injured person will be required to prove damage, the defect and the causal relationship between the defect and the damage. As it is clear from the case-law of the CJEU to date, the Court has accepted the practice of taking evidence, e.g. in establishing the product defect and in the existence of a causal link between the defect and the damage[14]. However, these improvements must not lead to a reversal of the burden of proof, and thus to a denial of the legal formula on which Article 4 of the Directive is based.

What is really new is the way in which national courts can - within the framework of their procedural autonomy - rule on disputes regarding the establishment of a causal link between damage and vaccination and the defectiveness of a medicinal product. Of particular interest here is the statement of the court that: "In the present case, evidence such as that relied on in the main proceedings relating to the temporal proximity between the administering of a vaccine and the occurrence of a disease and the lack of personal and familial history of that disease, together with the existence of a significant number of reported cases of the disease occurring following such vaccines being administered, appears on the face of it to constitute evidence which, taken together where applicable, may lead a national court to consider that a victim has discharged his burden of proof under Article 4 of Directive 85/374".

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[13] *N.W. and others v. Sanofi Pasteur*, Case C-621/15.

[14] CJEU: *Novo Nordisk Pharma*, Case C-310/13, EU:C:2014:2385; *Gonzales Sanches*, Case C-183/00, EU:C:2002:255; *Nike European Operations Netherlands*, Case C-310/14, EU:C:2015:690; *Eturas and others*, Case C-74/14, EU:C:206:42.

Doubts came from the possible acceptance of the link between the vaccination and the disease, which could become overly automatic and lacking in objectivity from a scientific point of view. It should be emphasized that such a point of view is by itself contradictory to the well-established principle of evidence-based medicine which is the 'emerging clinical discipline that brings the best evidence from clinical and health care research to the bedside, to the surgery or clinic, and to the community'[15]. Naturally, the sophisticated language used by the judges to express their findings does not imply that this link is established by default. This case has been greatly simplified in some communications[16]. Meanwhile, it follows the grounds for the ruling that the judges did not dismiss the possibility of proving a link between a defective medicinal product (e.g. vaccine) and a patient's disease in a special situation, when there is no scientific consensus to establish such a causal link but the circumstances of the particular case may support it.

With reference to the literature on the subject, it is worth noting that the CJEU recognizes the difficulties in proving both general causation (whether the product was capable of causing the damage alleged) and specific causation (whether the product did so in the individual case)[17]. The judgment of the CJEU allows us to "slip through" the often insoluble problem of establishing the first general causation and only answer the second question.

[15] David L. Sackett and Brian R. Haynes, "On the need for evidence-based medicine. EBM Notebook," *Evidence-Based Medicine* 1 (1995): 5–6, https://ebm.bmj.com/content/ebmed/1/1/5.full.pdf, accessed February 13, 2021.

[16] But while such an interpretation will be easily understood by lawyers and practitioners in this field, it is more likely to be interpreted literally by the by the anti-vaccine lobby. Thus, using the media as an example, it was simply reported that: "The highest court of the European Union ruled Wednesday that courts can consider whether a vaccination led to someone developing an illness even when there is no scientific proof", see: https://www.cbsnews.com/news/eu-court-vaccines-can-be-blamed-for-illnesses-without-proof, accessed February 19, 2020. (First published on June 21, 2017/10:27AM).

[17] Richard Goldberg, "Vaccine damage and causation: a Franco-American comparison," *Journal de Droit de la Santé et de l'Assurance Maladie* 1 (2014): 134–137.

It's hard not to agree with this claim if one considers the specificity of the medicinal product, which is dangerous *per se*[18]. The active ingredients used in it, in addition to their therapeutic effects, may also have harmful side effects. However, their use is justified by the fact that the benefits outweigh the risks of complications. With this in mind, first of all, the problem is to determine what the level of safety for people being vaccinated in light of the provisions of the Directive can reasonably be expected, given that a vaccine, like any other medicine, may be inherently dangerous[19].

It should be taken into account that the patient is not a 'normal' user of the product. The decision to vaccinate is linked to a belief in the indications given by the manufacturer which suggest an increase in the patient's health safety.

In this context, it cannot be said that the product is certainly safe on the sole basis that it has undergone all necessary clinical trials and has been authorised. As it is known, clinical trials on a medical product are conducted on a specific population group. It may be that, compared to the target population to which the drug was applied, the group of people on which the drug was tested was too small to discover a specific causation. Therefore, on the basis of the results of clinical trials that did not detect a given causation, it cannot be assumed in advance that a causal link between the medicine and the adverse event is definitely not involved. Even the European Medicine Agency (EMA) explains that: "All medicines have benefits as well as risks. While the authorisation of a medicine is based on an overall positive balance between the benefits and risks at population level, each patient is different and before a medicine is used, doctors and their patient should judge whether this is the right treatment option for them

[18] It is important to distinguish between a simple defectiveness of the product and a defect that causes danger. A defective product might not pose a risk of harm, while a non-defective product might be harmful, see more: Monika Jagielska, "Odpowiedzialność za product," in *System Prawa Prywatnego*, t. 6, ed. Adam Olejniczak (Warsaw: C.H. Beck, 2009), 907 (our translation).

[19] CJEU: *Boston Scientific Medizintechnik GmbH*, joined Cases C-504/13 and C-504/13, EU:C:2015:148. The EU Court considered that the safety that could reasonably be expected should be assessed in particular in light of the intended use, the characteristics and objective characteristics of the product concerned and the specificity of the user group for which the product is intended.

based on the information available on the medicine and on the patient's specific situation"[20].

In conclusion, the specificity of drugs (including vaccines) requires a different definition of safety, i.e. the determination of a higher level of safety that one can expect from a given drug. Referencing Article 6 of Directive 85/374, the assessment must be taken in light of the legitimate expectations of the general public. A product which, given its function, on the basis of an assessment of its objective properties, can be assumed to pose a threat to life and health, becomes a dangerous product[21].

For these reasons, the judges also concluded that exclusion of the possibility to prove the relationship between the medical product's (a vaccine) defectiveness and a disease (patient's damage) on evidence not necessarily connected with scientifically proved product's properties, would contradict the assumptions of the Directive 85/374.

It seems that this concept expresses the requirement to share the risks associated with modern technical production fairly between the injured party and the producer and to protect the safety and health of consumers[22]. On the other hand, it must not be forgotten that Directive 85/374, by harmonising legal solutions concerning a producer's liability in the EU market, should lead to the unification of case law in this area[23]. As the following considerations will show, this effect will not necessarily be achieved.

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[20] From laboratory to patient: the journey of a medicine assessed by EMA, https://www.ema.europa.eu/en/documents/other/laboratory-patient-journey-centrally-authorised-medicine_en.pdf.

[21] CJEU: *Boston Scientific Medizintechnik GmbH*, joined Cases C-504/13 and C-504/13, EU:C:2015:148, paras 37, 38. See more: Richard Goldberg, *Medical Product Liability and Regulation* (Oxford: Hart Publishing, 2013), *passim*.

[22] See point 2 of the preamble to the Directive 85/374/EEC: The position of the victim would have to be strengthened.

[23] As Brosset rightly points out: '.... the ECJ's ruling does nothing to unify this case law, despite pointing out that national courts must take into account the principle of legal certainty, whose corollary is the principle of protection of legitimate expectations', Brosset, "Distinguishing between law and science," 1915.

3. COMMENTARY IN THE CONTEXT OF CIVIL LIABILITY FOR VACCINE DAMAGE IN FRENCH LAW

The problem of compensation for post-vaccination damage is regulated specifically within the French legal system, mainly due to the separation of types of vaccinations into those which are compulsory and those which are non-compulsory[24]. Damages resulting from compulsory vaccination are controlled by a special compensation process[25], while liability for damages resulting from non-compulsory vaccination are mainly regulated under civil liability laws for defective products.

In the French legal system, as in the legal orders of other EU Member States (including Poland), the latter liability is based on risk, and the burden of responsibility is usually placed on the producer and sometimes also certain other operators[26]. The manufacturer shall be liable if damage to

[24] The creation of specific liability rules is limited by Article 13 of Directive 85/374/EEC, according to which: 'This Directive shall be without prejudice to the rights of the injured party under the contractual or non-contractual liability or special liability regime existing at the time of notification of the Directive. The case law of the CJEU has recognised that a competitive system regulating liability for damage caused by defective products can function alongside the system introduced by a Directive if: it existed already before its entry into force, and its application is limited to a specific sector of production, e.g. medical products (this was the case in France and Germany) or if its liability is based on a different principle than the regime introduced by the Directive and is therefore dependent on fault or constitutes contractual liability (e.g. warranty for hidden defects of goods). See CJEU: *González Sánchez*, Case C-183/00 EU:C:2002:255; *Novo Nordisk Pharma GmbH*, Case C-310/13. ECLI:EU:C:2014:2385.

[25] In cases where the hepatitis B vaccination was compulsory, e.g. in the course of a professional activity, compensation was paid under the Code de la Santé Publique rules (L. 3111–9 CSP), see French Conseil État, Judgment of 9 March 2007*, Receuil Dalloz* (2007): 2204.

[26] In addition to the manufacturer, the seller of the product, the manufacturer of the raw material used, the person claiming to be the producer and any other professional supplier of the product (wholesaler) may be responsible. See. Article 3 of the Directive 85/374 and the national solutions based on its provisions.

person[27] or property (intended and used for private purposes) is caused by a defective product placed on the market by him[28].

Pursuant to the provisions of this directive, the manufacturer bears responsibility for introducing into the market a product which is potentially hazardous and might prove harmful as a result of its use. In the case of vaccines, there is no typical defective product. The manufacturers of such products, knowing the potential risk factors, have the responsibility to disclose information related to this, while providing proper guidance and warnings as to its use[29]. It is necessary to monitor the use of the product as soon as it is placed on the market[30].

The provision of Article 1245–8 of the French Civil Code[31], similarly to the aforementioned article 4 of the Directive 85/374, has made the person seeking damages responsible for providing evidence of the defect and proving the causal relationship between defect and damage. However, in practice, the rules described above concerning the distribution of the burden of proof are not treated too strictly, in particular they are mitigated by presumptions leading to a reduction the 'standard of proof' in court proceedings[32].

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[27] Personal injury is subject to compensation if it is pecuniary loss, regulations on compensation for non- pecuniary loss, the Directive leaves it up to the national regulations.

[28] The responsibility for the introduction a defective product into the market according to the principles adopted in the Directive was introduced by the French legislature with a 13-year delay (therefore, France was responsible for non-implementation of the Directive). Finally, after long discussions, the act of 19 May 1998 (loi n ° 98–389) was adopted and its content was incorporated into the French Civil Code.

[29] See also The Spanish Supreme Court, Judgment of 10 July 2014, *RJ* (2014): 4318.

[30] See also comparative studies: Duncan Fairgrieve et al., "Product Liability Directive," in *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, ed. Piotr Machnikowski (Cambridge–Antwerp–Portland: Intersentia, 2016), 17–108.

[31] Previously, Articles 1386–9 French Civil Code, changed by the ordinance n° 2016–131 of 10 Feb. 2016 (Art. 2).

[32] In the French judiciary the presumption of a causal relation is assumed, especially in medical compensation cases. See: Yvonne Lambert-Faivre and Stéphanie Porchy-Simon, *Droit du dommage corporel. Systèmes d'indemnisation* (Paris: Dalloz, 2012), 489; Geneviève Viney, "La responsabilité des fabricants de médicaments et de vaccins: les affaire de la prevue," *Receuil Dalloz* 7 (2010): 391–396.

The notion of the "burden of proof" (*onus probandi*) belongs to the basic canon of legal concepts and denotes which party will suffer the negative consequences of not proving a given fact in a court dispute, while the concept of 'standard of proof' is much less clear for lawyers educated in countries whose legal systems are part of civil law orders (like France or Poland)[33]. In general, the 'standard of proof' is assumed to mean the extent or degree of certainty (probability) of the truthfulness of the facts presented, which must be apparent from the evidence presented in the case, leading to the assumption that the fact is proven. This definition makes it possible to distinguish between 'the burden of proof' and 'the standard of proof'. In the commented judgment, the Court confirmed this distinction by considering that, the principle of procedural autonomy granted to each Member State implies the possibility of laying down a set of detailed conditions for the taking of evidence and the evidential value of that evidence before the competent court[34]. While this court is bound by the burden of proof rule established in law, the required standard of proof is seated in the internal legal order of each Member State.

Thus, in its judgement, the Court of Justice did not prejudge the existence of a causal link between vaccination and Multiple Sclerosis disease (MS); it merely sanctioned the practice of state courts by adopting the evidentiary rules established in case law concerning the possibility of considering the version presented by the plaintiff. To clarify, it is worth noting that, in Advocate General Bobek's view, the French term "présomption" does not mean a legal presumption but rather should refer to what he calls circumstantial evidence or indirect evidence[35], i.e. a situation where a fact

[33] It is indicated that this concept derives from common law systems. See: Ewa Bagińska, *Odpowiedzialność deliktowa w razie niepewności związku przyczynowego. Studium prawnoporównawcze* (Toruń: TNOiK, 2013), 44.

[34] The verdict was widely commented in the French literature, see: Béatrice Espesson-Vergeat and Pierre. A. Morgon, "A propos de la preuve de la défectuosité du vaccin. Regards sur la position de la Cour de Justice de l'Union européenne dans un contexte de la politique vaccinale en pleine ébulition," *Revue générale de droit médical* 64 (2017): 123–137; Paul Véron and François Vialla, "Contentieux du vaccin contre l'hépatite B : l'autonomie de la causalité juridique validée par la Cour de Justice de l'Union européenne," *Revue générale de droit médical* 65 (2017): 223–233.

[35] See also explanations Brosset, "Distinguishing between law and science," 1904.

or set of facts is established, and from it is inferred the likelihood of occurrence of another fact or set of facts"[36].

French courts have for years been confronted with the problem of liability claims for post-vaccination damages[37]. The surge of such complaints into the courts was linked to widespread rumours among the French public, connecting the Hepatitis B vaccination of a large part of the adult population (around 20 mln.) in the mid-1990s, with an almost near two-fold increase in the number of newly confirmed cases of MS disease that later followed[38].

In its judgement of 2 May 2001, the Court of Appeal in Versailles became the first to adopt the presumption of defectiveness of the product (vaccine) and causal link between the vaccine and the plaintiff's injury.[39] The argument expressed by the Court for taking on evidence regarding post-vaccination damages, was subsequently applied by the French Court of Cassation and used in verdicts that it handed down on 23 Sept. 2003[40] and 27 Feb. 2007[41].

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[36] The opinion of Advocate General Bobek, delivered on 7 March 2017; EU:C:2017:176 (para 32).

[37] See also the jurisprudence of administrative courts at that time. In the judgement of the French Conseil d'Etat of 9 March 2007, ref. n° 267635, ref. n° 278665, ref. n° 285288, ref. n° 283067 (cases were joined for recognition), *Receuil Dalloz* (2007): 943 and 2204. The Court indicated that having taken into consideration the short period of time elapsed between injection (vaccination) in March 1991 and emergence of the symptoms leading to a clinical diagnosis indicating Multiple Sclerosis on the one hand, and the patient's previous state of good health and absence of any features indicative of the development of this disease on the other, the adoption of a relationship between the two events is possible.

[38] See: Dominique Le Houézec, "Evolution of multiple sclerosis in France. B vaccination," *Immunologic Research* 60 (2014): 219–225; https://doi.org/10.1007/s12026–014–8574–4. See also: Critical reports, accusing the author of the wrong methodology of the study, i.e. not taking into account other factors that may have influenced the increase in morbidity, Rodolfo E. Bégué, "Critical reports," *Immunologic Research* 5 (2015).

[39] See: Faivre-Lambert and Porchy-Simon, *Droit du dommage corporele*, 38, 822.

[40] The French Court of Cassation, Judgment of 23 Sept. 2003, ref. n° 188, *Receuil Dalloz* (2004): 898.

[41] The French Court of Cassation, Judgment from 27 Feb. 2007, ref. n° 06–10.063, *Receuil Dalloz* (2007): 2899 (note Philippe Brun).

As it seems, the most representative judgement for such cases falling under civil jurisdiction, was that rendered by the French Court of Cassation on 22 May 2008[42] in which the court accepted that "…if an action for damages due to a defective product requires proof of damage, product defect and causal relation between defect and damage, such evidence may be an outcome of presumption, if the evidence presented is serious, consistent and accurate"[43]. The French Court of Cassation in this case ruled that the mere reliance by the court on the first instance where the lack of certain statistical and scientific evidence as to the existence of a causal link between the vaccination and sudden development of the disease, is not sufficient to dismiss the action. The court hearing the case should take into account all of the circumstances of the case, and may use in the process of proving the presumption of fact. In light of this ruling, meeting the standard of proof requires the plaintiff to prove that the following circumstances took place: temporal compliance between the time inoculation took place and appearance of the first symptoms of the disease (the time of coincidence)[44], no other risk factors (good state of health and lack of predispositions of the plaintiff - also defined as the lack of personal and family history of such illness), or the absence of other, unexplainable, causes leading to development of such illness[45]. This judgment of the French Court of Cassation was part of a trend which clearly separates two con-

[42] The French Court of Cassation, Judgment of 22 May 2008*, Receuil Dalloz* (2008): 1544; *Revue trimestrielle de droit civil* (2008): 492.

[43] Our translation. Text in french: "Si l'action en responsabilité du fait d'un produit défectueux exige la preuve du dommage, du défaut et du lien de causalité entre le défaut et le dommage, une telle preuve peut résulter de présomptions, pourvu qu'elles soient graves, précises et concordantes".

[44] In Polish law, time coincidence is also accepted if an adverse post-vaccination reaction occurs after vaccination; it does not directly mean that we are dealing with a causal relationship and consequently with liability for damage. There is no special policy in compensation for post-vaccine damage in Polish law although discussions on the subject are ongoing.

[45] The CJEU also suggests taking into account the existence of a significant number of reported cases of the disease which occurred following such vaccines being administered, which, in light of existing statistical studies, may give rise to doubts. These premises are also extensively discussed in the medical perspective: Espesson-Vergeat, Morgon, "A propos de la prevue," 128–131.

cepts: scientific causality (also known as material causality) from the causal connection of the juridical nature[46]. Therefore, if there is a state of scientific uncertainty in the assessment of the causes of damage, the court should examine whether a causal link of a juridical nature (between the event and the damage) could have occurred, while the material links described by experts on the basis of current medical knowledge may be of auxiliary importance, without yet determining the existence or absence of a juridical link. In this context, the question arises as to what rank should be given to 'the auxiliary importance of scientific evidence'. For example, in its judgement of 27 Feb. 2007, the French Court of Cassation qualified that: "... scientific uncertainty is not allowing to carry a causal relationship between the vaccination preventing Hepatitis B virus and the onset of multiple sclerosis from being recognized".

In its judgement of 24 Sept. 2009[47], the French Court of Cassation ruled that primacy had to be given to the scientific data available, stating that presumptions by themselves could not meet the burden of proof in establishing a causal relationship between Hepatitis B vaccine and the development of MS disease at that time, thus dismissing the case against the vaccine's manufacturer. Similarly, in a judgement handed down on 25 Nov. 2011,[48] the Court of Cassation ruled that the circumstances of the case did not allow the court to assign responsibility to the vaccine manufacturer.

Finally, it should be noted that also in the case commented on, on the basis of which the ruling of the CJEU judgment of 21 June 2017 was issued, the claims were not finally recognised by the French Court. The assessment of the facts by the judge on the basis of serious, specific and con-

[46] See: Grégory Maitre, "L'intercitude sur la causalité scientifique est indifferente á l'appréciation de la causalité juridique," *Receuil Dalloz* 15 (2010): 947.

[47] The French Court of Cassation, Judgment of 24 Sept. 2009, ref. n° 08–16097, *Receuil Dalloz* (2009): 2426. Similarly, in the judgments of 25 Nov. 2010 and 28 April 2011, ref. n° 10–15289.

[48] The French Court of Cassation, Judgment of 25 Nov. 2011, ref. n° 09–16556, *JCP* (2011): 79. See: Philippe Brun, "Raffinements ou faux-fuyants? Pour sortir de l'ambiquïté dans le contentieux du vaccin contre le virus de l'hépatite B (á propos d'un arrêt de la Cour de Cassation du 25 novembre 2010)," *Receuil Dalloz* 5 (2011): 316–322.

sistent presumptions did not lead to the conclusion that the damage could be attributed to the use of a defective medical product[49].

4. COMMENTARY IN THE CONTEXT OF CIVIL LIABILITY FOR VACCINE DAMAGE IN POLISH LAW

Polish law does not provide for a special compensation procedure, as in French law, in cases involving losses following mandatory vaccinations[50]. Both in the case of mandatory and optional vaccinations, the rules of liability for damages, set out in the Polish Civil Code, apply[51]. They al-

[49] Let us note the far-reaching discrepancies between the judgments of the courts of particular instances in case W. and others v. Sanofi Pasteur. In the verdict of the First Instance Court in Nanterre of 4 Sept. 2009, the action of the deceased's family was included, while the Court of Second Instance (Appellate Court in Versailles, Judgment of 10 Feb.2011) did not agree with the plaintiffs' argument because they did not show product defects (vaccines). The French Court of Cassation passed the case for re-examination by its verdict of 26 Sept. 2012 to investigate whether the circumstances that determined the existence of a causal link did not support the defective nature of the product. As a result, the Paris Court of Appeal in its judgment of 7 March 2014, on hearing the case, stated that the evidence provided could not constitute, jointly or separately, serious, precise and consistent presumptions that would allow the recognition of the existence of a relationship. A cassation appeal was lodged against that judgment, which ended with the suspension of the proceedings and the court referred the prejudicial question to the CJEU (French Court of Cassation, Judgement of 2 Nov. 2015). Finally, the claim was dismissed. See: French Court of Cassation, Judgment of 18 Oct. 2017, ref. n° 14–18118, ref. n°15–20791*, Receuil Dalloz* (2017): 2096, *RTD civ*. (2018): 140–144 (note Patrice Jourdain). See also: Stéphane Prieur, "Défaut et causalité dans la contentieux de la vaccination contre l'hépatite B : suite, mais (probablement) pas fin," *Gazette du Palais*, November 21, 2017, 23–25.

[50] The special compensation procedure provided for in the Act of 6 Nov. 2008 on the Patients' Rights and the Patient's Ombudsman (consolidated text: Journal of Laws of 2019 r., item 1127 as amended) applies to the so-called 'medical events', which also include the use of medicinal products. The provisions of the Act provide for the possibility of establishing the existence of a 'medical event' only in relation to hospitals, which at the outset excludes the possibility of applying them to ambulatory vaccinations (in Poland within the framework of basic health care). This means that this mode can be used for post-vaccine damage to a very limited extent.

[51] The Polish Civil Code (Act of 23 April 1964, Journal of Laws of 1964, No° 210, item 2135 as amended). In short: Pol.Civ.Code. See more: Ewa Bagińska, "Poland," in

low, depending on the actual state of affairs, the patient to sue the medical establishment (medicinal entity)[52] or vaccine manufacturer.

The vaccine manufacturer's liability is based on the provisions of Articles 4491–44911 Pol.Civ.Code, introduced into the Code as a result of the implementation of the European Directive 85/374. The similarities between Polish and French law regulations result from the implementation of Directive 85/374.

Pursuant to Article 4491§1 of the Pol.Civ.Code.: "Anyone who manufactures a dangerous product within the scope of his business activity is liable for damage caused to anyone by that product"[53]. That procedure may be applied both when a vaccination was compulsory and when it was optional, if the claimant proves: firstly, that the vaccine was a dangerous product within the meaning of Article 4491§3 Pol.Civ.Code; secondly, that damage was caused, and thirdly that there is an adequate causal link between the vaccination and the damage suffered by the claimant[54].

European Tort Law: Basic Texts, eds. Ken Oliphant, and Barbara Steininger (Vienna: Jan Sramek Verlag, 2011), 231.

[52] The medical establishment is responsible if the vaccination has been carried out contrary to current medical knowledge and without due diligence, In this case, we are dealing with a classic fault-based liability, whose rules are set out in Articles 415, 416, 430 of the Pol.Civ.Code. See more: Kinga Bączyk-Rozwadowska, "Medical malpractice and compensation in Poland," *Chicago-Kent Law Review* 86, Issue 3 (2011): 1227. In recent years the question of the responsible entity has become the subject of discussion. It has been proposed to introduce the responsibility of the State, as the entity which has decided in statutory provisions that certain types of vaccination are obligatory. See f.e. Mirosław Nesterowicz, "Glosa do wyroku Sądu Okręgowego w Lublinie z 4.07.2002, I C 656/99," *Prawo i Medycyna* 3 (2004): 128; Urszula Drozdowska, "Odpowiedzialność odszkodowawcza za niezawinione skutki szczepień ochronnych – *uwagi de lege lata i de lege ferenda*," *Białystok Legal Studies* 17 (2017): 99.

[53] See more: Ewa Bagińska, "Poland," in *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, ed. Piotr Machnikowski (Cambridge-Antwerp-Portland: Intersentia, 2016), 377–406.

[54] To establish causal effect, in the first instance it is imperative to prove the occurrence of harm in relation to an event within an agreed factual state *conditio sine qua non*. It is equally important to establish that the harm caused was a 'natural' consequence of an event, according to 'selection by consequences' (Article 361 § 1 Pol.Civ.Code). Obviously, the course here is to evaluate a causal relationship, thus allowing the establishment of the proper liability of the defendant. It is worth noting that, unlike Polish law, French law

The standard of proof of these circumstances is treated rigorously in the case law of Polish courts[55], but polish civil procedure allows for the use of prima facie evidence, as well as the use of factual presumptions to establish the causal link and product defectiveness.

Let's start with *prima facie* evidence. The inference of *prima facie* evidence (at first sight)[56] is the result of the concept of representatives of the legal doctrine, who recognized that in some cases the statement of the dependence between facts arises "by itself", which means that the court bases its findings on the typical, most likely course of events. Applying this reasoning to vaccination, the question must be asked: Is it possible to deduce from the mere fact that the patient has been given a vaccine (and therefore a substance that may cause side effects) that there is a causal link between the injury and the vaccination?

The answer to this question must be in the negative. The opposite view seems far too far-reaching and unjustified even in the face of the directive's demand for far-reaching protection for victims from dangerous products. However, if the question were to be whether a causal link could be deduced from the mere fact that a defective vaccine has been administered to a patient? This, given the definition of a defect in a product as a non-safety product that can be expected, given the normal use of the product, the use of this design could not be excluded. From the point of view of liability, it is therefore important to determine the safety of the product from the point of view of medical knowledge. As the French cases show, the evidence that the product has passed clinical trials is not always sufficient. In the case of adverse events which are not detected in clinical trials, a legal procedure must be initiated. In the Polish legal system, both the doctor

applies both the theory of equivalence of conditions and the theory of adequate causation. Without going into the differences between the two theories, from the point of view of the issue under consideration the results of the findings of the *sine qua non* test are the most important. This is applied in both theories.

[55] As a rule, the burden of proof for these circumstances lies with the patient (Article 6 Pol.Civ.Code). Unfortunately, Polish civil law does not apply in civil cases the test known in common law systems: the evidence prevalence test (probability balance). This test as opposed to the 'beyond all doubt' test makes it possible to establish causal regularity in a less stringent manner.

[56] In *common law* it is the doctrine of *res ipsa loquitur* – "the thing speaks for itself".

and the patient have the right to report undesirable effects of medicinal products. Although the probability of the existence of a defect itself should not lead to a reversal of the burden of proof (proof of the defect lies with the victim), information on the probability of the existence of a defect in case-law leads to a 'specific reverse" of the burden of proof. A presumption of a causal link is then raised which the defendant can deny by showing that the damage could have arisen for other reasons for which he is not responsible.

In other words, it must be shown in the proceeding that whether a substance is capable of causing a particular injury or condition in the general population and that whether it actually caused a particular individual's injury[57].

This may be demonstrated by way of factual presumptions, which consist in the court inferring other facts from certain established facts, e.g. concerning the probability that a specific disease relied on by the claimant may be caused by the application of a defective medicinal product. The basis for the application of the presumptions is Article 231 of the Polish Civil Procedure Code[58] allows a court to consider presumptive facts derived from known facts, provided that such presumptions are always relevant to the case, sound in argument and believable in terms of evidentiary value. While such actual pre-accumulation simplifies the proof of facts process, it requires the recognition that if the presumption derived from certain facts is uncertain (e.g. because a different version of events is also possible) it cannot constitute the basis for making factual findings relevant to the resolution of the dispute[59].

This is exemplified by a case pending before the District Court in Warsaw[60], in which the patient, a person suffering from rheumatoid arthritis for years, was given a drug called Vioxx (active substance: rofekoxyb),

[57] Similarly, in line with the principles adopted in *common law* systems in the context of medicinal product liability, see: Richard Goldberg, "Epidemiological uncertainty, causation, and drug product lability," *McGill Law Journal* 4 (2014): 781–782.

[58] Act of 17 Nov. 1964 – Polish Civil Procedure Code (consolidated text: Journal of Laws of 2019, item 1460 as amended).

[59] Beata Janiszewska, "Dowodzenie w procesach lekarskich (domniemania faktyczne i reguły wnioskowania prima facie)," *Prawo i Medycyna* 2 (2004): 110.

[60] Provincial Court in Warsaw, Judgment of 12 Feb. 2016, ref. nº II C 1215/06.

manufactured by the defendant. In 2005, the patient underwent an acute myocardial infarction, which - in her opinion - resulted from the use of the aforementioned medicine. The Court found that the use of medicinal product Vioxx after 18 months increased the risk of myocardial infarction, which moreover was the basis for its withdrawal from the market in September 2004. Previously, scientific research had shown that there was a link between drugs from the group of selective cyclooxygenase-2 inhibitors (e.g. drug Vioxx) and the occurrence of cardiovascular incidents in patients. According to the Court, the withdrawal of the drug from the world market and the discontinuation of clinical trials following analysis of results indicating an increased risk of thrombotic complications, including heart attacks and strokes in patients taking this medicine, could have established that the product was dangerous and that its use could have caused the indicated diseases. However, this belief could not have led to producer liability in this particular case because of the lack of a causal link between the patient's use of the medicine and the myocardial infarction suffered and the consequent permanent disorder of health[61].

Although the case presented does not concern the use of a vaccine but a medicine, this may be an example of how to establish a causal link in cases under the rules on liability for dangerous products. In this case, as in other medical cases, the courts are forced to use the knowledge of professional experts. Since in life sciences it is not possible to predict with certainty whether a given cause led to specific effects, in medical disputes

[61] The Court, based on expert opinions, found that therapy with the drug rofekoxyb was not the cause of myocardial infarction due to the significant time lag between the time it was used and the failure of the claimant's health. At the same time, it pointed to the existence of a number of other risk factors of myocardial infarction in the claimant. According to the court, even if the use of the medicine could have accelerated myocardial infarction, that fact does not lead to the conclusion that the use of the medicine was a *sine qua non* condition giving rise to harm. Therefore, the Court did not find a factual basis for a causation between the plaintiff's injury and the use of a dangerous medicine. A similar verdict was passed in a case decided by The Federal Full Court of Australia (decision in Peterson's case, see: The Australian Federal Court, Judgment of 12 Oct. 2011, case *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson: Heart Risk and Vioxx*). This Court concluded that while the epidemiological evidence meant that it was possible Vioxx had caused Peterson's myocardial infarction, there were other strong potential causes, such as "age, gender, hypertension, hyperlipidaemia, obesity, left ventricular hypertrophy and history of smoking".

the cause-and-effect relationship does not have to be established categorically (with 100% certainty). After numerous considerations, the jurisprudence has determined that this should be a high level of probability[62]. This case does not allow the problem of grading the level of probability to be presented because the court found that there is no specific causation, despite the fact that the experts did not rule out the possibility of accelerating the disease process, which resulted in myocardial infarction, as a result of taking a drug. In this case, the lack of causation was determined by a different - in the court's opinion - more probable course of events which had nothing to do with the use of the medicine.

The problem of determining the level of probability of a causal relationship can be found in other cases settled by courts of appeal in recent years[63]. Although these were post-vaccination cases involving hospital liability, the problem of establishing a causation between vaccination and injury was similar. The characteristic of these cases is that expert testimonies are often not strong enough. They are seen as insufficient because they cannot prove or exclude the possibility of disease development as a result of the use of a vaccine. It is worth noting that even in cases where a vaccination could be shown to have acted as a 'trigger agent', the courts had doubts as to whether other factors could not have influenced the promotion of the disease.

In the judgment of the Court of Appeal in Łódź of 30 November 2012[64], the Court indicated that the occurrence of such additional circumstances as: complicated pregnancy and foetal growth disorders may constitute an additional risk factor for complications after vaccination. However, immediately after the admission of the claimant's minor to hospital, the doctor entered the following into the medical records: post-vaccination complication. This entry became the reason for the presumption that there is a causal link between the occurrence of the disease and vaccination.

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[62] Appellate Court in Kraków, Judgment of 8 Jul. 2016, ref. nº I ACa 360/16; Appellate Court in Katowice, Judgment of 5 May 2016, ref. nº I ACa 431/15.

[63] Appellate Court in Poznań, Judgment of 22 Jan. 2013, ref. nº I ACa 1160/12, Appellate Court in Łódź, Judgment of 30 Nov. 2012 r., ref. nº I ACa 1140/12; Appellate Court in Kraków of 4 Sept. 2012, ref. nº I ACa 676/12, I ACz 1011/12.

[64] Appellate Court in Łódź, Judgment of 30 Nov. 2012, ref. nº I ACa 1140/12.

Otherwise, in the judgment of the Court of Appeal in Poznań of 22 January 2013[65], the Court found no causal link between the disease and vaccination. The Court concluded that the causes of cerebral infirmity should be attributed to premature childbirth and immaturity of the foetus and probably to latent intracranial bleeding. The medical experts pointed that cerebral palsy in the child developed independently of the vaccine injection, probably the vaccine was like a 'trigger mechanism' and revealed symptoms of paralysis, which would also reveal itself later.

Reading the case law on post-vaccination injuries issued by Polish courts, it can be concluded that it is difficult for the claimant to meet the standard of proof. Claims are recognised, when the court - taking into account the expert opinion - has no doubts as to the high degree of probability that there is a causal link between the damage and the vaccine injection. Therefore, post-vaccine damage cases are characterised by a high degree of uncertainty as to the outcome of the case.

5. CONCLUSION

The European Court of Justice has opened the possibility for a compensation claim, even in cases where a dominant scientific theory claims that there is no scientific evidence of a link between vaccination and illness. As a result, procedural solutions (such as the required standard of proof, the admissibility of *prima facie* evidence reasoning and other solutions to cases of an uncertain causation) remain matters for national law to resolve.

Respect for procedural autonomy leads to the conclusion that, where the conditions led the court to consider: first, that the administration of the vaccine is the most reliable explanation for the outbreak of the disease, and, second, that the vaccine does not provide a level of protection which can reasonably be expected in light of all the circumstances of the case, the manufacturer may be held liable for damages.

The question arises as to whether this is in accordance with the spirit of Directive 85/374/EEC?

[65] Appellate Court in Poznań, Judgment of 22 Jan. 2013, ref. nº I ACa 1160/12.

One of the most important objectives, in the essence of European Union law, is to protect and promote the development of the single market in accordance with its four fundamental freedoms: the free movement of goods, capital, services and labour. In the context of consumer protection (an important element of the functioning of the single market), Directive 85/374 emphasises that '…the liability of a producer for damage caused by defectiveness of his products is necessary because existing divergences may distort competition and affect the movement of goods within the single market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property'.

The conclusion of the CJEU case law, including the Sanofi Pasteur judgment, is clear and appears to fully achieve the purpose outlined in Directive 85/374, which is to ensure consumer safety. The concern for consumer protection is clearly expressed in the preamble to the Directive in the following terms: "to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect".

The analysis of the current CJEU case law indicates that it is the individual interests of the vaccination victim as a consumer of medical services that have become the most important interpretative motive for Directive 85/374. They are undoubtedly interpreted as one of the overriding interests and the protection provided by EU law, in particular the provisions of Directive 85/374 and actions such as the decision taken by the Court of Justice of the European Union, serve to support this idea. However, the Court does not seem to have noticed that the adoption of the latter principle may lead to significant differences in the scope of judgments in similar cases in European countries that are members of the EU. The above presented jurisprudence of Poland (as opposed to some French rulings) indicates that it would be rather unacceptable to claim that the uncertainty of causation with regard to whether a given medicinal substance is at all capable of causing a specific disease is legally indifferent to the assessment of legal causality.

It is certainly worth noting that human health is regarded as a highly ranked value in the hierarchy of individual rights. As far as consumer attitudes are concerned, there is a certain trend towards increasing levels

of entitlement in health-related situations and, at the same time, towards patients seeking alternative methods of treatment.

There is an interesting preliminary ruling currently pending before the CJEU in which the national court asks: "Where a daily newspaper publishes inaccurate health advice in a daily column written by an independent newspaper columnist, can that newspaper be sued on the basis that it has distributed a defective product within the meaning of Council Directive 85/374/EEC (2) ('the Product Liability Directive') when a reader of the newspaper subsequently claims that she has suffered physical injury as a result of following that advice?"[66]. This case concerned the publication in a newspaper of advice, signed by a herbalist, according to which fresh, coarsely grated horseradish could help relieve the pain caused by rheumatism. Painful areas should first be rubbed with thick vegetable oil or pork lard, then a layer of grated horseradish should be applied and pressed. This compress can be left on for two to five hours and then removed. Its application has a positive draining effect. The confusion concerned the time-period of action of such a compress. The correct value is two to five minutes. According to the Advocate General, the answer should be negative, mainly because a claim of this kind falls outside the scope of the Product Liability Directive. It is essentially an action in relation to the provision of a service – advice to consumers contained in a newspaper column – which does not concern a newspaper qua physical product. It cannot therefore be said that any physical injuries which the applicant suffered were the result of a defect in a product as those terms are used in the Product Liability Directive[67].

However, it should be noted that in the era of "Dr. Google", which means free access to unverified and often questionable sources of medical knowledge, the patient is exposed to the danger of using various methods of treatment that are not scientifically recognised or evidenced.

It will therefore be interesting to observe further rulings on compensation for damage caused by medical products, including vaccines. Once

[66] Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on Feb. 2020, VI v. Krone-Verlag Gesellschaft mbH & Co KG (Case C-65/20).

[67] Opinion of Advocate General Hogan delivered on 15 April 2021(1). Case C65/20, VI v. Krone-Verlag Gesellschaft mbH & Co KG, ECLI:EU:C:2021:298.

the window is opened, it can be closed again and may also cause a strong draught. The future will show.

REFERENCES

Bagińska, Ewa. "Poland." In *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, edited by Piotr Machnikowski, 377–406. Cambridge-Antwerp-Portland: Intersentia, 2016.

Bagińska, Ewa. "Poland." In *European Tort Law: Basic Texts*, edited by Ken Oliphant, and Barbara Steininger, 191–200. Vienna: Jan Sramek Verlag, 2011.

Bagińska, Ewa. *Odpowiedzialność deliktowa w razie niepewności związku przyczynowego. Studium prawnoporównawcze*. Toruń: TNOiK, 2013.

Bączyk-Rozwadowska, Kinga. "Medical malpractice and compensation in Poland." *Chicago-Kent Law Review* 86, Issue 3 (2011): 1217–1261.

Black Corri, Kaye James A., and Jick Hershel. "Relation of childhood gastrointestinal disorders to autism: nested case control study using data from the UK General Practice Research Database." *British Medical Journal* 325 (2002): 419–421.

Brosset, Estelle. "Distinguishing between law and science in terms of causation and the hepatitis B vaccine: W. v. Sanofi Pasteur." *Common Market Law Review* 55 (2018): 1899–1915.

Brosset, Estelle, and Elsa Supiot. "Le vaccin contre l'hépatite B: l'autonomie de la preuve juridique en l'absence de consensus scientifique devant la Cour de justice de l'Union européenne." *Revue des contrats* 4 (2017): 662–668.

Brun, Philippe. "Raffinements ou faux-fuyants? Pour sortir de l'ambiquïté dans le contentieux du vaccin contre le virus de l'hépatite B (á propos d'un arrêt de la Cour de Cassation du 25 novembre 2010)." *Receuil Dalloz* 5 (2011): 316–322.

Büyüksagis, Erdem. "Arrêt "Sanofi": la responsabilité du fait des produits défectueux appliquée aux vaccins, une responsabilité objective basée sur des présomptions." *Journal de droit européen* 244 (2017): 395–397.

Cairó, Ruiz. "The Lack of Medical Research Does Not Prevent an Injured Person from Proving the Defect of a Product and the Causal Link between the Defect and the Damage." *European Journal of Risk Regulation* 4 (2017): 798–803.

Deer, Brian. "How the Case Against the MMR Vaccine Was Fixed." *British Medical Journal* 342 (2011): 77–82.

Drozdowska, Urszula. "Odpowiedzialność odszkodowawcza za niezawinione skutki szczepień ochronnych – uwagi de lege lata i de lege ferenda." *Białystok Legal Studies* 17 (2017): 99–112.

Duncan, Fairgrieve, Geraint Howells, Peter Møgelvang-Hansen, Gert Straetmans, Dimitri Verhoeven, Piotr Machnikowski, André Janssen, and Reiner Schulze. "Product Liability Directive." In *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies*, edited by Piotr Machnikowski, 17–108. Cambridge–Antwerp–Portland: Intersentia, 2016.

Espesson-Vergeat Béatrice, and Pierre A. Morgon. "A propos de la preuve de la défectuosité du vaccin. Regards sur la position de la Cour de Justice de l'Union européenne dans un contexte de la politique vaccinale en pleine ébulition." *Revue générale de droit médical* 64 (2017): 123–137.

Godlee, Fiona, Jane Smith, and Harvey Marcovitch. "Wakefield's article linking MMR vaccine and autism was fraudulent." *British Medical Journal* 342 (2011): 64–66.

Goldberg, Richard. "Epidemiological uncertainty, causation, and drug product lability." *McGill Law Journal* 4 (2014): 777–818.

Goldberg, Richard. "Vaccine damage and causation: a Franco-American comparison." *Journal de Droit de la Santé et de l'Assurance Maladie* 1 (2014): 134–137.

Houézec, Dominique Le. "Evolution of multiple sclerosis in France. B vaccination." *Immunologic Research* 60 (2014): 219–225.

Jagielska, Monika. "Odpowiedzialność za produkt." In *System Prawa Prywatnego*, t. 6, edited by Adam Olejniczak, 869–934. Warsaw: C.H. Beck, 2009.

Janiszewska, Beata. "Dowodzenie w procesach lekarskich (domniemania faktyczne i reguły wnioskowania prima facie)." *Prawo i Medycyna* 2 (2004): 104–129.

Kalkbrenner, Amy E., Rebecca J. Schmidt, and Annie C. Penlesky. "Environmental chemical exposures and autism spectrum disorders: a review of the epidemiological evidence." *Current Problems in Pediatric and Adolescent Health Care* 44 (2014): 277–318.

Lambert-Faivre, Yvonne, and Stéphanie Porchy-Simon. *Droit du dommage corporel. Systèmes d'indemnisation*. Paris: Dalloz, 2012.

Madsen, Kreesten Meldgaard, Andres Hviid, Mogens Vestergaard, Diana Schendel, Jan Wohlfahrt, Poul Thorsen, Jørn Olsen, and Mads Melbye. "A population-based study of measles, mumps, and rubella vaccination and autism." *New England Journal of Medicine* 347 (2002): 1477–1482.

Maitre, Grégory. "L'intercitude sur la causalité scientifique est indifferente á l'appréciation de la causalité juridique." *Receuil Dalloz* 15 (2010): 947–951.

Nesterowicz, Mirosław. "Glosa do wyroku Sądu Okręgowego w Lublinie z 4.07.2002, I C 656/99." *Prawo i Medycyna* 3 (2004): 122–130.

Prieur, Stéphane. "Défaut et causalité dans la contentieux de la vaccination contre l'hépatite B : suite, mais (probablement) pas fin." *Gazette du Palais*, November 21, 2017, 23–25.

Rao, T.S. Sathyanarayana, and Chittaranjan Andrade. "The MMR vaccine and autism: sensation, refutation, retraction, and fraud." *Indian Journal of Psychiatry* 53 (2011): 95–96.

Rizzi, Marco. "A Dangerous Method: Correlations and Proof of Causation in Vaccine Related Injuries." *Journal of European Tort Law* 9 (2018): 289–307.

Sackett David L., and Brian R. Haynes. "On the need for evidence-based medicine. EBM Notebook." *Evidence-Based Medicine* 1 (1995): 5–6.

Shetreet, Shimon. "On Assessing the Role of Courts in Society." *Manitoba Law Journal* 10 (1980): 357–414.

Siddiqui, Mariam, Daniel A. Salmon, and Omer B. Saad. "Epidemiology of vaccine hesitancy in the United States." *Human Vaccines & Immunotherapeutics* 9 (2013): 2643–2648.

Smillie, Laura R., Marc R. Eccleston-Turner, and Sarah L. Cooper. "C-621/15 – W. and others v Sanofi Pasteur: an exemple of judical distortion and indifference to science." *Medical Law Review* 26 (1) (2018): 134–145.

Smith, Philip J., Sharon G. Humiston, Edgard K. Marcuse. "Parental delay or refusal of vaccine doses, childhood vaccination coverage at 24 months of age, and the Health Belief Model." *Public Health Reports* 126 (suppl 2) (2011): 135–146.

Taylor, Brent, Elizabeth Miller, Raghu Lingam, Nick Andrews, Andrea Simmons, and Julia Stowe. "Measles, mumps, and rubella vaccination and bowel problems or developmental regression in children with autism: population study." *British Medical Journal* 324 (2002): 393–396.

Véron, Paul, and François Vialla. "Contentieux du vaccin contre l'hépatite B : l'autonomie de la causalité juridique validée par la Cour de Justice de l'Union eurpéenne." *Revue générale de droit médical* 65 (2017): 223–233.

Viney, Geneviève. "La responsabilité des fabricants de médicaments et de vaccins: les affaire de la prevue." *Receuil Dalloz* 7 (2010): 391–396.

Wakefield, Andrew J., S. H. Murch, A. Anthony, J. Linnell, D. M. Casson, M. Malik, M. Berelowitz, A. P. Dhillon, M. A. Thomson, P. Harvey, A. Valentine, S. E. Davies, and J. A. Walker-Smith. "Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children." *Lancet* 351 (1998): 637–641.

Zerbo, Ousseny, Ana-Maria Iosif, Cheryl Walker, Sally Ozonoff, Robin L. Hansen, and Irva Hertz-Picciotto. "Is Maternal Influenza or Fever During Pregnancy Associated with Autism or Developmental Delays? Results from the CHARGE (Childhood Autism Risks from Genetics and Environment) study." *Journal of Autism Developmental Disorders* 43, no. 1 (2013): 25–33.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLVI
YEAR 2021, ISSUE 3, pp. 291–312
DOI: https://doi.org/10.31743/recl.9269

REVIEW OF ERIK RINGMAR, *HISTORY OF INTERNATIONAL RELATIONS: A NON-EUROPEAN PERSPECTIVE*, OPEN BOOK PUBLISHERS, CAMBRIDGE 2019, PP. 206, ISBN 978–1–78374–022–2

*Marcin Nabożny**

1. INTRODUCTION

International politics, as usually taught, is hopelessly Eurocentric. History takes Europe as the standard by which every other part of the world is measured, although "Europe" here also includes the United States and other places where Europeans settled. The book is not interested in telling a story as long as history itself nor is it interested in the events, wars, names, and dates of the past, but the aim is to introduce you to a subject that we could call the "comparative study of international systems." Today, there is only one international system. This is the system that originated in Europe and spread to the rest of the world, as a result of European colonialism in the nineteenth century. As a result, the different international systems that previously existed were destroyed and the entire world has been recreated in Europe's image.

The project is funded by the Minister of Science and Higher Education within the program under the name "Regional Initiative of Excellence" in 2019–2022, project number: 028/RID/2018/19, the amount of funding: 11 742 500 PLN.

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2. ABOUT THE BOOK

The book History of International Relations: A non-European Perspective was written by Erik Ringmar and published by Open Book Publishers, Cambridge, UK in 2019. It is a historical book that goes back to the first millennium of the Common Era with an explicit non-European perspective. It is a book on international politics which puts Europe firmly in its place while taking a historical look at the world as a whole. Furthermore, just to be clear, this alternative perspective is not motivated by an attempt to be "politically correct." The aim is not to set the record straight out of a concern for balance or respect for people who are marginalized and silenced. But more straightforwardly to provide a better account of the kind of knowledge we need in order to understand today's world. The book dares to change the narrative of the history of international relations that is taught today. It has 206 pages, with 9 maps and 102 online sources across 8 chapters.

3. ABOUT THE AUTHOR

Erik Ringmar was born on December 10, 1960 in Sweden. He is a professor in the Department of Political Science and International Relations at Ibn University, Istanbul, Turkey. He graduated from Yale University in 1993 with a PhD in political science and has subsequently worked at the London school of Economics and as professor of international politics at Shanghai Jiaotong Daxue in Shanghai, China. In the summer of 2008 he underwent successful cancer surgery, an experience that he chronicled online.

4. CONTEXT/ REVIEW

China itself was an empire, at the same time, there was a great difference in the way the Chinese dealt with neighbors to the north and the west of the country and neighbors to the south and the east. The people to the north and west constituted permanent threats. Since the terrain

was flat and since there were few natural obstacles in the way, it was easy for the nomads to raid Chinese farming communities. Occasionally they made it all the way to the capital itself. The imperial authorities always struggled with how best to respond to these threats, mixing defensive and offensive strategies without ever finding a satisfactory solution. As a result, China was periodically invaded and two major dynasties were founded by tribes from the steppes: the Yuan, 1271–1368, which was of Mongol origin, and the last imperial dynasty, the Qing, 1644–1911, which was Manchu.

It was always difficult for the Chinese to defend themselves against these threats. The steppes were easily crossed by the nomads on their swift horses, but they were far more difficult for Chinese armies to cross on foot. Deserts like the Gobi and the Taklamakan constituted obstacles for both parties, but they were far more likely to keep the Chinese in than the nomads out. Moreover, the people of the steppes were ferocious warriors. Although they, initially at least, had little means of military technology and few inventions of their own, they had access to the best horses in the world. On the back of a horse, they could cover large distances very quickly and attack an enemy at full speed, wielding their spears and firing off arrows with high precision. The perennial question for the Chinese was how best to deal with enemies such as these. The most obvious option was to pursue a defensive strategy, and this is what the Chinese did for much of their history. One way to do this was to build walls.

Impressive as these physical structures no doubt were, a defensive strategy never worked all that well. The Mongols soon learned how to besiege a city using catapults and various ingenious siege engines. For that reason, it was better for the Chinese to go on the offense, and this is what the emperors did on numerous occasions. The first Han emperor undertook large military campaigns which were continued by his successors.

During the subsequent two thousand years, the leaders of the Chinese state would all be referred to as "emperors" and the country itself referred to as an "empire." Yet since one dynasty was constantly replaced by another, there is little continuity in Chinese history and struggles for political power resulted in both revolutions and prolonged periods of wars. The most important dynasties were the: Han, Tang, Song, Ming and Qing.

Towards the end of the Zhou dynasty, political power began to fragment as regional leaders who had been given land by the kings asserted their independence. Eventually, seven separate states emerged, and they were constantly at war with each other. This period has been reported to as the "Warring States period."

The art of war is a manual of military strategy and tactics ascribed to Sunzi, 544–496 BCE, a general active during the Warring States period. Although there indeed was a general by that name, it is not entirely clear that he was the author of the work in question, although in China the book is known as Sunzi bingfa, or "Master Sun's Rules for Soldiers." Sunzi emphasized the importance of intelligence gathering, of subterfuge and dissimulation, but he also discussed the role of diplomacy, and how best to deploy troops.

Konzi, 551–479 BCE better known outside of China a Confucius is the most famous of these wandering scholars. Born in the state of Lu in what today is the Shadong province the peninsula which juts out in the direction of Korea, Konzi rose from lowly jobs as a cow-herder and clerk to become an adviser to the king of Lu himself. Yet, eventually, political intrigues forced him to leave the court; this was when his life as a peripatic teacher began. Konzi's philosophy emphasized the importance of personal conduct and he insisted that the virtue of the rulers was more important than the formal rules by which the state was governed.

Since there was no way for foreigners to enter China except as tribute bearers, tribute bearers were what all foreigners who arrived in China became. This included foreign merchants. Barbarians, however, were not to be feared as much as pitied, and the fact that they had showed up on China's doorstep proved that they were willing to learn from the Chinese. As such they were to be treated benevolently. By coming to China, and by submitting themselves to the rules prescribed by the tribute system, the foreigners assumed their designated place in the Chinese order of things. A detailed protocol regulated these visits. Each mission was not to exceed one hundred men, of whom only twenty were allowed to proceed to the capital while the rest remained at the border. On their way to Beijing, each delegation was fed, housed and transported at the emperor's expense; and once they arrived they stayed in the official "Residence for Tributary Envoys," where they are given a statutory amount of silver, rice,

and other foodstuffs. Both coming and going, they were accompanied by imperial troops who both protected them and controlled their movements. The highlight of the mission was the audience with the emperor.

Once the first contacts were established with China in the fifth century CE, the inhabitants of the islands of Japan maintained a close relationship to the Asian mainland. When they eventually made it back to Japan, they had amazing stories to tell about all the wonders they had seen. The Japanese imported an entire culture from China. Once the Mongols tried, and failed to invade China at the end of the thirteenth century, relations could not continue as before.

A further similarity with China is that India too has constantly been menaced by invasions. Surplus agricultural goods financed an elaborate hierarchy of social classes and powerful states with rulers famous for their ostentatious display of wealth. The Mughals were Muslims and their culture was to have a profound impact on Indian society. Yet Hindu traditions remained strong. Even the most powerful of foreign conquerors had to make compromises with Indian ways of life. India has exercised a powerful influence over the rest of Asia, and over Southeast Asia in particular. Starting in the first centuries of the Common Era, Indian cultural practices, and ideas regarding society and religion were disseminated all around the Indian Ocean, leading to new cultural combinations.

The first written records of Indian history are the Vedas, a large body of religious texts dating from around 1500 BCE. The Vedas are based on secret oral teachings provided by religious teachers and they heavily emphasize rituals, including sacrifice of various kinds. The followers of the Vedas were the Indo-Europeans sometimes known as "Aryans." The Indo-Europeans were originally pastoralists and even though they increasingly turned to family, cattle breeding continued to be important in their lives. The cow was already at this time a sacred animal. Not that much is known about the Indo-Europeans, but the Vedas contain traces of their rituals. Their kings sacrificed horses and they drank soma, a potion with magical properties. Because of the importance of the Vedas, this early stage in the history of the subcontinent is often known as the "Vedic period." One of the rituals described in the Vedas is Ashvamedha, horse-sacrifice.

In India, mathematical knowledge always developed in conjunction with its practical application. Already the Harappa civilization, some

2,500 years BCE, used geometry in order to calculate the size of fields. Indian mathematicians calculated the value of pi with a very high degree of precision, and determined the circumference of the earth and the timing of lunar and solar eclipses.

Alexander the Great and his armies moved into the Punjab, in the northwestern corner of the subcontinent. Once in Punjab, however, his troops rebelled and he was forced to turn back. Shortly afterwards, only thirty-three years old, he died in Babylon. The chaos of his failed invasion provided an opportunity for others to assert themselves. The Mauryans overthrew the various mahajanapada kingdoms. They ruled an Empire which for the first time encompassed almost all of India only the southern tip of the subcontinent remained outside of their control. The most famous of the Mauryan kings was Ashoka the Great. Ashoka renounced violence after ruling ruthlessly, converted to Buddhism being remorseful and disgusted with his previous way of life, and he started a number of projects to improve the welfare of the poor, the aged and widowed.

Industrialization refers to the process whereby the cultural practices of the Indian subcontinent, together with aspects of its political and social system, came to influence the rest of Asia. Despite this fact, India has had a profound impact on societies elsewhere. This power has been civilization rather than political and it has relied on exchange rather than political and it has relied on exchange rather than on the force of arms. In the third century CE, there were already well-established contacts between ports all around the Indian Ocean. This was where Indian merchants came to settle.

After the death of the prophet Muhammad in Medina in 632, his followers on the Arabian Peninsula quickly moved in all directions, creating an example which only one hundred years later came to include not only all of the Middle East and much of Central Asia, but North Africa and the Iberian Peninsula as well. This was known as the caliphate. The first, the Rashidun Caliphate, 632–661, was led by the companions who were the family and friends of the prophet Muhammad. The second caliphate, the Umayyads, 661–750. The third caliphate, the Abbasids, 750–1258, presided over what is often referred to as the "Islamic Golden Age," when science, technology, philosophy, and the arts flourished. The third caliphate was the Ottoman Empire with its capital in Istanbul, the city the Greeks had called Constantinople. The Fatimid Caliphate,

909–1171, is usually considered as the last of the four original caliphates which succeeded the prophet Muhammad. The Fatimids were originally Berbers from Tunisia but claimed their descent from Fatimah, the prophet's daughter. They were Shia Muslims, which make them unique among caliphs. The followers were the custodians of the revelation as given to Muhammad and their task was to spread the word and convert infidels to the new faith. The new leaders of the community must consequently, many felt, combine the qualities which had characterized Muhammad to be a religious leader but also a politician and military commander.

Arab expansion may best be explained not by a religious but by a military logic. Thus, when the advance of the Muslim forces throughout Europe was eventually halted at the Battle of Tours in 732, this was regarded as a major triumph by European observers but merely as a temporary setback by the Arabs themselves. They simply retreated in order to fight another day.

Since most land between Europe and Asia was sparsely populated and quite unprotected, the Mongols quickly overran an enormous territory while most of the actual warfare consisted of sieges. Once they had mastered the art of siege warfare, the cities too built a navy and tried to invade both Java, and Japan. In 1241 they completely obliterated the European armies that had gathered against them and in 1258 they besieged, sacked and burned Baghdad. The Mongol Empire lasted only some 150 years. The political structure had already begun to crack by the middle of the thirteenth century and by the early fourteenth century it was disintegrating. At the end of the fourteenth century; the Mongol Empire was once again a small kingdom confined to the Steppes north of China. Its last remnant was conquered by the Manchu armies in 1635. Other vestiges of the Mongols and their descendants lived on, most successfully in the form of the Mughal Empire in India, founded in 1526 by Babur who counted himself as a direct descendant of Genghis Khan.

The boy who was to become Genghis Khan was born in 1162, not far from the current Mongolian capital of Ulaanbaatar. He was given the name Temujin. In 1206, he took the name "Genghis Khan" for himself. The people he united came to be called "Mongols" after the name of his own tribe. The people who were loyal to him he treated as family members, while those who crossed or betrayed him were given no mercy. Once

in power, Genghis Khan put in place a legal and institutional framework that would help break the cycle of violence in Mongol society and prevent the kinds of events that had wreaked havoc in his own life. One aim was to abolish the traditional divisions into tribes, clans and lineages. Consequently Genghis Khan abolished aristocratic title and promoted people according to merit.

Two separate waves of expansions have served to unite the African continent the Arab invasion and the Bantu migration. The Arab invasion connected North Africa to the caliphates in the Middle East and thereby to prosperous centers of civilization. Likewise, the Bantu migration spread kindred languages throughout the continent together with cultural practices and technical know-how. Yet it was trade which more than anything brought the continent together. The trade in gold, salt and slaves was particularly brisk and it was the profits derived from these key commodities that convinced Berber merchants to cross the Sahara, and that took Arab down the Swahili coast. This is also what eventually brought European explorers and merchants to Africa. It was by taxing this trade that city states grew rich and expanded into kingdoms and empires. It was also trade which more than anything allowed people to escape their ecological niches. Trade made cities spring up in the desert and gave the people of the jungle the resources they needed to cut down even the tallest of trees.

But relations were not always peaceful. The groups of people living in the rainforest often conducted raids on each other, and the states on the savanna relied on powerful armies which could subjugate and enslave their enemies. Yet wars in Africa were different from many wars fought elsewhere. Since land was an abundant resource, it was not worth fighting over. The only proper exceptions to this rule are the Yoruba city-states in the Niger Delta of Nigeria, which were very concerned indeed about territorial boundaries. Political leaders were content to raze the capital of the enemies they had defended, humiliate them and include them as a subordinate partner in an alliance. The subordinate state would become a tribute bearer who brought gifts to the Suzerain state. This is how the empires of Africa were created.

Taken together, the Americas, North and South, cover an enormous geographical area which runs from one polar region to the other, com-

prising all kinds of climate and ecological environments including rainforest, deserts, prairies and some of the highest mountains in the world. There had been at least three major empires in the Americas the Maya and the Aztecs in Central America and the Incas in South America. In North America, meanwhile, societies were smaller and more dispersed. Despite the enormous distances involved, trade connected these various communities in North America, for example, sold turquoise to the Aztecs. Neighbors fought each other in bloody wars, made peace and forged alliances.

There were many political similarities too. For one thing, the empires of the Americas had societies that were as hierarchical as their pyramids. At the top of society there was an aristocracy, a priestly class and a king who was associated with the sun and treated as a deity. Ordinary people had few rights and many obligations but they were at the same time subjects of the benevolent care of the state. This was most obvious among the Incas where there were no economic markets and no money, and where the government instead provided all the goods, including foodstuffs, which people could not produce themselves.

The most notorious performances staged in public places such as squares and on the top of pyramids were the public rituals which included sacrifices of human beings. The aims of the rituals was religious to convince the sun to rise in the sky, to keep away sickness, and to ensure another year of plentiful harvests. However, the aim was also political: human sacrifices were a means of instilling terror both in the emperor's enemies and in his own subjects. Human sacrifices were public displays of power. Many of the people sacrificed were prisoners of war.

European expansion is a story of imperialism and colonialism. In the first half of the fifteenth century, Europeans began to embark on sea voyages which took them down the western coast of Africa, and eventually far further afield. Here they discovered a number of commodities which found a ready market back home. Before long the Europeans began looking for new goods and for opportunities to trade. The commercial activities transformed Europe's economy and enormously strengthened the institutional structure of the state. It was at this point that the Europeans established their first permanent colonies overseas. In some areas, such as in the Americas, Europeans settled permanently, but in Asia they mainly established small trading posts.

Beginning at the end of the eighteenth century, the development of an industrial economy based on mechanical production in factories radically changed European societies, making them "modern." Modernization entailed changes in almost all aspects of social, economic and political life.

As a result of the industrial revolution, and the relentless pace of economic development it unleashed, the Europeans gained a new sense of self-confidence. This radically changed their view of the rest of the world, and of Asia in particular. From the first faltering contacts in the middle ages to the end of the eighteenth century, the Europeans admired and looked up to Asia. However, in the first part of the nineteenth century, almost overnight, Asia became an object of scorn. The problem, more than anything, was that Asia had failed to develop in the European fashion. Asia had missed out on the industrial revolution.

5. THESIS OF THE BOOK

Ringmar opined that for much of its history, China was the dominant country in East Asia and international relations in this part of the world were, more than anything, organized by the Chinese and on Chinese terms. China itself was an empire but the international system of which China was the center concerned the external relations of the empire its relations with the rest of East Asia. According to him, from Korea, Japan and states throughout Southeast Asia the Chinese emperors demanded tributes. The foreigners were required to make the journey to the Chinese capital at regular intervals and present gifts to the emperor. In this way the Chinese were confirmed in their views of themselves. They really were the country at the center of the world the "Middle Kingdom" to which all human beings paid tribute.

The author reiterated that what made a person Chinese, and what brought a sense of unity to the Chinese people, was not state power but more than anything a shared set of rituals and seasonal celebrations. These rituals go way back in time. The first rulers the Shang dynasty, 1600–1046 BCE engaged in human sacrifice and ancestor worship. They were also the first to use characters divinations inscribed on so-called "oracle bones"

as a means of writing. He went on, while human sacrifice soon ceased, ancestor worship and the unique Chinese form of writing have survived to this day.

According to Ringmar, in Japan, the Art of War was used as a textbook in military academies at the end of the nineteenth century. Admiral Togo Heihachiro, who destroyed the Russian navy at the Battle of Tsushima in 1905, was reputed to have been an avid Sunzi reader. The Japanese victory in the war with Russia was the first time since the Mongols that an "eastern people" had defeated a "western people." Also, Ho Chi Minh, leader of the Vietnamese independence movement, translated portions of the book and it was read by Vo Nguyen Giap, the general who defeated the French army at the battle of Dien Bien Phu in 1954. The author wrote: this was when Americans started reading Sunzi. Much as in Japan, the book was used at military academies and it was suggested reading for American officers dispatched to Vietnam. This was how a Chinese military manual from the fifth century BCE became readily available in bookshops the world over.

Although one dynasty was constantly replaced by another, Ringmar wrote, several of the dynasties were not Chinese at all, but established by foreign invaders. Despite this political diversity, there is a striking continuity when it comes to cultural values. Most of the emperors embraced Confucian ideals and were active participants in the various rituals which Chinese culture prescribed including ancestor worship and offerings to Heaven at various times of the day, month and year. The emperors saw themselves as "Sons of Heaven" who ruled by virtue of the mandate that Heaven had given them.

Ringmar claimed that nomads were always potentially on the move, and since they never stayed long enough in one place, they could not accumulate many resources. The Chinese, by contrast, were overwhelmingly farmers and some were city-dwellers, meaning that they lived sedentary lives and stayed in one place. Every Chinese family had a home, be it ever so humble, which they were prepared to defend with their lives. And, of course, some Chinese families were very wealthy indeed. To the nomads this constituted an obvious temptation. The nomads were interested in all kinds of resources as long as they were portable gold and silver, animals, and women and children who could be turned into slaves.

The author recorded, despite the official Confucian doctrine which said that China was self-sufficient in all things, many Southeast Asian merchants discovered the Chinese to be interested not only in spices and hardwoods but also in special items such as rhinoceros horns and ivory. And there was, of course, no end to the things which the foreigners might buy from the Chinese.

The author recalled the Confucian scholars pointed out that, while farmers toiled in the field, merchants got rich without breaking a sweat. Lacking an economic rationale for the activity, the imperial authorities instead interpreted foreign trade in cultural terms. China, they argued, was the most sophisticated country in the world and, by comparison, everyone else was a "barbarian."

During the Ming dynasty there were altogether 123 states which participated in these ceremonies, although many of the entities in question showed up only once and some of the more obscure names of the list may indeed have been fictional. Ringmar also recorded, during the Qing period, the records became more accurate, with a core group of states regularly undertaking missions. These included Korea, Siam, the Ryukyu Island, Annam, Sulu, Burma, Laos, Turfan, but also the Portuguese, the Dutch, and the British. The Europeans were represented by their respective trading companies. One may wonder why the foreigners agreed to submit themselves to these exacting requirements, Ringmar was of the opinion the answer was that they wanted to trade with the Chinese.

The author agreed it is unclear how the Japanese first came into contact with China, but it is easy to imagine that Japanese fishermen were washed up somewhere on the shores of the Asian mainland after a storm. When they eventually made it back to Japan, they had amazingly stories to tell about all the wonders they had seen. Hearing such tales, the local rulers dispatched better-organized delegations, and soon the Japanese embarked on regular study-visits. Eventually, the Japanese imported an entire culture from China, including arts and technology, religion, a writing system, political and social thought, and associated political and social institutions. Among the institutions borrowed from China was that of an emperor, yet the emperor of Japan was nowhere near as powerful as his Chinese counterpart.

India, just as China is not a country as much as a world in itself. Indeed, it is often referred to as a "subcontinent" which includes not only

India, but today's Pakistan, Bangladesh, and Sri Lanka as well. The first human settlements in India go back at least 9,000 years. In the valley of the Indus River, the first organized states were established some 5,000 years ago. There are more than 2,000 separate ethnic groups in India, often with their own language and customs. In addition, India is the origin of two world religions, Hinduism and Buddhism, and of smaller religions too, such as Jainism and Sikhism. By 2024, it is estimated that India will overtake China as the country with the largest population in the world.

According to Ringmar, the reason for the invasions in India was always the same: the extraordinary wealth of the Indian subcontinent. In India everything grew in great abundance; in the fertile rice fields of the South it was possible to gather two, sometimes three, harvests per year. In the Classical period roughly during the first millennium of the Common Era India must have been the richest country in the world. And well after that duty the Mughal period India continued to be known as the emporium mundi, the world's greatest hub for trade and manufacturing.

The author identified the influences of Indianization: it is because of Indianization that today's Thailand is a Buddhist country, that Angkor wat in Cambodia was originally built as a Hindu temple complex, and why a majority of people in Indonesia are Muslims. He went further to state that the influence of Indian culture on non-Indians remains strong to this day although the impact is now felt on a worldwide scale.

The author was of the opinion the Indo-Europeans, at least according to one prominent theory, came from Central Asia sometime around 2,000 BCE and established themselves in northern India, along the plains of the Ganges River, as well as on the Deccan Plateau in central and southern parts of the subcontinent.

All kings in Vedic India performed the Ashvamedha, and the ritual declined only in the latter part of the Gupta period. New-age Hindu spiritualists have recently tried to revive the Ashvamedha ritual, but they use a statue of a horse rather than kill a live one. Apparently, devotion to the horse can help one defeat enemies and clear debts, Ringmar drafted.

The author recalled the history of mathematics is a great example of a civilizational exchange. The Indians learned maths from the Greeks and taught it to the Arab world, who in turn taught the Europeans. At each stage, the knowledge was transformed and improved upon. To this day

only some 10 percent of all the manuscripts on Sanskrit science have been published and much remains to be properly studied.

Ringmar was of the opinion that one invasion which was to have a profound impact on India was the Great Alexander's failed invasion. He explained, Alexander was a Greek statesman and general who had already successfully fought the Persians and continued eastward from there. In this way he created a vast, if short-lived, empire which stretched from Europe all the way to India. India, the Greeks believed, was where the world ended and by conquering it, Alexander would come to rule the whole world. Alexander's failed invasion was how the first India-wide state, the Mauryan Empire, came to be established. Asoka the Great was a Mauryan king. The author recalled legend has it he killed no fewer than ninety-nine of his brothers, and once he assumed power he continued to be selfish and cruel. Yet he eventually came to regret his behavior and in addition to his awakened projects he put up pillars all over his empire on which he explained his policies and his aspirations. Today, there are still thirty-three of the pillars in existence.

The term Indianization, as recalled by Ringmar, was first used by Indian nationalists in Bengal in the 1920s, at the time when India was still a British colony. Inspired by French excavations of Angkor Wat and other ancient temple sites, they began to speculate regarding the existence of an ancient "greater India" which had spread out over much of East Asia. This had not been an empire, they explained, but rather a civilization. India had brought progress and prosperity to its neighbors but not, like the British, through military conquest, but instead through trade and peaceful exchange.

Ringmar recalled the Umayyads Caliphate moved the capital to Damascus in Syria. And while it did not last long, one of its off shots established itself in today's Spain and Portugal. He recalled that Baghdad was the capital during the Abbasids Caliphate, a center in which Islamic learning combined with influences from Persia, India and even China. Which Cairo later constituted the center of the Muslim world after the Mongols sacked Baghdad in 1258. Although Cairo too was quickly undermined. He also identified the Ottomans to be Muslims, although not Arabs but Turks, and they had their origin in Central Asia, not on the Arabian Peninsula.

Despite the community story of political infighting and fragmentation, the idea of the caliphate continues to exercise a strong rhetorical force in the Muslim world to this day. The author agreed that during the caliphates, the Arab world experienced unprecedented economic prosperity and a cultural and intellectual success which made them powerful and admired. Not surprisingly perhaps, the idea of restoring the caliphate is still alive among radical Islamic groups who want to boost Muslim self-confidence. The term jihad, "holy war," is often used to describe this military expansion, yet political control, not religious conversion, was its main objective.

Although the occupation of lands outside of the Arabian Peninsula happened exceedingly quickly, converting the occupied populations to the new faith took centuries to accomplish, and in many cases, it never happened. As a result of its military victories, Islam became a minority religion everywhere the Arabs went and forced conversions were for that reason alone unlikely to prove successful. Moreover, conversions were financially disadvantageous to the authorities.

According to the author, the Fatimids founded the al-Azhar mosque there in 970, and also the al-Azhar University, associated with the mosque, where students studied the Quaran together with the sciences, mathematics, and philosophy. Al-Azhar University is still the chief center of Islamic learning in the world and the main source of fatwas, religious ruling, and opinions.

At the height of their power the mongols controlled an area which stretched from central Europe to the Pacific Ocean. It was a territory about the size of the African continent and considerably larger than North America. Ringmar recorded, although the Mongols counted only about one million people at the time, the lands they once controlled comprised today a majority of the world's population.

The Mongols were known as merciless warriors who destroyed the cities they captured, sparing no humans and occasionally even killing their cats and dogs. Yet apart from the military superiority, they had nothing much to impart to the rest of the world. The Mongols made no technological breakthroughs, founded no religions, built no buildings, and they not even mastered simple techniques such as weaving, pottery or bread-making. The writer included the only thing the Mongols built were bridges.

Bridges were crucial for allowing armies to mobilize and giving merchants free passage. The Mongols built them whenever they were needed. They were also experts at breaching walls. They recruited Chinese engineers who taught them how to construct siege engines. Before long the Mongols were building their own catapults, trebuchets and battering rams, and siege warfare being the only area in which they made technological advances.

According to the author, in the latter part of the fourteenth century, the bubonic plague hit first China, then the Mongols, the Arabic world and finally Europe in a series of successive waves. It is estimated that some 75million people died worldwide and that China lost between one-half and two-thirds of its population, and Europe perhaps half. The disease had a profound and immediate impact on commerce and on the Mongol Empire itself.

Ringmar was of the opinion that all human beings are Africans. It was in today's Ethiopia some 200,000 years ago, that the first settlements of Homo sapiens were established. From this origin we gradually came to migrate to every corner of the planet. He opined that Africa is actually different than we think since the Mercator projection used for most world maps under represents the true size of territories around the equator and Africa straddles the equator.

Northern Africa, as recorded by the author, was one of the first parts of the world to convert to Christianity, with an important center of scholarship being Alexandria, in Egypt. The kings of today's Ethiopia converted to Christianity in the fourth century. Later in the seventh century, North Africa was overrun by Muslim armies. In the eleventh century, two Berber kingdoms, located in today's Morocco, invaded Spain.

Human beings, according to the author, began settling here some 20,000 years ago. Scholars are convinced that the first Americans wondered across the land bridge which at the time connected Asia and North America across today's Bering Strait, between Siberia and Alaska but there is an abundance of other, far more fanciful theories. From this time onward, although they had some contact with each other, the people of the Americas had no connection with the rest of the world. As a result, their societies developed entirely according to their own logic.

Europe was an international system focused on itself, confident in its own culture and largely uninterested in what was going on elsewhere.

Moreover, outsiders like the Berber kingdoms in the eleventh and twelfth centuries and the Mongols in the thirteenth century found a few impressive cathedrals, the occasional castle, but also a lot of desperately poor people, serfs without much food and without education. Before the year 1500, no European city was a match for the splendors of Baghdad, Xian, Kyoto or Tenochtitlan.

The author recognized that history is constantly making itself present and today people and countries outside of Europe asserting themselves. He further affirmed that the world is once again changing and changes, once underway, can be quick and dramatic. Today, Europe and North America play a far less important role in world politics than in the past century, and in the future this role is likely to become less important still.

6. ANALYSIS/ EVALUATION OF THE BOOK

"The people to the north and the west constituted permanent threats. They were nomads who grazed their animals on the enormous steppes of inner Asia. Despite their economic and technological backwardness, they had access to the most advanced military technology of the day fast horses and in addition they were highly skilled archers… As far as China's relations with countries to east and the south were concerned, they were far easier to manage. Since the Himalayas effectively blocked any invasion from the south, there were no military threats from this direction and instead, communications took place across the ocean." (Ringmar, 2019, p. 13).

According to Ringmar, "Chinese people are fond of saying that their land has the longest continuous history of any existing country, yet the subject of this history "China," "the Middle Kingdom" has itself varied considerably overtime. What we mean by "the Chinese people" are also less than clear. People who historically have lived in what today is the People's Republic of China represent many hundreds of different ethnic groups… It was only in the latter part of the nineteenth century that it became possible to talk about a Chinese "nation," understood as a community of people which encompassed most of the country." (2019, p. 14).

Ringmar revealed that the Art of War came to be read as a manual, embodying a uniquely "eastern" way of making war. "This, at any rate, was

how the book was understood by students from various East Asian countries who studied in Japan in the first decades of the twentieth century. Taking The Art of War home with them, they used it as a manual for how to liberate themselves from European Colonialism." (2019, p. 15).

Ringmar recalled that moral conduct, as Kongzi saw it, is above all a matter of maintaining the obligations implied by our social relationships. Society in the end consists of nothing but hierarchical pair relations between: father and son, husband and wife, older and younger brother, ruler and subject, and between friends. The inferior party in each pair should submit to the power and will of the superior, but the superior has the duty to care for the inferior, to look after his or her welfare. A well-ordered society is a society in which these duties are faithfully carried out.

"In general, the closer the country was located in relation to China, the more often it had to present itself at the imperial court. The Koreans were put on a three-year cycle and they were thereby the most frequent visitors. Since they had to travel so far, the Europeans were supposed to make an appearance only every seventh year, but these regulations were, in practice, never followed. All in all, the Portuguese only made four visits to the imperial court, the Dutch also four, and the British three. The Russians showed up as well, altogether some twelve times, but since they were a part of the overland system they came from the north after all particular rules applied to them." (Ringmar, 2019, p. 35).

Ringmar analyzed the Japanese often changed the cultural imports to fit their own needs, and many of the changes were radical enough, but Japanese society was nevertheless profoundly altered as a result of the interaction. Ringmar further analyzed, the Japanese did not want anything to do with an aggressive and expansionist China. Although informal commercial contacts continued and thrived, no more official delegations were dispatched to the Chinese court. The imported Chinese culture continued to evolve, but in a distinctly Japanese fashion.

"Japan was decentralized, with many different centers vying for political power. There was, for example, a fundamental tension between the leaders who controlled the Kanto region, where today's Tokyo is situated, and the leaders who controlled the Kansai region, the area around today's Osaka and Kyoto. During the Kamakura period, 1185–1333, power was taken over by military leaders, the shoguns, for whom Kanto was

their center… This was particularly the case during the Sengoku period, 1467–1573, which was Japan's own version of China's Warring States period. The Sengoku period was a time of lawlessness, heroism, and political intrigue with vast armies of Samurai pitted against each other." (Ringmar, 2019, p. 36).

According to Ringmar, in the case of India, there is no single political subject about which a story can be told. Instead, various states and empires have replaced one another. Today India is a country, but throughout most of its history, it would best be described as an international system. At the same time, it was an international system which was held together by a strong sense of shared identity based above all on Hindu practices and beliefs.

Ringmar described ashvamedha as one piece of evidence which locates the Indo-Europeans outside of India. He further narrated: "To the people of the steppe, the horse was a sacred animal, and horses were often buried together with dead kings. Horse sacrifices have been carried out all over the Eurasian landmass in China, Iran, Armenia, among the Greeks and the Romans, even in Ireland. In the Irish ritual, the king, had sexual intercourse with a mare who then was killed, dismembered and cooked in a cauldron in which the king proceeded to swim and drink from the broth." (2019, p. 47).

"Darius, the king of Persia, had put up similar monuments where he had boasted about the battles he won and the number of enemies he had killed. Ashoka, however, inverted this message. His pillars expressed his promise to rule his people with compassion and benevolence, to renounce violence and make sure that every one of his subjects was happy and well-fed." (Ringmar, 2019, p. 53).

"Since Indianization was never a matter of official policy. It is difficult to say exactly when the process began and how it developed; what is clear, however, is that Indian influences spread along trade routes, both in Central Asia and in the Indian Ocean… In Southeast Asia, a strong Indian influence is detectable from the eight century and it was to continue for at least five hundred years. This was when Hinduism spread, followed by Buddhism and then Islam. This was also how the Pali and Sanskrit languages were exported, together with Indian music, theater and dance, food, ways of dressing, and much else besides." (Ringmar, 2019,

p. 58). Also, according to Ringmar, Indianization is not the spread of Indian culture as much as the creation of a new species of culture which draws heavily from India but, which at the same time is adapted to local traditions and needs. Indian culture has continued to have a profound impact on other societies, but in the twenty-first century, its influence is nothing short of global.

To briefly describe the success and operation of the Arabs' holy war, Ringmar wrote: "The secrets behind this astounding military success was a lightly armed and heavily mobile fighting force… Once they were formed into an army their horses could be used for swift attacks and their camels for transporting supplies. The neighboring empires the Greeks in Byzantium to the west and the Persians to the east were both stationary by comparison. As soon as the Arabs had mastered the basics of siege warfare, these sedentary societies were easily defeated." (2019, p. 74).

"In 1368, the Mongols lost control over their most prized possession China. One important reason for the decline and fall of the Mongol Empire was the perpetual infighting which took place among Genghis Khan's descendants. By the middle of the thirteenth century when his grandchildren were ready to take over the realm the question of succession turned out to be impossible to settle. The outcome was a civil war which turned brothers against each other and eventually resulted in the division of the empire into four separate realms the Golden Horde in Russia, the Ilkhanate in Persia, the Yuan dynasty in China, and the Chagati Khanate in the traditional heartlands of Mongolia." (Ringmar, 2019, p.102).

Ringmar described the Mongols as having singular bad press. According to him, "they are known as blood thirsty barbarians who annihilated entire cities, killing all inhabitants together with their cats, and dogs. And the Mongols did indeed use terror as a means of defeating their enemies, but it is not clear that their way of making war was substantially more destructive than that of other people at the time or indeed, more destructive than wars fought today. Another question concerns their long-term impact on the societies they included. In China, Russia and the Middle East, the Mongols have often been blamed for causing economic and cultural stagnation. Arab scholars have pointed to the destruction of Baghdad as the pivotal events that ended their "Golden Age" right at the time when the revival of learning was making Europe increasingly dynamic. Chinese

scholars have similarly faulted the Mongols for ending the Song dynasty during which China came tantalizingly close to embarking on an industrial revolution of its own. Some Russian scholars, meanwhile, have blamed the Golden Horde for the facts that Russia never managed to keep up when the rest of Europe was modernizing." (2019, pp. 120–121).

Ringmar analyzed, that there are good reasons to conclude that there is no such thing as an African international system. After all, in many parts of Africa, geography and climate have created obstacles to the formation of the kinds of political structures which we think of as states. In the rainforest, he continued, the vegetation was usually too dense to clear and no large communities could be formed and further inland people were often pastoralists and not that easy to organize politically. And if there are no states, there can be no inter-state system. Yet one's ecological niche is not one's fate, and Africa has been full of mighty empires, elaborate political structures and unimaginably wealthy kings. Even the most remote locations have been connected to international trading networks.

Ringmar divided the African continent into regions. The most commonly made distinction is between "North Africa" and "Sub-Saharan Africa," with the Sahara desert diving the two. The author wrote, "North Africa has a coastline along the Mediterranean Sea and from the very beginning people here have interacted with populations in the Middle East and Europe. Pharaonic Egypt, one of the world's oldest civilization, dating back to 3000 BCE, is located in North Africa, and so is Carthage, in today's Tunisia, which for hundreds of years was Rome's main adversary. South of the Sahara in Sub-Saharan or "Black" Africa most people speak Bantu languages. The Bantu speakers originated in western and central parts of the continent but started moving east and southward in the first millennium BCE, spreading their language, cultural practices and crafts."

"A study of comparative international systems is by definition a historical study. There are no separate international systems to compare anymore. There is only one system the system which first made its appearance in Europe in the late Renaissance, and which later came to spread to every corner of the globe. But "spread" is not the right word. This was not a matter of a process of passive diffusion. Rather, the eventual victory of the European international system was a result of the way the Europeans

first came to "discover" and later to occupy and take possession of most non-European lands." (Ringmar, 2019, p. 179).

7. CONCLUSION

The author, Ringmar, wrote he would tell the history of international relations in a way that is not Eurocentric: to tell the history of each part of the world and how they had related with the world and not how Europe had influenced every part of the world; of which he did, and should be commended for a good work. But as identified, by telling a comparative international system, the author had either misrepresented the past by telling the history of the states and not the history of stateless people, or had incompletely presented the past by mostly telling the history of of the states and only a flash of the stateless people.

8. RECOMMENDATION

This book is recommended to all since it spans across the world, recording the culture and traditions of each respective part of the world, and how they have all related with other parts. But, more specifically, it is recommended to students and history scholars in fields of international relations, public relation, as well as political science and international politics.